

NO WAY TO TREAT MAN’S BEST FRIENDS:  
THE UNCOUNTED INJURIES OF  
ANIMAL CRUELTY VICTIMS

By  
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*As society has come to recognize the sentience and intelligence of nonhuman animals, jurisdictions across the United States (U.S.) have promulgated animal protection laws. Despite the development of anti-cruelty statutes, though, states with sentence enhancement mechanisms continue to elevate criminal offenders’ sentences only if they injure human victims. This Note considers the development of anti-cruelty laws and explores how sentencing guidelines, victim injury points, and other sentence enhancement mechanisms function in U.S. criminal justice systems. It examines how multiple states treat victim injury, focusing particularly on Florida where, in October 2011, a Florida Assistant State Attorney—in what was likely the first attempt of its kind—sought to score victim injury points against an offender who brutally stabbed a dog. By looking at legislative intent and other persuasive authority, this Note argues that courts can and should enhance the sentences of offenders who victimize animals. It contends that legislatures should clear up any statutory ambiguity by making it explicitly clear that the criminal justice system should treat animals as victims. Using history and current trends for support, this Note argues that we should award the same number of victim injury points for animals as people. It also looks at several other facets of practical application, such as which animals would qualify as victims for the purpose of victim injury points, and how we can make animal victims and victim injury points a priority in the criminal justice system.*

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I. INTRODUCTION

“My goal in life is to be the person my dog thinks I am,” an unknown author once said. This quote reflects our view of animals in our lives today—trusting, loyal companions who love us unconditionally, despite our flaws and inadequacies. Animals today are our heroes and best friends. They snuggle with us on the couch,<sup>1</sup> guide us when we cannot see,<sup>2</sup> protect us from or alert us of intruders, serve as the “four legged partners” of law enforcement officers,<sup>3</sup> sniff out explosive de-

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<sup>1</sup> In the United States (U.S.), approximately 62% of households have a pet, and they own approximately 86 million cats and 78 million dogs. Am. Socy. for the Prevention of Cruelty to Animals, *Pet Statistics*, <http://www.aspca.org/about-us/faq/pet-statistics.aspx> (accessed Nov. 17, 2012) (citing the American Pet Products Association).

<sup>2</sup> *E.g.* The Seeing Eye, *About Us*, <http://www.seeingeye.org/aboutUs/default.aspx> (accessed Nov. 17, 2012) (explaining the benefit of Seeing Eye dogs).

<sup>3</sup> *E.g.* Eden Consulting Group, *Valor*, <http://www.policek9.com/html/valor.html> (accessed Nov. 17, 2012) (honoring the “valor and courage” of K9 police dogs who died in the line of duty).

vices in Afghanistan,<sup>4</sup> and rescue us from the wreckage of natural disasters and terrorist attacks.<sup>5</sup>

Because of our warm sentiments towards them and the important roles they play in our lives, animals have come a long way in terms of their rights and protections in our society, under both state and federal law. Since the Puritans enacted the first state animal cruelty statute in 1641,<sup>6</sup> the federal government has enacted several animal protection laws<sup>7</sup> and forty-eight states have passed felony animal abuse provisions.<sup>8</sup> Nonetheless, animals still have a long way to go—or, perhaps more accurately, we as a society have a long way to go to protect and do justice for them. Although some may view them as radical, many writers go even further than anti-cruelty laws, arguing for more rights, better protections, and drastic variations from our current legal system and social norms. Some argue that pets, not human relatives, are many Americans’ “nearest and dearest,” and that they should be able to inherit when they are designated the recipients of property.<sup>9</sup> Others argue that we should allow private lawsuits to prevent unlawful cruelty and neglect,<sup>10</sup> and that anti-cruelty laws should be expanded to areas that are currently excluded from them, such as farming<sup>11</sup> and scientific experiments.<sup>12</sup> Still others argue that humans need to recognize the inherent value of animals and eradicate their property status, by, for example, becoming vegan and creating an abolitionist movement.<sup>13</sup>

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<sup>4</sup> *E.g.* Michelle Tan, *More Working Dogs Heading to the Front*, Marine Corps Times (Sept. 24, 2011) (available at <http://www.marinecorpstimes.com/news/2011/09/marine-more-working-dogs-heading-to-the-front-092411/> (accessed Nov. 17, 2012)) (discussing the importance of dogs and their sense of smell in searching for improvised explosive devices).

<sup>5</sup> *E.g.* Am. Rescue Dog Assn., *ARDA History*, [http://www.ardainc.org/about\\_history.html](http://www.ardainc.org/about_history.html) (accessed Nov. 17, 2012) (noting that dogs participated in rescue missions following the September 11th attacks and the Hurricane Katrina disaster).

<sup>6</sup> *Infra* pt. II(A) (discussing the first anti-cruelty statute in the U.S.).

<sup>7</sup> *Infra* pt. II(B)(1) (surveying federal animal protection laws).

<sup>8</sup> *Infra* pt. II(B)(2) (surveying state anti-cruelty statutes).

<sup>9</sup> Frances H. Foster, *Should Pets Inherit?*, 63 Fla. L. Rev. 801, 803 (2011).

<sup>10</sup> Cass R. Sunstein, *The Rights of Animals*, 70 U. Chi. L. Rev. 387, 401 (2003).

<sup>11</sup> *Id.*; Joseph Vining, *Animal Cruelty Laws and Factory Farming*, 106 Mich. L. Rev. First Impressions 123, 123–24 (2008).

<sup>12</sup> Sunstein, *supra* n. 10, at 401. The use of animals in medical research, for example, has serious ethical implications. *See e.g.* Steven M. Wise, *Dismantling the Barriers to Legal Rights for Nonhuman Animals*, 7 Animal L. 9, 9–10 (2001) (recounting the story of Jerom, an ape who died bloated, depressed, and sick in a windowless cage—where he was confined for over a decade—after being purposely infected with multiple strains of HIV).

<sup>13</sup> Such an abolitionist movement would have veganism as its moral baseline. Arguing that animal welfare laws do not truly benefit animals, the movement would completely eliminate animals’ property status. It would require that we care for domesticated animals we already “own” but stop breeding animals to use for human exploitation. Gary L. Francione, *Reflections on Animals, Property, and the Law and Rain without Thunder*, 70 L. & Contemp. Probs. 9, 56–57 (2007).

While many of those are likely valid arguments, they will not be the main focus of this Note. Many of the suggestions, especially converting to veganism and applying anti-cruelty laws to scientific experiments, would require a transformation of our societal behavior—and bring moral and ethical controversies—that our country is not ready for. Whether and how to accomplish those goals are tough questions, probably with tough answers, which fall outside the scope of this Note.

Currently, in states with sentence enhancement mechanisms, perpetrators' sentences are enhanced if they injure a human victim.<sup>14</sup> Although violent acts against animals are criminalized, perpetrators' sentences are not enhanced in these same states if the perpetrator injured an animal victim.<sup>15</sup> The question discussed in this Note is whether that should be the case. Unlike whether we should convert to veganism or stop testing on animals, this is an easy question with an easy answer. Offenders' sentences can and should be enhanced if they injure an animal victim. This Note will look at current animal cruelty laws: how sentencing guidelines, victim injury points, and other sentence enhancement mechanisms function, and how and why legislatures should change them to include animals as victims to enhance offenders' sentences. This Note will also look at some of the practical aspects of awarding victim injury points for injured animals.

## II. WHERE WE HAVE BEEN AND WHERE WE ARE NOW

### A. *Where We Have Been*

As long ago as 1641, the Puritans of the Massachusetts Bay Colony passed their first legal code, "The Body of Liberties."<sup>16</sup> It contained 100 "liberties," the ninety-second of which proscribed cruelty to animals and threatened prosecution.<sup>17</sup> This was rare as a statutory prohibition, but other jurisdictions criminalized cruelty to animals at formal common law.<sup>18</sup> In 1828, New York passed the second anti-cruelty stat-

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<sup>14</sup> See e.g. Fla. Stat. Ann. § 921.0024 (West 2012) (providing sentence points for a spectrum of victim injuries); Code Md. Regs. 14.22.01.05 (2012) (available at <http://www.dsd.state.md.us/comar/comarhtml/14/14.22.01.05.htm> (accessed Nov. 17, 2012)) (providing reasons for imposing a sentence over the guidelines range); Code Md. Regs. 14.22.01.09 (2012) (available at <http://www.dsd.state.md.us/comar/comarhtml/14/14.22.01.09.htm> (accessed Nov. 17, 2012)) (including victim injury as a factor to consider in computing an offense score); Code Md. Regs. 14.22.01.02 (2012) (available at <http://www.dsd.state.md.us/comar/comarhtml/14/14.22.01.02.htm> (accessed Nov. 17, 2012)) (defining "victim injury").

<sup>15</sup> For a discussion of the current efforts to add sentencing enhancements to violence against animals, see *infra* Part V.

<sup>16</sup> Margaret C. Jasper, *Animal Rights Law* 5 (Oceana Publications 1997). The Puritans equated crime with sin and treated the state as God's instrument on earth, and their criminal code symbolized a formal break with customary English law. It issued the punishment of death for only twelve crimes, all of which were punishable by death in the Bible. Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 *Am. J. Leg. Hist.* 326, 333 (1982).

<sup>17</sup> Jasper, *supra* n. 16, at 5.

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

ute in the U.S.,<sup>19</sup> and by 1921, every jurisdiction had implemented some form of anti-cruelty legislation.<sup>20</sup> Penalties varied under these statutes, but usually included a period of imprisonment and/or a monetary fine.<sup>21</sup> Typical definitions of “cruelty” included the “unnecessary or cruel torture, mutilation, beating or killing of an animal”; “depriving a confined animal of sustenance”; “us[ing] an animal for fighting or baiting”; “carrying . . . an animal in or upon any vehicle in a cruel or inhuman manner”; “using dogs for pulling vehicles for business purposes without a license”; or abandoning a “maimed, sick, infirmed or disabled animal.”<sup>22</sup>

## B. Where We Are Now

### 1. Federal Laws

The federal government can only regulate crimes against animals if the crimes relate to the government’s limited powers under the Constitution. Thus, it cannot criminalize violent treatment of animals.<sup>23</sup> But Congress has enacted animal welfare provisions such as the Animal Welfare Act (AWA),<sup>24</sup> the Humane Methods of Slaughter Act (HMSA),<sup>25</sup> and the Marine Mammal Protection Act (MMPA),<sup>26</sup> which regulate animals and activities that can be tied to interstate or foreign commerce.<sup>27</sup> Congress enacted the AWA to ensure the humane treat-

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

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* Those who are more skeptical about the protections provided to animals have noted that since animals were considered property, laws to protect them developed slowly, and even when they were created they did more to preserve human ownership rights and financial interests than to protect animals from abuse. Gary L. Francione, *Animals, Property, and the Law* 34 (Temple U. Press 1995); see also Beth Ann Madeline, *Cruelty to Animals: Recognizing Violence against Nonhuman Victims*, 23 U. Haw. L. Rev. 307, 309 n. 9 (2000) (discussing the idea that early anti-cruelty laws were intended to protect animals from “deliberate, ferocious cruelty”).

<sup>23</sup> This is because, under the Tenth Amendment, any powers not specifically given to the federal government by the Constitution are reserved to the States or to the American people. U.S. Const. amend. X. There is no power that directly relates to animal abuse or neglect. See Am. Socy. for the Prevention of Cruelty to Animals, *Reporting Cruelty FAQ*, <http://www.aspca.org/fight-animal-cruelty/reporting-cruelty-faq> (accessed Nov. 17, 2012) (discussing why there cannot be a federal statute that specifically prohibits animal abuse).

<sup>24</sup> 7 U.S.C. §§ 2131–2159 (2006).

<sup>25</sup> *Id.* at §§ 1901–1907.

<sup>26</sup> 16 U.S.C. §§ 1361–1423h (2006).

