

**JOURNAL OF
ANIMAL &
NATURAL
RESOURCE LAW**

Michigan State University
College of Law

MAY 2013

VOLUME IX

**JOURNAL OF ANIMAL &
NATURAL RESOURCE LAW**

VOL. IX

2013

**EDITORIAL BOARD
2012-2013**

Editor-in-Chief

GRAHAM P.B. BOSWELL

Managing Editor

ERIN FURMAN

Animal Articles Editor

CAITLIN BRATT

Natural Resource Articles Editor

ERIK MONTGELAS

Executive Editor

CAROLYN DILLARD

Business Editor

JEN DOEHNE

Senior Editors

MICHAEL KELLEY

ASHLEE RUDNICK

Associate Editors

RACHEL AMON

BEN LIBBY

DAIN BARNETT

ATHEINA MANSOUR

CHANTAL CRAWLEY

SAMUEL MERRITT

KIMBERLY ELWELL

JANINA OLIVERO

EVAN GEORGE

KJIRSTEN SNEED

CHRIS JACKSON

MELISSA VATTEROTT

NICK KIPA

KENT WOOD

Faculty Advisor

DAVID FAVRE

JOURNAL OF ANIMAL & NATURAL RESOURCE LAW

VOL. IX

2013

PEER REVIEW COMMITTEE 2012-2013

TAIMIE L. BRYANT

DAVID CASSUTO

DAVID FAVRE, CHAIR

REBECCA J. HUSS

PETER SANKOFF

STEVEN M. WISE

The *Journal of Animal & Natural Resource Law* received generous support from the Animal Legal Defense Fund and the Michigan State University College of Law. Without their generous support, the *Journal* would not have been able to publish and host its third speaker series. The *Journal* also is funded by subscription revenues. Subscription requests and article submissions may be sent to: Professor Favre, *Journal of Animal & Natural Resource Law*, Michigan State University College of Law, 368 Law College Building, East Lansing MI 48824.

The *Journal of Animal & Natural Resource Law* is published annually by law students at Michigan State University College of Law.

Current yearly subscription rates are \$27.00 in the U.S. and current yearly Internet subscription rates are \$27.00. Subscriptions are renewed automatically unless a request for discontinuance is received.

Back issues may be obtained from: William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209.

The *Journal of Animal & Natural Resource Law* welcomes the submission of articles, book reviews, and notes & comments. Each manuscript must be double spaced, in 12 point, Times New Roman; footnotes must be single spaced, 10 point, Times New Roman. Submissions should be sent to anilawj@msu.edu using Microsoft Word (or saved as "rich text format"). Submissions should conform closely to the 20th edition of *The Bluebook: A Uniform System of Citation*. Authors should provide photocopies of the title pages of all sources used and photocopies of the phrases and sentences quoted from the original sources. All articles contain a 2013 author copyright unless otherwise noted at beginning of article. Copyright © 2013 by the *Journal of Animal & Natural Resource Law*.

JOURNAL OF ANIMAL & NATURAL RESOURCE LAW

VOL. IX

2013

PEER REVIEW COMMITTEE

Taimie L. Bryant is Professor Law at UCLA School Of Law where she teaches Property and Nonprofit Organizations in addition to teaching different courses on animal law. Prior to receiving her J.D. from Harvard Law School, Professor Bryant earned a Ph.D. in anthropology from UCLA. Since 1995, she has turned her attention to animal rights, focusing both on the theoretical issues of conceptualizing such rights and on legislative and other legal regulations of human treatment of animals. Recent publications include *Similarity or Difference as a Basis for Justice: Must Animals be Like Humans to be Legally Protected from Humans?*, *False Conflicts between Animal Species*, and *Transgenic Bioart, Animals and the Law*.

David Cassuto is a Professor of Law at Pace University School of Law where he teaches Animal Law, Environmental Law, Property Law, and Professional Responsibility. Professor Cassuto has published and lectured widely on issues in legal and environmental studies, including animal law. He is also the Director of the Brazil-American Institute for Law & Environment. He holds a B.A. from Wesleyan University, an M.A. & Ph.D. from Indiana University, and a J.D. from the University of California, Berkeley, Boalt Hall School of Law.

David Favre is a professor of law at Michigan State University College of Law. He is Faculty Advisor to the *Journal of Animal Law* and Chair of the Peer Review Committee of the *Journal*. As Editor-in-Chief of the *Animal Legal and Historical Web Center*, he has published several books on animal issues. He teaches Animal Law, Wildlife Law, and International Environmental Law.

PEER REVIEW COMMITTEE CONTINUED

Rebecca J. Huss is a professor of law at Valparaiso University School of Law in Valparaiso, Indiana. She has a LL.M. in international and comparative law from the University of Iowa School of Law and graduated *magna cum laude* from the University of Richmond School of Law. Recent publications include *Companion Animals and Housing in Animal Law and the Courts: A Reader*; *Rescue Me: Legislating Cooperation between Animal Control Authorities and Rescue Organizations*; *Valuation in Veterinary Malpractice*; and *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*. Her primary focus in research and writing is on the changing nature of the relationship between humans and their companion animals and whether the law adequately reflects the importance of that relationship.

Peter Sankoff is an Associate Professor at the University of Western Ontario, Faculty of Law who specializes in animal law, criminal law, and the law of evidence. He is the author or editor of five books, including *Animal Law in Australasia: A New Dialogue*, the first book ever published in the Southern Hemisphere to focus exclusively on animal law issues. Peter lectures and publishes on a variety of animal law topics. He taught animal law at the University of Auckland from 2006-2010, and also as a Visiting Professor at Haifa University in Israel, and the University of Melbourne Australia. Peter also taught an advanced animal law course entitled Comparative Concepts in Animal Protection Law at Lewis and Clark College of Law

Steven M. Wise is President of the Center for the Expansion of Fundamental Rights, Inc. and author of *Rattling the Cage - Toward Legal Rights for Animals* (2000); *Drawing the Line - Science and The Case for Animal Rights* (2002), *Though the Heavens May Fall - The Landmark Trial That Led to the End of Human Slavery* (2005), as well as numerous law review articles. He has taught Animal Rights Law at the Vermont Law School since 1990, and at the Harvard Law School, John Marshall Law School, and will begin teaching at the St. Thomas Law School. He has practiced animal protection law for over twenty-five years

JOURNAL OF ANIMAL & NATURAL RESOURCE LAW

VOL. IX

2013

TABLE OF CONTENTS

ARTICLES

**WHOA MEANS WHOA – THE REINSTITUTION OF HORSE
SLAUGHTER IN THE U.S. IS NOT NECESSARY TO ENSURE
EQUINE WELFARE**

Ann M. Griffin 1

Since the cessation of equine slaughter in the U.S. in 2007, efforts have been ongoing to reinstitute the practice. Equine slaughter is not a humane solution to any existing equine welfare problems and is not an acceptable substitute for humane euthanasia. However, there are segments of the horse industry, such as breeders, and related industries, such as the racing and pharmaceutical industries, which are striving to convince people that countless numbers of “unwanted horses” are suffering because domestic slaughter is no longer an option. Ironically, a baseless equine welfare argument is being used to urge a return to a very inhumane practice. Equine slaughter is not needed to prevent horses from suffering abandonment, abuse, or neglect. If steps were taken by the industries that contribute disproportionately to the equine slaughter numbers to be responsible for training and re-homing those horses—either of their own volition or because they were forced to do so—the levels of equine supply and demand could reach a manageable balance. We owe a quality of life, and death, to these noble animals who have contributed and continue to contribute so much to our quality of life.

**THE PARADOX OF ANIMAL HOARDING AND THE LIMITS OF
CANADIAN CRIMINAL LAW**

Kathryn M. Campbell, Ph.D.45

Animal welfare advocates believe that all animals should live lives free of suffering; this applies not only to the millions of animals used for experimentation and those bred in factory farming but also to companion animals. Companion animals accompany humans in our daily lives, live in our homes, and in many cases are part of our families. However, animal hoarders who keep large numbers of companion animals in drastically unsanitary conditions pose particular challenges to animal welfare groups, to public health officials, and to prosecutors who wish to pursue these most egregious cases of animal abuse. The consequences for the animals of this bizarre form of cruelty are disastrous and result in immeasurable suffering. The focus of this paper will be on an examination of these many challenges. The paper will begin with an overview of animal hoarding, how it is defined, and the impact that hoarding has on the animals kept. The psychological implications of this behaviour will be examined, followed by the legal challenges prosecutors face in pursuing animal hoarders in court. The limits of Canadian criminal law to address animal hoarding will illustrate the difficulties in charging animal hoarders in this country. Finally, the paper will focus on the need for a more concerted approach to this problem by integrating legal, municipal, and public health services in an attempt to better address the serious consequences for animals that result from this behaviour.

**PROPERTY STATUS AND THE LIMITED IMPACT OF WELFARE
LEGISLATION FOR FARM ANIMALS**

Lee McConnell.....63

This article examines the extent to which the categorization of animals as property impacts the legal protection of farm animals. As will be demonstrated, the welfare provisions currently in place fail to address the main sources of animal suffering, often serving to entrench established practices, limited as they are by property status, and as such, by economic imperatives. Illustrative examples will be drawn primarily from the English legal system and the parameters established by the Animal Welfare Act 2006, with parallels to the United States and New

Zealand drawn in comparative analysis. The aim is to highlight recurring issues concerning customary husbandry practices and the economic motivations that stem from property status, which may serve to expedite or impede effective legislative protection across these jurisdictions.

**OF NON-HUMAN BONDAGE: GREAT APES, BLIND EYES,
AND DISORDERLY COMPANY**

Jordan Carr Peterson83

Great apes occupy a special place in human society and imagination. What place, though, should they occupy under human law? This article examines the current legal environment for great apes, considering it both comparatively, within the broader movement for animal liberation, and individually, as a subset of animal rights that has received special attention because of great apes' particular intelligence and biological similarity to humans. The inadequate level of legal protection afforded great apes is philosophically arbitrary and morally inexcusable. The most pragmatic solution is the incremental conferral of a limited subset of human rights on great apes.

**PSYCHOLOGICAL ASPECTS OF CRUELTY TO ANIMALS:
A CLINICIAN'S PERSPECTIVE**

Elizabeth A. Wailess, Psy. D...... 115

This article addresses psychological aspects of cruelty to animals. While it is widely known that childhood abuse may lead to the abuse of animals, the underlying mechanisms of infant and child development and the role of external influences is described. Children are not born with the innate capacity for cruel behavior. In particular, the author focuses on the early acquisition of social rules of behavior within the caretaking relationships, which may be supportive of cruelty toward animals. Using case material from her own work, the author describes a teenager who experienced no guilt regarding his cruel behavior and contrasts this with a young adult who clearly did. The purpose of the article is not to excuse behavior but to better understand behavior and so to lead to informed preventative actions.

UNDERSTANDING BLOOD SPORTS

Maria A. Iliopoulou & Gene P. Rosenbaum125

In this paper, we explore and discuss theories that explain why men are attracted to blood sports and more specifically dogfighting, cockfighting, and bullfighting. We selected three theories and provided an overview of each theory separately. These theories address the issue of blood sports in three different countries, and cultural contexts. Finally, we proceed with a discussion regarding common conceptual themes that emerge through these three theories and their significance in understanding blood sports as a first step in preventing them.

NOTES & COMMENTS

INTERNATIONAL COOPERATION CONCERNING THE EXTINCTION OF TIGERS

Caitlin Bratt141

Over the past century, tiger populations have been decreasing dramatically. The number of tigers is decreasing due to poaching for use in traditional Chinese medicines and to show status. Loss of tiger habitats from human population increases and development has also harmed tiger populations. Many countries, especially China, have played a role in endangering tiger populations. Extinction of an important species, such as tigers, could negatively affect the biodiversity of the ecosystem.

There is a need for more strict anti-trade and anti-poaching laws to preserve tiger populations. Most countries that have tiger populations currently have laws to protect tigers, but these laws are not always enforced. This paper addresses what animal-preservation organizations have done help protect the tigers and increase their populations. This paper also gives suggestions as to what more countries can do to stabilize and even increase tiger populations.

**IMPROVING THE WELFARE OF EGG-LAYING HENS THROUGH
ACKNOWLEDGMENT OF FREEDOMS**

Amanda Wright169

This article concerns the welfare of egg-laying hens. The purpose of this article is to analyze the flaws in the Egg Products Inspection Act Amendments of 2010, or H.R. 3798. The article seeks to show that this proposed legislation cannot adequately protect the hens’ welfare in a system that seeks to exploit these animals. The article begins by providing a brief history of factory farming as used in the egg-producing industry. In order to demonstrate a need for federal regulation, the paper discusses the consequences of factory farming on the lives of egg-laying hens and explains how these practices cause suffering.

This article examines and compares the current regulations protecting egg-laying hens in the European Union and the United States. The article explains how public support and an acknowledgment of animal freedoms helped the European Union implement regulations, despite the egg-producing industry’s strong influence. Using the European Union as an example, the paper proposes that the federal government adopt an acknowledgement of enumerated animal rights or freedoms and implement it into H.R. 3798. The author explains why an acknowledgement of enumerated animal rights or freedoms is necessary and asserts that this addition to H.R. 3798 would curb the egg-producing industry’s pervasive animal abuse and influence over egg-production legislation.

2012-2013 CASE LAW REVIEW

Kjirsten Sneed195

WHOA MEANS WHOA – THE REINSTITUTION OF HORSE SLAUGHTER IN THE U.S. IS NOT NECESSARY TO ENSURE EQUINE WELFARE

ANN M. GRIFFIN*



I believe there is one catch phrase which is contributing greatly to the confusion surrounding horse slaughter. That phrase is “unwanted horses.” They wanted them when they bought them, didn’t they? Horses are the responsibility of their owners who owe them kind treatment through life and a peaceful death administered by caring hands. Period! Enabling a callous and irresponsible person to walk away from a problem, pocket a few hundred dollars and feel good about it, is a disservice to our industry and the animal they profess to care about. In this they are helped by the enablers who refer to “processing” rather than slaughter and “plants” rather than slaughterhouses.¹

* The author teaches an Animal Law Seminar at the University of Detroit Mercy School of Law. She wishes to thank UDM Law and her family, friends, and colleagues for their support. This article was inspired by Glory, a 23-year-old Tennessee Walking Horse mare with Cushing’s Disease who had few options once her previous owner could no longer afford to keep her. The author adopted her and started the research that resulted in this article. Glory is now healthy and content and lends her sweet and gentle personality to an equine therapy program. The author would also like to thank all of her friends at Tuthill Farms (www.tuthillfarms.com) for their help in caring for Glory and keeping her safe from the cruel demise experienced by so many horses in similar circumstances.

¹ *Horse Slaughter*, EQUINE ADVOCATES, <http://www.equineadvocates.org/issueDetail.php?recordID=2> (last visited Nov. 28, 2012) (quoting the late John Hettinger, an anti-slaughter activist) [hereinafter *Horse Slaughter*].

I. INTRODUCTION

The issue of equine slaughter in the U.S. has been very controversial. The last equine slaughterhouses in the U.S. closed in 2007, but efforts to reinstitute equine slaughter have been ongoing.² Based on the available evidence, slaughter is not a humane solution to any existing equine welfare problems and is not an acceptable substitute for humane euthanasia. The cessation of equine slaughter in the U.S. has been blamed for decreases in equine welfare, but that connection is not clearly supported by the available data. The cessation of slaughter is also blamed for a drop in horse prices, which can be supported by reliable data. Those in the business of breeding or selling horses are in favor of reinstating slaughter because the slaughter buyers establish a floor for horse prices. That floor has dropped precipitously since the cessation of domestic slaughter. Other slaughter proponents participate in an industry, such as the racing or pharmaceutical industries, which generate thousands of horses annually that they view as unwanted byproducts and that they dispose of via slaughterhouses. Those who are the most eager to reinstitute slaughter want it because it would benefit them financially, but they make the argument that slaughter is necessary to maintain or improve equine welfare. Equine slaughter is not needed to prevent horses from suffering abandonment, abuse, or neglect. The appropriate, humane solutions to any equine welfare problems are expensive, slow to have an impact, and require individual and industry responsibility. However, these are the only changes that will make a real and sustainable difference.

II. WHAT IS A HORSE?

“A horse is a horse, of course, of course.”³ It might be said that this nonsense phrase is about the most straightforward definition to be had. The horse’s long history in the United States and the varied types of relationships the horse has had with humans have resulted in varying perceptions of the horse and its place in modern society. At one end of the spectrum, the horse is revered as the physical manifestation of the

² U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-228, HORSE WELFARE: ACTION NEEDED TO ADDRESS UNINTENDED CONSEQUENCES FROM CESSATION OF DOMESTIC SLAUGHTER. 26-27 (2011) [hereinafter HORSE WELFARE]. A number of states, including Arkansas, Oklahoma, Utah, Wyoming, Montana, and North and South Dakota passed resolutions in support of a return to slaughter or passed state laws to facilitate slaughter. *Id.* at 26. In addition, “[s]everal states are seeking to reopen domestic horse slaughter facilities.” *Id.*

³ *Mr. Ed Theme Lyrics*, <http://www.lyricsondemand.com/tvthemes/mredlyrics.html> (last visited Dec. 26, 2012).

American spirit,⁴ and at the other end of the spectrum, the horse is the unwanted byproduct of industry⁵ and a nuisance on federal lands.⁶ And of course, there are a variety of perceptions in the middle of the spectrum, where the horse is seen as livestock⁷ or as a pet or even as a member of the family.⁸ There is one perspective on horses that is universal in this country. Regardless of how they are individually perceived, legally, horses are property.⁹

III. THE EVOLUTION OF THE HORSE AND ITS ROLE IN SOCIETY

Approximately 3.4 to 3.9 million years ago, *Equus* made its appearance in North America.¹⁰ The modern horse is part of the *Equus* genus.¹¹ *Equus* migrated to Eurasia approximately 2 to 3 million years ago.¹² While fossil evidence indicates that early *Equus* was native to North America, the genus became extinct in North America between 13,000 and 11,000 years ago, and it was only the previous migrations to Eurasia that saved it from total extinction.¹³ Columbus reintroduced the modern horse to the New World.

⁴ “Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West.” 16 U.S.C.A. §1331 (West 2012).

⁵ See *infra* Parts VIII.A and VIII.B.

⁶ *Wild Horse and Burro Quick Facts*, U.S. DEPT. OF INTERIOR, BUREAU OF LAND MANAGEMENT, http://www.blm.gov/wo/st/en/prog/whbprogram/history_and_facts/quick_facts.html (last visited Dec. 26, 2012). The Bureau of Land Management estimates that approximately 37,300 wild horses and burros (about 31,500 horses and 5,800 burros) are roaming on BLM-managed rangelands in 10 Western states, based on the latest data available, compiled as of February 29, 2012. Wild horses and burros have virtually no natural predators and their herd sizes can double about every four years. As a result, the agency must remove thousands of animals from the range each year to control herd sizes. *Id.* This article does not address the issue of slaughter of wild horses, which is an issue unto itself.

⁷ Horses are livestock for purposes of the Humane Methods of Slaughter Act. 7 U.S.C.A. §1902 (West 2012).

⁸ Gary L. Francione, *Animals as Property*, 2 Animal L. 1, 1 (1996).

⁹ *Id.*

¹⁰ Jay F. Kirkpatrick & Patricia M. Fazio, *Wild Horses as Native North American Wildlife*, THE CLOUD FOUNDATION, <http://www.thecloudfoundation.org/reading-room-faq-s-articles/wh-returned-native/145-wild-horses-as-native-north-american-wildlife> (last visited Dec. 26, 2012).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

In 1493, on Columbus' second voyage to the Americas, Spanish horses, representing [Equus] caballus, were brought back to North America, first in the Virgin Islands, and, in 1519, they were reintroduced on the continent, in modern-day Mexico, from where they radiated throughout the American Great Plains, after escape from their owners.¹⁴

Horses were part of many aspects of developing America. In addition to their traditional roles in farming, ranching, transportation, and industry, of which most people are aware, horses have figured heavily in other areas of service and entertainment. The first Thoroughbred made its appearance in the U.S. in 1730.¹⁵ Not surprisingly, horse racing was not far behind, starting in the Carolinas in 1734 and in Virginia in 1739.¹⁶ The first Kentucky Derby was held in 1878.¹⁷ Horses began serving in the military with the establishment of the U.S. Cavalry in 1833.¹⁸ There were staggering numbers of equine casualties in the military, with 1.5 million horses killed in the Civil War between 1861 and 1865.¹⁹ Almost a million horses died over a four-year period during World War I.²⁰ Horses delivered the mail through the famous Pony Express.²¹ As larger, heavier steam engines were developed to fight fires, horses were needed to pull them, and horses became an integral part of the fire department.²² For example, The Great Boston Fire raged out of control, destroying hundreds of buildings and resulting in more than two dozen human casualties because the fire department's horses were sick with equine distemper and could not move the equipment needed to fight the fire.²³ The last San Francisco fire horse retired in 1921.²⁴ In 1882, horses made their appearance in circuses.²⁵ Horses have been key figures in rodeos since 1849.²⁶ In the first year of the 20th century, the Olympics,

¹⁴ *Id.*

¹⁵ Beverley Davis, *Timeline of the Development of the Horse*, SINO-PLATONIC PAPERS, at 93 (Aug. 2007), available at www.sino-platonic.org/complete/spp177_horses.pdf.