<sup>27</sup> The federal government can regulate “commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3. Thus, the government can criminalize crimes against animals if regulating them is an aspect of regulating commerce. Congress found that animals and activities regulated under the AWA are either in interstate or international commerce, or significantly affect such commerce or the flow of such commerce. 7 U.S.C. § 2131. Likewise, the HMSA is constitutional because Congress found that using humane methods in the killing of livestock prevents unnecessary suffering, results in betterment of products and economies in slaughtering processes, and brings about other benefits that tend to expedite an effi-

ment of certain animals transported in commerce; specifically, those animals designated for use in research facilities, for exhibition, or as pets.<sup>28</sup> The HMSA forbids slaughtering animals if they have not been rendered immune to pain by rapid and effective means or if they have not lost consciousness via anemia of the brain in accordance with the ritual mandates of religious faiths.<sup>29</sup> The MMPA seeks to protect marine mammals from depletion by human activities.<sup>30</sup> It observes that certain species and populations of marine mammals are, or might be, endangered because of human activities, and should not be allowed to diminish below their ideal sustainable population. The MMPA thus provides that measures should be taken to replenish any marine mammal species or population that has already been depleted beyond its peak sustainable population.<sup>31</sup> The MMPA provides that efforts should be made to guard important habitats—including mating grounds, rookeries, and areas of similar importance for each species of marine mammal—from the negative consequences of human behavior.<sup>32</sup> It also establishes that negotiations should commence to promote international arrangements for the study and conservation of marine mammals.<sup>33</sup>

## 2. *State Laws or Lack Thereof*

Modern state animal cruelty statutes use largely the same wording as the earliest ones.<sup>34</sup> At least some modern statutes apply not only to companion or domesticated animals like dogs and cats, but also to wild animals such as raccoons.<sup>35</sup> Protections are expanding as more

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cient flow of livestock and livestock products in interstate and international commerce. *Id.* at § 1901. Finally, the MMPA is within the federal government's limited power because of Congress's findings that marine mammals and marine products either travel through interstate commerce, or influence the balance of marine ecosystems in a way that is significant to other animals and animal products that move through interstate commerce. 16 U.S.C. § 1361.

<sup>28</sup> 7 U.S.C. § 2131. The Act's final purpose is to protect animal owners from the theft of their animals by thwarting the sale or use of stolen animals. *Id.* The law is not perfect, even in its limited scope, in part because it excludes many kinds of animals. *Id.* at § 2132(g).

<sup>29</sup> *Id.* at § 1902. This statute is not perfect, either, partially because it leaves open for debate whether poultry is included in "other livestock." See *Levine v. Vilsack*, 587 F.3d 986, 987–88 (9th Cir. 2009) (discussing whether poultry should be considered "other livestock" under the HMSA).

<sup>30</sup> 16 U.S.C. § 1361. Again, this Act is not flawless because it is concerned not with individual animals themselves, but with preventing marine mammals from decreasing below their ideal sustainable population. See 16 U.S.C. § 1361(2) (establishing that species and population stocks should not be permitted to diminish below the point where they stop being a significant element in their ecosystem).

<sup>31</sup> *Id.* at § 1361(2).

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

<sup>33</sup> *Id.*

<sup>34</sup> Madeline, *supra* n. 22, at 310.

<sup>35</sup> See e.g. *Wilkerson v. State*, 401 So. 2d 1110, 1112 (Fla. 1981) (finding that the legislature intended for raccoons to be included in the definition of "animal" under the cruelty to animals statute).

and more people come to believe that animals are more than mere property.<sup>36</sup> Legislatures across the nation have granted local courts the ability to issue protective orders that address the special circumstances of domestic violence victims with companion animals who are also at risk.<sup>37</sup>

As of 2012, forty-eight states and four territories, districts, and possessions have felony animal abuse provisions.<sup>38</sup> The first state to enact such laws was Massachusetts in 1804, and the most recent was Idaho in 2012.<sup>39</sup> That leaves only North Dakota, South Dakota, American Samoa, and the Northern Marianas Islands without felony animal abuse laws.<sup>40</sup> In 2012, the Animal Legal Defense Fund (ALDF) ranked the states' animal protection laws based on fifteen categories of information.<sup>41</sup> It placed states in the bottom, middle, or top tier,<sup>42</sup> and determined the best and worst five states in terms of protecting their nonhuman residents.<sup>43</sup> As an example, while ALDF still suggests areas for potential improvement, it rated Illinois as having the best state animal protection laws.<sup>44</sup> Some of the strengths of the Illinois laws are

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<sup>36</sup> Joshua L. Friedman & Gary C. Norman, *Protecting the Family Pet: The New Face of Maryland Domestic Violence Protective Orders*, 40 U. Balt. L. Forum 81, 81 (2009).

<sup>37</sup> *Id.* at 81–82.

<sup>38</sup> Animal Leg. Def. Fund, *U.S. Jurisdictions with and without Felony Animal Cruelty Provisions* (available at [http://aldf.org/downloads/Felony\\_Status\\_List%204-12.pdf](http://aldf.org/downloads/Felony_Status_List%204-12.pdf) (updated Apr. 2012) (accessed Nov. 17, 2012)).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* In 2012, North Dakota voters rejected a ballot measure to make animal cruelty a felony offense. *N. Dakota Voters Reject Tougher Animal Cruelty Law*, S.F. Chron. (Nov. 7, 2012) (available at <http://www.sfgate.com/news/crime/article/N-Dakota-voters-reject-tougher-animal-cruelty-law-4016082.php>) (accessed Nov. 17, 2012)).

<sup>41</sup> Animal Leg. Def. Fund, *2012 U.S. Animal Protection Laws Rankings: Comparing Overall Strength & Comprehensiveness* 19 (2012) (available at <http://aldf.org/custom/rankings/ALDF2012USRankingsReport.pdf> (accessed Dec. 28, 2012)) [hereinafter *ALDF, U.S. Animal Protection Laws*]. The ALDF rankings also include U.S. territories.

<sup>42</sup> *Id.* at 7–9. In order, ALDF ranked Illinois, Maine, California, Michigan, Oregon, Washington, West Virginia, Indiana, Rhode Island, Colorado, Virginia, Tennessee, Kansas, Minnesota, Massachusetts, Nebraska, Delaware, and Florida in the top tier; Vermont, Arkansas, Arizona, Louisiana, Nevada, North Carolina, New Hampshire, Oklahoma, Wisconsin, Mississippi, Texas, Ohio, Montana, Georgia, South Carolina, and Pennsylvania in the middle tier; and Maryland, Missouri, New York, Connecticut, Alabama, Idaho, Alaska, Utah, Hawaii, New Jersey, Wyoming, New Mexico, South Dakota, Iowa, North Dakota, and Kentucky in the bottom tier. *Id.* Nonetheless, it is important to note that even states with a favorable ranking can deliver insufficient sentences in animal cruelty cases. In 2012 in Tennessee, for example, two young men beat and stabbed to death a stray St. Bernard puppy—“Puppy Doe.” Lauren Adams, *Puppy Doe Case: Teens Sentenced to Community Service*, WPSD Local 6 (Nov. 9, 2012), <http://www.wpsdlocal6.com/news/local/Puppy-Doe-Case-Teens-sentenced-to-community-service-177966761.html> (accessed Nov. 17, 2012). In an apology letter read aloud to the court, one of the defendants characterized the crime as “extremely inappropriate, immature, and lack[ing] any respect.” *Id.* Although the men were eligible for a two-year jail sentence under the state’s anti-cruelty statute, the trial judge sentenced them only to community service. *Id.*

<sup>43</sup> ALDF, *U.S. Animal Protection Laws*, *supra* n. 41, at 7–9.

<sup>44</sup> *Id.* at 12.

that they provide felony penalties for cruelty,<sup>45</sup> neglect,<sup>46</sup> abandonment,<sup>47</sup> and sexual assault;<sup>48</sup> they adequately define terms and standards of minimum care;<sup>49</sup> and their main protections apply to most animals.<sup>50</sup> Additionally, certain provisions allow—and in some cases require—the administration of mental health evaluations before sentencing offenders.<sup>51</sup> There are some required cost recovery methods for impounded animals<sup>52</sup> and forfeiture of animals before conviction is allowed.<sup>53</sup>

Kentucky, on the other hand, ranks as the worst state in the country in terms of protecting its animals.<sup>54</sup> ALDF explains that some of the reasons why it is ranked as the worst state are that its felony provision is applicable only for cruelty against certain animals,<sup>55</sup> it has no felony provisions for extreme neglect or abandonment, it does not make the sexual assault of an animal a separate crime, and it does not provide mental health evaluations or counseling for offenders.<sup>56</sup> Likewise, Kentucky does not have cost mitigation and recovery clauses for impounded animals, it does not force offenders to forfeit abused animals, it does not restrict future ownership or possession of animals after a conviction,<sup>57</sup> and veterinarians are barred from reporting suspected fighting or cruelty absent consent from the client or a court order.<sup>58</sup> We can infer, then, that the other forty-eight states' compila-

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<sup>45</sup> 510 Ill. Comp. Stat. Ann. 70/3.01 (West 2012).

<sup>46</sup> *Id.* at 70/3.

<sup>47</sup> *Id.* at 70/3.01.

<sup>48</sup> 720 Ill. Comp. Stat. Ann. 5/12-35 (West 2012).

<sup>49</sup> 510 Ill. Comp. Stat. Ann. 70/3.

<sup>50</sup> *Id.* at 70/2.01–2.01a.

<sup>51</sup> *Id.* at 70/3–3.01.

<sup>52</sup> *E.g.* 510 Ill. Comp. Stat. Ann. 70/3.05 (providing for posting security for seized companion animals and animals used for fighting); *id.* at 70/4.02 (providing for posting security for animals seized when an offender is arrested for a crime involving animals).

<sup>53</sup> *Id.* at 70/3.04. Some of Illinois's other strengths are that the laws mandate that specified non-animal-related agencies report suspected animal cruelty, 325 Ill. Comp. Stat. Ann. 5/11.8 (West 2012); they mandate that veterinarians report animal cruelty, 510 Ill. Comp. Stat. Ann. 70/3.07; they give humane agents some law enforcement authority, *see id.* 70/10 (providing that an approved humane agent may enter any premises during normal business hours to investigate a complaint); and they allow protective orders to include animals, 725 Ill. Comp. Stat. Ann. 5/112A-14(11.5) (West 2012).

<sup>54</sup> ALDF, *U.S. Animal Protection Laws*, *supra* n. 41, at 18.

<sup>55</sup> Ky. Rev. Stat. Ann. § 525.135 (2012); ALDF, *U.S. Animal Protection Laws*, *supra* n. 41, at 18.

<sup>56</sup> ALDF, *U.S. Animal Protection Laws*, *supra* n. 41, at 18.

<sup>57</sup> *Id.*; Animal Leg. Def. Fund, *Animal Protection Laws of the United States of America & Canada* KY-3–KY-5 (7th ed., 2012) (available at <http://aldf.org/downloads/compendium/Animal-Protection-Laws-2012.pdf> (accessed Nov. 17, 2012)) [hereinafter ALDF, *Animal Protection Laws of the U.S. & Canada*].

<sup>58</sup> Ky. Rev. Stat. Ann. § 321.185; ALDF, *U.S. Animal Protection Laws*, *supra* n. 41, at 18; ALDF, *Animal Protection Laws of the U.S. & Canada*, *supra* n. 57, at KY-5. Furthermore, Kentucky does not have provisions requiring any non-animal-related agencies or professionals to report suspected animal cruelty, it has insufficient humane agent provisions, and it has no duty mandating peace officers to execute animal protection laws. *See* Ky. Rev. Stat. Ann. § 436.605 (containing minimal provisions for peace

tions of animal laws currently fall somewhere on the spectrum between Illinois, relatively impressive, and Kentucky, shocking and disconcerting.

Florida, for example, is ranked at the low end of the top tier because its animal protection laws are not as advanced as those in Illinois and the other states occupying the highest positions.<sup>59</sup> Florida's animal protection laws treat children and animals similarly and provide for the appointment of agents to investigate crimes to protect children and animals.<sup>60</sup> They also allow an injunction for domestic violence when the perpetrator deliberately injures or kills a family pet;<sup>61</sup> establish criminal liability for killing or wounding an animal labeled endangered, threatened, or of special concern;<sup>62</sup> and criminalize exhibiting a mutilated, malformed, or disfigured animal for pay or compensation.<sup>63</sup> Moreover, Florida's animal protection laws also establish a means to ensure that abused or neglected animals will be properly cared for;<sup>64</sup> proscribe animal fighting, baiting, and related activities;<sup>65</sup> mandate the seizure, humane treatment, and humane disposition of animals if animal fighting or baiting occurs;<sup>66</sup> criminalize abandonment of unwell animals and the confinement of animals without adequate food, water, air, and exercise;<sup>67</sup> and mandate that police officers arrest, even without a warrant, anyone who violates any of the animal cruelty laws.<sup>68</sup>

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officers, providing only for the acquisition of a search warrant from a judge and the arrest of those who have committed acts of cruelty). Kentucky does not provide adequate definitions or standards of minimum care. *See* Ky. Rev. Stat. Ann. § 525.130 (delineating what constitutes cruelty to animals in the second degree). Kentucky does not provide statutory authority to allow protective orders to include animals, and the state law also lacks sufficient animal fighting provisions. ALDF, *U.S. Animal Protection Laws*, *supra* n. 41, at 18; ALDF, *Animal Protection Laws of the U.S. & Canada*, *supra* n. 57, at KY-4–KY-5; *see* Ky. Rev. Stat. Ann. § 525.125 (providing only that “[t]he following persons are guilty of cruelty to animals in the first degree whenever a four-legged animal is caused to fight for pleasure or profit”).

<sup>59</sup> *See* ALDF, *U.S. Animal Protection Laws*, *supra* n. 41, at 7 (ranking Florida nineteenth in terms of animal protection laws, after seventeen states and the District of Columbia).

<sup>60</sup> Fla. Stat. § 828.03 (2012).

<sup>61</sup> Fla. Stat. § 741.30.

<sup>62</sup> Fla. Stat. § 379.2291; Fla. Stat. § 379.411.

<sup>63</sup> Fla. Stat. § 877.16.

<sup>64</sup> Fla. Stat. § 828.073.

<sup>65</sup> Fla. Stat. § 828.122.

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

<sup>67</sup> Fla. Stat. § 828.13.

<sup>68</sup> Fla. Stat. § 828.17. This statute explicitly allows for arrest when a person violates Fla. Stat. §§ 828.08, 828.12, or 828.13–828.16. Other related statutes include Fla. Stat. § 828.05(1), which allows the destruction of domestic animals through humane and merciful means to end their suffering; Fla. Stat. § 828.05(4), which grants immunity to veterinarians and officers behaving in good faith; Fla. Stat. §§ 828.055–828.065, which allow humane euthanasia, licensing, and methods designed to diminish unnecessary pain and suffering; Fla. Stat. § 828.22, which requires using humane means to slaughter livestock; Fla. Stat. § 705.19, which provides for placement of abandoned animals and grants immunity to agencies that follow its procedures; Fla. Stat. § 736.0408, al-

It is important to note the difference between felony animal abuse provisions and sentencing guidelines, which can use victim injury points—or other mechanisms—to enhance offenders' sentences. The two are separate and distinct. Felony animal abuse provisions, discussed above, classify acts committed against animals as criminal felonies.<sup>69</sup> Sentencing guidelines and victim injury points (or other mechanisms), on the other hand, are tools to sentence or enhance offenders' sentences, and will be explained in Part III.

This Note focuses on several different states that have mechanisms to enhance offenders' sentences because of victim injuries. To try to get an idea of the entire spectrum, this Note selects states from the bottom and top tiers. It discusses New Jersey, Maryland, and Kentucky from the bottom tier; Florida from the low end of the top tier; and Illinois from the number one position in the top tier. In Florida, a movement to add victim injury points to enhance offenders' sentences has begun, and hopefully other states will follow suit. Thus, this Note will focus on Florida first and most heavily.

### III. HOW SENTENCING GUIDELINES WORK . . . OR DO NOT (FOR ANIMALS)

In Florida, courts use a Criminal Punishment Code Scoresheet<sup>70</sup> to compute sentence points, which largely determine the sentence a convicted criminal receives.<sup>71</sup> Sentencing is the last, or one of the last, stages of the criminal justice process.<sup>72</sup> It occurs after the defendant has either pled guilty, pled no contest, or been convicted of a crime at trial, and a pre-sentence investigation has been completed.<sup>73</sup> A sentencing scoresheet must be completed for each defendant who is sentenced for a felony, and the scoresheet is used to calculate the range allowed for the sentence imposed by the court.<sup>74</sup> In Florida, the state

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lowing the creation of trusts to finance animals' care; and Fla. Stat. § 828.12(3), which holds veterinarians harmless for their part in an animal cruelty investigation. And, finally, Florida's related statutes include Fla. Stat. § 828.1231, making it illegal to sell clothing containing cat or dog hair or the pelt of a dog or cat, and Fla. Stat. § 768.13(2)(a), Florida's Good Samaritan Act, which immunizes anyone giving aid to a wounded animal in good faith. Geoffrey C. Fleck, ALDF, *Senten. Memo.* at 4–5, *State v. Nebus* (Fla. 8th Cir. 2011) (No. 01-2010-CF-003230-A) [hereinafter Fleck, *Senten. Memo.*].

<sup>69</sup> Fla. Stat. § 828.122(3).

<sup>70</sup> Fla. R. Crim. P. 3.992(a) (available at [http://www.floridabar.org/TFB/TFBResources.nsf/0/BDFE1551AD291A3F85256B29004BF892/\\$FILE/Criminal.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/0/BDFE1551AD291A3F85256B29004BF892/$FILE/Criminal.pdf?OpenElement) (updated Oct. 23, 2012) (accessed Nov. 17, 2012)); Fla. Dept. of Correct. & Off. of St. Ct. Administr., *Florida Criminal Punishment Code Scoresheet Preparation Manual* 23–26 (2011) (available at [http://www.dc.state.fl.us/pub/sen\\_cpcm/index.html](http://www.dc.state.fl.us/pub/sen_cpcm/index.html) (accessed Nov. 17, 2012)) [hereinafter *Scoresheet Preparation Manual*].

<sup>71</sup> Fla. Stat. § 921.0024; *Scoresheet Preparation Manual*, *supra* n. 70, at 13.

<sup>72</sup> St. Atty.'s Off. 10th Judicial Cir. Fla., *Criminal Justice Process*, [http://www.sao10.com/victim-criminal\\_justice.asp](http://www.sao10.com/victim-criminal_justice.asp) (accessed Nov. 17, 2012).

<sup>73</sup> *Id.*

<sup>74</sup> Fla. Stat. § 921.0024.

attorney prepares the defendant's scoresheet or scoresheets, which he or she presents to the defense counsel for review unless the judge orders otherwise.<sup>75</sup> The sentencing judge must approve and sign all scoresheets.<sup>76</sup>

Florida uses such guidelines because the state legislature wants to arrange for the imposition of criminal penalties and ensure that it is making the best possible use of Florida's state prisons so that violent criminals are properly incarcerated.<sup>77</sup> The legislature found that it was in the state's best interest to make, codify, and continually revise a sentencing policy.<sup>78</sup> Florida's Criminal Punishment Code exemplifies many values, including that sentencing is unbiased towards gender, race, and social and economic status; that the primary function of sentencing is to punish the offender;<sup>79</sup> and that the punishment should be proportionate with the seriousness of the primary offense and the circumstances around it.<sup>80</sup> The offender receives a certain amount of points for the primary offense committed, additional offenses committed, his or her prior record, his or her legal status, victim injuries caused, whether a weapon was used, and other related categories.<sup>81</sup> Most of the scores are based upon different "levels" of offenses qualifying for different amounts of points.<sup>82</sup> The offender scores more points for committing more serious crimes and causing more serious injuries. Trial judges can authorize sentences below the lowest sentence permitted by the code,<sup>83</sup> but they have to explain the departure in writing and can only do so when there are factors or circumstances that justify mitigating the sentence.<sup>84</sup>

State attorneys add victim injury points to defendants' scoresheets to raise the sentencing minimums.<sup>85</sup> With the addition of victim injury points, an elevated term of incarceration is permitted because the lowest allowable sentence is raised.<sup>86</sup> Offenders score victim injury points for physical wounds or death inflicted on a person as a direct consequence of any crime before the court for sentencing.<sup>87</sup> To

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<sup>75</sup> Fla. R. Crim. P. 3.701(d)(1).

<sup>76</sup> *Id.*

<sup>77</sup> Fla. Stat. § 921.002.

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

<sup>79</sup> *Id.* Rehabilitation is an objective as well, but it is secondary to punishment. *Id.*

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

<sup>81</sup> Fla. Stat. § 921.0024; *Scoresheet Preparation Manual*, *supra* n. 70, at 7–13.

<sup>82</sup> See Fla. Stat. § 921.0024 (listing slight physical injury at 4 points, moderate physical injury at 18 points, severe physical injury at 40 points, sexual contact with a victim with no penetration at 40 points, sexual contact with a victim with penetration at 80 points, causing the death of a victim at 120 points, and causing a victim's death by second degree murder at 240 points).

<sup>83</sup> *Id.* at (b)(2). This is calculated using the sentence points described above.

<sup>84</sup> Fla. Stat. § 921.002.

<sup>85</sup> See *Scoresheet Preparation Manual*, *supra* n. 70, at 5, 12 (stating that victim injury points must be scored for each victim physically injured).

<sup>86</sup> *Id.* at 13 (stating that judges cannot depart from the lowest permissible sentence without providing a written statement).

<sup>87</sup> Fla. R. Crim. P. 3.704.

guarantee that the criminal justice system recognizes the severity of a crime, the legislature has required that state attorneys add victim injury points to defendants' Criminal Punishment Code Scoresheets: the points are added even when physical injury to or death of the victim is encompassed in the offense level, and even when injury or death is a component of the crime in front of the court for sentencing.<sup>88</sup>

In Florida, the victim injury points available range from 4 to 240 per injury.<sup>89</sup> The points are allocated in the following manner: 4 points are awarded for slight physical injury, 18 points for moderate physical injury, 40 points for severe physical injury, 40 points if an offense involves sexual contact with a victim with no penetration, 80 points if the offense involves sexual contact with a victim with penetration, 120 points for causing the death of a victim, and 240 points for causing the victim's death by second degree murder.<sup>90</sup> Offenders can score victim injury points for multiple offenses or injuries on the same scoresheet.<sup>91</sup> For example, if the victim of an offense including sexual penetration suffers physical injury as a direct result of an offense, that physical injury counts separately and in addition to points scored for the sexual violation.<sup>92</sup> Victim injury points are scored for every victim physically injured and every offense causing physical injury regardless of the number of victims.<sup>93</sup> Victim injury points cannot be assigned for every distinct injury, however, regardless of the number of offenses before the court for sentencing.<sup>94</sup> Thus, a defendant charged with aggravated battery with a firearm for repeatedly shooting a victim cannot be awarded additional victim injury points for every gunshot wound inflicted on the victim.<sup>95</sup>

The victim injury points, between 4 and 240, comprise a part of the offender's total sentence points.<sup>96</sup> If the offender's total sentence

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<sup>88</sup> *Sims v. State*, 869 So. 2d 45, 48 (Fla. 5th Dist. App. 2004), *quashed on other grounds*, 998 So. 2d 494 (Fla. 2008). It makes sense to ratchet up the sentencing minimums within felony tiers. *Id.* Even though all second-degree felonies have the same maximum penalty, for instance, they are not all thought to warrant the same penalty. Leaving the scene of a crash involving death, a second-degree felony, may justify a harsher punishment than dealing in stolen property—also a second-degree felony. *Id.* Therefore, to ensure that the seriousness of the former crime is acknowledged, the legislature has mandated that the offender score victim injury points if the death was the direct result of the crime. *Id.*

<sup>89</sup> Fla. Stat. § 921.0024.

<sup>90</sup> *Id.* For a discussion of what constitutes severe, moderate, and slight injuries, see William H. Burgess III, 16 Fla. Prac. Series: Senten. § 5:22 (2012–2013 ed., West) (distinguishing “severe” injuries or “great bodily harm” from “moderate” cuts, bruises, and bumps or “slight” injuries that require no medical treatment or loss of income).

<sup>91</sup> Fla. R. Crim. P. 3.704.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See *Cooper v. State*, 919 So. 2d 516, 518 (Fla. 1st Dist. App. 2005) (finding that it was error to “score the victim injury points three times, once for each of the discrete injuries to the victim”).

<sup>95</sup> *Id.* at 517–18.