¹⁶ *Id.* at 93-94.

¹⁷ *Id.* at 132.

¹⁸ *Id.* at 115.

¹⁹ *Id.* at 124.

²⁰ *Id.* at 148.

²¹ *Id.* at 124.

²² *A History of Horses in the Fire Service*, <http://firehistory.weebly.com/a-history-of-horses-in-the-fire-service.html> (last visited Mar. 1, 2013).

²³ *Id.* at 129.

²⁴ *Id.* at 152.

²⁵ *Id.* at 134.

²⁶ *Id.* at 120.

which were held in Paris in 1900, included equestrian events for the first time.²⁷ In 1939, nine horses were killed during the making of the movie *Jesse James*, and the American Humane Association started monitoring the wellbeing of animals used in movies.²⁸

In addition to these various types of service to humans, there was a time when horses were also a food source in the U.S. Horsemeat was on the menu at the Harvard Club as recently as 1985.²⁹ “[D]escribed as tender, slightly sweet, and a little gamey.”³⁰ Horsemeat has served as a substitute for beef at times when beef was scarce, such as it was at the end of World War II and in the early 1970s.³¹ While there are some isolated issues with black market horsemeat sold for human consumption,³² for the most part, horsemeat is no longer part of the American diet.³³ There are a number of theories as to why Americans are opposed to eating horsemeat, such as the horse-and-rider bond; the horse’s place in American history; and the horse’s athleticism, intellect,

²⁷ *Id.* at 141.

²⁸ *Id.* at 162. There are, however, shortcomings with the oversight process, and animals used in the entertainment industry continue to suffer. For example, the American Humane Association (AHA) is not allowed to monitor facilities where the animals are housed when they are not on set. This means that the AHA cannot intervene when animals are housed in dangerous conditions, as they were during the recent filming of the high-budget film “The Hobbit” in Wellington, New Zealand. “Animal wranglers involved in the making of ‘The Hobbit’ movie trilogy say the production company is responsible for the deaths of up to 27 animals, [including horses,] largely because they were kept at a farm filled with bluffs, sinkholes and other ‘death traps.’” “*Hobbit* farm had animal ‘death traps’ that killed as many as 27: handlers, CBSNEWS.COM (Nov. 19, 2012), www.cbsnews.com/8301-207_162-57551648/hobbit-farm-had-animal-death-traps-that-killed-as-many-as-27-handlers/.

²⁹ Cameron Berkman, *Hungry Enough to Eat a Horse?*, BON APPÉTIT (May 6, 2011), <http://www.bonappetit.com/blogsandforums/blogs/badaily/2011/05/hungry-enough-to-eat-a-horse.html>.

³⁰ *Id.*

³¹ David Beriss, *How Americans Think: About Horsemeat, for Example*, SOCIETY FOR THE ANTHROPOLOGY OF FOOD & NUTRITION (Dec. 6, 2011), <http://foodanthro.com/2011/12/06/how-americans-think-about-horsemeat-for-example/>.

³² See *infra* Part VIII.C.

³³ Beriss, *supra* note 31. The mere suggestion that a U.S. restaurant would serve horsemeat was recently met with a public outcry. When the chef at M. Wells Dinette, a restaurant that recently opened in MoMA PS1, said in an interview that horsemeat tartare would be on the menu, the owners began “receiving angry emails and postings that threatened their personal safety. The museum, they said, also received letters demanding that its upscale cafeteria not serve the meat.” Liz Robbins, *Outcry Scuttles Plan to Put Horse on a New York Menu*, N.Y. TIMES, Oct. 5, 2012, at A20.

and skill.³⁴ Others equate horses with domestic pets, such as dogs and cats. “Our forefathers honored The Horse as a ‘favored’ animal like dogs and cats when this country was founded. Dog, cat and horse slaughter are not part of our culture or heritage.”³⁵ Put another way,

We are talking here about what might be called “The 101 Dalmations Quandary.” . . . Every adult who ever saw the firm knew that Cruella only needed a new press agent and a better hair stylist to make her case; what is the difference *really* between a Dalmation and a mink? For most of us, there is a difference, and it is determined only by our society’s attachment to certain animals and not to others. As John Hettinger, the Chairman of Fasig-Tipton, the Thoroughbred auction house, and the leader of the anti-slaughter forces in the Thoroughbred industry, has become famous for saying, “They are not just fast cows.” To which I, an Arkansan, must add, “They are not just large chickens.” They are horses.³⁶

Horses are still on the menu in Europe and Japan,³⁷ although acceptance of horsemeat in the European Union (“EU”) may be changing.³⁸ “[E] quines are being transported across the Canadian and Mexican borders where they are slaughtered and their meat is then exported overseas, selling for between \$15 and \$25 per pound.”³⁹ In fact, some say that it was this foreign interest in horsemeat that initiated equine slaughter in the early 1970s.⁴⁰ The last slaughterhouses in operation in the U.S. were owned by foreign companies and were exporting horsemeat overseas for human consumption.⁴¹

³⁴ Caroline L. Mayberger, *Responsibility in the “Sport of Kings:” Imposing an Affirmative Duty of Care on the Primary Financial Beneficiaries of the Thoroughbred Horseracing Industry*, 4 STAN. J. ANIMAL L. & POL’Y 64, 67-68 (2011).

³⁵ *Horse Slaughter*, *supra* note 1 (quoting Cathleen Doyle, who “headed the successful Save the Horses campaign which resulted in the historic passage of Proposition 6 in 1998 which banned horse slaughter in California.” *Id.*).

³⁶ Robert Laurence, *Cowboys and Vegetarians: The Proposed “American Horse Slaughter Prevention Act,”* 2003 Ark. L. Notes 103, 106 (2003).

³⁷ *Horse Slaughter*, *supra* note 1.

³⁸ *See infra* Part X.C.5.

³⁹ *Horse Slaughter*, *supra* note 1.

⁴⁰ *Id.*

⁴¹ Mayberger, *supra* note 34, at 68.

IV. THE HORSE INDUSTRY’S ECONOMIC IMPACT

In 2005, the American Horse Council⁴² (“AHC”) Foundation commissioned an economic study of the horse industry by Deloitte Consulting LLP. “The economic study... validate[d] what the industry has known for some time, that the horse industry is a highly diverse, national, serious and economically significant industry that deserves the attention of the general public, the media and federal, state and local officials.”⁴³ The horse industry is truly national in scope, with horses residing in every state. “Forty-five states have at least 20,000 horses each.”⁴⁴ The horse industry’s direct economic impact is 39 billion dollars annually, which increases to 102 billion dollars if industry suppliers’ and employees’ spending are taken into account.⁴⁵ There are more than 700,000 people directly employed by the industry, but some are part-time or seasonal workers.⁴⁶ “The industry directly provides 460,000 full-time equivalent jobs.”⁴⁷ Again, if suppliers’ and employees’ spending are taken into account, the horse industry’s total employment impact amounts to 1.4 million full-time equivalent jobs.⁴⁸ “The horse industry pays \$1.9 billion in taxes to all levels of government.”⁴⁹ However, the common perception that only the very wealthy are involved in the horse industry is disproved by the Foundation’s study. “Approximately 34% of horse owners have a household income of less than \$50,000 and 28% have an annual income of over [sic] \$100,000. 46% of horse owners have an income of between \$25,000 and \$75,000.”⁵⁰

⁴² The American Horse Council describes itself as follows:

Founded in 1969, the AHC was organized by a group of horsemen concerned about federal legislation affecting their industry. They recognized the need for national and coordinated industry action in Washington, DC. The AHC promotes and protects all horse breeds, disciplines and interests by communicating with Congress, federal agencies, the media and the industry itself each and every day. The AHC is member supported by approximately 160 organizations and 1,200 individuals representing every facet of the horse world – from owners, breeders, trainers, veterinarians, farriers, breed registries and horsemen’s associations to horse shows, racetracks, rodeos, commercial suppliers and state horse councils.

About Us, THE AMERICAN HORSE COUNCIL, <http://www.horsecouncil.org/about-us-0> (last visited Feb. 10, 2013).

⁴³ National Economic Impact of the U.S. Horse Industry, THE AMERICAN HORSE COUNCIL, www.horsecouncil.org/national-economic-impact-us-horse-industry [hereinafter AMERICAN HORSE COUNCIL] (last visited Nov. 19, 2012).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

V. HORSE VALUES

In addition to the overall economic impact of the horse industry, there is also an important perspective to be gained by examining equine values. In terms of aggregate figures, “[t]he estimated value of equine sales was \$1.64 billion for 1997 and \$1.75 billion for 1998.”⁵¹ However, more recent data shows that the average sale value of horses has been dropping. In June 2011, the Government Accountability Office (“GAO”) published a report entitled, “Horse Welfare: Action Needed to Address Unintended Consequences from Cessation of Domestic Slaughter.”⁵² The GAO report indicated that some equine industry representatives blamed the cessation of slaughter for the drop in horse sale prices. But, as with many aspects of the horse industry, this was more a matter of speculation, as “[n]ational data on horse prices do[es] not exist.”⁵³ Recognizing that hard data could be gained from an analysis of auction prices at large horse auctions, the GAO “collected price data on more than 12,000 sale transactions from spring 2004 through spring 2010 from three large horse auctions located in the western, southern, and eastern United States.”⁵⁴

Using these data and regression methods to isolate the impact on prices for specific variables, our analysis indicates that the cessation of domestic horse slaughter led to an 8- to 21-percent decline—depending on sale price—in the per head price of horses sold at those auctions. . . . [W]e estimate that price reductions were greatest, in percentage terms, for lowest-priced horses, gradually declined as prices increased, and became insignificant for horses in the higher price categories.⁵⁵

Of course, the economic downturn also contributed to the decline in horse values. According to the GAO, “our estimates show that the economic downturn (represented by the change in the average unemployment rate for the region where the auction was held) was associated with a consistent decline of about 5 percent in price across all price categories

⁵¹ 2008 *Animal Health Report, Chapter 6: Overview of U.S. Livestock, Poultry, and Aquaculture Production in 2008*, at 68, UNITED STATES DEPARTMENT OF AGRICULTURE, ANIMAL & PLANT HEALTH INSPECTION SERVICE, available at http://www.aphis.usda.gov/animal_health/animal_health_report/downloads/AHR_08/2008_US_Animal_Health_Report.pdf [hereinafter *Animal Health Report*].

⁵² HORSE WELFARE, *supra* note 2.

⁵³ *Id.* at 14.

⁵⁴ *Id.*

⁵⁵ *Id.* at 16.

for those auctions.”⁵⁶ Therefore, while the economic downturn did have a negative impact on horse prices, the cessation of domestic slaughter had a more significant negative impact overall.

VI. U.S. EQUINE DEMOGRAPHICS

It is difficult to ascertain how many horses there are in the United States.⁵⁷ “Statistics on the demographics of the U.S. equine industry are sparse. U.S. Department of Agriculture (“USDA”) does not have an equine statistic program; the only estimates available for the entire domestic equine population date from 1998 and 1999.”⁵⁸ The USDA reported that there were 5.25 million equids (including horses, ponies, mules, burros, and donkeys) in the U.S. as of January 1, 1998.⁵⁹ A year later, that figure had increased to 5.32 million.⁶⁰ No further USDA equine census has been taken since 1999. However, the AHC Foundation study reported that there were 9.2 million horses in the United States at the time of the survey.⁶¹

As equine slaughterhouses in the U.S. were closing, some people began to express concern that the cessation of slaughter would lead to an abundance of “unwanted” horses that would be abandoned, abused, or neglected. In 2006, purportedly in response to this growing concern about the number of unwanted horses in the U.S., the American Association of Equine Practitioners⁶² (“AAEP”) created the Unwanted Horse Coalition (“UHC”). The UHC operates under the auspices of the AHC.⁶³ AHC member organizations support the UHC, which focuses on “education, communication and responsible ownership.”⁶⁴ The AAEP defined the

⁵⁶ *Id.* at 17.

⁵⁷ *Animal Health Report*, *supra* note 51.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ AMERICAN HORSE COUNCIL, *supra* note 43.

⁶² The American Association of Equine Practitioners describes itself as follows:

The American Association of Equine Practitioners (“AAEP”) was founded in 1954 by a group of 11 charter members who saw that together they could direct the focus of equine veterinary medicine. Today, the AAEP, headquartered in Lexington, Kentucky, represents an educated group of men and women who cover a broad range of equine disciplines, breeds and associations. Over 10,000 veterinarians and veterinary students in 57 countries are members of the AAEP.

About AAEP, AAEP.ORG, http://www.aaep.org/about_us.htm (last visited Dec. 26, 2012).

⁶³ AMERICAN HORSE COUNCIL, *supra* note 43.

⁶⁴ UNWANTED HORSE COALITION, *2009 Unwanted Horses Survey*, Preface (2009), <http://www.unwantedhorsecoalition.org/?id=5&s=5&story=79> [hereinafter *Unwanted Horses Survey*].

term “unwanted horse” as “[h]orses which are no longer wanted by their current owner because they are old, injured, sick, unmanageable, fail to meet their owner’s expectations (e.g., performance, color or breeding) or their owner can no longer afford them.”⁶⁵ This definition was subsequently adopted by the UHC.⁶⁶ According to the Equine Welfare Alliance⁶⁷ (“EWA”), this was a disingenuous tactic to divert the public’s attention away from equine overproduction.⁶⁸ Because of the lack of hard data regarding equine demographics, it is very difficult to determine if there is an equine overpopulation problem in the U.S. or if there are growing numbers of “unwanted horses” being subjected to abandonment, abuse, and neglect.

Some horse lovers may have a hard time imagining that there is such a thing as an “unwanted horse.” A responsible horse owner would probably refuse to apply that label. Even those who believe—or at least represent—that such a problem exists are hard-pressed to quantify it. In an effort to support its argument that there is an “unwanted horse” problem in this country, the UHC started by reviewing all of the available data regarding horses and unwanted horses.⁶⁹ Quickly realizing that there was much speculation and anecdotal data but no reliable evidence, in fall 2008, the UHC embarked on a nationwide study regarding the unwanted horse problem, which culminated in the *2009 Unwanted Horses Survey* (hereinafter “Survey”).⁷⁰ The stated purpose of the Survey was “to gather projectable national metrics that would be useful in identifying and/or creating solutions to the [unwanted horse] problem.”⁷¹ The UHC developed two questionnaires, one that was intended for horse owners and one that was designed for a variety of equine industry stakeholders, including “[i]ndustry professionals (e.g., trainers, breeders, boarding facility operators) [], [e]quine veterinarians [], [e]quine association directors/staff [], [m]

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ The Equine Welfare Alliance describes itself as follows:

The Equine Welfare Alliance is a dues free, umbrella organization with 172 member organizations and hundreds of individual members worldwide. The organization focuses its efforts on the welfare of all equines and the preservation of wild equids.

About Us, EQUINE WELFARE ALLIANCE, http://www.equinewelfarealliance.org/About_Us.html (last visited Dec. 26, 2012).

⁶⁸ “Unwanted Horse” Producer Pfizer Sponsors Teleconference to Promote Compromised GAO Report, EQUINE WELFARE ALLIANCE (June 2011), http://www.equinewelfarealliance.org/Press_Releases.html [hereinafter EWA Press Release].

⁶⁹ *Unwanted Horses Survey*, *supra* note 64, Introduction. The UHC indicated that it obtained information from “the USDA, breed registration trends, the *National Animal Health Monitoring System 2005 Report*, and the AHC’s *Economic Impact of the Horse Industry in the United States* study.” *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

anagers/owners of horse rescue/adoption facilities [], [l]ocal sheriffs [], [e]quine media publishers/editors [], [s]tate agricultural and veterinary officials [], and [a]uction/sale barn operators [].”⁷²

The response to the survey, which was taken via the internet, was significant, resulting in more than 27,000 completed surveys.⁷³ “Response to the survey generated a statistical significance at 95% or higher, with less than a $\pm 0.6\%$ margin of error for the total sample.”⁷⁴ It is important to note that much of the data collected and reported in the Survey is based on the respondents’ *perceptions*, rather than hard data or specific numbers.

A majority of the respondents perceived that the unwanted horse problem is significant. “More than 80% of respondents in every group perceived unwanted horses as a big problem in the past year – compared to less than 20+% who believe it was a big problem three years ago.”⁷⁵ Perceptions regarding the cause of the unwanted horse problem varied slightly among constituencies. Overall, there were five reasons cited most often as to why respondents believed horses become unwanted: “[e]conomics, ... [o]ld age/injury, ... [l]oss of owner interest/use for the horse, [u]nmanageability of the horse, and [c]hange in the owner’s employment status.”⁷⁶ However,

[w]hile all groups cite the Economy as the number one contributing factor, Horse Owners and Stakeholders agree Closing of Processing Facilities is a major contributor to the problem. Non-horse owners and Rescue/Adoption/Retraining Facilities on the other hand, rank Change in Breed Demand/Indiscriminate Breeding and Closing of Processing Facilities as secondary major contributors.⁷⁷

Setting aside perceptions, the UHC attempted to estimate the number of “unwanted horses” in existence in the U.S. in 2007.⁷⁸ Based in part on numbers acquired from the USDA Veterinary Services and the Bureau of Land Management, the UHC estimated that there were approximately 170,000 unwanted horses in the United States in 2007.⁷⁹

⁷² *Id.* at 22. A total of 899 stakeholder respondents did not fall into any of the identified categories. *Id.*

⁷³ *Id.* at 5.

⁷⁴ *Id.* A total of 20,484 horse owners responded, for which there was a $\pm 0.7\%$ margin of error. For the 2,245 stakeholders who responded, there was a $\pm 2.2\%$ margin of error. *Id.* There were no statistically significant regional differences noted. *Id.*

⁷⁵ *Id.* at 8.

⁷⁶ *Id.* at 6.

⁷⁷ *Id.* at 9.

⁷⁸ *Id.* at Preface.

⁷⁹ *Id.*

VII. EQUINE WELFARE

If a large number of unwanted horses are being abandoned, abused, or neglected, there should be data to support that conclusion. In the world of human-animal relationships, there are undeniably some animals, including horses, that get the bad end of the bargain. It is important to understand what is required to properly care for a horse and then to look for evidence of horses whose humans are failing to care for them properly.

In a perfect world, animal guardians would experience only improved financial circumstances, would not encounter emergencies or health problems for themselves or the animals in their care, and would budget for the possibility of hard times ahead before deciding to breed, buy, or adopt an animal. Unfortunately, this is not the reality. As with the decision to acquire any animal, the decision to own a horse is often un-researched or under-researched and over-emotional. In response to the Unwanted Horse Coalition's 2009 Survey, "all groups, except Rescue/Adoption/Retraining Facilities, indicated 'Could no longer afford the horse' as the number one reason" that horses became unwanted.⁸⁰ The owner's inability—or unwillingness—to pay for a horse's basic needs has a direct impact on equine welfare.

A. Cost of Care

Most horse owners would probably agree that the least expensive aspect of horse ownership is the acquisition cost. Horses can be acquired for free or for a very modest amount, and "[m]ost horses are valued between the range of \$1,000 and \$5,000 at the time of acquisition."⁸¹ This certainly does not help to weed out those who might ultimately be unable to bear the cost of the lifetime care for an animal that could live, on average, to be thirty years old.⁸²

There are a variety of costs associated with the proper care and maintenance of a healthy horse.⁸³ If an owner cannot keep the horse on his or her property, the first cost to consider is the cost of keeping the horse at a safe, reputable boarding facility. Whether the horse has access

⁸⁰ *Id.* at 12. Rescues indicated that the owner's determination that the horse was too old or injured was the primary reason an owner wanted to give up a horse, and financial inability to keep the horse was cited by Rescues as the second major reason for relinquishing a horse. *Id.*

⁸¹ *Id.* at 18.

⁸² *Unwanted Horses and Horse Slaughter (FAQ)*, AVMA.ORG, (Feb. 1, 2012), <https://www.avma.org/KB/Resources/FAQs/Pages/Frequently-asked-questions-about-unwanted-horses-and-horse-slaughter.aspx> [hereinafter AVMA FAQs].

⁸³ These cost estimates are for routine maintenance in a healthy horse. The cost of care for a horse with acute or chronic health issues can quickly skyrocket.

to a stall or is turned out in a pasture, whether there are amenities like an indoor riding ring or riding trails, and whether additional services are provided by the barn manager or staff will all impact the board price.⁸⁴ On average, monthly board can range between \$200 and \$800.⁸⁵ It is not necessarily less expensive to keep a horse at home, depending on the cost of constructing and maintaining a barn or other shelter, fences, and pastures.⁸⁶

The cost of board may or may not include the cost of hay, grain, or supplements. Depending on the availability of high-quality forage and the particular horse's nutritional needs, it may be necessary to supplement his or her diet with grain, hay, or both.⁸⁷ In some parts of the country, drought can regularly impact the cost and availability of hay. The drought that affected much of the U.S. in the summer of 2012 is responsible for increased hay prices and decreased hay availability across the country.⁸⁸ The drought also killed pasture grass, and owners were forced to start feeding hay in the summer to compensate for the lack of grass.⁸⁹ Horses need even more hay in the winter because the process of digesting hay helps to keep them warm.⁹⁰ Depending on a particular horse's needs, an owner may decide (preferably in consultation with his or her veterinarian) to provide the horse with one or more supplements. Common supplements include those intended to improve hoof or joint health.⁹¹ Even in a healthy horse, routine and preventative medical care can be costly. A horse's hooves grow continuously, and generally, a healthy horse's hooves need to be trimmed every eight weeks at an average cost of \$40.⁹² If the horse requires shoes for the particular type of riding the owner will be doing, that presents an additional cost. Like his or her hooves, a horse's teeth grow and change throughout his or her life. The process of grinding food can cause the teeth to wear unevenly, and an equine dentist's services are needed every year or two to "float,"

⁸⁴ Katherine Blocksdorf, *How Much Does it Cost to Board a Horse?*, ABOUT.COM <http://horses.about.com/od/basiccare/qt/boardingcost.htm> (last visited Mar. 1, 2013).

⁸⁵ Mande Widrick, *Is Horse Ownership Right for Me (And My Wallet)?*, HORSE FAMILY (May 10, 2012), <http://horsefamilymagazine.com/is-horse-ownership-right-for-me>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Pamela Engel, *Owners Part with Horses as Hay Prices Soar*, THE COLUMBUS DISPATCH (Aug. 27, 2012), <http://www.dispatch.com/content/stories/local/2012/08/27/owners-part-with-horses-as-hay-prices-soar.html>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Widrick, *supra* note 85.

⁹² *Can You Afford a Horse?*, BACK IN THE SADDLE PROJECT, <http://backinthesaddleproject.com/affordahorse.html> (last visited Dec. 27, 2012).

or smooth the surfaces, of the horse's teeth.⁹³ A horse owner should plan on \$150 in dental care annually, assuming the horse has no tooth or mouth problems.⁹⁴ To combat intestinal parasites, a dewormer should be administered every eight weeks at a cost of \$5 to \$10 per dose.⁹⁵ Depending on the diseases that are a concern in a particular region of the country, a veterinarian may recommend a number of vaccinations, which, coupled with the cost of the veterinarian's barn calls, would average around \$400 annually.⁹⁶ Grooming is also an important part of caring for a horse, and an owner should expect the one-time cost of buying a number of supplies for this purpose.⁹⁷

The cost of these basic equine needs will, of course, vary by horse. However, it is interesting to note that Rescue/Retirement/Adoption facilities estimate that it costs \$2,300 annually to care for one horse.⁹⁸ Generally speaking, this would not include the cost of using the horse to engage in a particular equine discipline.

In addition to all of these basic needs, there are costs associated with the owner's use of the horse. There are a variety of equine disciplines, and the costs of participating vary widely. The type of equipment needed for the horse, or tack, and the type of equipment and apparel needed for the rider would differ greatly between, for example, a dressage rider and a trail rider. As one website advises the new horse owner, "[I]f you're anything like the average horse owner, you'll probably want to buy everything you see when you visit your local tack shop. Start with the necessities, and expect that you'll likely be spending more than your initial investment along the way."⁹⁹ If the owner plans to participate in horse shows, there are the costs associated with travel (likely necessitating a trailer and a vehicle capable of hauling it) and admission to the events. The horse, the owner, or both may require extensive training in the owner's chosen discipline.¹⁰⁰

As the foregoing information indicates, there is a considerable annual cost for a horse's basic care. And depending on the owner's interests and goals, the sky is the limit in terms of what he or she may spend, or wish to spend, to achieve those goals. However, a significant number of people who own horses are not wealthy. As noted by the AHC Foundation study, about half of the people who own horses who

⁹³ Katherine Blocksdorf, *Does Your Horse Need Dental Care?*, ABOUT.COM <http://horses.about.com/od/horsehealth/qt/dental-care-for-horses.htm> (last visited Mar. 1, 2013).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Widrick, *supra* note 85.

⁹⁸ *Unwanted Horse Survey*, *supra* note 64, at 26.

⁹⁹ Widrick, *supra* note 85.

¹⁰⁰ *Id.*

have an annual household income between \$25,000 and \$75,000.¹⁰¹ The GAO cited that statistic to support the conclusion that

a considerable number of horse owners are from lower-to-moderate income households and are less able to withstand the effects of a recession, according to academic experts. . . . According to several State Veterinarians, those owners are more likely to have problems affording the care of their horses during an economic downturn.¹⁰²

B. Current Prevalence of Equine Abuse and Neglect

If we do not know exactly how many horses there are in this country, and we do not know how many of them are “unwanted,” then we cannot determine with any accuracy how many of them are being subjected to abuse or neglect. As a veterinarian on the AVMA Animal Welfare Committee said, “[t]here is no reliable way to document the actual number of instances of abuse or neglect, other than what can be read in the news.”¹⁰³

In its 2009 Unwanted Horse Survey, the Unwanted Horse Coalition asked respondents if they *perceived* that the number of neglected or abused horses is increasing.¹⁰⁴ A majority of all respondents reported their perception that equine abuse and neglect is on the rise.¹⁰⁵ Among the respondents, those from rescue/adoption facilities were least likely to report that perception, but at 85 percent, a majority of them were also of the view that equine abuse and neglect is an increasing problem.¹⁰⁶ More than 90 percent of stakeholders, horse owners, and non-horse owners reported a similar perception.¹⁰⁷ The Survey also reproduced a number of write-in comments shared by respondents, who reported that horses were

[I]eft to starve, abandoned or shot by owners. Turned out in the wild or other properties, even the freeways. Tied to a stranger’s trailer. Let loose to die in the woods. Left to run wild or to die on the roadside. Just turned loose to fend for themselves. Starved to death. Abandoned. Just left to die without food or water.¹⁰⁸

¹⁰¹ AMERICAN HORSE COUNCIL, *supra* note 43.

¹⁰² HORSE WELFARE, *supra* note 2, at 14.

¹⁰³ Nat T. Messer, *The Unwanted Horse and Horse Slaughter*, AVMA.ORG (Feb. 22, 2012), <https://www.avma.org/KB/Resources/Reference/AnimalWelfare/Pages/AVMA-Welfare-Focus-Featured-Article-Feb-2012.aspx>.

¹⁰⁴ *Unwanted Horse Survey*, *supra* note 64, at 11.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

Of course, these comments are purely anecdotal and presumably unverifiable.

Unlike the UHC Survey, the GAO Report does include some concrete data regarding the prevalence of equine abuse and neglect, but much of the information on that subject in the Report is also anecdotal.¹⁰⁹ While the Report indicates that “[h]orse welfare in the United States has generally declined since 2007,”¹¹⁰ the Report also indicates that the “extent of the decline is unknown due to a lack of comprehensive, national data.”

¹¹¹ The GAO was able to obtain the following statistics from

states that do collect some data. . . . For example, data from Colorado showed a 50-percent increase investigations for abuse and neglect from 1,067 in 2005 to 1,588 in 2009. Similarly, data from Indiana indicated that horse abuse and neglect Investigations more than doubled from 20 in 2006 to 55 in 2009.¹¹²

The Report indicated that State Veterinarians and organizations representing counties and localities reported an increase in abuse and neglect, but these individuals and entities had no data to support their conclusions.¹¹³ Again, these assertions were based on anecdotal information.¹¹⁴

VIII. INDUSTRY AND THEFT CONTRIBUTE DISPROPORTIONATELY TO EQUINE SLAUGHTER NUMBERS

The available information regarding “unwanted horses” does not specify the source or sources of the problem. By indicating an emphasis on responsible ownership, groups like the UHC imply that the responsibility lies with individual owners. However, a more thorough examination of the number and type of horses sent to slaughter reveals that the majority of the blame lies elsewhere. Indiscriminate and excessive breeding by those in the business of breeding and selling horses is a significant problem. For example, more than “140,000 Quarter Horses are born every year, often ‘puppy mill style’ with the ones that are ‘not just right’ in terms of color and/or conformation

¹⁰⁹ HORSE WELFARE, *supra* note 2, at 18.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 19.

¹¹³ *Id.*

¹¹⁴ *Id.*

being scrapped conveniently for slaughter.”¹¹⁵ In addition to equine breeders, there are specific industries that utilize horses and contribute disproportionately to the number of horses killed in slaughterhouses.¹¹⁶ There is also evidence that an unknown number of horses have been taken from their owners through fraud or theft and sold to slaughter.¹¹⁷

A. Racing

Horse racing has a long and illustrious history. As noted above, it first appeared as a sport in the U.S. in 1734.¹¹⁸ Horse racing is legal in 43 states.¹¹⁹ “Many consider racehorse ownership to be a symbol of prestige, and thus the wealthy and status-conscious invest in the racing industry.”¹²⁰ However, behind the glamorous façade of this “multibillion dollar industry”¹²¹ exists a much less pleasant reality in which “very few racehorses retire to a life of proper care and pasture grazing. . . . [M]any thus end up neglected, abused, abandoned, or shipped to either Canada or Mexico to be slaughtered for the foreign horsemeat industry.”¹²² This is not just the fate of the racing failures or underperformers, either. Many notable and successful horses, including past Kentucky Derby winners, have met their fate in a slaughterhouse.¹²³

In 2010, almost 7,600 Thoroughbred yearlings were sold at auction to billionaires from around the world.¹²⁴ However, more than that number of former racehorses are being sent to slaughter each year in Canada and Mexico.¹²⁵ Referred to as “racing’s collateral damage,”¹²⁶ a racing Thoroughbred is very vulnerable to meeting his or her death in a slaughterhouse. This vulnerability has been attributed to the competitive nature of the sport, in which the high overhead costs invested are generally not recouped and rarely return dividends; to the fact that these horses have a six- or seven-year career but could live to four times that age; and to the reality that retraining these horses for another career is a significant undertaking.¹²⁷

¹¹⁵ *Horse Slaughter*, *supra* note 1.

¹¹⁶ *See infra* sections VIII.A and B.

¹¹⁷ *See infra* section VIII.C.

¹¹⁸ *See supra* note 16 and related text.

¹¹⁹ Mayberger, *supra* note 34, at 76.

¹²⁰ *Id.* at 74.

¹²¹ *Id.*

¹²² *Id.* at 73.

¹²³ *Id.* at 75-76. This includes such famous horses as Ferdinand and Exceller. *Id.*

¹²⁴ Vickery Eckhoff, *Racing Industry Silent About Slaughtered Thoroughbreds*, FORBES (Nov. 29, 2011), <http://www.forbes.com/sites/vickeryeckhoff/2011/11/29/racing-industry-silent-about-slaughtered-thoroughbreds/>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Mayberger, *supra* note 34, at 73-74.

There is another aspect of the racing industry that contributes to the number of unwanted horses in the U.S.—the nurse mare farm industry. The use of nurse mares enables racehorse owners or trainers to return a racing mare to the track sooner than she would be able to if she had to nurse her own foal for four months.¹²⁸ This practice results in a large number of nurse mare foals that have no real purpose and few options. “A nurse mare foal is a foal which is born so that its mother comes into milk so the mare can nurse another mare’s baby.”¹²⁹ Trainers and owners engage in this practice to maximize a racing mare’s value as a racehorse and broodmare while remaining in compliance with Jockey Club rules.

According to the Jockey Club rules, an owner cannot register a foal unless the stallion physically bred with the mare, and the foal was gestated in and delivered from the body of the same broodmare in which the foal was conceived. No foal produced by artificial insemination, embryo transfer, or transplant can be registered. However, the rules do not require the broodmare to nurse the foal. The consequence of these rules is that thousands of nurse mare foals are constructively orphaned each year when they are weaned from their mothers at only one or two days of age so that the racing mares can either get back onto the track or be rebred to a stallion under the Jockey Club rules.¹³⁰

Nurse mare foals that do not get adopted are slaughtered.¹³¹

B. Premarin

The Food and Drug Administration approved the hormone replacement drug Premarin in 1942.¹³² The drug has been manufactured and marketed for decades by Wyeth,¹³³ which is currently owned by Pfizer.¹³⁴ The name Premarin is a contraction of its primary component—

¹²⁸ Mary W. Craig, *Just Say Neigh: A Call for Federal Regulation of By-Product Disposal by the Equine Industry*, 12 ANIMAL L. 193, 207 (2006).

¹²⁹ *Id.* at 206-07.

¹³⁰ *Id.* at 207.

¹³¹ *Id.*

¹³² Keith Morrison, *The HRT Horses – What Happens to Them When the Market Dries Up?*, NBC NEWS (Jan. 18, 2004), www.msnbc.msn.com/id/3995076/ns/datetime_nbc/t/hrt-horses/#.UMD1OuS5PIU.

¹³³ *Id.*

¹³⁴ Ed Silverman, *No Horsing Around: Pfizer, Premarin & Horse Meat*, PHARMALOT (June 23, 2011), <http://www.pharmalot.com/2011/06/no-horsing-around-pfizer-premarin-horse-meat/>.

PREgnant MAre uRINe.¹³⁵ Pfizer’s Wyeth unit has contracts with ranchers to obtain the pregnant mare urine needed to produce Premarin.¹³⁶ Premarin production initially required breeding tens of thousands of horses annually.¹³⁷ For about half of their eleven-month pregnancy, Premarin mares are confined to narrow stalls and are connected to a device to catch their urine, which greatly inhibits their ability to move.¹³⁸ Their access to water is restricted so that their urine is more concentrated, and this “practice leads to widespread renal and liver disorders.”¹³⁹ The foals that are the byproduct of the Premarin production process typically end up at auction.¹⁴⁰ Some may be purchased by individuals who want to raise and train them.¹⁴¹ Others may be purchased by rescue organizations.¹⁴² Often, they are purchased by “killer buyers,” are sent to feedlots to gain weight, and are ultimately sent to slaughter.¹⁴³

Millions of women have taken Premarin to relieve their menopause symptoms, which has generated billions of dollars in profit for the pharmaceutical companies.¹⁴⁴ However, the industry hit an unexpected roadblock in July 2002 when a women’s health study revealed that women taking a Premarin-like drug “were found to be suffering from higher rates of heart attack, blood clots, breast cancer and dementia.”¹⁴⁵ Wyeth began manufacturing a lower-dose version of the drug, and “[b]y the end of 2003, Wyeth canceled the contracts of more than half of the [P]remarin farmers.”¹⁴⁶ Wyeth established a \$3.7 million trust fund to subsidize the farmers or transfer the horses to recreational owners or rescues.¹⁴⁷ However, some equine welfare advocates pointed out that there were just not enough homes for all of the horses that were no longer needed to produce Premarin, and compared to the billions of dollars the pharmaceutical companies made from the drug, the trust fund was a “drop on [sic] the bucket.”¹⁴⁸

¹³⁵ Craig, *supra* note 128, at 201. “The Premarin brand includes Prempro, Premphase, Prempac, and Premelle, and is made from conjugated estrogens extracted from urine produced by pregnant mares.” *Id.* at 202.

¹³⁶ Silverman, *supra* note 134.

¹³⁷ Morrison, *supra* note 132.

¹³⁸ *Id.*

¹³⁹ Craig, *supra* note 128, at 202-03.

¹⁴⁰ Morrison, *supra* note 132.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

Although the number of horses needed by Pfizer's Wyeth unit has decreased, there are still thousands of mares being bred and milked of their urine to produce Premarin and related drugs. Pfizer reported that it "collected pregnant mare urine from about 5,100 mares in 2009 and 2010, but was unable to provide the number of ranches contracted to supply the ingredient, other than to say these are located 'primarily' in Manitoba and Saskatchewan."¹⁴⁹ Premarin mares that can no longer produce, along with the foals that are the unwanted byproducts of this industry, are still likely to meet their fate in a slaughterhouse.

C. Horses Obtained Through Fraud or Theft

When the U.S. slaughterhouses were still in operation, horses that were stolen or obtained by fraud were converted by criminals who were able to quickly sell them for slaughter. In one such case, Judy Taylor, whose health problems were preventing her from caring for her two beloved Appaloosas, entered into a "free-lease arrangement" with Lisa and Jeff Burgess, who agreed to care for her horses on their property.¹⁵⁰ Taylor did not transfer ownership of her horses to the Burgesses.¹⁵¹ Within a few days of taking possession of the horses, Lisa Burgess sold them to a kill buyer for \$500 each.¹⁵² The Burgesses repeatedly lied to Taylor regarding her horses' whereabouts and concocted a story about giving them to someone they met on a trail ride.¹⁵³ They even enlisted the help of a friend to lie on their behalf and support their story.¹⁵⁴ Taylor sought the help of a humane investigator and the president of a humane organization to try to find her horses.¹⁵⁵ By the time they were able to track the horses down, they learned that the two horses had been slaughtered.¹⁵⁶ The Court of Appeals of Kentucky affirmed the jury's verdict that the Burgesses were guilty of intentionally inflicting emotional distress on Taylor.¹⁵⁷ The court of appeals also affirmed the jury's award to Taylor of \$126,000, which primarily consisted of compensatory and punitive damages.¹⁵⁸

Even though slaughterhouses are no longer operating in the U.S., horses are still at risk of being stolen and slaughtered for their meat because of the black market trade in horsemeat, which is popular

¹⁴⁹ Silverman, *supra* note 134.

¹⁵⁰ Burgess v. Taylor, 44 S.W.3d 806, 809 (Ky. Ct. App. 2001).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 810.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 812.

¹⁵⁸ *Id.* at 813.

within the large Cuban population in and around Miami-Dade County, Florida.¹⁵⁹ For example, in August 2012, a family's Thoroughbred horse, Marco, was stolen from a paddock in Southwest Ranches in Broward County, Florida.¹⁶⁰ He was led down a dirt path near the paddock, where he was tied to a tree and butchered.¹⁶¹ According to Richard Couto, who founded the Animal Recovery Mission in an effort to shut down illegal slaughter facilities and to stop related crimes such as this one, "the sale of black market horse meat continues to be popular with certain ethnic groups who believe horse meat can increase virility or cure disease."¹⁶² Sadly, this is not an isolated incident: "In Miami-Dade County more than a dozen horses have been murdered for their meat."¹⁶³ These criminals have been bold enough to break into barns on private property and butcher horses in their stalls.¹⁶⁴

IX. WHO IS RESPONSIBLE FOR "UNWANTED HORSES?"

When asked where the responsibility for solving the unwanted horse problem should lie, perceptions again differed among constituencies responding to the UHC Survey. "With the exception of Rescue/Adoption Facilities, all groups indicated the primary responsibility for solving the problem of unwanted horses falls on the shoulders of Horse Owners, followed closely by Horse Breeders. Rescue/Adoption Facilities place more emphasis on Horse Breeders (78%), Equine Associations (72%), then Horse Owners (68%)."¹⁶⁵ Interestingly, "Horse Breeders are less likely to assume responsibility than Horse Owners, and they place considerably more emphasis on the Closing of Processing Facilities as the primary contributor to the problem."¹⁶⁶ Again, with the exception of rescues, which appear to have a more realistic perception, fingers point to individual owners. Breeders avoid responsibility and blame the cessation of slaughter for their inability to easily dispose of their "overstock." And no one points a finger at some of the worst offenders—the racing and pharmaceutical industries.