<sup>96</sup> Fla. R. Crim. P. 3.992(a); *Scoresheet Preparation Manual*, *supra* n. 70, at 9–10, 13.

points are forty-four or less, the lowest allowed sentence is any non-state prison punishment.<sup>97</sup> If the perpetrator has more than forty-four total sentence points, twenty-eight are subtracted from the total number of sentence points.<sup>98</sup> That number (the total number of sentence points minus twenty-eight) is then multiplied by 0.75.<sup>99</sup> The resulting number is the lowest number of months in prison the judge can sentence the defendant.<sup>100</sup> Victim injury points can significantly affect offenders' sentences. By increasing the total number of sentence points used in the formula, the points increase the lowest permissible sentence felony offenders receive.<sup>101</sup> Because the victim injury points range from 4 to 240, they can potentially cause a drastic increase in the minimum sentence permitted.

#### IV. A BRIEF LOOK AT OTHER STATES AND VICTIM INJURY

While it appears that few states use victim injury points in the same way as Florida, this is likely a universally important topic. Based on a glimpse of states from the top and bottom ranking tiers, it seems probable that all—or at least most—states have some sort of mechanism to enhance offenders' sentences if they caused injury to a victim. Moreover, all states should count animals as victims.

##### A. *Illinois*

Some states' sentencing policies, like Illinois's, set out potential sentence ranges for various felonies and misdemeanors.<sup>102</sup> The judge may not sentence a perpetrator to a period of incarceration greater than the maximum permitted by Article 4.5 of Chapter V for a crime within the category of the worst offense the perpetrator was convicted of unless aggravating factors were present.<sup>103</sup> If the pre-trial and trial proceedings were performed in compliance with the Illinois Code of Criminal Procedure, the judge can sentence the perpetrator to an extended term.<sup>104</sup>

Illinois does not appear to award victim injury points per se, but certain aggravating factors can affect an offender's sentence in a similar fashion. Illinois's list of aggravating factors reflects the high qual-

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<sup>97</sup> Fla. R. Crim. P. 3.992(a).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> The maximum sentence the offender can receive is up to the statutory maximum for the primary and any other offenses enumerated in Florida Statute § 775.082 (2011), unless the lowest allowed sentence under the Code surpasses the statutory maximum. A life sentence can be imposed if there are 363 or more total sentence points. Fla. R. Crim. P. 3.992(a); *Scoresheet Preparation Manual*, *supra* n. 70, at 13, 25.

<sup>102</sup> See 730 Ill. Comp. Stat. 5/5-4.5 (setting class-based sentence ranges for felonies and maximum sentences for misdemeanors).

<sup>103</sup> 730 Ill. Comp. Stat. 5/5-8-2.

<sup>104</sup> *Id.*

ity of its animal protection laws.<sup>105</sup> The factors are far from perfect in terms of recognizing animal cruelty, but they do twice reference animals.<sup>106</sup> One factor the court can consider as a reason to impose a longer sentence is when an offender is convicted of a felony and the crime involved the “brutalizing or torturing of humans or animals” as a part of a “ceremony, rite, initiation, observance, performance, practice or activity of any actual or ostensible religious, fraternal or social group.”<sup>107</sup> Another such factor is whether the defendant committed a felony and, while having control over an animal, ordered it to assault a law enforcement officer acting in his or her official capacity or in furtherance of the illegal activities of a gang the defendant was participating in.<sup>108</sup>

Section 5/5-5-3.2.(a)(1) is additionally analogous to victim injury points. It provides that if the defendant’s behavior caused or threatened severe harm, that shall be given weight in favor of imposing a period of incarceration or can be considered by the court to impose a harsher sentence.<sup>109</sup> Like victim injury points, this section of the Illinois statute should be applied to harm or threatened harm to animals. The Illinois statute does not restrict the harm to people, so while there appears to be no case law on the issue, it could conceivably be applied to animal victims even more easily and less contentiously than in states like Florida.

### B. New Jersey

Some states, like New Jersey (which occupies the bottom tier in terms of animal protection laws),<sup>110</sup> use sentencing guidelines but do not use victim injury points.<sup>111</sup> Instead, similar to Illinois, they use aggravating and mitigating factors to enhance or reduce an offender’s term of imprisonment.<sup>112</sup> In the New Jersey statute, aggravating circumstance 2C:44–1(a)(2) basically translates to victim injury points. It

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<sup>105</sup> See *supra* nn. 44–53 and accompanying text (noting that ALDF ranked Illinois as having the best animal protection laws due to its comprehensive definition of what constitutes criminal activity, the adequacy of its penalties, and extensive remedial efforts). Illinois’s comprehensive approach to animal protection is reflected in the Factors in Aggravation of the Illinois Corrections Code. 730 Ill. Comp. Stat. 5/5-5-3.2.

<sup>106</sup> 730 Ill. Comp. Stat. 5/5-5-3.2.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* This aggravating factor is likely intended more, or only, for the protection of law enforcement officers than animals, but it still clearly benefits animals as it discourages breeding or forcing animals to participate in violent acts and altercations.

<sup>109</sup> *Id.* at 5/5-5-3.2(a)(1).

<sup>110</sup> ALDF, *U.S. Animal Protection Laws*, *supra* n. 41, at 9 (showing that New Jersey is ranked 48th).

<sup>111</sup> See Heather Young Keagle, *Oral Argument Sentencing Guidelines* 1–5, 27 (2011) (available at <http://www.judiciary.state.nj.us/sentguide.pdf> (accessed Nov, 17 2012)) (describing the process of imposing sentences by weighing aggravating and mitigating factors). The New Jersey statute does not allocate victim injury points, but instead leaves the sentencing process to judicial discretion. A sentence will not be overturned unless it is clearly unsupported by the record. *Id.*

<sup>112</sup> *Id.* at 1–5; N.J. Stat. Ann. § 2C:44–1(a) (West 2012).

provides that the court “shall consider . . . the gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance.”<sup>113</sup> In states like New Jersey, courts should ensure that they take animal victims into account when considering this—and other—aggravating factors. It appears that courts in New Jersey have not ruled out considering aggravating factors in animal cruelty cases.<sup>114</sup>

### C. Maryland

Maryland, also in the bottom tier, is similar to Florida. It uses sentencing guidelines<sup>115</sup> and its code of regulations provides that the judge can impose a sentence outside of the guidelines range.<sup>116</sup> Common reasons for judges’ departures above the guidelines range include victims’ special circumstances and the “vicious or heinous nature of the conduct.”<sup>117</sup> Like Florida, Maryland assigns points for victim injury on its sentencing guidelines worksheet.<sup>118</sup> In Maryland, “[v]ictim injury” means physical or psychological injury to the crime victim, the cause of which is directly linked to the conduct of the defendant in the commission of the convicted offense.<sup>119</sup> Like Illinois, the definition of victim injury refers only to a victim and does not specifically mention a person or people.<sup>120</sup> The scoring of total points on the Maryland worksheet is very different from its Florida counterpart. The minimum score in Maryland is one point and the maximum is fifteen.<sup>121</sup> For the victim injury portion of the defendant’s score, the person who completes the worksheet assigns zero points if the defendant did not cause the victim injury, one point if the defendant caused the victim temporary injury, and two points if the defendant caused the victim permanent injury or death.<sup>122</sup> Additionally, if the victim is considered a vulnerable victim, the offender scores one point.<sup>123</sup>

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<sup>113</sup> N.J. Stat. Ann. § 2C:44–1(a)(2).

<sup>114</sup> See *State v. Kess*, 2008 WL 2677857, at \*11 (N.J. Super. App. Div. July 10, 2008) (noting that the court appropriately considered mitigating and aggravating factors in sentencing a defendant convicted of animal cruelty).

<sup>115</sup> Md. Crim. P. Code Ann. § 6-208 (2008).

<sup>116</sup> Code Md. Regs. § 14.22.01.05.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at § 14.22.01.09.

<sup>119</sup> *Id.* at § 14.22.01.02.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at § 14.22.01.09.

<sup>122</sup> Code Md. Regs. § 14.22.01.09.

<sup>123</sup> *Id.* A vulnerable victim is someone who is older than sixty-five, younger than eleven, or has a physical or mental handicap, including individuals who are mentally or physically limited in a significant way. *Id.* at § 14.22.01.02. The author of this Note would suggest that animals should also be considered vulnerable victims, as they are often dependent on or at the mercy of humans.

### D. Kentucky

Kentucky's sentencing policies reflect its ranking as the worst state in terms of animal protection laws.<sup>124</sup> In Kentucky, if a criminal case is tried before a jury, the jury is entitled to determine the defendant's sentence within the range allowed by Kentucky law.<sup>125</sup> As in Florida, Illinois, New Jersey, and Maryland, Kentucky juries are entitled to consider evidence regarding "[t]he impact of the crime upon the victim or victims . . . including a description of the nature and extent of any physical, psychological, or financial harm suffered by the victim or victims."<sup>126</sup> The Kentucky statute that defines "victim" will only recognize "an individual" as a "victim" if that individual suffered:

direct or threatened physical, financial, or emotional harm as a result of the commission of a crime classified as stalking, unlawful imprisonment, use of a minor in a sexual performance, unlawful transaction with a minor in the first degree, terroristic threatening, menacing, harassing communications, intimidating a witness, criminal homicide, robbery, rape, assault, sodomy, kidnapping, burglary in the first or second degree, sexual abuse, wanton endangerment, criminal abuse, or incest.<sup>127</sup>

Given that the animal cruelty statutes are located in Chapter 525 of the Kentucky statutes and are separate from all of the offenses enumerated in the statutory definition of "victim," it is clear that animal victims, even service animals, are excluded from consideration by the jury for sentencing purposes.<sup>128</sup>

It is clear from the above brief survey of five very different states that victim injury and sentencing is a topic likely to involve many states. Whether victim injury can affect offenders' sentences through victim injury points, aggravating factors, or simply consideration by the judge or jury, all states should ensure that injuring animals results in enhanced sentences.

## V. PAVING THE WAY FOR CHANGE

### A. *The First Attempt for Victim Injury Points*

On October 10, 2011, what was likely the first attempt in the country to get victim injury points scored in a stand-alone animal cruelty case occurred in Florida.<sup>129</sup> In his sentencing memorandum and at the hearing, Assistant State Attorney Geoffrey C. Fleck argued that a defendant should score victim injury points in a cruelty case for injur-

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<sup>124</sup> See *supra* nn. 54–58 (explaining some of ALDF's reasons for ranking Kentucky as having the worst animal protection laws in 2012).

<sup>125</sup> Ky. Rev. Stat. Ann. § 532.055.

<sup>126</sup> *Id.*

<sup>127</sup> Ky. Rev. Stat. Ann. § 421.500(1).

<sup>128</sup> Ky. Rev. Stat. Ann. §§ 521.010–521.220.

<sup>129</sup> E-mail from Geoffrey C. Fleck, Fla. Asst. St. Atty., to Samantha D.E. Tucker, Author, *Re: Contact Info.* (Sept. 2, 2011) (copy on file with *Animal Law*).

ing a dog.<sup>130</sup> The defendant in *State v. Nebus*<sup>131</sup> found a Rottweiler dog, Rosco, “fighting” with a smaller Schnauzer dog.<sup>132</sup> Though the dogs separated and Rosco withdrew to his own property, the defendant willfully decided to kill Rosco by stabbing him again and again—twelve to fifteen times, according to an expert veterinarian—in the chest and neck.<sup>133</sup> Fleck explained that the defendant’s acts were unnecessary, cruel, and sadistic, as Rosco was trapped and bleeding against a fence, and law enforcement was on the way.<sup>134</sup> This was clear even from the defendant’s testimony, when he admitted that “I stabbed and tried to cut the Rottweiler’s throat,” and “I jugged it some more and cut its throat.”<sup>135</sup>

Fleck argued that victim injury points should have been assigned on the Criminal Punishment Code Scoresheet, as there was no question that Rosco was the victim of the crime, that injury was caused to Rosco, and that the defendant directly caused Rosco’s injuries.<sup>136</sup> Fleck noted that the court correctly recognized that a dog can be a victim, as it gave the jury instruction requested by the defendant.<sup>137</sup> The instruction<sup>138</sup> allowed the jury to acquit the defendant—on the ground of justifiable use of deadly force—if it concluded that he acted in defense of the Schnauzer dog.<sup>139</sup> By doing so, the Eighth Circuit judge recognized that the Schnauzer dog is not chattel; a dog is a living being who deserves minimum rights and protections under the law.<sup>140</sup> The judge’s recognition of the Schnauzer dog’s value was clear from the reading of the instruction because it acknowledged the Schnauzer dog as “another” under the Florida defense statute, which would justify the defendant’s use of deadly force against Rosco if he reasonably believed such force was necessary to prevent imminent death or great bodily harm to “another”—the Schnauzer dog. The judge acknowledged that the Schnauzer dog was “another” worthy of protection, just as a person would be, and that the Schnauzer dog was a potential victim who could

<sup>130</sup> Fleck, Senten. Memo., *supra* n. 68, at 2.

<sup>131</sup> *State v. Nebus*, No. 01-2010-CF-003230-A (Fla. 8th Cir. 2011).

<sup>132</sup> Fleck, Senten. Memo., *supra* n. 68, at 1.

<sup>133</sup> *Id.* at 1–2.

<sup>134</sup> *Id.* at 2.

<sup>135</sup> *Id.* Poor Rosco did not die immediately from the attack, but his wounds were so extensive that he had to be euthanized later that day. Stephen Wells, Animal Leg. Def. Fund, *Together, We Can Be Their Voice in Courts of Law*, <http://aldf.org/article.php?id=1786> (Aug. 10, 2011) (accessed Nov. 17, 2012).

<sup>136</sup> Fleck, Senten. Memo., *supra* n. 68, at 2.

<sup>137</sup> *Id.* at 2–3.

<sup>138</sup> Fla. Stand. Jury Instr. in Crim. Cases 3.6(f) (amended 2010) (available at [http://www.floridasupremecourt.org/jury\\_instructions.shtml](http://www.floridasupremecourt.org/jury_instructions.shtml) (accessed Nov. 17, 2012)) (stating that “[a] person is justified in using deadly force if [he or she] reasonably believes that such force is necessary to prevent imminent death or great bodily harm to [himself, herself,] or another”). See Fla. Stat. Ann. § 776.012 (West 2012) (allowing the use of force in defense of oneself or another).

<sup>139</sup> Fleck, Senten. Memo., *supra* n. 68, at 2–3.

<sup>140</sup> *Id.* at 3.

be defended under the law. Likewise, Rosco was the victim of the heinous crime committed by the defendant.<sup>141</sup>

### B. *The Florida Legislature's Intent*

It is clear from looking at Florida Statute section 828.12(2)<sup>142</sup> that the legislative intent was to penalize the victimization of animals as a felony.<sup>143</sup> This section prohibits the deliberate commission of acts that result in “the *cruel* death, or excessive or repeated infliction of unnecessary *pain or suffering*” on an animal.<sup>144</sup> The section thus “recognizes not only the sentience of animals but their indisputable existence as victims of crime.”<sup>145</sup> In his memorandum, Fleck goes on to observe that Florida law deals with the abuse of the elderly and disabled in Chapter 825,<sup>146</sup> the abuse of children in Chapter 827,<sup>147</sup> and cruelty against animals in Chapter 828.<sup>148</sup> Fleck argues that obviously the elderly, disabled adults, and children are acknowledged as victims, so it is only reasonable to grant animals, at least sentient mammals, the same protection.<sup>149</sup> All three of these categories contain members who are frequently vulnerable, helpless, and completely at the mercy of the people around or in control of them. The law thus needs to play a special role, perhaps a more involved role, in protecting these vulnerable groups. Placing the anti-cruelty statutes next to these sections illustrates our feelings, expressed by the Florida legislature, about animals as special, less powerful victims.

Failing to recognize animals as victims on the scoresheet, Fleck argued, would create an unwarranted, irrational “loophole” through which perpetrators of atrocious crimes of violence and cruelty to animals, such as the defendant who victimized Rosco, would be impervious to full responsibility via sentence enhancements.<sup>150</sup> Such perpetrators would receive an unjustified windfall. When read in combination with Florida Statute section 828.12,<sup>151</sup> at least seventeen related statutes offer circumstantial evidence of the Florida legislature’s intent that the judicial branch treat animals not as inanimate property, but as living, breathing victims who deserve to be protected from

<sup>141</sup> *Id.*

<sup>142</sup> Fla. Stat. Ann. § 828.012(2).

<sup>143</sup> Fleck, Senten. Memo., *supra* n. 68, at 3.

<sup>144</sup> Fla. Stat. Ann. § 828.12(2) (emphasis added).

<sup>145</sup> Fleck, Senten. Memo., *supra* n. 68, at 3.

<sup>146</sup> Fla. Stat. Ann. §§ 825.101–825.106; Fleck, Senten. Memo., *supra* n. 68, at 2–3.

<sup>147</sup> Fla. Stat. Ann. §§ 827.01–827.08; Fleck, Senten. Memo., *supra* n. 68, at 2–3.

<sup>148</sup> Fla. Stat. Ann. §§ 828.02–828.43; Fleck, Senten. Memo., *supra* n. 68, at 2–3.

<sup>149</sup> Fleck, Senten. Memo., *supra* n. 68, at 3.

<sup>150</sup> *Id.* An offender would not be completely free of criminal liability, of course, as they would still be guilty of violating the Florida animal cruelty statute. But, unlike other violent offenders, they would be impervious to sentence enhancements for the injuries they caused their victims. *Id.*

<sup>151</sup> Fla. Stat. Ann. § 828.12. This section prohibits cruelty to animals and imposes required minimum fines and anger management or mental health counseling for “knowing[ly] and intentional[ly]” torturing an animal. *Id.*

pain, suffering, and injury.<sup>152</sup> Many of these statutes are discussed above.<sup>153</sup>

### C. *The Wrong Outcome*

Sadly, though not surprisingly, “despite logic, two memos, three experts, and an emotional speech,” the wording of the Florida statute caused the Eighth Judicial Circuit judge to reject Assistant State Attorney Fleck’s argument to recognize Rosco as a victim and add victim injury points to Nebus’s scoresheet.<sup>154</sup> Even the defense conceded that the arguments made sense, but Fleck was unable to overcome the fact that Florida defines a “victim” as a “person.”<sup>155</sup>

This was not the right outcome. In Florida, it is clear that victim injury points for animals can and should be scored on the Criminal Punishment Code Scoresheet. First of all, as discussed above, the reason the legislature created Florida’s sentencing policy was to ensure that “violent criminal offenders are appropriately incarcerated.”<sup>156</sup> The main goal of sentencing, at least in Florida, is to punish the perpetrator,<sup>157</sup> and for the penalty to be “commensurate with the severity of the primary offense and the circumstances surrounding” it.<sup>158</sup> Who does *not* think that someone who needlessly stabs a trapped animal twelve to fifteen times, like the defendant, or someone who tortures or fights or baits an animal deserves to be punished harshly? “[T]he circumstances surrounding”<sup>159</sup> offenses like these are that there was a suffering, terrified victim—in Rosco’s case, a victim who “bled profusely from his gruesome wounds”<sup>160</sup>—and the penalty should be commensurate with that fact, as the legislature wished. It is clearly directly in line with the legislature’s goals for violent, sadistic perpetrators who cause unnecessary pain and suffering to receive an enhanced punishment.

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<sup>152</sup> Fleck, Senten. Memo., *supra* n. 68, at 4.

<sup>153</sup> For more information on the statutes that demonstrate the Florida Legislature’s intent that animals be treated as victims, see *supra* notes 60–68.

<sup>154</sup> E-mail from Geoffrey C. Fleck, Fla. Asst. St. Atty., to Samantha D.E. Tucker, Author, *Re: Victim Injury Points Article* (Oct. 20, 2011) (on file with *Animal Law*) [hereinafter E-mail].

<sup>155</sup> *Id.* To the judge’s credit, Nebus did receive a higher sentence than Assistant State Attorney Fleck would have predicted. Because of Nebus’s status as a Vietnam veteran, age, and documented physical and mental illnesses, Fleck expected the judge to impose a time-served sentence. The judge, however, gave Nebus six months in jail, three years of reporting probation, and seven special conditions: no possession, control, ownership, or cohabitation with any animals; no weapons; alcohol treatment; mental health treatment; \$500 restitution; \$2500 fines; and no alcohol. *Id.* While this sentence was not harsh enough and victim injury points should have been included on the scoresheet, it was certainly more appropriate than time served.

<sup>156</sup> Fla. Stat. Ann. § 921.002(1).

<sup>157</sup> *Id.* at 1(b).

<sup>158</sup> *Id.* at 1(c).

<sup>159</sup> *Id.*

<sup>160</sup> Fleck, Senten. Memo., *supra* n. 68, at 2.

The remainder of the sentencing scoresheet illustrates this even more persuasively. Since how to score victim injury is within the discretion of the trial court, awarding the amount of points for a moderate injury has been approved when an injured detective had to be on light duty for several months, wear an ankle brace, and frequently attend doctors' and physical therapy appointments.<sup>161</sup> The amount of points for slight injury have been awarded where an officer hit his head but was not damaged, and others were bruised and cut by flying glass.<sup>162</sup> Absolutely, victim injury points should have been awarded in these cases, and this Note does not trivialize any injury suffered by any person. But the idea that victim injury points—even a few—are awarded when someone receives “no injuries other than tiny knicks,”<sup>163</sup> while none are awarded when a dog is brutally, repeatedly stabbed is irrational and contrary to the legislative intent. Indeed, authors state that all reasonable people believe in animal rights,<sup>164</sup> and even the fiercest critics agree with the anti-cruelty laws.<sup>165</sup> If that is true—and even if it is not—it is likely indisputable that no reasonable person thinks that “tiny knicks” inflicted on a person are more worthy of victim injury points than the horrific, painful wounds inflicted on animal victims like Rosco. A reasonable person would not think that a drunk who resists arrest in a bar, not causing an officer to seek any medical attention,<sup>166</sup> is more deserving of an enhanced sentence than someone who deliberately and maliciously inflicts pain, suffering, and substantial injury or death on a defenseless animal.

While Florida law does define “victim” as “a person,”<sup>167</sup> this does not match the legislative intent in creating the sentencing scheme and animal cruelty laws, and it does not explicitly exclude animals.<sup>168</sup> With such a huge disjuncture between the word “person” and the rest of the Florida law, trial courts should use their discretion to award victim injury points and elevate the sentences of those who victimize animals until the law is changed. In Florida, “[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning . . . the statute must be given its plain and obvious meaning.”<sup>169</sup> Legislative intent, however, has to be given effect even if it

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<sup>161</sup> *Tillman v. State*, 819 So. 2d 913, 914 (Fla. 3d Dist. Ct. App. 2002).

<sup>162</sup> *Poole v. State*, 753 So. 2d 698, 698–99 (Fla. 4th Dist. Ct. App. 2000) (finding that when police officers suffered no injuries other than “tiny knicks,” the injuries should be classified, at most, as slight).

<sup>163</sup> *Id.* at 698.

<sup>164</sup> Sunstein, *supra* n. 10, at 391.

<sup>165</sup> *Id.* at 389.

<sup>166</sup> *Poole*, 753 So. 2d at 698.

<sup>167</sup> Fla. Stat. Ann. § 960.03.

<sup>168</sup> Fla. Stat. Ann. § 921.002. As explained above, the legislature implemented and revised the sentencing policy to ensure that “violent criminal offenders are appropriately incarcerated.” *Id.* The legislature did not limit this policy by only making it applicable to offenders who injure humans. *Id.*

<sup>169</sup> *GTC, Inc. v. Edgar*, 967 So. 2d 781, 785 (Fla. 2007); *but see Saadeh v. Farouki*, 107 F.3d 52, 58 (D.C. Cir. 1997) (stating that the “Supreme Court has observed that ‘in

seems to contradict the plain wording of the statute.<sup>170</sup> Additionally, construction of a law that would lead to an irrational or unreasonable result is discouraged.<sup>171</sup>

To decipher legislative intent, Florida courts must consider the evil to be rectified, the language of the law, the state of existing law related to the subject, the law's name, and the legislative history of the law.<sup>172</sup> Violent offenders are the evil to be addressed by victim injury points. Although the Florida statute's language defines a victim as a "person," the statute does not expressly exclude animals. People are expressly included because they are the commonplace and/or normative definition of a victim. However, by implementing laws to punish offenders who victimize animals,<sup>173</sup> the legislature has revealed its intent to protect nonhuman victims of cruelty. Neither the law's name nor its legislative history appears to add anything to the analysis of this law. The legislature's clear intent to punish violent offenders and protect animals, combined with the lack of positive exclusion of animals as victims, renders it nonsensical to bar the addition of victim injury points to an offender such as Nebus's sentence.