¹⁵⁹ Mark Hawthorne, *Richard Couto Targets Horse Killers*, STRIKING AT THE ROOTS (Jan. 17, 2010), <http://strikingattheroots.wordpress.com/2010/01/17/richard-couto-targets-horse-killers/>.

¹⁶⁰ Cheryl Hanna, *Family Horse Stolen and Slaughtered for His Meat in Broward County*, EXAMINER.COM (Aug. 22, 2012), <http://www.examiner.com/article/family-horse-stolen-and-slaughtered-for-his-meat-broward-county>.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Hawthorne, *supra* note 159.

¹⁶⁵ *Unwanted Horse Survey*, *supra* note 64, at 16.

¹⁶⁶ *Id.*

X. WHAT ARE THE OPTIONS FOR UNWANTED HORSES?

As the Survey's declared purpose was to identify common ground among constituencies and move everyone toward solutions, "[r]espondents were asked to choose the '[m]ost appealing solution to the problem of unwanted horses' and to indicate 'the least appealing solution.'"¹⁶⁷ The four most appealing solutions were: "[h]orse ownership education focused on buying and owning responsibly[,] [i]ncrease[d] ability of rescue/adoption/retraining facilities to care for unwanted horses[,] [r]eopening U.S. processing plants[,] [and] [m]ore resources for humane euthanasia."¹⁶⁸ All groups agreed that owner education is a top priority in addressing the unwanted horse problem.¹⁶⁹ Stakeholders and Rescue/Adoption Facilities would also place an emphasis on the Increase in the Ability of Rescues because "[l]everaging this emotional connection could unite different groups through a shared commitment to educational efforts."¹⁷⁰

Faced with the reality of an unwanted horse, most owners' first thought is to sell the horse.¹⁷¹ In response to the UHC's Survey, "Horse Owners report[ed] that sales of unwanted horses ha[d] doubled in the past year, while donations and euthanasia ha[d] increased by 50%."¹⁷² However, when owners who had sold, donated, or euthanized a horse within a year of the Survey were asked what other options they may have considered at the time of their decision, "[m]ore than half of the Horse Owners indicated they were unaware of the options of donation and euthanasia."¹⁷³

A. *What Does Humane Euthanasia Entail?*

"More resources for euthanasia" was identified as an appealing solution to the unwanted horse problem.¹⁷⁴ Statistics show that an increasing number of horse owners are utilizing humane euthanasia as the solution to an unwanted horse problem, although many horse owners claim to be unaware of that option.¹⁷⁵ It is important to note that euthanasia for the sake of convenience can be controversial. For example, if an owner wants to euthanize a horse because it can no longer be used for the owner's purposes and the owner is trying to avoid maintaining the horse in "retirement," "the veterinarian will often weigh the horse's

¹⁶⁷ *Id.* at 29.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 30.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 18.

¹⁷² *Id.* at 17.

¹⁷³ *Id.* at 18.

¹⁷⁴ *Id.* at 29.

¹⁷⁵ *See supra* note 173 and related text.

prospects of finding another home before refusing or agreeing to the owner's request to put it down."¹⁷⁶ Convenience euthanasia may even be illegal in some states.¹⁷⁷ But on the whole, given the horse's status as property that the owner can, theoretically, dispose of as he or she wishes, and the fact that the only other alternative may be an inhumane end via transportation for slaughter in Canada or Mexico, principled objections to the humane euthanasia of an unwanted horse will probably not prevent an owner from exercising the humane euthanasia option.¹⁷⁸

According to the American Veterinary Medical Association ("AVMA"), "[t]here are three methods for the euthanasia of horses: chemical euthanasia, with pentobarbital or a pentobarbital combination (euthanasia solution); gunshot; and penetrating captive bolt."¹⁷⁹ If it is a viable option, "[c]hemical euthanasia is preferred by many veterinarians and horse owners."¹⁸⁰ The AVMA describes the procedure as follows:

This procedure requires injection of euthanasia solution into the horse's vein, and the use of an intravenous catheter is recommended to make sure all of the solution is properly injected. . . . This is the most expensive form of equine euthanasia. Carcasses of horses euthanized chemically can potentially contaminate the environment, and pose a substantial risk of poisoning for prey species (especially birds) unless they are disposed of or protected from scavenging in a proper and immediate manner. Nevertheless, chemical euthanasia is the recommended method of euthanasia for horses, unwanted or otherwise, as long as environmental concerns are appropriately addressed.¹⁸¹

There are some instances in which chemical euthanasia is not an option: "If [a] horse is badly injured or in significant pain it can be dangerous to attempt to use an injection. If it is in shock, its circulation may be too impaired to transport the drug to its brain and heart, and the veins may be difficult or impossible to locate to administer it."¹⁸² In these types of situations, it may be necessary to use a physical form of euthanasia.

¹⁷⁶ *Euthanasia – What You Need to Know About Putting a Horse Down*, HORSES AND HORSE INFORMATION <http://www.horses-and-horse-information.com/articles/0198bye.shtml> [hereinafter *Euthanasia*].

¹⁷⁷ Mayberger, *supra* note 34, at 72-73 (citing Delaware's animal cruelty statute).

¹⁷⁸ *Id.* at 73.

¹⁷⁹ AVMA FAQs, *supra* note 82.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Euthanasia*, *supra* note 176.

Gunshot and penetrating captive bolt are physical methods of euthanasia that cause death by destruction of brain tissue. When applied correctly, unconsciousness is instantaneous and they induce death more rapidly than chemical euthanasia. Euthanasia by gunshot may pose an inherent risk for other animals and humans, and should only be performed by someone skilled in the method and in a safe environment. The penetrating captive bolt is safer than gunshot euthanasia because it does not release a projectile (e.g., bullet). . . . The penetrating captive bolt induces death by firing a rod into the brain. . . . Gunshot and penetrating captive bolt euthanasia are less expensive than chemical euthanasia and do not present risks of environmental contamination or animal poisoning. These techniques are considered aesthetically displeasing by many horse owners . . . but they are effective and humane when properly performed.¹⁸³

Based on the responses received from horse owners, the UHC reported that the average cost of euthanizing a horse and disposing of its carcass was \$385 in the year leading up to the Survey.¹⁸⁴ It is not clear what euthanasia methods may have been included in calculating this amount. In 2008, the USDA indicated that the estimated cost to bury a horse was \$250 to \$500.¹⁸⁵ Cremation was estimated to cost from \$600 to \$2,000.¹⁸⁶ Disposal of a horse's corpse in a landfill cost between \$80 and \$500.¹⁸⁷ A rendering plant would process a horse's corpse for \$75 to \$250.¹⁸⁸

B. What Does Rescue Entail?

Among the numerous respondents to the UHC's Survey, a total of 61 participants indicated that they represented Rescue/Retirement/Adoption/Retraining Facilities.¹⁸⁹ At the time the survey was published, the "American Horse Defense Fund, the nation's largest non-profit

¹⁸³ AVMA FAQs, *supra* note 82. The penetrating captive bolt is distinguishable from the nonpenetrating captive bolt. A nonpenetrating captive bolt "causes a severe concussion that stuns the animal but may not kill it. The nonpenetrating captive bolt is not considered a humane method of euthanasia for horses." *Id.*

¹⁸⁴ *Unwanted Horse Survey*, *supra* note 64, at 19.

¹⁸⁵ AVMA FAQs, *supra* note 82 (quoting 2008 USDA statistics).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Unwanted Horses Survey*, *supra* note 64, at 24.

horse welfare organization, lists 432 rescue facilities in its national database.”¹⁹⁰ There is no umbrella organization or agency that accredits or maintains records regarding horse rescue organizations.¹⁹¹ While this means that national statistics are not available, six out of ten of those survey respondents who represented rescue facilities indicated that they were at or near full capacity and they were “turning away an average of 38% of the horses that are brought to them.”¹⁹² Assuming that those respondents’ experiences are consistent with those of the other rescue organizations in the country, the unavoidable conclusion is that the existing rescues cannot absorb the unwanted horses in the U.S.

While many rescue operations will attempt to re-home the horses in their care if they are candidates for adoption and the right home can be found, “Rescue/Adoption/Retraining Facilities report almost as many horses stay at a facility for life (74%) as are adopted out (83%).”¹⁹³ Given that math, it is not surprising that rescues lack the capacity to absorb the full number of unwanted horses.

Of course, considerable financial resources are required to rescue and maintain equines. As noted above, rescue facilities report an annual average cost of \$2,300 for each horse.¹⁹⁴ Based on that per-horse cost and the number of horses requiring rescue, “the industry will need a minimum of \$25,714,000 just to care for the horses that are currently being turned away.”¹⁹⁵

The question then becomes where the money can be found. Typical funding sources include donations, the facility owner’s personal funds, income generated by the facility (including adoption fees, boarding fees, and income from lessons or events), and grants.¹⁹⁶ Part of the cost of rescue may also be contributed, at least on a one-time basis, by the horse’s owner. According to the Survey, the “average cost of donating a horse is reported to be more than \$1,000. . . . [I]t’s not unusual for certain requirements to be placed on donated horses, such as a veterinary examination, transportation costs, and several months boarding fees.”¹⁹⁷ As noted above,¹⁹⁸ expanding rescues’ ability to care for unwanted equines is high on the list of appealing options, and individual horse owners who responded to the Survey indicated that they

¹⁹⁰ *Id.*

¹⁹¹ HORSE WELFARE, *supra* note 2, at 23.

¹⁹² *Unwanted Horses Survey*, *supra* note 64, at 6.

¹⁹³ *Id.* at 25.

¹⁹⁴ *See supra* note 98 and accompanying text.

¹⁹⁵ *Unwanted Horses Survey*, *supra* note 64, at 26.

¹⁹⁶ *Id.* at 24.

¹⁹⁷ *Id.* at 19.

¹⁹⁸ *See supra* notes 168 and 170 and accompanying text.

would be willing to contribute money to help unwanted horses.¹⁹⁹ Based on the amounts the Survey participants could potentially contribute to support rescues, their contribution would amount to more than \$1.7 million.²⁰⁰ If the two million horse owners in the U.S. would be willing to give at a similar level, that would amount to \$163 million.²⁰¹ While this is a substantial sum, it “would still fall significantly short of raising the \$230 million needed (as estimated by the AAEP at \$2,300 per horse) to care for, on average, 100,000 unwanted horses each year.”²⁰²

C. What Does Slaughter Entail?

There are very few federal rules governing the transport of equines to slaughter and the actual slaughter process. Those that exist are enforced by the USDA and its Food Safety Inspection Service (“FSIS”) and Animal and Plant Health Inspection Service (“APHIS”). Generally, the road to the slaughterhouse starts at an auction. These auctions are frequented by slaughter buyers, also referred to as kill buyers. They either transport the horses to a feedlot or collection point before shipping them to a slaughterhouse or the horses are taken directly to a slaughterhouse. With the closure of U.S. slaughterhouses, American horses have been transported to Canadian and Mexican slaughterhouses,²⁰³ although the future of that practice is unclear in light of new EU standards designed to keep certain drugs commonly administered to horses out of the EU food chain, which is the only market for horsemeat.

1. Legislation Regarding Slaughter

There is very little legislation governing how horses are transported to slaughter and how they are slaughtered. The Humane Methods of Slaughter Act (“HMSA”) applies to horses and requires that they be “rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut.”²⁰⁴ “USDA’s Food Safety Inspection Service (“FSIS”) carries out the Humane Methods of Slaughter Act and related regulations, which require the humane handling of livestock, including horses, in connection with slaughter.”²⁰⁵

¹⁹⁹ *Unwanted Horses Survey*, *supra* note 64, at 31.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ HORSE WELFARE, *supra* note 2, at 11.

²⁰⁴ 7 U.S.C.A. § 1902(a) (West 2012).

²⁰⁵ HORSE WELFARE, *supra* note 2, at 5.

The USDA is authorized to issue guidelines for the regulation of the commercial transportation of slaughter-bound horses pursuant to the Federal Agricultural Improvement and Reform Act of 1996.²⁰⁶ Within the USDA, this authority was delegated to the APHIS.²⁰⁷ If an animal is being transported in a “vehicle or vessel” that does not provide “food, water, space, and an opportunity for rest,”²⁰⁸ what is commonly referred to as the 28-hour rule applies. Under this statute, the transporters to which it applies “may not confine animals in a vehicle or vessel for more than 28 consecutive hours without unloading the animals for feeding, water, and rest.”²⁰⁹ After 28 hours, “[a]nimals being transported shall be unloaded in a humane way into pens equipped for feeding, water, and rest for at least 5 consecutive hours.”²¹⁰ Regulations also provide the standards that must be met for vehicles used to haul slaughter-bound horses:

- a. The animal cargo spaced of conveyances used for the commercial transportation of equines to slaughter must:
 1. Be designed, constructed, and maintained in a manner that at all times protects the health and well-being of the equines being transported (e.g., provides adequate ventilation, contains no sharp protrusions, etc.);
 2. Include means of completely segregating each stallion and each aggressive equine on the conveyance so that no stallion or aggressive equine can come into contact with any of the other equines on the conveyance;
 3. Have sufficient interior height to allow each equine on the conveyance to stand with its head extended in the fullest normal postural height; and
 4. Be equipped with doors and ramps of sufficient size and location to provide for safe loading and unloading.
- b. Equines for slaughter must not be transported in any conveyance that has the animal cargo space divided into two or more stacked levels, except that

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ 49 U.S.C.A. § 80502(c) (West 1994).

²⁰⁹ *Id.* at § 80502(a)(1).

²¹⁰ *Id.* at § 80502(b).

conveyances lacking the capability to convert from two or more stacked levels to one level may be used until December 7, 200. Conveyances with collapsible floors (also known as “floating decks”) must be configured to transport equines on one level only.²¹¹

Not surprisingly, equine welfare advocates find these provisions grossly lacking.²¹²

2. Horse Auctions

For most horses, the road to the slaughterhouse begins with an equine auction. Some horse owners do not realize (or do not care) that an auctioned horse may be purchased by a “kill buyer” or “meat man.”²¹³ An owner who drops off a horse at auction without the necessary Coggins papers has similarly, and perhaps unknowingly, subjected that horse to the kill pen.²¹⁴ Auctions also provide an opportunity for horse thieves to sell stolen horses to kill buyers for a quick profit.²¹⁵ Auctions are the “easy out” for irresponsible owners who do not wish to spend the time or money necessary to train or rehabilitate a horse or sell a horse privately to a carefully screened prospective buyer. And of course, auctions are routinely utilized by breeders and those in the racing and pharmaceutical industries to quickly dispose of “overstock” or “byproduct” foals and horses.²¹⁶

The conditions at the auction, including the associated feedlots, are extremely inhumane. A group called Animals’ Angels USA spent five years investigating the treatment of horses in the slaughter pipeline, including “auctions, feedlots and export pens, as well as slaughter plants.”²¹⁷ Their findings were disturbing. They documented and reported a variety of abuses suffered by horses at auction that were designated

²¹¹ 9 C.F.R. § 88.3 (2011).

²¹² See Valerie James Patton & Laura Allen, *New Regulation Won’t Protect Equines*, ANIMAL LAW COALITION (Nov. 25, 2011), <http://www.animallawcoalition.com/horse-slaughter/article/1891> [hereinafter Patton & Allen]. See *infra* Part X.C.3 on some of the problems with enforcement of this regulation.

²¹³ *Savage Passage: Down the Horse Slaughter Gauntlet*, 12, ANIMALS’ ANGELS, available at <http://animalsangels.org/images/stories/pdf/Animals%27%20Angels%20horse%20slaughter%20compilation%20report%20-%20short%20paper%202012.pdf> (last visited Nov. 29, 2012) [hereinafter *Savage Passage*].

²¹⁴ *Id.*

²¹⁵ See *supra* Part VIII.C.

²¹⁶ See *supra* Parts VIII.A and VIII.B.

²¹⁷ *Savage Passage*, *supra* note 213, at 2.

as “kill horses.”²¹⁸ Investigators saw horses packed into auction pens in such a way that they were prone to injury or death,²¹⁹ such as a horse that was seen to suffer a “profusely bleeding knee injury” and a horse that was “kicked in the chest or head” (the investigator could not tell which) and “immediately dropp[ed] to the ground dead.”²²⁰ Horses that are slated for kill buyers are often kept in feedlots, exposed to extremely low²²¹ or high temperatures and denied food and water.²²² Horses that have been designated as kill horses are often kept in a separate kill pen in the back of the auction facility.²²³ They are not seen by the general public and have little to no chance of being purchased by anyone other than a kill buyer.²²⁴

In fact, auction conditions make it very difficult to demonstrate a horse’s strong points” so that a prospective buyer may decide if the “horse [would be] a good fit.”²²⁵ Instead, “horse[s] [are] ridden” into or allowed to “run loose [in] the auction ring.”²²⁶ Then,

the auctioneer will quickly try to run up the bidding price. Often, killer buyers can be seen standing inside the auction ring, communicating directly with the auctioneer. At many auctions, would-be buyers include not only families looking for riding horses, but also horse rescue organizations trying to outbid killer buyers for horses that they know they can rehabilitate and adopt into loving homes.²²⁷

Auction conditions are very stressful for horses, but for horses purchased by a kill buyer, this is just the beginning of an intensely stressful and inhumane process.²²⁸

²¹⁸ *Id.* at 5.

²¹⁹ *Id.* at 11. Investigators observed a pen containing 27 horses that should not have held more than 8 horses. *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 6.

²²² *Id.*

²²³ *Id.* at 5.

²²⁴ *Id.*

²²⁵ *Transport to Slaughter*, THE HUMANE SOCIETY OF THE UNITED STATES (Sept. 25, 2009), http://www.humanesociety.org/issues/horse_slaughter/facts/transport_to_slaughter_092909.html [hereinafter *Transport to Slaughter*].

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

3. Transportation to Slaughter

In order to make as much money as possible on a shipment, kill buyers will pack horses into trailers for transport to a feedlot, collection point, or Canadian or Mexican slaughterhouse.²²⁹ “In the crowded, cramped confines of the trailer, fighting, serious injury and even death are frequent occurrences.”²³⁰ Before December 2006, horses could be transported to slaughter in double-decker trailers.²³¹ Designed for animals like cows and pigs that have shorter necks, double-decker trailers forced horses “into a stooped, unnatural position, unable to maintain their balance.”²³² Horses transported in double-decker trailers were more prone to injury or death, and that type of trailer has been involved in a number of terrible accidents, endangering both horses and humans.²³³ In December 2006, regulations were promulgated that prohibited the use of double-decker trailers to haul equines directly to a slaughterhouse.²³⁴ However, those regulations left a loophole exploited by slaughter buyers who would instead ship horses in double-decker trailers to a stockyard or feedlot.²³⁵ Regulations passed in October 2011 attempted to close that loophole.²³⁶ However, critics of the regulation point out that the regulation “relies on . . . information [reported] on the owner/shipper certificate.”²³⁷ The GAO reported that “less than half [of these certificates] are returned,” and those that are returned are often incomplete.²³⁸

The USDA’s APHIS is responsible for enforcing regulations regarding the welfare of horses transported for slaughter.²³⁹ The GAO reports that APHIS faces three major challenges in fulfilling this responsibility:

²²⁹ *Horse Slaughter*; ANIMAL WELFARE INSTITUTE, <http://awionline.org/content/slaughter> (last visited Mar. 2, 2013).

²³⁰ *Id.*

²³¹ Patton & Allen, *supra* note 212.

²³² *Transport to Slaughter*, *supra* note 225.

²³³ *Id.*

²³⁴ Patton & Allen, *supra* note 212.

²³⁵ *Id.*

²³⁶ 9 C.F.R. § 88.3 (2011).

²³⁷ Patton & Allen, *supra* note 212.