Thus, the lower courts should award victim injury points in animal cruelty cases, and the Florida Supreme Court should allow them to stand. Until the legislature amends the statute, trial courts should use their discretion to assess victim injury points for offenders who victimize animals, thus enhancing their sentences. This is within their province, since "[t]he imposition of victim injury points is within the discretion of the trial court."<sup>174</sup> Animals can unquestionably be victims and courts should count them as such.

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rare cases, the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling"). In state courts, state law is likely to control on these issues. It is theoretically possible, though, that federal law could be triggered if some sort of constitutional right for animals is found. In the first case of its type, People for the Ethical Treatment of Animals (PETA); several marine-mammal experts; and two former orca trainers filed a lawsuit requesting a federal court to declare that five orcas, who were caught in the wild and who now perform at Sea World, are being kept as slaves in violation of the Thirteenth Amendment to the United States Constitution. PETA, *PETA Sues SeaWorld for Violating Orcas' Constitutional Rights*, <http://www.peta.org/b/thepetafiles/archive/2011/10/25/peta-sues-seaworld-for-violating-orcas-constitutional-rights.aspx> (accessed Nov. 17, 2012). The lawsuit is grounded in the text of the Thirteenth Amendment, which forbids the condition of slavery without explicit reference to "person" or any specific category of victim. *Id.* Jeffrey Kerr, PETA's general counsel, argued that "[s]lavery is slavery, and it does not depend on the species of the slave any more than it depends on gender, race, or religion." *Id.*

<sup>170</sup> *State v. Webb*, 398 So. 2d 820, 824 (Fla. 1981) (citing *Foley v. State*, 50 So. 2d 179, 184 (Fla. 1951)).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> See generally Fla. Stat. Ann. §§ 828.01–828.43 (containing Florida's anti-cruelty laws); see also Fla. Stat. Ann. § 828.12(2) (making certain acts of animal cruelty a felony under Florida law).

<sup>174</sup> *Ely v. State*, 719 So. 2d 11, 13 (Fla. 2d Dist. App. 1998) (citing *McDonald v. State*, 520 So. 2d 668 (Fla. 1st Dist. App. 1988)).

### D. *The Wording of the Law*

The legislature should change the wording of the law to reflect Florida policies and attitudes, and to eradicate this problem for lawyers and courts. As discussed above, states are increasingly criminalizing offenses against animals and implementing harsher punishments for these crimes. As of 2012, only two states do not have a felony animal abuse provision.<sup>175</sup> But, still, the Florida statute provides that “victim injury” is scored for physical injury or death suffered by a *person* as a direct result of any offense pending before the court for sentencing.<sup>176</sup> It is a double standard that the criminal laws of Florida, and other states like it, recognize that offenses against animals should be criminalized<sup>177</sup> yet they decline to enhance the sentences of offenders who victimize animals. The word “person,” once taken for granted, is now outdated—“victim” no longer exclusively refers to “persons.” In the past, we assumed that people were the only victims and animals were just property. But with the advent of the Body of Liberties’ prohibition against animal cruelty,<sup>178</sup> the development and growth of animal welfare laws across the country, and the scientific realization of the sentience and intelligence of animals,<sup>179</sup> our modern society is beginning to recognize that animals are victims, too. To many—perhaps most—Americans, animals are beloved family members; they have names, personalities, preferences, desires, dislikes, fears, and feelings. They have birthdays to celebrate<sup>180</sup> and stockings to be hung for the holidays.<sup>181</sup> As described previously, animals are also he-

<sup>175</sup> See *supra* n. 40 and accompanying text (noting that, as of the end of 2012, only North Dakota and South Dakota lack felony animal cruelty provisions).

<sup>176</sup> Fla. R. Crim. P. 3.704 (emphasis added).

<sup>177</sup> See ALDF, *Animal Protection Laws of the U.S. & Canada*, *supra* n. 57, at FL-3-FL-7.

<sup>178</sup> Jasper, *supra* n. 16, at 5.

<sup>179</sup> E.g. Eleanor Boyle, *Neuroscience and Animal Sentience* 2–4 (March 2009) (available at [http://www.ciwf.org.uk/includes/documents/cm\\_docs/2009/b/boyle\\_2009\\_neuroscience\\_and\\_animal\\_sentience.pdf](http://www.ciwf.org.uk/includes/documents/cm_docs/2009/b/boyle_2009_neuroscience_and_animal_sentience.pdf) (accessed Nov. 17, 2012)) (arguing that neurochemical evidence, similarities in human and animal anatomy, and the fact that animals experience pain all support the notion of animal sentience); Jeffrey Moussaieff Masson & Susan McCarthy, *When Elephants Weep: The Emotional Lives of Animals* 116–17 (Dell Publ. 1995) (advocating the idea that animals feel emotions including, but not limited to, happiness and pride); Fleck, *Senten. Memo.*, *supra* n. 68, at 5–6 (arguing, and providing multiple references to support, that animals are sentient beings).

<sup>180</sup> See e.g. Alex Lieber, *Do You Celebrate Your Pet’s Birthday?* <http://www.petplace.com/dogs/do-you-celebrate-your-pet-s-birthday/page1.aspx> (accessed Nov. 17, 2012) (stating that celebrating a pet’s birthday is common); *Dog Birthday Parties: Throw a Grrreat Dog Birthday Party (Not Just Their Favorite Toy!)*, <http://www.dog-birthday-parties.com> (accessed Nov. 17, 2012) (a company providing themed “doggie parties”); K.C. Baker, *A Dog Do to Die for Pet Birthdays Celebrated with Style*, [http://articles.nydailynews.com/1999-11-27/entertainment/18109952\\_1\\_birthday-bash-dog-owners-pooch-friendly](http://articles.nydailynews.com/1999-11-27/entertainment/18109952_1_birthday-bash-dog-owners-pooch-friendly) (accessed Nov. 17, 2012) (describing a stylish dog birthday party).

<sup>181</sup> See Am. Humane Assn., *FACTS: Pet Ownership*, <http://www.petfinder.com/shelters/facts-pet-ownership.html> (accessed Nov. 17, 2012) (providing statistics that show how many American households hang Christmas stockings for their pets); Per-

roes.<sup>182</sup> Furthermore, animals are sentient creatures, capable of experiencing pain and suffering.<sup>183</sup> The law is beginning to recognize that animals are victims—the statutes in place in all fifty states are not just about animals as property. These laws recognize the inherent importance of animals.<sup>184</sup> In effect, they recognize nonhuman animals as victims. Thus, legislatures should amend statutes, like the Florida statute defining “victim injury,” to read that victim injury points are “scored for physical injury or death suffered by a *victim*”—or “*person or other animal*,” if legislatures do not wish to include “victim” in both the term and its definition—“as a direct result of any offense pending before the court for sentencing.”<sup>185</sup> Legislatures should amend statutes similar to the one in Florida, and even clearly ambiguous statutes like those in Illinois and New Jersey, so that there is no question about whether animals should count as victims.

Likely incited by Fleck’s impassioned speech, Nebus decided to speak at the end of the sentencing proceeding. Clearly moved, he said, “Shit, judge, you all are acting like I killed the president. It was just a damn dog.”<sup>186</sup> We need to tell violent, malicious offenders like Nebus that it was not, is not, “just a damn dog.” It—he—was *Rosco*. He was a being, a sentient being, with feelings and value. And as a civilized, compassionate society, we cannot stand for that kind of conduct or attitude. Unfortunately, Florida—like the vast majority of states—has yet to recognize its first official “victim” of animal cruelty. It is doubtless that every animal who has suffered needlessly at the hands of a human has been a very real victim—but our laws are only just beginning to acknowledge this victimization.

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sonalization Mall.com, *Christmas Gifts Department*, <http://www.personalizationmall.com/Personalized-Pet-Christmas-Ornaments-d1190.dept> (accessed Nov. 17, 2012) (promoting holiday gifts for animals and personalized pet ornaments); Personal Creations .com, *Christmas Stockings, Love My Cat, Love My Dog Stocking*, <http://www.personalcreations.com/personalized-christmas-stockings-pchrsto> (accessed Nov. 17, 2012) (selling pet-themed stockings to leave toys and treats for pets in).

<sup>182</sup> *Supra* nn. 2–5 and accompanying text (providing examples of heroic dogs, including those who work in law enforcement and search and rescue, and others who assist the blind and visually impaired).

<sup>183</sup> Boyle, *supra* n. 179, at 2–4 (explaining that animal sentience is strongly supported by neurochemical evidence, the similarities in human and animal anatomy, the fact that animals experience pain, and the fact that animals exhibit emotions).

<sup>184</sup> This is strongly supported by the diction in federal and state statutes. Instead of treating animals like humans’ property, these statutes focus on ensuring the humane treatment of animals and protecting animals from potential pain and suffering. *See e.g.* Fla. Stat. §§ 828.05(1), 828.055–828.065 (including provisions for euthanasia and the humane killing of injured or diseased domestic animals).

<sup>185</sup> Fla. R. Crim. P. 3.704(9).

<sup>186</sup> E-mail, *supra* n. 154.

## VI. FURTHER LEGAL SUPPORT FOR ANIMALS AS LEGAL VICTIMS

Nonetheless, scientific evidence shows—and lawmakers are beginning to recognize—that animals are sentient.<sup>187</sup> This explains why animals have been slowly gaining legal protections in Florida and many other states.<sup>188</sup> State courts can therefore support a decision to award victim injury points in cases like Rosco's by looking at persuasive authority.

In *Nebus*, for example, Fleck used both federal and Michigan law to supplement his sentencing arguments.<sup>189</sup> Outside the criminal context, at least one federal court has recognized that when acts are clearly motivated by kindness towards animals, “who are uniquely incapable of defending their own interests in court,” it makes sense to permit groups particularly concerned with animal welfare to invoke the help of the courts to enforce the law.<sup>190</sup> That court thus found that the Humane Society had standing to petition the United States Postal Service to classify an animal-fighting periodical as nonmailable.<sup>191</sup> In addition to positive law in favor of recognizing animals as victims, there is also significance in the lack of certain law. Although a number of courts view animals as property,<sup>192</sup> both the Sixth Circuit Court of Appeals and the Michigan Supreme Court have declined to follow the traditional rule that privately owned animals are “effects” subject to Fourth Amendment protection.<sup>193</sup>

In 2010, a U.S. District Court stated that “[w]hile many dog fighting enthusiasts advertise the blood sport as a victimless crime, there are in fact many who suffer at the hands of these handlers.”<sup>194</sup> In addition to less obvious victims—such as children who may be exposed to the “sport” and our society that must carry the economic load created by the “sport”—“[t]he obvious victims of this blood sport are the dogs

<sup>187</sup> For scientific evidence that animals are sentient, see Boyle, *supra* note 179 and accompanying text.

<sup>188</sup> See Fleck, *Senten. Memo.*, *supra* n. 68, at 4–6 (discussing Florida's intent to protect animal victims by punishing animal cruelty, and listing the state's statutory provisions that protect against animal pain and suffering); see generally ALDF, *Animal Protection Laws of the U.S. & Canada*, *supra* n. 57 (surveying the animal protection statutes of the U.S. and Canada).

<sup>189</sup> Geoffrey C. Fleck, *Animal Leg. Def. Fund, Supp. Senten. Memo.*, *State v. Nebus*, No. 01-2010-CF-003230-A (Fla. 8th Cir. 2011). Assistant State Attorney Geoffrey Fleck gathered the information for this Supplemental Memorandum from the Monroe Society for the Prevention of Cruelty to Animals. Monroe Socy. for the Prevention of Cruelty to Animals, [http://www.monroespca.org/Dogs\\_as\\_victims\\_outline\\_-\\_1%5B1%5D%5B1%5D-03.pdf](http://www.monroespca.org/Dogs_as_victims_outline_-_1%5B1%5D%5B1%5D-03.pdf) (accessed Nov. 17, 2012) [hereinafter Monroe Socy.].

<sup>190</sup> Monroe Socy., *supra* n. 189, at 1 (citing *Humane Socy. of the U.S. v. U.S. Postal Serv.*, 609 F. Supp. 2d 85, 93 (D.D.C. 2009)).

<sup>191</sup> *Humane Socy.*, 609 F. Supp. 2d at 93.

<sup>192</sup> Monroe Socy., *supra* n. 189, at 1.

<sup>193</sup> *Id.*

<sup>194</sup> *U.S. v. Kizeart*, No. 10-CR-30053-MJR 21 (S.D. Ill. Sept. 17, 2010) (available at <http://www.lb7.uscourts.gov/documents/ILSD/10-30053op.pdf> (accessed Nov. 17, 2012)).

themselves, who spend their entire lives trapped in a violent and brutal world . . . .”<sup>195</sup>

Finally, in 2012, the Oregon Court of Appeals issued a landmark decision when it ruled that animals can be “victims” for sentencing purposes.<sup>196</sup> In reaching this conclusion, the Oregon court observed that the primary goal of lawmakers was “to protect individual animals as sentient beings.”<sup>197</sup> Thus, where a defendant was convicted of neglecting twenty different animals, the trial court should have imposed twenty separate convictions.<sup>198</sup> Not only will this ruling ensure that Oregon offenders receive distinct punishments for each animal victim they harm, but it could also help prosecutors in other states to overcome adverse precedents.<sup>199</sup>

Clearly, the animal-victim paradigm is becoming embedded in the minds of lawmakers. Legislatures and judges should draw on laws and cases such as these when ensuring that animals are treated as legal victims.

## VII. HOW MANY POINTS TO AWARD AND HOW WE GET THERE

### A. *How Many Points to Award*

Agreeing on how many victim injury points to award for animal injuries—or on how an animal injury would function as an aggravating factor or consideration—would be a challenge. Some people—those who are in opposition to animal rights or are indifferent in general about the welfare of animals—might be vehemently opposed to awarding the same number of victim injury points for an animal as for a human. They might argue that humans are more intrinsically valuable than animals, so criminal sentencing should emphasize the experiences of human victims over animal victims. Regardless of the appeal of this argument for some, courts should award the same amount of victim injury points for animals as they do for humans. The reason states like Florida enhance sentences is to punish violent offenders,<sup>200</sup> and violent offenders who victimize animals deserve to be punished, too. Victims are victims and violence is violence. In addition to deontological arguments, punishing animal cruelty as harshly as possible—regardless of the victim’s status—serves the goals of criminal punish-

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<sup>195</sup> *Id.*

<sup>196</sup> *State v. Nix*, 283 P.3d 442, 449 (Or. App. 2012).

<sup>197</sup> *Id.* (emphasis added).

<sup>198</sup> *Id.*

<sup>199</sup> Scott Heiser, Dir. of Animal Leg. Def. Fund Crim. Just. Program, Animal Leg. Def. Fund Blog, *Great News in Oregon: Each Animal Counts!*, <http://aldf.org/article.php?id=2123> (Aug. 3, 2012) (accessed Nov. 17, 2012).

<sup>200</sup> See Fla. Stat. § 921.002(1)(b)–(c) (seeking primarily to punish the most violent offenders by making the sentence proportional to the savagery of the crime and criminal).

ment: to penalize offenders, to safeguard victims and society, to deter crime, and to encourage public morality.<sup>201</sup>

Getting to a point where states are comfortable awarding an equivalent number of victim injury points for our animal companions might require a change in our thinking about animals. This change may be necessary because animals are usually considered property under our laws.<sup>202</sup> Historically, classifying living beings as “property” has been used repeatedly as a tool for subordination.<sup>203</sup> This is because “[p]roperty’ has value solely as a means to an end, whereas ‘people’ are ends in themselves.”<sup>204</sup>

### B. Children as Property and Economic Assets

As Americans, we can change our thinking about animals just as we have moved beyond other antiquated paradigms of the past. For example, parents historically valued their children not only for their inherent worth, but also as necessary sources of labor and economic support.<sup>205</sup> In the late nineteenth century, working-class urban families counted on the household help of younger children and the earnings of older ones.<sup>206</sup> Children were important largely because they were useful.<sup>207</sup> But then there was a transformation in the financial and sentimental worth of children between the 1870s and 1930s, which produced an “economically ‘worthless’ but emotionally ‘priceless’ child.”<sup>208</sup> By solely economic criteria, kids are now worthless and extremely expensive;<sup>209</sup> couples would be better off investing their

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<sup>201</sup> Madeline, *supra* n. 22, at 338. Madeline argues that the goal of preventing animal abuse is better served by shifting the argument from why animal abuse should be prohibited to the general consensus that it should be prohibited. She argues this because the majority of society is not likely to accept controversial animal rights proposals. *Id.* Madeline believes that anti-cruelty statutes should be eradicated and our laws should simply criminalize acts of violence regardless of the victim’s status. *Id.* She argues that both humans and animals are harmed by weak anti-cruelty laws, as the link between human-animal violence shows that humans and animals are likely to be victimized by the same violent perpetrators. She advocates this approach because elevating anti-cruelty laws to give felony-level penalties has been futile, as few anti-cruelty laws adequately address and punish cruelty to animals. *Id.* Her approach would also solve the problem addressed by this Note, since crimes against humans and animals would be treated identically.

<sup>202</sup> Gary L. Francione, *Animals as Property*, 2 Animal L. i, ii (1996).

<sup>203</sup> Derek W. St. Pierre, *The Transition from Property to People: The Road to the Recognition of Rights for Non-Human Animals*, 9 Hastings Women’s L.J. 255, 255 (1998).

<sup>204</sup> *Id.* at 257.

<sup>205</sup> See Viviana A. Rotman Zelizer, *Pricing the Priceless Child: The Changing Social Value of Children* 3–6 (Basic Books, Inc. 1985) (discussing the historical shift in Americans’ valuation of children from economically useful to “economically worthless” and “emotionally priceless”).

<sup>206</sup> *Id.* at 6.

<sup>207</sup> See *id.* at 5 (stating that “the birth of a child in eighteenth-century rural America was welcomed as the arrival of a future laborer and as security for parents later in life”).

<sup>208</sup> *Id.* at 3.

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

money in a bank to save for retirement.<sup>210</sup> Parents are paying over a hundred thousand dollars and expecting children to provide “love, smiles, and emotional satisfaction, but no money or labor.”<sup>211</sup> Animals are especially similar to children in that animals bring people “love, smiles, and emotional satisfaction”; their importance to humans is greater than their property value.<sup>212</sup> Just like animal protection laws are now beginning to protect animals as beings rather than property, child protection laws—such as labor laws—developed to protect children as sentimentally valuable beings when the historic paradigm shifted.<sup>213</sup>

### C. *Slaves as Property*

Slaves in America were treated as property even more than children used to be. The justifications for slavery were grounded in science, culture, and religion.<sup>214</sup> Similar to the current or recent situation for animals, the law protected slaves only to the extent necessary to protect the slave owner’s property.<sup>215</sup> Legislatures labeled slaves as personal chattel, leaving the furtherance of “rights” to the courts.<sup>216</sup> The courts, creating common law, then used slaves as the objects of “mortgages, assignments, inheritance, seizure, bailment, insurance[,] and warranties.”<sup>217</sup> The Alabama Supreme Court proclaimed that while a slave was considered as having a mind to originate criminal acts he could be punished for, in terms of civil acts a “slave, not being a person, has no legal mind, no will which the law can recognize.”<sup>218</sup> It was not until the ratification of the Thirteenth Amendment that slavery finally, officially, ended in America,<sup>219</sup> and former slaves started to acquire rights as people, not just as property.<sup>220</sup>

### D. *A Paradigm Shift for Animals*

It is axiomatic that both children and former slaves are—or were—*Homo sapiens*, humans, people. Animals are a different species. So the above arguments are not to say that children, slaves, and animals are entirely analogous. Nonetheless, the shift in social beliefs about the value, worth, and importance of children and slaves reveals the type of cultural transformation that is both necessary and possible in order for us to acknowledge the inherent worth of animals. Our soci-

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<sup>210</sup> *Id.* at 4.

<sup>211</sup> Zelizer, *supra* n. 205, at 3.

<sup>212</sup> *Cf. id.* (finding that a child is expected to provide “love, smiles, and emotional satisfaction, but no money or labor”).

<sup>213</sup> *Id.* at 6.

<sup>214</sup> St. Pierre, *supra* n. 203, at 263.

<sup>215</sup> *Id.* at 262.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Creswell’s Executor v. Walker*, 37 Ala. 229, 236 (1861).

<sup>219</sup> U.S. Const. amend. XIII.

<sup>220</sup> St. Pierre, *supra* n. 203, at 264.

ety initially conceptualized both children and slaves almost entirely in terms of economic value and use. Over time, however, society came to realize the intrinsic value in all people—regardless of age or race.

It is time for society to change its perspective once again. While animals may never obtain the same rights as humans, we should value them not only for their utility but also for their inherent worth, intelligence, and sentience. Humans are not special; people “do not possess any characteristics which are not possessed by at least one other species. Nonhuman animals use tools, communicate with language, display emotions, have social relationships, establish cultures, display rational thought and exhibit altruism.”<sup>221</sup> Likewise, there are no flaws demonstrated by nonhuman animals that do not also exist in human behavior.<sup>222</sup> It is even clearer that our society values humans just because they are humans when one takes into account the fact that our laws generally aim to protect all humans without distinction.<sup>223</sup> We place inherent worth only on the lives and emotions of humans, without rational grounds for doing so.<sup>224</sup>

A transformation of the human-animal relationship is already occurring; we are already beginning to view animals as living beings instead of as mere property.<sup>225</sup> Although this shift in perception is not necessary to award an equal number of victim injury points for animals, it would certainly help facilitate the process. The municipal codes of San Francisco, California and Boulder, Colorado, as well as the county code of Marin County, California, now refer to people as “guardians” of their companion animals rather than “owners,” in order to attempt to modify society’s views.<sup>226</sup> By discarding the

concept and accompanying language of animal ‘ownership,’ we can reconstruct the social and legal relationship between humans and animals . . . . As our societal perceptions of animals change, the legislatures and courts will begin to recognize our obligation to protect animals, not as someone’s

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<sup>221</sup> *Id.* at 258 (citing Gary Francione, Keynote Speech, *The University of Oregon Land Air Water Conference* (U. Or. Mar. 14, 1997) (available at the University of Oregon)). See also Wise, *supra* n. 12, at 10–11 (noting that a mere fifty genes might account for the differences between humans and chimpanzees and bonobos—with whom humans share about 99.5% of their working DNA—and explaining that these animals can suffer, act deliberately, understand cause and effect, deceive, empathize, self-medicate, perform basic math (simple numbers and even fractions), symbolically play, comprehend spoken English with the ability of a three-year-old, and speak human language like a two-year-old).

<sup>222</sup> St. Pierre, *supra* n. 203, at 258.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*; see also Wise, *supra* n. 12, at 16–17 (arguing that it is commendable that we award basic legal rights even to humans who lack autonomy, but it would be “naked prejudice” to deny the same rights to chimpanzees and bonobos who act with much greater autonomy and mental complexity).

<sup>225</sup> See e.g. *supra* pt. V (observing that recognition of animals as sentient beings has led to increased legal recognition and protections).

<sup>226</sup> Melissa Bjorkenstam, Am. Socy. for the Prevention of Cruelty to Animals, *Legal Rights for Animals: Courting Legal Change*, <http://www.petfinder.com/how-to-help-pets/legal-rights-animals.html> (2001) (accessed Nov. 17, 2012).

personal property, but as conscious beings with feelings and interests of their own.<sup>227</sup>

This is exactly the kind of thinking and lawmaking that will facilitate social acceptance of equivalent victim-injury schemes for human and animal victims. It is a tricky concept because animals are in some ways, quite literally, personal property in our society. No legal citation is needed to prove that. We buy animals and we sell them. We give them as gifts and party favors,<sup>228</sup> and we win them—at least those bettas in fishbowls<sup>229</sup>—at carnivals or fairs. If, however, we conceptualize ourselves as the guardians of animals, not their owners, it will become apparent that we should not be owning them and treating them as we see fit, or as we find most efficient or useful—we should be safeguarding their rights and interests. This idea is similar to how our legal system appoints guardians ad litem and “next friends” to represent mentally incompetent adults, children, and other humans who are considered incapable of advocating for their own interests.<sup>230</sup>

We do not necessarily need this semantic shift from owner to guardian in order to enhance offenders’ sentences equally for victimizing humans and animals. Simply recognizing animals as victims based on scientific evidence, criminal codes, reason, and compassion will enable and encourage the legal system to elevate animal victims’ legal rights and protections to the same level afforded to human victims. Nevertheless, such a shift in word choice might help to convey the rationality of equal enhancement to those who would question or oppose it.<sup>231</sup>

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<sup>227</sup> *Id.* (quoting Elliot Katz, D.V.M., the president of the Mill Valley, California-based organization, In Defense of Animals).