²³⁸ *Id.*

²³⁹ HORSE WELFARE, *supra* note 2, at 5. Under the delegated authority from USDA to implement the Animals and Plant Health Inspect Act, PHIS promulgated the “Commercial Transportation of Equines to Slaughter” regulation and established a transportation program, which seeks to ensure safe transportation conditions for horses destined for slaughter. *Id.*

First, APHIS faces several specific management challenges in implementing the transport program. Second, legislative prohibitions on using federal funds for inspecting horses prior to slaughter impede USDA's ability to ensure horse welfare. Third, the cessation of domestic slaughter has diminished APHIS's effectiveness in overseeing the transport and welfare of horses intended for slaughter.²⁴⁰

The management challenges include delays in rulemaking that would enhance APHIS's oversight regarding equines "transported for slaughter," shortages in "staff and funding" that make it difficult to obtain and review owner/shipper certificates, and the "lack of... formal [cooperation] agreements" with officials in Canada, Mexico, and various adjacent U.S. states.²⁴¹ The prohibition on using federal funds to inspect horses being transported for slaughter has applied since fiscal year 2006.²⁴² This restriction means that:

the transport program's compliance officer may only inspect the owner/shipper certificates associated with the shipment of horses and the conveyance on which the horses are transported. That is, only while inspecting these items may the office also incidentally observe any potential violations of the transport regulation regarding the physical condition of the horses. ...²⁴³

According to APHIS, horses that are now being shipped to Canada or Mexico for slaughter are shipped over longer distances and are more likely to suffer injuries during prolonged trips in tight quarters.²⁴⁴ [O]nce [these] horses ... cross[] the border into Canada or Mexico," APHIS has no authority regarding their welfare.²⁴⁵

4. The Slaughterhouse

"Upon arrival at the slaughter plant, the horses are unloaded into holding pens already crowded with other horses."²⁴⁶ "[T]he smell[s] of blood and death[,]'" coupled with the crowded conditions, further

²⁴⁰ *Id.* at 27.

²⁴¹ *Id.*

²⁴² *Id.* at 37.

²⁴³ *Id.*

²⁴⁴ *Id.* at 39.

²⁴⁵ *Id.*

²⁴⁶ *Transport to Slaughter, supra* note 225.

increase the horses' stress levels.²⁴⁷ "From the holding pens, horses are . . . herded into . . . 'kill chutes.'"²⁴⁸ Some slaughterhouses use captive bolt guns.²⁴⁹ While a correctly-applied blow could render a horse senseless, "[b]ecause of the anatomy, behavioral patterns, and strong survival instincts of the horses, it is very difficult for the untrained slaughter plant workers to accurately aim the captive bolt—leading to numerous painful blows to the horse's head and body."²⁵⁰ "In Mexican plants, . . . [the] puntilla" is used to sever the horse's spine, "causing paralysis and eventual asphyxiation, but not unconsciousness. Some horses are still conscious as they are bled out and dismembered."²⁵¹

5. Where are the Slaughter Facilities?

There were at least sixteen equine slaughtering facilities operating in the U.S. in the 1980s.²⁵² By 1994, that number had dropped to seven.²⁵³ There were as few as two slaughter facilities in the U.S. in 2002.²⁵⁴ The last three slaughterhouses in the United States closed by September 2007.²⁵⁵ These slaughterhouses, which were located in Texas and Illinois, closed when those "states passed laws making horse slaughter for human consumption illegal, and the Fifth and Seventh Circuits upheld the laws on appeal."²⁵⁶ While the USDA reported to the GAO that it was unaware of any U.S. slaughter facilities in operation in 2010, the "USDA identified at least three establishments—in Colorado, Nebraska, and New Jersey—that import horsemeat for repackaging and distribution to purchasers in the United States who feed the meat to animals at zoos and circuses."²⁵⁷ While they were in operation,

[e]quine processing plants produce[d] products other than meat for human consumption – such as glue, pet food, and food for zoo animals – but the slaughter of

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* For a description of the use of a captive bolt gun in the context of euthanasia, see note 183 and accompanying text.

²⁵⁰ *Id.*

²⁵¹ *Id.* For additional information regarding the use of the puntilla in Mexican slaughterhouses, see note 262 and accompanying text.

²⁵² HORSE WELFARE, *supra* note 2, at 10.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* The Texas slaughterhouse closed May 2. The Illinois slaughterhouses closed September 1. *Id.* at 12, Figure 3.

²⁵⁶ Laura Jane Durfee, Note, *Anti-Horse Slaughter Legislation: Bad for Horses, Bad for Society*, 84 IND. L.J. 353, 354 (2009).

²⁵⁷ HORSE WELFARE, *supra* note 2, at 11.

horses for human consumption is the driving economic factor behind slaughter facilities. Without the profits from meat destined for human consumption, equine slaughterhouses cannot operate.²⁵⁸

Although U.S. slaughter facilities ceased operations in 2007, there are still equine slaughter facilities in North America located in both Canada and Mexico. “As of the end of 2010, Canada had four such facilities, and Mexico three, that were the principal destinations of U.S. horses exported for slaughter.”²⁵⁹ Conditions in the Canadian and Mexican slaughterhouses are reported to be inhumane. According to the Humane Society International’s website, “[t]here have been many reported cases of animal welfare violations in Canadian horse slaughterhouses including failure to provide food and water, illegal unloading of animals, animals left for extended periods in kill pens and sick or injured animals denied veterinary care.”²⁶⁰ According to Temple Grandin, the conditions are even worse in Mexico.

Some of the horses that go to Mexico are slaughtered in an EU inspected plant, but many others [go] to local abattoirs. In their plants, they are killed with the puntilla. The puntilla is a short knife that is used to sever the spinal cord in a fully conscious animal. Both U.S. and International humane slaughter regulations and guidelines state that the puntilla should NOT be used.²⁶¹

Much of the horsemeat produced at the slaughterhouses in Canada and Mexico is shipped to countries in the European Union (“EU”).²⁶² The EU’s efforts to keep certain drugs out of the food chain have already begun to impact the Canadian and Mexican slaughterhouses and the flow of horses there from the U.S.²⁶³ A new EU policy, which becomes effective July 31, 2013, will require lifetime medication records for horses to be slaughtered for human consumption in the EU.²⁶⁴ EU regulations

²⁵⁸ Durfee, *supra* note 256, at 354-55.

²⁵⁹ HORSE WELFARE, *supra* note 2, at 11.

²⁶⁰ *Horse Slaughter*, HUMANE SOCIETY INTERNATIONAL CANADA, http://www.hsicanada.ca/horses/horse_slaughter/.

²⁶¹ Temple Grandin, *Answering Questions About Animal Welfare During Horse Slaughter*, DR. TEMPLE GRANDIN’S WEB PAGE (April 2012), www.grandin.com/humane/questions.answers.horse.slaughter.html.

²⁶² Glenye Cain Oakford, *Canada Stops Accepting U.S. Horses for Slaughter*, DAILY RACING FORM (Oct. 13, 2012), <http://www.drfr.com/news/canada-stops-accepting-us-horses-slaughter>.

²⁶³ *Id.*

²⁶⁴ *Id.*

currently require documentation that slaughter-bound horses have not been treated with certain drugs for six months prior to slaughter.²⁶⁵ These drugs include Phenylbutazone, or Bute, which is commonly administered to horses and which the EU wants to keep out of the food chain.²⁶⁶ In mid-October 2012, the European Commission’s Health and Consumers Directorate–General released a report regarding its audit of Mexican equine slaughterhouses.²⁶⁷ The report called into question the validity of veterinary documentation for slaughter-bound horses.²⁶⁸ The day after the report was released, slaughter buyers indicated that they would not be attending U.S. horse auctions because it appeared that Canadian slaughterhouses would not be accepting U.S. horses.²⁶⁹ As a result, auction houses cancelled or postponed their auctions.²⁷⁰ It is not clear whether these changes will also apply to Mexican slaughterhouses.²⁷¹ No official statement regarding the situation has been issued.

6. Slaughter Numbers

The number of horses slaughtered in the U.S. has varied wildly over the years.²⁷² According to data published by the GAO for an almost two-decade period from 1990 to 2007, the largest number of horses was slaughtered in 1990, with 345,900 horses dying in slaughterhouses.²⁷³ The last U.S. slaughterhouses closed in 2007, and that year, 29,767 horses were slaughtered in the U.S.²⁷⁴ “Because all domestic slaughtering facilities closed by September 2007, however, the number of horses being slaughtered in the United States dropped to zero by the end of that year.”²⁷⁵

Just because equine slaughter has ceased in the U.S. does not mean that U.S. horses are not dying in slaughterhouses. With the closure of domestic slaughter facilities, export of horses to Canada and Mexico for slaughter increased dramatically.²⁷⁶ “From 2006 through

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² HORSE WELFARE, *supra* note 2, at 11. The GAO’s report includes a bar chart showing equine slaughter numbers from 1990 through 2007. The numbers are based on the GAO’s analysis of USDA data. *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 10.

²⁷⁶ *Id.* at 12, Figure 3.

2010, Canadian and Mexican imports increased by 148 percent and 660 percent, respectively, with the total number of horses imported from the United States for slaughter increasing from about 33,000 in 2006 to about 138,000 in 2010.”²⁷⁷ And chances are, these numbers do not reflect the total number of U.S. horses being slaughtered in other countries. Although horses are also exported to Canada and Mexico for purposes other than slaughter, such as breeding or participation in horse shows, USDA officials believe that “some horses exported for purposes other than slaughter were likely ‘feeder’ horses that were ultimately sent to slaughtering facilities at a later time.”²⁷⁸ These horses are fattened up at a feedlot first before being sent to slaughter, but the USDA is unable to determine which horses are really “feeder” horses.²⁷⁹

XI. IS THERE A RELATIONSHIP BETWEEN THE CESSATION OF DOMESTIC SLAUGHTER AND EQUINE WELFARE?

The buzz words “unwanted horses” are ringing in the ears of everyone in the horse industry and have reached the ears of the general public. The phrase is unavoidable in any discussion of equine slaughter in the U.S. However, it is not clear whether the phrase “unwanted horses” is in the air because there is a genuine issue or whether this is part of a larger campaign in favor of a return to domestic slaughter. There are some interesting relationships within the equine industry that give the impression that the latter is true. When the GAO Report was finally released in June 2011, “slaughter supporters ha[d] been indicating for months that they [had] leaked the [confidential] report and . . . orchestrated an ‘Unwanted Horse’ teleconference late in the day of the release presumably to promote the report’s findings.”²⁸⁰ The AVMA’s magazine, *The Horse*, presented the teleconference, which was sponsored by Pfizer.²⁸¹ As the Equine Welfare Alliance observed,

²⁷⁷ *Id.* at 12. The report noted:

U.S. exports of horses intended for slaughter are unofficial estimates because official U.S. export trade data do not specify the quantity or value of horses exported for slaughter. Thus, while official U.S. trade data can be used to determine total U.S. live horse exports (the sum of horses exported for slaughter or other purposes, such as breeding and showing), an estimate of horses intended for slaughter can only be determined using Canadian and Mexican official trade statistics.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ EWA Press Release, *supra* note 68.

²⁸¹ *Id.*

Pfizer Pharmaceuticals sponsoring a teleconference on solutions to the “unwanted horse” problem is beyond brazen. Pfizer owns Wythe [sic] Pharmaceuticals, the producer of a line of hormone replacement therapy drugs made from pregnant mare urine and is one of the largest producers of excess, poorly bred and untrained foals in North America.²⁸²

In yet another twist, the teleconference featured veterinarian Tom Lenz.²⁸³ The former Chair of the Unwanted Horse Coalition,²⁸⁴ Mr. Lenz was the senior director of equine veterinary services at Pfizer Animal Health.²⁸⁵ The Equine Welfare Alliance asserted that the Unwanted Horse Coalition has “concentrated on promoting the phrase ‘unwanted horse’ to take the focus off of over production, which slaughter actually encourages, and impl[ies] slaughter horses are somehow unusable except as meat.”²⁸⁶ In fact, the “USDA has estimated that 92.3% of horses sent to slaughter are healthy and can continue to be productive animals – they are not old or infirm.”²⁸⁷

Some individuals and organizations blame the cessation of slaughter for “unwanted horses” and the perception that these horses are suffering an increasing amount of abuse, neglect, and abandonment. While the GAO was able to identify some meager statistics that might support the conclusion that equine abuse, neglect, and abandonment has been on the rise since the U.S. slaughterhouses closed in 2007, much of the information on which slaughter proponents rely in an attempt to establish that there are equine welfare problems and to link these problems with the cessation of equine slaughter is anecdotal.²⁸⁸

For example, the AVMA asserted that more horses are being abused and neglected since the U.S. slaughterhouses closed.²⁸⁹ It cites the longer transport times to slaughter in Canada and Mexico, an “increasing number” of media reports regarding equine abuse and neglect, the Unwanted Horse Coalition’s Survey results that rescues are at or near capacity, and the GAO’s findings published in its Report.²⁹⁰ There are several problems with this assertion, and the arguments the

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ Silverman, *supra* note 134.

²⁸⁶ EWA Press Release, *supra* note 68.

²⁸⁷ *Fact Sheet: Oppose Horse Slaughter*, HUMANE SOCIETY OF THE UNITED STATES, www.humanesociety.org/assets/pdfs/legislation/horse_slaughter_key_points.pdf (last visited Dec. 7, 2012) [hereinafter *Fact Sheet*].

²⁸⁸ *See supra* Part VII.B.

²⁸⁹ AVMA FAQs, *supra* note 82.

²⁹⁰ *Id.*

AVMA claims support it. The HSUS takes issue with those who argue that the cessation of domestic equine slaughter created a welfare issue with long-haul trips to slaughterhouses in Canada and Mexico.

This argument is disingenuous on several grounds. First, long-distance hauls are inherent in this industry, since there is no domestic demand for horsemeat and not enough foreign demand to make the operation of a widespread array of slaughter plants profitable. Those raising this argument now were silent before, though long-distance transport has always been the norm for domestic slaughter and export for slaughter.²⁹¹

The AVMA offers no statistics to support its claim that there are an increasing number of media reports regarding equine abuse and neglect. Similarly, the data reported in the Survey and the GAO Report is largely anecdotal. In fact, the AVMA had to concede that

[w]hile it's difficult to demonstrate a direct link between the cessation of slaughter and incidents of abuse and neglect, information compiled by the GAO in the production of its report indicated a rise in horse abuse, neglect and abandonments since the cessation of slaughter in the United States. Unfortunately, this information is confounding [sic] by the poor economy and high hay prices. The real, nationwide effect of the elimination of horse slaughter on the frequency of horse abuse or neglect remains to be seen.²⁹²

Of course, there is no indication as to when we may actually see the connection between the cessation of slaughter and the equine welfare problems that the AVMA predicts, but apparently, the more than five years since the U.S. slaughterhouses closed is not long enough.

As part of the process of preparing its report, the GAO asked 17 State Veterinarians if they believed that equine welfare had improved, declined, or stayed the same over the preceding five years.²⁹³ All of the State Veterinarians indicated that in their perception, equine welfare had generally declined.²⁹⁴ While these veterinarians did not blame any one factor for the decline, they were most likely to identify “the cessation

²⁹¹ *Fact Sheet*, *supra* note 287.

²⁹² AVMA FAQs, *supra* note 82.

²⁹³ HORSE WELFARE, *supra* note 2, at 19.

²⁹⁴ *Id.*

of domestic slaughter in 2007 and the economic downturn.”²⁹⁵ It is important to note that the slaughterhouses ceased operations at virtually the same time that the U.S. economy took a turn for the worse, making it difficult to differentiate between the two factors as possible causes of the perceived equine welfare problems. Based on the conclusions reached in the GAO Report, these factors may be inextricably intertwined:

[T]he primary drivers for the increase in abandonment and neglect cases are the cessation of domestic slaughter, causing lower horse prices and difficulty in selling horses, and the economic downturn, affecting horse owners’ ability to properly care for their animals. As discussed, our analysis also showed that the cessation of slaughter and the economic downturn generally reduced prices for the low-to-mid range priced horses that are more frequently abandoned and neglected. Furthermore, regarding neglect, some State Veterinarians, noting that people are more inclined to take care of that which has value, said that the drop in horse prices affected some owners’ interest in caring for their animals, especially if their financial situation had declined.²⁹⁶

Therefore, if the cessation of slaughter is responsible for equine abandonment, neglect, and abuse, it is not because taking slaughter out of the equation eliminated an option for disposing of “unwanted horses,” but because the cessation of slaughter had an impact on horse values, particularly at the low end to midpoint of the horse price spectrum.²⁹⁷

Horse values across the country have plummeted in recent years, something Chris Ray, owner of Southern Illinois Equine Sale in Goreville, credits to the closure of the last American slaughterhouse in 2007. “They quit slaughtering horses and it just really brought the prices down,” Ray said. “We deal in riding horses, but it corners the market and bases the price of the horses at auctions.” When horse slaughtering was outlawed in the United States in 2007, demand for the animals decreased dramatically, cutting sale prices to a fraction of what they once were.²⁹⁸

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 20.

²⁹⁷ See *supra* Part V.

²⁹⁸ Tom Barker, *Horse Market Sees Struggle*, SOUTHERN BUSINESS JOURNAL (Feb. 7, 2010), http://thesouthern.com/business/local/article_b1854d6c-13a7-11df-945e-001cc4c03286.html.

Where slaughter buyers were once effectively establishing a floor for horse prices through their participation in auctions and willingness to spend a certain amount per pound that recreational and other buyers, including rescues, would have to outbid to acquire the horse of their choice, that floor began to crumble in 2007. Those who advocate for equine slaughter and express a concern regarding the link between the cessation of slaughter and the equine welfare problems in this country are glossing over the real reason for their concerns—the cessation of slaughter hit them in the wallet, and they would like to reinstate slaughter in order to reestablish that floor for horse prices.

Further evidence of the connection between slaughter and horse prices can be found in the industry’s response to Canada’s recent refusal to accept U.S. horses at its slaughterhouses.

Leroy Baker, who operates Sugarcreek Livestock Auction in Sugarcreek, Ohio, said Friday night that the tighter EU regulations on horse meat already had contributed to a sharp decline in low-end horse prices, even before word filtered out among slaughter buyers that U.S. horses would not be welcome across U.S. borders. . . . ‘Starting the last six months, any horse would bring \$150 to \$550,’ he added. ‘Now, it’s down from nothing to \$400. Today, with the market shut down, it’s from nothing to \$100. And that’s just little traders who didn’t realize what happened and they think they’re going somewhere else tomorrow or next week and sell the same horse over and someone will buy it. But news travels fast. By tomorrow at noon, everybody in the country will know that they’re shut down.’ ‘It’s going to kill the horse industry in the U.S.A.’ said horse dealer Brian Moore.²⁹⁹

Apparently, there are those who would prefer to kill thousands of horses in slaughterhouses and ship U.S. horsemeat overseas so long as that process artificially sustains horse prices and avoids the “death” of the horse industry.

Additionally, there is evidence to support the assertion that equine welfare problems are attributable to the economic downturn rather than to the cessation of slaughter.

²⁹⁹ Oakford, *supra* note 262.

For example, in March 2010, Animal Welfare Institute representatives said that since a 1998 California ban on dealing in horses intended for slaughter, their organization has offered a \$1,000 reward for notification of abandoned horses but has never received a tip. In addition, the Humane Society of the United States and the United Animal Nations reported that there has been no documented rise in abuse and neglect cases in California since the 1998 ban. United Animal Nations also reported there was no documented rise in abuse and neglect cases in Illinois following the 2-year closure of the horse slaughtering facility in that state in 2002. Furthermore, Humane Society of the United States officials said that owners who abandon horses are going to abandon them regardless of having the option for domestic slaughter, adding that there were instances of horse abandonment near domestic horse slaughtering facilities before they closed.³⁰⁰

In addition to this evidence that the cessation of slaughter has not negatively impacted equine welfare, it is important to note that the California slaughter ban actually decreased the number of reported horse thefts in that state.³⁰¹

XII. SLAUGHTER IS NOT THE ANSWER

As the year 2012 comes to a close, both the current status and the future of equine slaughter in the U.S. are unclear. Legislative efforts to ban slaughter and to reinstitute slaughter have met with controversy.³⁰² It may be that because there is no domestic market for horsemeat and the majority of the foreign market appears to be closing with new regulations in the E.U., the issue of horse slaughter will quietly become a moot point. But what if the anecdotal evidence of excess horses that are being subjected to abandonment, cruelty, or neglect is proven true? What can be done to care for these horses, and what steps can be taken to maintain the equine population at a manageable level? There are numerous examples of efforts to be responsible and care for U.S. horses.

³⁰⁰ HORSE WELFARE, *supra* note 2, at 24-25.

³⁰¹ AVMA FAQs, *supra* note 82.

³⁰² American Horse Slaughter Prevention Act of 2011, S. 1176, 112th Cong. (2011); HORSE WELFARE, *supra* note 2, at 26.

A. Kentucky Equine Health and Welfare Council

Some states, particularly those with greater involvement in the equine industry, are stepping up to the plate to protect horses in their states. For example, legislation to create the Kentucky Equine Health and Welfare Council was passed by the Kentucky legislature and went into effect in July 2010.³⁰³ The Council's duties include:

- (1) Undertaking research, conducting public hearings, and collecting data to determine the prevalent equine health and welfare issues;
- (2) Striving to develop regional centers of care for unwanted, abused, neglected, or confiscated equines. The development of the centers may be undertaken in cooperation with state and local governments, private entities, universities, or other groups;
- (3) Creating a system of voluntary certification of equine rescue and retirement operations that includes, at a minimum, industry-accepted standards of care for equines;
- (4) Researching and offering suggestions to the commission for statutory changes affecting equine health, welfare, abuse, and neglect issues;
- (5) Assisting veterinarians and others in maintaining the health and welfare of equines by identifying and referring to the appropriate authorities critical areas of need; and
- (6) Submitting a written report annually to the Governor, the Department of Agriculture, and the Legislative Research Commission regarding its administrative, financial, and programmatic activities.³⁰⁴

The Council meets quarterly (or upon the Chair's call) to do its work.³⁰⁵ For example, at its March 2012 meeting, the Council's primary focus was developing a voluntary certification system for equine rescue, retirement, and rehabilitation facilities.³⁰⁶

³⁰³ KY. REV. STAT. ANN. § 257.472(a) (West 2012).

³⁰⁴ *Id.* at § 257.474.

³⁰⁵ *Id.* at § 257.472(6).

³⁰⁶ Erica Larson, *Kentucky Equine Health and Welfare Council Convenes*, THE HORSE (Mar. 21, 2012), <http://www.thehorse.com/articles/28869/kentucky-equine-health-and-welfare-council-convenes>.

The formation of the Equine Health and Welfare Council is a monumental victory for Kentucky, and has already drawn attention from several other states seeking to duplicate this first-of-its-kind legislation. While the Council's task is understandably large, its overall mission is quite important for a state that is so historically, culturally and economically linked to the welfare of the horse.³⁰⁷

It is incumbent upon other states to follow Kentucky's lead. Although far less comprehensive, other state efforts include a 2009 Montana law that allows horse owners to surrender horses to the state via a licensed livestock market without being subjected to prosecution for cruelty and Colorado's state income tax return checkbox allowing taxpayers to make a contribution to the Colorado Unwanted Horse Alliance.³⁰⁸

B. Castration Clinics

At its most basic level, equine values and welfare come down to the laws of supply and demand. If there is a horse surplus, values drop, and there is not enough demand to absorb the supply. One of the ways to tackle this issue is to take steps to reduce the number of horses that are being produced. A variety of clinics to castrate stallions at little or no cost to owners are designed to do just that.

The impetus for these clinics is to help prevent overbreeding and produce a gentler horse that is more rideable, more trainable, and more salable, allowing it to be used in several careers. The clinics also reduce the number of horses being bred and aid in the adoption or sale of more horses.³⁰⁹

Such programs include The Gelding Project in Minnesota, established in 2009, and the Unwanted Horse Coalition's Operation Gelding and castration clinics offered by the Missouri-Columbia College of Veterinary Medicine, both initiated in 2010.³¹⁰

³⁰⁷ *News – Kentucky Equine Health and Welfare Council Formed*, KENTUCKY FARM BUREAU (Jul. 1, 2010), <https://www.kyfb.com/news/?i=6810>.

³⁰⁸ HORSE WELFARE, *supra* note 2, at 25.

³⁰⁹ Malinda Larkin, *Castration Clinics Fight Unwanted Horse Problem*, JAVMA NEWS, AVMA (Oct. 15, 2010), <https://www.avma.org/News/JAVMANews/Pages/101015v.aspx>.

³¹⁰ *Id.*

C. Low- or No-cost Humane Euthanasia

The Humane Society of the United States maintains a comprehensive list of resources by state where horse owners may be able to find assistance with low-cost euthanasia and options for disposing of a horse's remains.³¹¹ For example, Sound Equine Options serves northwest Oregon and southwest Washington. Founded in 2009 by an equine veterinarian, the organization strives to assist owners who cannot afford to provide basic medical care to their horses. Sound Equine Options also provides periodic euthanasia clinics.³¹² Similarly, the Horse Plus Humane Society in Oroville, California offers free euthanasia clinics to owners who could not otherwise afford the procedure. At Horse Plus Humane Society, the horses brought to them are evaluated for health and temperament. If it is determined that the horse could be rehomed successfully, the horse is taken in by the organization and cared for until a new home is found. If humane euthanasia is considered to be the best option, the horse is euthanized by a veterinarian at no cost.³¹³

XIII. CONCLUSION

No one with a conscience wants to think about “unwanted horses” being abandoned, abused, or neglected. There are segments of the horse industry, such as breeders, and related industries, such as the racing and pharmaceutical industries that are striving to convince people that countless numbers of “unwanted horses” are suffering because domestic slaughter is no longer an option. Ironically, a baseless equine welfare argument is being used to urge a return to a very inhumane practice. The evidence does not support the argument that the cessation of domestic slaughter has caused a decrease in equine welfare in this country. Those advocating a return to slaughter would benefit from the boost it would give to horse prices or would benefit from an easy method of disposing of their industry's unwanted equine byproducts. While individual owners bear some responsibility, they do not need slaughter to assist them with unwanted horses. If steps were taken by

³¹¹ *Humane Horse Remains Disposal*, HUMANE SOCIETY OF THE UNITED STATES, http://www.humanesociety.org/animals/horses/facts/humane_horse_remains_disposal.html (last visited Dec. 28, 2012).

³¹² *Humane Euthanasia Clinics*, SOUND EQUINE OPTIONS, <http://www.soundequineoptions.org/humane-euthanasia-clinics.html> (last visited Dec. 23, 2012).

³¹³ *More About the Euthanasia Clinics*, HORSE PLUS HUMANE SOCIETY, <http://horsehumane.org/eclinic.htm> (last visited Dec. 23, 2012).

the industries that contribute disproportionately to the equine slaughter numbers to be responsible for training and rehoming those horses—either of their own volition or because they were forced to do so—the levels of equine supply and demand could reach a manageable balance. We owe a quality of life, and death, to these noble animals who have contributed and continue to contribute so much to our quality of life.

THE PARADOX OF ANIMAL HOARDING AND THE LIMITS OF CANADIAN CRIMINAL LAW

KATHRYN M. CAMPBELL, PH.D.*

I. INTRODUCTION

A. Definitions

“[T]he most disturbing aspect of hoarding: the psychological blindness of hoarders, their sheer inability to see the reality of what they are doing and how they are living. Generally speaking, hoarders do not intend to be cruel, and yet the condition of the animals they keep is sometimes worse – and on a larger scale – than those hurt by the most deliberate kind of abusers.”

—Carrie Allen¹

Animal hoarding, sometimes referred to as pathological collecting, has been described as a serious mental health issue that has ramifications not only for individuals who hoard large numbers of animals over time, but especially for the many animals who suffer in appalling conditions. Animal hoarding, as defined by the Hoarding of Animals Research Consortium at Tufts University,² constitutes the following: more than the typical number of companion animals; inability to provide even minimal standards of nutrition, sanitation, shelter, and veterinary care, with this neglect often resulting in starvation, illness and death; denial of the inability to provide this minimum care and the impact of that failure on the animals, the household, and human occupants of the dwelling; obsessive attempts to maintain and possibly increase the number of animals in face of these failures and deteriorating conditions.³ What distinguishes hoarders from animal breeders or

* I would like to thank Tara Santini, Alanna Devine, and Peter Sankoff for comments on an earlier draft of this paper. This paper is dedicated to Kathleen Marie Smith, who loved animals and was troubled by hoarding.

¹ Anita Wolff, Prisoners of “Love”—the Victims of Animal Hoarding, ADVOCACY BRITANNICA (2012) <http://advocacy.britannica.com/blog/advocacy/2009/02/prisoners-of-love-the-victims-of-animal-hoarding>.

² See Hoarding of Animals Research Consortium (HARC), <http://www.tufts.edu/vet/cfa/hoarding>.

³ Gary J. Patronek, *Hoarding of Animals: An Under-Recognized Public Health Problem in a Difficult-to-study Population*, 114 PUB. HEALTH REPORTS 81 (1999).

farmers, who also keep large numbers of animals on their property, is “the condition of the animals, the environment in which they’re kept, and the failure of the hoarder to remedy the negative effects of their collecting.”⁴ Farmers and breeders often keep large numbers of animals on their property for specific purposes; however, the manner in which these animals are treated (in most cases) is qualitatively different. What seems to differentiate animal hoarders from backstreet breeders or puppy mills, who also keep animals in appalling conditions mainly for profit, is that hoarders believe that they are in fact acting in the best interests of the animals and are “saving” them from further abuse or possible euthanasia.

A study done by Patronek examined the characteristics of a large group of animal hoarders from 54 case reports.⁵ The first of its kind, this study illustrated that over half of the cases came to the attention of the authorities through neighbours reporting unsanitary conditions, strong odours, and noise. The majority of animal hoarders were female (76%); most were single, divorced or widowed (72%); and over half (56%) lived in single-person homes. Three hoarders lived with children, and two had dependent elderly persons in their homes. This study also revealed interesting information about the types of animals hoarded: the majority were cats (65%), most likely due to the ease of finding and keeping stray cats and how quickly they breed, while dogs and birds were each implicated in 11% of the cases. The average number of animals seized was 39, and in four cases, over 100 animals were involved. Although less common, there have been some cases of hoarding of farm animals, including horses, cows, and goats.⁶

Animal hoarders are not animal collectors. This euphemism may have been used in the past to describe the behaviour of animal hoarders, but it has become clear that hoarding behaviour represents a much more complex phenomenon. In fact, this behaviour raises a number of issues not only for animal welfare agencies, but also illustrates how current protective legislation fails to protect animals from this type of abuse.

⁴ Susan E. Davis, *Prosecuting Animal Hoarders is Like Herding Cats*, CAL. LAWYER 26, 28 (2002), <http://www.tufts.edu/vet/hoarding/pubs/herdingcats.pdf>.

⁵ Patronek, *supra* note 3, at 81.

⁶ Recently, in Idaho Springs, Colorado, more than 100 animals living in unsanitary conditions were seized including geese, dogs, llamas, rabbits, mules, horses, goats, sheep, chickens, a pony, alpacas, cats, and reindeer from a private ranch. Ian Neligh, *More than 100 Animals Seized from Laughing Valley Ranch*, CLEAR CREEK COURANT (Jun. 8, 2012), <http://www.clearcreekcourant.com/content/more-100-animals-seized-laughing-valley-ranch>.

1. Animal Victims

While animal hoarders may justify their actions as being in the best interests of the animals and think that they are “saving” animals, the consequences of animals in these hoarding situations are devastating. In addition to living in cramped conditions with dozens, sometimes hundreds, of other animals, the level of suffering is incalculable. The kinds of problems that emerge from the hoarding of companion animals such as cats and dogs include emaciation, starvation, ammonia burns in their respiratory system from exposure to urine, urine scald, blindness or near blindness, untreated broken bones, missing limbs, lesions from fighting, skin lesions, ear mites and fleas, internal parasites, rotted teeth, mouth disease, maggot-filled fur matting, and eye and ear injuries.⁷ Moreover, in Patronek’s study, it was not uncommon to find dead animals in the freezers and homes of hoarders; this was evident in almost 60% of the cases studied.⁸ By the time authorities become involved in many of these cases, the extent of animal suffering has been so egregious that the majority of the animals have to be euthanized. Some studies have indicated that up to 80% of seized animals from animal hoarding raids are put down.⁹

2. Human Victims

There are also human victims in animal hoarding cases. Besides the hoarder him or herself, there may be children involved, neglected senior citizens, and even neighbours who, because of the unsanitary conditions, may be exposed to the spread of zoonotic diseases.¹⁰ It is not unusual for protective social services to be involved in animal hoarding cases; at times they may even alert animal welfare agencies to existing problems. Neglect and abuse of animals appears to often co-occur with child and elder abuse. Furthermore, in cases where hoarding has gone on for months or even years, the condition of the home can deteriorate to the point where buildings may be condemned. The long-term harm caused by untreated urine and feces damages can take a huge toll on the walls, floors, and foundation of buildings, and there are many cases where homes must be destroyed following the seizure of animals.

⁷ Lisa Avery, *From Helping to Hoarding to Hurting: When the Acts of “Good Samaritans” Become Felony Animal Cruelty*, 39 Val. U. L. REV. 4, 849 (2005); Colin Berry, Gary Patronek, and Randall Lockwood, *Long-Term Outcomes in Animal Hoarding Cases*, 11 Animal L. 167, 181 (2005); Dana M. Campbell, *A Call to Action: Concrete Proposals for Reducing Widespread Animal Suffering in the United States*, 15 Animal L., 2, 144 (2009).

⁸ Patronek, *supra* note 3, at 85.

⁹ Avery, *supra* note 7.

¹⁰ Patronek, *supra* note 3, at 82.

II. PSYCHOLOGICAL PATHWAYS TO ANIMAL HOARDING BEHAVIOUR

Animal hoarding has been described as a psychological disorder which manifests in considerable maladaptive functioning for individuals and severe consequences for the animal victims. There appears to be no agreed upon singular diagnosis amongst the psychiatric community; however, some believe that animal hoarding may represent a form of obsessive compulsive personality disorder.¹¹ In these cases, a symptom of the disorder, object hoarding, has been described as an inability to discard items of seemingly no value; it is often accompanied by an obsessive fear of losing items that are thought to be needed later, as well as distorted beliefs regarding these possessions and an exaggerated emotional attachment to them.¹² However, Nathanson questions whether or not this label can really be applied to animal hoarders, as it is possible that the collection of objects as opposed to the collection of sentient beings may represent different pathologies.¹³

Another explanation for animal hoarding is found in the addictions-based model. Here, hoarding is compared to substance abuse, whereby animals are substituted for drugs or alcohol where there is a “[p]reoccupation with animals, denial of a problem, excuses for their behaviour, claims of persecution, and neglect of personal and environmental conditions.”¹⁴ Moreover, compulsive hoarding of animals has also been compared to other compulsive addictions such as gambling or compulsive shopping.¹⁵

One more recent psychological explanation for animal hoarding behaviour is thought to be the result of attachment disorder based on attachment theory. This theory is founded on the idea that individuals develop different ways of interacting, in part due to the degree to which

¹¹ R. Lockwood, “The Psychology of Animal Collectors” (1994) 9 *TRENDS MAGAZINE*, 18; Gary J. Partonek, & Jane N. Nathanson, *A Theoretical Perspective to Inform Assessment and Treatment Strategies for Animal Hoarders*, 29 *CLINICAL PSYCHOLOGY REV.*, 274, 275 (2009).; Amanda I. Reinisch, *Understanding the Human Aspects of Animal Hoarding*, 49(12) *THE CAN. VETERINARY J.*, 1211, 1213 (2008); Mirène, E. Winsberg, Kirsten S. Cassic, and Lorrin M. Koran, *Hoarding in Obsessive Compulsive Disorder: A Report of 20 Cases* 60 *J. OF CLINICAL PSYCHIATRY*, 591 (1999).

¹² Randy O. Frost & Rachel C. Gross, *The Hoarding of Possessions* 31 *BEHAV. RES. THERAPY* 367, 69 (1993).

¹³ Jane N. Nathanson, *Animal Hoarding: Slipping into the Darkness of Comorbid Animal and Self-Neglect*, 21 *J. ELDER ABUSE & NEGLECT*, 307, 307 (2009).

¹⁴ Randy Frost, *People who Hoard Animals* (2000) 17 *PSYCHIATRIC TIMES*; See also R. Lockwood, *The Psychology of Animal Collectors*, 8 *TRENDS MAGAZINE*, 18 (1994).

¹⁵ Beth M. Meagher, Randy Frost, & John H. Riskind, *Compulsive Lottery, Scratch Ticket, and Keno Gambling: Its Relation to OCD, Hoarding, Impulsivity, and the Urge to Buy*, 17 *J. GAMBLING STUD.* 5, 7 (1999).

their needs were or were not met as children by their primary caregivers.¹⁶ Disorders occur when there is some sort of disruption or difficulty in establishing that early bond with caregivers. Given the importance that companion animals play in many people's lives, the extrapolation of attachment disorder as a basis for animal hoarding makes some sense. For many, animals serve to fill a bond that is absent with other people; however, the excessive numbers of animals seen in the homes of animal hoarders indicate that other factors are at play. Evidently, there are many contributing factors that have an impact on the development of this behaviour, and as Nathanson notes,

[a]nimal hoarding is likely related to a complex, multifaceted spectrum of underlying psychological disorders, the most relevant taking into account the interactive relationship between the human and the animals, along with the driving force of excessive caregiving, which has been associated with attachment disorder.¹⁷

While other psychiatric or psychological diagnoses have been thought to explain animal hoarding behaviour, including delusional disorder, dementia, and borderline personality disorder, they appear to have received less support as explanatory models.¹⁸ The delusional disorder model is thought to manifest in an inability to see the problematic nature of the behaviour, as many animal hoarders believe they are providing proper animal care. Related to this is the dementia model, thought to explain the lack of insight animal hoarders show for the poor conditions in which their animals live, along with the fact that they have no insight into their own blatant irrationality.¹⁹ Finally, borderline personality disorder has been proffered as providing a psychological explanation for animal hoarding. Thought to emanate from severe family pathology, this disorder has been described as manifest in fear of abandonment, difficulty with anger, and unstable interpersonal relationships; animals are thought to fill the huge emotional lacunae these people experience.²⁰ While many of these explanations provide some insights into the pathways that lead individuals to hoard animals, as single factor models,

¹⁶ JOHN BOWLBY, *A SECURE BASE: CLINICAL APPLICATIONS OF ATTACHMENT THEORY* 112 (Routledge, 1988).

¹⁷ Nathanson, *supra* note 13, at 317.

¹⁸ Patronek, *supra* note 3, at 81; Hoarding Animals Research Consortium, *available at* <http://www.tufts.edu/vet/cfa/hoarding>.

¹⁹ Reinisch, *supra* note 11, at 3.

²⁰ ARNOLD ARLUKE AND CELESTE KILLEEN, *INSIDE ANIMAL HOARDING: THE CASE OF BARBARA ERICKSON AND HER 552 DOGS* (West Lafayette, Indiana, Purdue University Press, 2009).

none appear to explain all behaviour all the time for everyone. What these explanations also reveal is that animal hoarding is a complex issue with psychological and emotional problems at its roots, requiring a nuanced response.

A. Justification

When animal hoarders are questioned about their behaviour, a number of consistent justifications emerge, including denial, the “Good Samaritan strategy,” posing as a rescue organization, and blaming the system. In the case of Barbara Erickson, an Oregon woman who kept over 550 dogs in her small two-bedroom home, she plead not guilty to animal abuse charges and claimed to have fed, watered, and loved all of her dogs, in spite of the fact that 134 of the rescued dogs had to be euthanized, and most of the over 400 that were saved had behaviour problems.²¹ Moreover, in Patronek’s 1999 study of animal hoarders, the hoarders in over half of the 43 cases where the animals were found in extremely poor conditions would not even acknowledge a problem existed.²² Denial is clearly part of a strategy that many animal hoarders use in order to be able to function and often live with their animals in such horrific conditions. Moreover, in a study that examined how animal hoarders justified their wrongdoings, many employed what is termed the “Good Samaritan strategy,” whereby they could “[l]essen the negativity of their performance by grounding the act in something noble.”²³ In such instances, the hoarders attempted to justify their behaviour on the belief that the animals would have been otherwise euthanized had they not stepped in to save them. In fact, in some cases animal hoarders posed as rescue operations or shelters and were able to amass large numbers of animals based on this justification. For example, Tammy and William Hanson were convicted on a number of counts of animal cruelty following the seizure of 477 dogs on their property living in squalid conditions. Following Hurricane Katrina in New Orleans, the Hansons established a facility known as EDNAH (Every Dog Needs A Home) and were able to “rescue” large numbers of homeless animals following the evacuation of the city and surrounding area.²⁴

²¹ *Id.* at 154.

²² Patronek, *supra* note 3, at 84.

²³ Maria Vaca-Guzman & Arnold Arluke, *Normalizing Passive Cruelty: The Excuses and Justifications of Animal Hoarders*, 18 *Anthrozoos* 4, 344 (2004).