<sup>228</sup> The author’s college roommate, for instance, attended a golden (fiftieth) anniversary party where two goldfish were given as party favors to each guest.

<sup>229</sup> People for the Ethical Treatment of Animals, *Betta Fish*, <http://www.peta.org/issues/companion-animals/betta-fish.aspx> (accessed Nov. 17, 2012).

<sup>230</sup> St. Pierre, *supra* n. 203, at 258 (“An infant or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian [ad litem].”) (Citing Fed. R. Civ. P. 17(c)). “The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.” Fed. R. Civ. P. 17(c)(2).

<sup>231</sup> The Monroe Society states that the property/victim differentiation appears to turn on whether the animals are the objects of crimes. If animals are the subjects of crimes, they are accurately and more frequently recognized as victims rather than inanimate property. *Id.* at 1. This Note’s author would argue that this change from the human’s role as owner to the human’s role as guardian needs to be embraced across the board, not only when an animal is the victim of a crime. But, as mentioned earlier, first things first. Considering animals as non-property in a criminal context is enough for the addition of victim injury points onto an offender’s Criminal Punishment Code Scoresheet.

## VIII. PRACTICAL APPLICATION

A. *The Number of Victim Injury Points and its Implication*

If victim injury points are awarded, there are other facets to consider as well. Victim injury points, or similar sentence enhancement mechanism schemes, would not be difficult to implement. As proposed earlier, each state should award the same number of victim injury points for the injury or penetration of an animal victim as it would for a human victim. For example, in Florida, four points would be awarded for slight physical injury to an animal victim, eighteen points for moderate physical injury, forty points for severe physical injury, forty points if the offense involved sexual contact with an animal with no penetration, and eighty points if the offense involved sexual contact with penetration. Since murder does not legally exist with regard to animals, the victim injury point system could provide higher victim injury points for offenses that involve cruel deaths; accordingly, 120 points could be awarded for the death of an animal victim as the result of a violation of Florida Statutes Annotated § 828.12(1), and 240 points could be awarded if the animal victim's death was caused by a violation of Florida Statute § 828.12(2).<sup>232</sup> The current Criminal Punishment Code Scoresheet<sup>233</sup> could continue to be used exactly the way it is now.

It is important to note two things. First, offenders' punishments would not be the same even if the enhancement mechanisms were the same. Even if the same number of victim injury points were awarded for killing an animal and a person, the sentences would still be drastically different as a result of the disparate penalties for the underlying crimes. In Florida, for instance, the penalty (not including victim injury points) for murdering a person ranges from fifteen years of incarceration to life imprisonment to death, depending on the type and degree of murder.<sup>234</sup> It can also include a fine of up to \$10,000 or \$15,000.<sup>235</sup> A person who deliberately commits an act that results in the cruel death of an animal, however, can only be imprisoned for a maximum of five years and fined a maximum of \$5,000.<sup>236</sup> Thus, even if animal victims and human victims were given the same weight for enhancement purposes, offenders who victimize humans would be

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<sup>232</sup> Fla. Stat. Ann. § 828.12(2). In Maryland, then, one point could be awarded if temporary injury occurred to the animal victim, and two points could be awarded if the animal victim's injury was permanent or caused the victim's death. In states like Illinois and New Jersey, injury to an animal victim could be considered like any other aggravating factor. In states like Kentucky, the statute that determines when an individual can be considered a victim could be amended to include Kentucky's animal cruelty provisions. *See supra* pt. IV (giving an overview of current sentencing laws related to animal victim injuries in Illinois, New Jersey, Maryland, and Kentucky).

<sup>233</sup> Fla. R. Crim. P. 3.992(a).

<sup>234</sup> Fla. Stat. Ann. § 775.082.

<sup>235</sup> Fla. Stat. Ann. § 775.083.

<sup>236</sup> Fla. Stat. Ann. § 828.12.

punished much more harshly than offenders who victimize animals since the penalty for the underlying crime is so much harsher.<sup>237</sup>

Secondly, if courts or legislatures were willing to award victim injury points for animals but were unwilling to allocate them equally for humans and animals, the enhancements could be scaled. In Florida, for instance, three quarters of the victim injury points awarded for human victims could be awarded for animal victims. In that case, three points could be awarded for slight physical injury to an animal victim, thirteen-and-a-half points for moderate physical injury, thirty points for severe physical injury, thirty points for sexual contact with no penetration, and sixty points for sexual contact with penetration. Again, since murder does not legally exist with regard to animals, ninety points could be awarded for the death of an animal victim as the result of a violation of Florida Statute § 828.12(1), and 180 points could be awarded if the animal victim's death was caused by a violation of Florida Statute § 828.12(2).<sup>238</sup> The current Criminal Punishment Code Scoresheet<sup>239</sup> could be used in almost exactly the same format—blanks for these new numbers would just have to be added to the victim injury section.<sup>240</sup>

### B. Which Animals Would Be Included?

The animals included as victims for the purpose of victim injury points would be the same animals protected by that state's anti-cruelty statutes. If an offender could be convicted under state anti-cruelty laws for abusing a rabbit, that offender could also score victim injury points (or an aggravating factor) for injuring, sexually penetrating, or killing that rabbit. If the offender could not be convicted under those same anti-cruelty laws for abusing a catfish, that offender could not score victim injury points for injuring, penetrating, or killing that catfish.<sup>241</sup>

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<sup>237</sup> The author is not saying that this is the way it should be but merely noting that it is the current state of affairs.

<sup>238</sup> Fla. Stat. Ann. § 828.12(1)–(2). In Maryland, three-fourths of a point could be awarded if temporary injury occurred to the animal victim, and one-and-a-half points could be awarded if the animal victim's injury was permanent or caused the victim's death. In states like Illinois and New Jersey, injury to an animal victim could still be considered like any other aggravating factor. In states like Kentucky, the statute, which determines when an individual can be considered a victim, could still include Kentucky's animal cruelty provisions. *See supra* pt. IV (giving an overview of current sentencing laws related to animal victim injuries in Illinois, New Jersey, Maryland, and Kentucky).

<sup>239</sup> Fla. R. Crim. P. 3.992(a).

<sup>240</sup> This author is not advocating using less victim injury points for animals. Even if humans are treated as special, violent offenders deserve to be punished harshly, and incarcerating violent offenders benefits and protects society as a whole. The author is just pointing out an alternative option, which may be more appealing to some.

<sup>241</sup> Any remaining problems with this system could be addressed through prosecutorial and judicial sentencing discretion. *See e.g. Nix*, 251 Or. App. at 462 (ruling that, as a matter of statutory interpretation, animals are "victims" for sentencing purposes in Oregon).

### C. *Making Animal Victims and Victim Injury Points a Priority*

Sadly, often animal cruelty and fighting cases are not a high priority for prosecutors.<sup>242</sup> This can and should change, though, because animal cruelty cases are important, and there are many resources available to assist law enforcement officers, prosecutors, and judges in learning how to prepare, prosecute, and adjudicate these cases. For example, the Humane Society's director of animal cruelty prosecutions holds training seminars for law enforcement, prosecutors, and judges about prosecuting and adjudicating animal abuse cases.<sup>243</sup> Similarly, the Animal Legal Defense Fund has attorneys who conduct accredited training programs for law enforcement and animal control officers, judges, prosecutors, and community organizations regarding investigating and prosecuting animal cruelty.<sup>244</sup> Programs such as these could count as Continuing Legal Education (CLE) credit that the American Bar Association requires lawyers to acquire.<sup>245</sup> In some states, such as Florida, CDs, DVDs, On-Demand Online Courses, and CLE downloads are approved for CLE credit.<sup>246</sup> If training courses and seminars were made available in these formats, they could greatly increase the number of viewers and participants. These programs would raise awareness about animal cruelty issues, and they would promote the enforcement of animal cruelty provisions and the use of enhancement mechanisms such as victim injury points.

## IX. CONCLUSION

As we as a society become more aware of the suffering and importance of our animal counterparts, we will have to face more—per-

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<sup>242</sup> See e.g. Randall Lockwood, *Animal Cruelty Prosecution: Opportunities for Early Response to Crime and Interpersonal Violence* 1, 15–17 (Am. Prosecutors Research Inst., July 2006) (available at [www.ndaa.org/pdf/animal\\_cruelty\\_06.pdf](http://www.ndaa.org/pdf/animal_cruelty_06.pdf)) (accessed Nov. 17, 2012) (explaining the difficulties in prosecuting animal cruelty); Animal Leg. Def. Fund, *Why Prosecutors Don't Prosecute*, <http://aldf.org/article.php?id=245> (accessed Nov. 17, 2012) (explaining the challenges that may lead a prosecutor to not pursue criminal animal-cruelty charges).

<sup>243</sup> Humane Socy. of the U.S., *Animal Cruelty Prosecutor and Judicial Training*, [http://www.humanesociety.org/about/leadership/subject\\_experts/prosecutor\\_training.html](http://www.humanesociety.org/about/leadership/subject_experts/prosecutor_training.html) (Sept. 19, 2012) (accessed Nov. 17, 2012).

<sup>244</sup> Animal Leg. Def. Fund, *Criminal Justice Program*, <http://www.exposeanimalabusers.org/section.php?id=80> (accessed Nov. 17, 2012). ALDF's Criminal Justice Program provides a lot of other assistance for prosecutors and investigators handling animal cruelty cases, including assistance with legal research, strategy, briefs, memos, and location of expert witnesses. ALDF will also provide sample pleadings, voir dire questions, and jury instructions. *Id.*

<sup>245</sup> Am. Bar Assn., *Mandatory CLE*, [http://www.americanbar.org/publications\\_cle/mandatory\\_cle.html](http://www.americanbar.org/publications_cle/mandatory_cle.html) (accessed Nov. 17, 2012); Animal Leg. Def. Fund, *MCLE FAQs*, [http://www.americanbar.org/publications\\_cle/frequently\\_asked\\_questions.html](http://www.americanbar.org/publications_cle/frequently_asked_questions.html) (accessed Nov. 17, 2012).

<sup>246</sup> Am. Bar Assn., *Florida: MCLE Requirements*, [http://www.americanbar.org/publications\\_cle/mandatory\\_cle/mcle\\_states/states\\_a-k/florida.html](http://www.americanbar.org/publications_cle/mandatory_cle/mcle_states/states_a-k/florida.html) (accessed Nov. 17, 2012).

haps—difficult questions: questions about factory farming,<sup>247</sup> testing on animals, and performing medical research at the expense of our sentient animal companions.<sup>248</sup> These questions may divide the “tree huggers” and animal welfare and rights activists from mainstream society, and may raise hot controversies and moral, ethical, and religious debates. But the question before us is relatively easy. Our society has come to both accept that animals experience pain and to reject the intentional infliction of suffering upon them. Now it is just a matter of modifying our laws to reflect our values. Defendants’ sentences across the country should be enhanced via victim injury points—or aggravating factors considered by the judge or jury—for violent acts committed against animal victims. Come on, America. Let us be the people our dogs<sup>249</sup> think we are.

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<sup>247</sup> Vining, *supra* n. 11, at 123–24.

<sup>248</sup> Some scholars argue that federal animal welfare laws (*see supra* nn. 24–33 and accompanying text) and state statutes like Florida’s (*see e.g. supra* nn. 59–68 and accompanying text) are worthless because humans can justify the infliction of even immense pain on animals. This justification is applicable as long as the act is deemed “necessary” because it serves some legitimate purpose and is not purely malicious, irrational abuse. *See* Francione, *supra* n. 202, at i (discussing the property status of animals); St. Pierre, *supra* n. 203, at 259–60 (addressing the potential recognition of rights for animals). This Note’s author would argue that even if animal welfare laws are (even grossly) insufficient and need to be improved, they are important because they protect many animals and punish many offenders.

<sup>249</sup> Or cats, fish, ferrets, chinchillas, etc.