²⁴ In 2006, Tammy Hanson was convicted on 20 misdemeanor counts of cruelty to animals, and received a one year sentence in the county jail and \$10,000 in fines, including \$5000 in restitution to be paid to the Humane Society of the United States, the maximum amount allowed under Arkansas law. The restitution was an attempt to defray the costs of over \$100,000 incurred by the Humane Society in sheltering, caring for and fostering the seized dogs from EDNAH. KY3, *available at* <http://www.ky3.com/news/local/69192467.html>.

One final type of justification strategy used by animal hoarders involves blaming the system, as though the “system” (criminal justice, animal welfare, or otherwise) had a vendetta against them or was “out to get them.”²⁵ From a sociological perspective, this has been likened to a technique of neutralization and serves to focus attention on the system that is persecuting the animal hoarder rather than on the hoarder’s own behaviour.²⁶ One example of this type of justification was a hoarder found with 150 dogs, 14 cats, three monkeys, and a pregnant pot-bellied pig living in filthy conditions who denied they were treated poorly and claimed the police were harassing her without cause.²⁷ It is thus not uncommon for animal hoarders to use a number of excuses for their behaviour in order to deflect responsibility. In a study of animal hoarders’ justifications, other excuses included appealing to the difficulty of the task, defeasibility (not being fully informed), scapegoating, lack of intentionality, self-handicapping, and appealing to accidents.²⁸

Irrespective of the excuses many animal hoarders use, a further difficulty of this behaviour is its resistance to change. In fact, the Hoarding of Animals Research Consortium at Tufts University estimates that the recidivism rate for animal hoarding stands at 100%. Vikki Kittles is one example of a serial animal hoarder; her most recent conviction followed her arrest in Oregon in 1993 where she was found living on a school bus with 116 dogs, four cats, and two chickens in horrific conditions.²⁹ She was sentenced to 210 days in jail, five years probation, and an order to undergo psychiatric counselling. She had previously been charged with animal cruelty in Florida in 1985 for keeping 37 dogs, three cats, and two horses in a bedroom of her home.³⁰ However, Ms. Kittles had a great deal of experience with the legal system and was initially able to prevent her animals from receiving medical treatment while she was being tried; at that time under Oregon law, the dogs were considered evidence and could not be surrendered without her consent. Her defense was that she was being persecuted for her “lifestyle” choice and “if she wanted to live among animal feces, that was her right.”³¹ More recently,

²⁵ Vaca-Guzman, *supra* note 23, at 345.

²⁶ Gresham Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 1957 22 AM. SOCIOLOGICAL REV. 640 (1957), referred to in Maria Vaca-Guzman & Arnold Arluke, *supra* note 23.

²⁷ Vaca-Guzman, *supra* note 23, at 346.

²⁸ *Id.* at 342.

²⁹ *From fire to frying pan: How forfeiture laws mistreat abused animals*, 1 The Animal’s Advocate 1 (2001).

³⁰ *Id.*

³¹ Joshua Marquis, *The Kittles Case and its Aftermath* 2 ANIMAL L. 197, 198 (1996). Her case also inspired the “Kittles” Bill, enacted by the Oregon legislature in 1995, which amended animal cruelty legislation making serious animal cruelty a felony, and allowed the state the right to treat and care for animals seized pending case resolution.

Kittles had 48 cats seized from a small trailer where she was living in Wyoming, although she was not charged.³² The legal system is evidently unable to address what is compelling this woman, and many others like her, to hoard animals. What is required is a more concerted approach that takes into account the psychological variables that may impact on this behaviour.

III. LEGAL IMPLICATIONS: CHALLENGES TO PROSECUTION

In Canada, laws that protect animals from cruelty and abuse are woefully insubstantial. The federal *Criminal Code*³³ contains provisions that address the issue of animal cruelty, and each province has animal welfare legislation that can be invoked to address animal cruelty.³⁴ Under the *Criminal Code*, animals are designated as property and have no real rights aside from their value as property owned by citizens. Sections 444 to 447 provide for prohibitions against cruelty to animals and were recently amended in 2008; however, the Senate Bill that amended the provisions against animal cruelty changed very little, and as in the past, the majority of those who abuse animals will continue to escape punishment. The Bill, S-203,³⁵ enacted in June 2008, simply increased the penalties for animal cruelty crimes and continues to make it nearly impossible to punish the crime of neglect, nor does it criminalize the breeding and training of animals to fight. Under § 445.(1), it states now that:

Everyone commits an offence who, wilfully and without lawful excuse,

³² *Animal Abuse: Wyoming Needs to Toughen Animal Cruelty Legislation*, Tribune-Eagle, Aug. 27, 2002, <http://www.highbeam.com/doc/1P2-15846021.html>.

³³ Criminal Code, R.S.C. 1985, c. C-46 (Can.).

³⁴ Most provinces have statutes that specifically contain provisions that deal with the safety and welfare of animals, although they vary widely in terms of the issues covered and level of enforcement. See Prevention of Cruelty to Animals Act, R.S.B.C. 1996, c. 372 (B.C.); Animal Protection Act, R.S.A. 2000, c. A-41 (AB); The Animal Protection Act, R.S.S. 1999, c. A-21.1 (SK); The Animal Care Act, C.C.S.M. 1996, c. 84 (MB); Consolidation of Dog Act (Nunavut) R.S.N.W.T., 1988, c. D-7 (NU); Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36 (ONT); Animal Health Protection Act, R.S.Q. c P-42 (QC); Society for the Prevention of Cruelty to Animals Act, R.S.N.B. 1973, c. S-12, s. 0.1 - 32(2) (NB); Animal Cruelty Prevention Act, 1996, c. 22, s. 1 (NS); Animal Protection Act, R.S.N.L. 1990, c. A-10 (NL); Part iv: Animal Protection Section of Animal Health and Protection Act and Companion Animal Protection Act . c. 2001 C-14.1 (PE); Animal Protection Act, 2002, R.S.Y. ch. 6 (YK). However, while provincial legislation does focus on the issue of “distress”, it does not have the reach of federal law and the penalties are less onerous.

³⁵ *An Act to amend the Criminal Code* (cruelty to animals).

- (a) Kills, maims, wounds, poisons, or injures dogs, birds, or animals that are not cattle and are kept for a lawful purpose;
- or
- (b) Places poison in such a position that it may be easily consumed by dogs, birds, or animals that are not cattle and are kept for a lawful purpose.

The definition here and in § 446.1 retains the “wilful” designation which serves as a real and significant barrier to prosecuting cases of animal cruelty in this country.

Over several years, various members of the Liberal government have put forward a number of private member Bills to amend the *Criminal Code* that have attempted to drastically change the way animal cruelty cases are dealt with. To date, none have gone further than a first reading in the House of Commons, but the latest iteration (Bill C-274³⁶) was introduced in the fall of 2011. This Bill allows for greater ease of prosecution of animal cruelty cases by replacing “wilful neglect” with a negligence standard and introduces the idea of recklessness with respect to causing unnecessary pain or suffering or injury to an animal.³⁷ It makes it a crime to promote, assist, or receive money for fighting or baiting animals, as well as administering a poisonous or injurious drug to a domestic or wild animal.³⁸ Moreover, promoting, arranging, conducting, or assisting in or receiving money for any type of contest or display involving trapping or shooting animals as they are liberated from captivity is criminalized.³⁹ Punishment for all of these offences ranges from fines of a maximum of ten thousand dollars or imprisonment of up to five years.

What is particularly significant about this bill is that it also criminalizes the failure to provide adequate care for animals through either willfully or recklessly abandoning or negligently failing to provide adequate food, water, air, or shelter for an animal or injuring an animal while it is being conveyed.⁴⁰ It further defines negligence as “departing markedly from the standard of care that a reasonable person would use.”⁴¹ The negligence-based offences carry lesser penalties, with fines not exceeding five thousand dollars and terms of imprisonment not exceeding more than two years. This bill also allows for judges to prohibit or ban ownership of animals for determined periods of time for

³⁶ Bill C-274, *An Act to amend the Criminal Code* (animal cruelty), First Reading, September 19, 2011.

³⁷ *Id.* at § 182.2(1)(a).

³⁸ *Id.* at § 182.2(1)(c-d).

³⁹ *Id.* at § 182.2(1)(e).

⁴⁰ *Id.* at § 182.3(1)(a-b).

⁴¹ *Id.* at § 182.3(2).

either cruelty or negligence based offences after a second or subsequent offence, for a minimum of five years and can order costs be paid to an organization where they are ascertainable.⁴² Unlike previous bills of this nature, C-274 introduces the crime of willfully or recklessly poisoning, injuring, or killing a law enforcement animal,⁴³ and a law enforcement animal is defined as “a dog, horse, or any other animal used by a peace officer or public officer in the execution of their duties.”⁴⁴ This latter crime carries penalties of fines not exceeding ten thousand dollars and terms of imprisonment not in excess of five years. While far-reaching, the likelihood of this Bill becoming law is highly questionable given the history of previous attempts.

The current lack of a negligence standard is particularly problematic for prosecuting animal hoarders. If such a standard was present, it could allow for prosecution in cases where the behaviour departed markedly from the standard of care a reasonable person would use. In the case of animal hoarders, they are generally not wilful or malicious in their neglect of the needs of animals in their care, but rather are often motivated by altruism for the plight of stray animals or love of animals in general. What becomes problematic is when animal breeding becomes out of control and they are no longer able to care for the growing number of animals in their care. Courts would likely be more inclined to find for cruelty in cases where large numbers of animals are kept in unsanitary conditions, in spite of a lack of intent. Providing the law with more power may help in addressing animal cruelty, but what is also needed is greater volition on the part of judges to interpret and enforce the law in cases of blatant cruelty. At the same time, the criminal justice system is only one means of addressing this complex and disturbing problem.

Given that there is no actual provision in Canadian law that addresses animal hoarding,⁴⁵ it is difficult to get a sense of how often these cases come to court and how they are dealt with. The results of a

⁴² *Id.* at § 182.4(1)(a-b).

⁴³ *Id.* at § 182.7(2).

⁴⁴ *Id.*

⁴⁵ See R.B.C. M., c. C-10 (QC); It could be argued that the various municipal by-laws throughout the country that limit the number of animals that can be kept in a residential dwelling indirectly address the problem of animal hoarding. In fact, a recently amended by-law in the city of Montreal, Quebec concerning dog and animal control limits the number of cats (four) and dogs (two) that can be kept in a dwelling. Ostensibly this was amended to address complaints about occupants of dwellings who were keeping large numbers of cats and to avoid “public-health issues.” Ville de Montréal, *available at* http://ville.montreal.qc.ca/portal/page?_pageid=4377,6055912&_dad=portal&_schema=PORTAL.

search of Canadian case law turned up three reported cases⁴⁶ whereby the number of animals seized gave a sense that these were likely hoarding cases. In the case of *R. v. Stewart*,⁴⁷ an elderly couple with psychiatric problems living in a small apartment were found guilty of animal cruelty by failing to provide suitable and adequate water and food to 50 cats, kittens, and dogs who were found living in conditions of disease, distress, and suffering (under § 446(1)(a)). This was not the husband's first offence, and the penalties imposed by the court included 60 days incarceration for the wife and 75 days incarceration for the husband, as well as a reimbursement to the Ontario Society for the Prevention of Cruelty to Animals ("SPCA") of \$595 each for the removal and care of the animals. In addition, part of the probation order sought for both defendants by the prosecution was a prohibition from "owning, having the custody or control for any animal for a period of two years."⁴⁸ However, the defense attorneys argued that mitigating circumstances included the couple's good intentions in spite of the result, as well as the fact that the harm was due to negligence and oversight and not torture. At the same time, Judge Moore recognized that the defendants lacked insight and empathy to their animals' situation, and the sentences he handed down were meant to send a message of denunciation and general deterrence, which Moore described as being based on the fact that pet owners have a special role of care and trust towards their animals that the defendants had egregiously violated.

In the case of *R. v. MacIsaac*,⁴⁹ a mother and daughter were charged separately with animal cruelty under the *Animal Cruelty Prevention Act* of Nova Scotia.⁵⁰ The daughter had 27 dogs and puppies and 78 cats; the mother had 24 dogs and one cat in their respective homes, all in situations of filth and neglect, with neither food nor water visible. Both had been operating shelter/rescue operations. However, the Nova Scotia law makes it a strict liability offence in such case, "no

⁴⁶ A *Quicklaw* search of all 93 "animal cruelty" cases in Canada, as of February 17, 2012, revealed only three that could be classified as probable animal hoarding cases. This was done by a process of elimination: cruelty cases with one or two animal victim(s) were eliminated, as were those cases where large numbers of animals were seized from breeders or farmers, leaving only three cases where large numbers of animals were seized from individuals or couples. While an imperfect methodology that would likely not stand up to scientific rigour, this method was used to gain some sense of how these cases are dealt with by Canadian courts. However, the focus was solely on reported cases, which serves as another level of filtering and does not account for all actual cases of animal hoarding where charges had been brought or those cases where charges may be initiated and later dropped.

⁴⁷ *R. v. Stewart* (2008) O.J. No. 5493.

⁴⁸ *Id.* at ¶ 26.

⁴⁹ N.S.J. No. 648 (2008).

⁵⁰ Animal Cruelty Prevention Act, S.N.S. 1996, c.22 (1996).

owner of an animal or person in charge of an animal shall cause or permit the animal to be, or continue to be, in distress.”⁵¹ Thus, there is no requirement to establish *mens rea* or wilful intent in order to ascertain liability in these cases. In this instance, both pled guilty, but the defense counsel had indicated that they were running pet rescue shelters and had incurred substantial financial debts as a result of the animals in care. In both cases, the defendants had suffered from psychological difficulties but lacked intentionality; they were described as “victims of their own success” and ended up taking on far too many animals. Ultimately, the sentence reflected denunciation, specific and general deterrence, as well as considerations of their rehabilitation. They both received \$1000 fine, a 20 year ban on owning animals or operating commercial operations relating to animals with a few exceptions⁵² (i.e., they were permitted to keep a small number of the current pets they owned and must allow the SPCA of Nova Scotia to inspect their homes at any time).

The third case, *R. v. Baker*, involved a seizure of 65 animals living in poor conditions from a property in Ontario, but the appeal revolved around the constitutionality of the warrant in the initial search.⁵³ Baker was originally acquitted of animal cruelty charges when the Ontario SPCA entered his property to search and seize the animals on the basis that the warrant was not executed properly. The initial warrant had only authorized one agent of the SPCA and one veterinarian to enter the property, but in fact six agents, a veterinarian, and two police officers entered the property at that time. On appeal, it was found that the search was conducted reasonably and there was no *Charter*⁵⁴ breach, thus a new trial was ordered.

What is interesting in these cases is the role of the so-called “benevolent” intentions of animal hoarders. In spite of the resulting extreme suffering, it seems their benevolence or good intention is used at times as a mitigating factor in sentencing, as seen in *R. v. Stewart* and *R. v. MacIsaac*. In the case of *R. v. Stewart*, Judge Moore, described the case as clearly not the “worst offence” in spite of the fact that:

⁵¹ *Id.*

⁵² A lifetime ban on owning cats was recently instituted for a Saskatchewan man who had 40 cats seized (10 were immediately euthanized) from his property living in horrific conditions; he was also fined and ordered to pay restitution to the Saskatchewan Humane Society. This lifetime ban seems somewhat unusual, and perhaps difficult to enforce, given how easy it is to come across stray cats. *Huel Can't Own Cats*, REGINA LEADER POST (Aug. 14, 2008), http://www.canada.com/reginaleaderpost/news/city_province/story.html?id=a2f048c9-0c12-42e4-879e-822f2a7400d0.

⁵³ O.J. No. 4102 (2004).

⁵⁴ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

amongst the various ailments were cats missing fur, ear mites, caked and closed eyes, discharge flowing from eyes and noses... many cats could be heard wheezing, some cats were but skin and bones. Diarrhea and urine was visible in some areas in the apartment. One cat, in particular, had severely burnt paws from exposure to urine.⁵⁵

One shudders to think what would constitute the “worst” offence. At the same time, Judge Moore recognized that the defendants lacked insight and empathy to the situation of their animals. For most animal hoarders, there is often evidence of compassion and some warped sense of caring for animals, which should raise red flags for officials. For animal hoarders the issues are not simply about cruelty, but rather indicate other deep-seated problems that the criminal justice system appears ill-equipped to address.

A further challenge once animal hoarding cases are actually prosecuted surrounds what happens to the seized animals. Unless the owner voluntarily gives up custody of the animals, which remain their property until otherwise decided by a court, then a huge burden falls on local shelters to either house the animals or find foster homes for them for the duration of the case. While seizure of animals can occur in any case of animal cruelty, the results are particularly problematic in hoarding cases due to the sheer number of animals involved. As discussed, the majority of animals seized in these cases will have suffered long-term neglect, and many will have to be euthanized. The ones who survive will likely require a great deal of veterinary attention for their medical needs, but also will need help in socialization, both with other animals and with humans. The financial costs of rehabilitating these animals are vast and often tax already over-burdened shelters whose ever-shrinking budgets rely increasingly on private donations. The often diseased and dying animals may be kept with other animals waiting to be adopted, exposing them to disease and causing great overcrowding problems. Thus, in turn, creating hidden costs for shelters that must pick up the slack when animal hoarders are prosecuted. Moreover, a long period of time can pass between the seizure of animals and the ultimate adjudication of cruelty charges.

If charges are brought under the *Criminal Code*, there is unlikely to be a disposition of goods hearing, so animals must remain in shelters or in foster care until the case is decided. Under provincial animal welfare legislation, disposition of goods hearings may occur shortly after animals are seized but prior to the merits of the case being

⁵⁵ *Id.* at ¶ 13.

heard. While this may seem like a better option in terms of the animals' long-term care, in those cases where charges are dropped or if there is insufficient evidence to move forward, the animals may have to be returned to the owner and placed back in those same conditions of neglect. While seizing animals on a legal warrant to seize property is one way to remove animals from these horrific conditions, having the animal hoarder surrender the animals voluntarily is another route. In the latter cases, this option may be pursued where there is insufficient evidence to warrant a prosecution but enough concern that the animals may be at risk. Given that in most cases animal hoarders believe that they are saving animals or that they are providing care even in face of horribly neglectful conditions, they would also most likely be reluctant to voluntarily surrender them.

Perhaps lessons can be learned from other jurisdictions. In particular, the state of California has comprehensive animal protection laws, specifically the California Penal Code: Animal Welfare Provisions § 597, Cruelty to Animals, provides substantial penalties for animal cruelty whereby anyone who "maliciously and intentionally maims, mutilates, tortures or wounds a living animal or maliciously and intentionally kills an animal" is subject to imprisonment and fines of up to \$20,000. Moreover, the cruelty provisions in this code are quite encompassing and extend to a large number of behaviours, including deprivation of food, water or shelter or causing unnecessary suffering. Thus, anyone who

overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, drink, or shelter, cruelly beats, mutilates, or cruelly kills any animal, or causes or procures any animal to be so overdriven, overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, drink, or shelter, or to be cruelly beaten, mutilated, or cruelly killed; and whoever, having the charge or custody of any animal, either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses any animal, or fails to provide the animal with proper food, drink, or shelter or protection from the weather, or who drives, rides, or otherwise uses the animal when unfit for labor, is for every such offence, guilty of a crime punishable as a misdemeanor or as a felony or alternatively punishable as a misdemeanor or a felony and by a fine of not more than twenty thousand dollars (\$20,000).⁵⁶

⁵⁶ Cal. Penal Code § 597.

Furthermore, this law extends protection to endangered species, animals in pet shops, and animals in confinement. The California Penal Code also addresses prohibitions against fighting animals (birds and dogs) and punishments for neglect of animal care. It is likely that animal hoarders could be convicted under this legislation in a number of places, particularly § 597(a) and (b).

In 2002, the state of Illinois amended the *Act Concerning Cruelty to Animals* to include a definition of “companion animal hoarder” as:

[a] person who (i) possesses a large number of companion animals; (ii) fails to or is unable to provide what he or she is required to provide under Section 3 of this Act; (iii) keeps the companion animals in a severely overcrowded environment; and (iv) displays an inability to recognize or understand the nature of or has a reckless disregard for the conditions under which the companion animals are living and the deleterious impact they have on the companion animals’ and owner’s health and well-being.⁵⁷

Moreover, if convicted of cruelty under this law and having also been designated as a companion animal hoarder, the court may order a psychological or psychiatric evaluation and/or treatment, where deemed appropriate.⁵⁸ This amendment to the law was inspired by the case of Cheryl Dashke, who, in 2000, was found living with 127 neglected animals in a trailer, as well as nine dead cats in her refrigerator. A lawyer with the ASPCA took a number of photographs of the extent of the neglect which in turn were instrumental in generating support for the *Companion Animals Act of 2002*.⁵⁹ At this juncture it is not known whether this amendment to address animal hoarding has had the intended effect.

IV. REMEDIES: WHAT CAN BE DONE?

In terms of prevalence, the ASPCA has estimated that there are 900 to 2,000 new cases of animal hoarding every year in the United States, victimizing over a quarter million animals annually.⁶⁰ While it

⁵⁷ 510 ILCS 70/2.10.

⁵⁸ 510 ILCS 70/3; 510 ILCS 70/3.01.

⁵⁹ *Honoring Animal Victims: Landmarks in Legislation, Animal Legal Def. Fund* (Feb. 10, 2009), http://www.aldf.org/downloads/ALDF_Honoring_Animal_Victims_Landmarks.pdf.

⁶⁰ *Animal Hoarding*, ASPCA (2012), <http://www.aspc.org/fight-animal-cruelty/animal-hoarding.html>.

is difficult to estimate the actual numbers in Canada, the three reported cases are clearly just the tip of the iceberg, and countless other cases go unnoticed and unreported. In fact, the Canadian Federation of Humane Societies now contains information about animal hoarding on its website in order to better educate the public about what constitutes animal hoarding, as well as how to find out more information about this problem.⁶¹ However, educating the public is only the first step in addressing hoarding, which is so devastating for large groups of animals. What is required is a concerted effort from different agencies working in conjunction to address the problem to the extent that it does not reoccur.

Some argue that animal hoarding is “beyond the law”⁶² and that it will continue to occur in spite of animal cruelty legislation aimed at addressing it. Given the inherent difficulty in addressing animal cruelty more generally in Canada, the outlook for addressing animal hoarding is somewhat bleak. As argued earlier, animal hoarding may be viewed as a manifestation of a mental health problem and perhaps should not be investigated and prosecuted in the same way as other animal cruelty cases. The Illinois amendment to include companion animal hoarding as a category under its animal cruelty legislation also includes a provision allowing a court to order a psychiatric/psychological evaluation and/or treatment, which illustrates a recognition of the extreme nature of this behaviour and the need for a more nuanced response than simply punishment through the criminal law. However, while animal hoarding behaviour may have roots in some form of psychological disturbance or pathology, the fact that a court can actually order evaluation or treatment may cross an individual’s civil liberty rights. On its face, this provision is laudable; however, it may raise other concerns that conflict with recognized constitutional rights.

As noted early, what appears to be problematic about animal hoarding is that such cases tend to fall between the cracks of multiple jurisdictions – federal/provincial/state/municipal governments, departments, agencies, and services.⁶³ Early rationales offered for not intervening in many of these cases was that it was a “lifestyle” choice and not a public health or mental health issue.⁶⁴ There is now a greater recognition that this issue has mental health implications with concomitant implications for animal welfare, one that requires a co-ordination of services from law enforcement, animal protection, and mental health professionals.

⁶¹ Canadian Federation of Humane Societies, *available at* http://cfhs.ca/athome/animal_hoarding/.

⁶² Avery, *supra* note 7, at 13.

⁶³ Patronek, *supra* note 3.

⁶⁴ *Id.* at 86.

V. CONCLUSION

It appears that the criminal law in Canada is unable to adequately address the issue of animal hoarding and is equally ineffective in dealing with cases of animal cruelty more generally. As long as criminal law fails to embrace a negligence standard and continues to require evidence of wilfulness, the majority of animal cruelty cases will likely never make it to the courts. The resultant effect is that scores of animals will remain abused, neglected, and maltreated. Even if criminal law were to be modified at some time in the future to allow greater flexibility in prosecuting those who abuse animals, it is unlikely that animal hoarders will be caught in this web given the many psychological antecedents to this behaviour. Yet a negligence standard would be difficult to apply to animal hoarders as their capacity to understand the suffering of hoarded animals in their care may be clouded by their own suffering, and the likelihood of this behaviour repeating is extremely high.

While federal legislation, found in the *Criminal Code*, has changed very little since 1892 when it was first enacted, several provinces through various animal welfare statutes are attempting to fill in the gaps, but with less reach and less clout. However, there is some overlap as certain offences deemed “illegal” in provincial statutes may also be pursued as “criminal” through the *Criminal Code*. Given this overlap, when abuse occurs, charges may be laid under either the provincial or federal legislation or both. It has been noted that:

In general, provincial laws usually have broader, stronger protections for animals than the Criminal Code and include specific standards of care that animal owners must adhere to (which the code does not). Because of this, enforcement officials in provinces that have broad, comprehensive animal welfare legislation tend to lay charges under the provincial law more frequently than under the Criminal Code.⁶⁵

Moreover, prosecutions under provincial regulatory statutes for regulatory offences are easier to prove and often do not require evidence of intent or fault as do offences under the *Criminal Code*.

A comprehensive report in 2012 comparing the animal protection laws of the Canadian provinces and territories by the Animal League Defense Fund noted that Quebec, Prince Edward Island, Northwest

⁶⁵ *Animals in the Law: Provincial legislation*, CANADIAN FEDERATION OF HUMANE SOCIETIES, http://cfhs.ca/law/provincial_legislation/ (last visited Oct. 15, 2011).

Territories, and Nunavut were rated as provinces where “animal abusers get off easy,” while Ontario, Manitoba, and British Columbia have strong protective legislation for animals.⁶⁶ For the weaker provinces, the difficulties include minimal fines and penalties, a limited range of protections, and a lack of basic care standards, whereas the so-called stronger provinces have stiffer penalties for offenses.

When adjudicating hoarding cases, some judges have allowed hoarders to keep one or more spayed or neutered animals following prosecutions for hoarding.⁶⁷ This occurred in *R. v. MacIsaac*,⁶⁸ whereby the defendants were allowed to keep a number of pets they had owned previous to the seizure of the other animals, subject to periodic visits from the SPCA. This approach recognizes and acknowledges not only the strong emotional attachment hoarders have to their animals, but also the increased likelihood that hoarders will seek out and own animals anyway, in spite of an ownership ban. What this paper has underlined is that the law is clearly not enough, that enforcement is sporadic at best, and most hoarders simply go on to re-offend. However, one innovative means of addressing the issue of animal hoarding, developed by the Massachusetts SPCA, involves working in conjunction with social workers to intervene immediately with first-time hoarders. The idea behind this strategy is to work directly with animal hoarders in developing trust and connecting them with community services that will help them in living with their compulsive behaviour.⁶⁹ While these efforts are admirable, what may be needed is a task force approach, as recommended by Avery,⁷⁰ bringing together all interested parties, including animal welfare agencies, mental health agencies, child and adult protection services, municipalities, fire and police departments, veterinarians, and the legal system. Such a taskforce would need to convene only in cases where animal hoarders are identified, and with some coordination, each agency could bring a certain expertise to the table and address a particular need represented by the behaviour of animal hoarders. While perhaps initially a costly endeavour, by better addressing the problem of animal hoarding through more specialized services, the long-term savings could be enormous in terms of preventing recidivism. The possibility of preventing mass scale suffering of these animals demands no less.

⁶⁶ 2012 Canadian Animal Protection Laws, June 2012, <http://aldf.org/downloads/ALDF2012CanadianRankingsReport.pdf>, at p.2 (last visited Sep. 18, 2012).

⁶⁷ Avery, *supra* note 7, at 14.

⁶⁸ *R. v. MacIsaac* (2008) N.S.J. No. 648.

⁶⁹ Avery, *supra* note 7, at 14.

⁷⁰ *Id.* at 14.

PROPERTY STATUS AND THE LIMITED IMPACT OF WELFARE LEGISLATION FOR FARM ANIMALS

LEE J. McCONNELL*

I. INTRODUCTION

In England, the laws that purport to protect animals from abuse have been in development for around 200 years, but the prevailing legal approach and all currently enforceable legislation is rooted in welfare, where animals are protected by virtue of their status as property rather than via the ascription of legal rights. As will be demonstrated, this is a legal position that permeates world jurisdictions. Rather than permitting gradual reform to husbandry and slaughter standards, welfare legislation can often serve to refine and ingrain farming practices and property status based on human and economic interests, while the interests of animals are conveniently side-lined. Given the explicit commoditization of animals for human consumption and economic benefit in the agriculture industry, this article will focus exclusively on the protection of farm animals and the impact of property status. It has been suggested that despite their apparent entrenchment in the contemporary laws governing animals, welfare provisions are a relatively recent phenomenon¹ with protection historically arising from the pragmatic agricultural practices employed on small farms. Welfare was not as much of a concern since animals were generally part of the labour and transport on farms and not raised solely as food, and “as a general proposition, it remains accurate to suggest that people have little incentive to harm their own property.”² But by the end of the 18th century, society’s reliance on animals had increased, and intensive farming practices had become more commonplace.³

* Lee J. McConnell is a PhD candidate at Northumbria University School of Law, Newcastle upon Tyne, UK. This article is based on a paper delivered at the Critical Perspectives on Animals in Society Conference held at the University of Exeter on March 10, 2012.

¹ ANIMAL LAW IN AUSTRALASIA, 10 (Peter Sankoff & Steven White eds., Federation Press, 2009).

² *Id.* at 11.

³ Daniel Defoe, *A Tour Thro’ the Whole Island of Great Britain* 313 (1971) [hereinafter RADFORD] cited in M. RADFORD, ANIMAL WELFARE LAW IN BRITAIN: REGULATION AND RESPONSIBILITY, 18 (Oxford University Press, 2001).

The Food and Agriculture Organization of the United Nations (FAO) estimates that over 60 billion animals are used worldwide per annum to produce meat, milk, and eggs.⁴ These rising figures, and the correlative propensity for the suffering of animals in agriculture, demonstrate the importance of effective legal protection. Accordingly, I will first establish the underlying ethical and moral dimensions which have shaped the early development of the English law governing animals, highlighting the role that property status has played. I will then examine the contemporary laws that purport to protect animals in England through analysis of the provisions of the Animal Welfare Act 2006. Further illustration will later be drawn from global jurisdictions in discussion of the conflicting views of animal advocates – those who claim that apparent improvements to animal welfare via legislative provisions are an effective and incremental means of enhancing protection, and those who submit in opposition that welfare campaigns orchestrated under the current system are bound by human and economic interests, fail to confront or protect against the main sources of animal suffering, and may instead serve to further embed them.

II. THE LEGAL DEVELOPMENT IN ENGLAND

The aim of the following section is to provide historical context by charting the early case law concerning animal cruelty, as well as the attitudes of legal scholars and philosophers at the time that welfare legislation was first contemplated. Though it is beyond the scope of this article to include a complete enumeration of shifting societal attitudes towards animals, it is nevertheless illuminating to consider contemporary legal provisions in the light of protracted legislative change and the seemingly entrenched property status of animals.

A. Moral Shifts and Early Legal Development

Compassion for animals is by no means a new philosophical consideration, as evidenced by the calls to abstain from eating animal flesh made by theologians such as Tertullian in the early centuries AD⁵ and the earliest attempts at enacting legislative protection for animals

⁴ See Food and Agriculture Organisation of the United Nations (FAO) Animal production/livestock online database FAOSTAT, 2010, http://faostat.fao.org/Portals/_Faostat/Downloads/zip_files/Production_LivestockPrimary_E_All_Area_Groups_1.zip (last visited January 9, 2013).

⁵ H. WILLIAMS, *THE ETHICS OF DIET: A CATENA OF AUTHORITIES DEPRECATORY OF THE PRACTICE OF FLESH-EATING*, 52 (University of Illinois Press, 2003).

between the 17th and 19th centuries.⁶ Despite this apparent ethical recognition, the prevalent attitude historically has been one that asserts the dominance of humankind over animals, as is clearly visible in the work of naturalist legal philosophers such as Thomas Aquinas, who emphasised the human relationship with the divine.⁷ This thinking served as reinforcement to the hierarchical relationship between humans and animals attested by philosophers such as Aristotle,⁸ adding weight to the view that animals were property for human control. Further, the influential assessment of their sentience by René Descartes, as he equated animals to “automata, or moving machines”⁹ able to display “a realistic illusion of agony,”¹⁰ continued to “underpin prevailing religious and philosophical conventions.”¹¹ The significance of the property status of animals is clearly apparent in the first major prosecutions that arose in respect of animal cruelty. The illegality of these acts arose on the basis of destruction or depreciation of another’s property rather than any infringement of legal rights or interests enjoyed by animals. In the 1793 case of John Cornish, a man was found not guilty of maliciously maiming a horse by ripping out its tongue, the judge determining that he could only have been guilty if it was “shown that the wounding occurred because of malice shown towards the owner [of the horse.]”¹² Property rights and ownership were the main criteria on which a successful prosecution could be brought.

The move to substantially legislate in protection of animals is evidenced by the work of John Lawrence who expressly requested that “the Rights of Beasts be formally acknowledged by the state, and that a law be framed upon that principle, to guard and protect them from flagrant wanton cruelty.”¹³ Lawrence too rejected Cartesian ideals, complaining that “it has ever been and still is the invariable custom of

⁶ An Act that No Butcher Flea any Manner of Beast within the Walls of London, 1488 Hen. 7, c. 3.; Act against Plowing by the Tayle, and Pulling the Wooll off Living Sheep, 1635 (Ir.).

⁷ G. STEINER, *Anthropocentrism and its Discontents: The Moral Status of Animals in the History of Western Philosophy*, 130 (University of Pittsburgh Press 2010).

⁸ ARISTOTLE, *Politics*, 34 (Benjamin Jowett trans. Dover Publications, 2000).

⁹ R. Descartes, A Discourse of Method, Pt. 5, reproduced in E. Chávez-Arviso (ed.), *Descartes: Key Philosophical Writings* 107 (E. S. Haldane & G. R. T. Ross trans. Wordsworth Editions Ltd, 1997).

¹⁰ R. Descartes, cited in D. Thomas, *Lab Animals and The Art of Empathy*, 31 *J MED. ETHICS* 197, 197 (2005).

¹¹ RADFORD, *supra* note 3, at 17.

¹² S. BROOMAN & D. LEGGE, *LAW RELATING TO ANIMALS*, 40 (Cavendish Publishing 1997) (citing E. S. TURNER, *ALL HEAVEN IN A RAGE* 104 (Centaur Press, 2nd Ed., 1992)).

¹³ John Lawrence, *On the Rights of Beasts* (1799), reprinted in E.B. NICHOLSON, *THE RIGHTS OF AN ANIMAL: A NEW ESSAY IN ETHICS* 78, 78 (1978).

the bulk of mankind – not even excepting legislators, both religious and civil – to look upon brutes as mere machines; animated, yet without souls.”¹⁴ By 1822, England had passed its first major piece of protective legislation known as Martin’s Act,¹⁵ and in 1911, the landmark Protection of Animals Act provided the primary consolidated source for the regulation of animal protection, which stood for almost a century. The 1911 Act brought with it the offence of cruelty,¹⁶ a breach of which could be established if owners failed to exercise reasonable care and supervision in respect of protection,¹⁷ as well as some regulation of living conditions.¹⁸

In 1964, the Brambell Committee issued findings of numerous faults with the virtually untouched 1911 Act.¹⁹ The findings included the absence of precise definitions of intensive livestock husbandry and suffering, as well as inadequate safeguards against neglect.²⁰ Some of the principal recommendations of the committee were eventually enacted in the Agricultural (Miscellaneous Provisions) Act 1968, which was the first legislation to employ the term welfare.²¹ This statute laid the framework for the progression of animal welfare legislation, setting out guidelines for the prevention of unnecessary pain and distress²² and for the implementation of regulations and codes of recommendation for the welfare of livestock.²³ Regulations could be implemented without major statutory change. Accordingly, the Act was used to incorporate numerous EC directives, including the Welfare of Livestock Regulations 1994,²⁴ which covered the majority of agricultural livestock. With this context in mind, the substantial issues arising from welfare protection and property status will next be examined in detail in respect of the current English legislation.

¹⁴ *Id.* at 79.

¹⁵ An Act to prevent the cruel and improper Treatment of Cattle, 1822, 30 Geo. 4, c. 71 (U.K.).

¹⁶ Protection of Animals Act, 1911, 1 & 2 Geo. 5, c. 27, §1 (U.K.) [hereinafter Protection of Animals Act].

¹⁷ *Id.* at § 1(2).

¹⁸ *Id.* at § 7.

¹⁹ Report of Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems, 1965, London: Ministry of Agriculture Fisheries and Food, Cmnd 2836, cited in RADFORD *supra* note 3, at 264.

²⁰ *Id.* at 223.

²¹ Agricultural (Miscellaneous Provisions) Act, 1968, c. 34 §§. 2-3 (U.K.).

²² *Id.* at § 1.

²³ *Id.* at §§ 2-3.

²⁴ Welfare of Livestock Regulations 1994, (U.K.).

B. Contemporary English Legislation – Animal Welfare Act 2006

Almost a century after its enactment, the Protection of Animals Act was eventually repealed and replaced by the Animal Welfare Act 2006 (AWA). The scope of this legislation includes any animal defined as “a vertebrate, other than man,”²⁵ and its main offences pertain to ‘protected animals,’ defined as being commonly domesticated or under the temporary or permanent control of man or not living in a wild state.²⁶ Clearly, these provisions cover animals in agriculture. However, despite the improved definitional clarity of the 2006 Act, the actual protection offered suffers extensive limitations. As will be demonstrated, the provisions often serve to ingrain common farming practices and property status, rather than encouraging enhanced husbandry standards, or acting as gradual stepping stones toward the recognition of limited legal rights for animals. To illustrate, two provisions of the Act will be examined in detail: Section 4 (Offence of cruelty) and Section 12 (which permits the enactment of additional regulations for the promotion of welfare, a breach of which may constitute an offence).

1. Section 4 of the AWA

A Section 4 offence of cruelty involves an act or omission which causes the animal to suffer by a person who knew or ought to have reasonably known that the act or failure to act would have that effect or was likely to do so.²⁷ Crucially, the legislation then stipulates that the suffering incurred must be ‘unnecessary,’²⁸ a problematic and subjective qualification which was also present in the 1911 Act.²⁹ The reforms suggested by Mike Radford in the Select Committee on Environment, Food and Rural Affairs’ first report prior to the enactment of the 2006 Act³⁰ are in line with the tests set out previously under the 1911 Act, calling for interpretation of the provision ‘by means of an objective test . . . on the basis of what a reasonable person in the position of the defendant would have known about the consequences of his or her conduct.’³¹ The previous guidance offered through case law in the interpretation of this concept remains relevant and places emphasis on the existence of ‘actual suffering’, as the destruction of an animal in ‘an appropriate and

²⁵ Animal Welfare Act 2006, c. 45 § 1(1) [hereinafter Animal Welfare Act].

²⁶ *Id.* at § 2.

²⁷ *Id.* at § 4(1)(a) - (b).

²⁸ *Id.* at § 4(1)(d).

²⁹ Protection of Animals Act, *supra* note 16, at §1(1)(a).

³⁰ See The Draft Animal Welfare Bill, December 8, 2004, HC 52-I. available at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmenvfru/52/52i.pdf>.

³¹ *Id.* at ¶ 82.

humane manner⁷ is excluded under the current legislation.³² Brooke LJ, in *Isted v. CPS*³³ illustrates this point in relation to shooting and injuring a neighbour's dog, noting that "they could not have convicted him of an offence... if the dog had been killed outright in circumstances where she did not suffer unnecessarily."³⁴ The assessment and interpretation of unnecessary suffering put forward in case law was considered in the Scottish case of *Tudhope v. Ross*³⁵ and later in *Hall v. RSPCA*³⁶ and *RSPCA v. Isaacs*.³⁷ The latter cases were decided on consecutive days, with the Divisional Court determining that the offence of cruelty is only committed when the suffering of an animal is "unnecessary in the sense of its not being inevitable despite proper husbandry."³⁸ The question then emerges as to what husbandry practices are held to be 'proper'.

Suffering incurred by animals during "accepted husbandry practices" which are commonly recognised and not prohibited by legislation will not constitute unnecessary suffering.³⁹ This point was illustrated in *Roberts v. Ruggiero*,⁴⁰ which concerned the raising of veal calves in narrow crates that prevented the calves from exercising or turning around. The practice has subsequently been banned in England, though at the time of the case Stephen Brown, LJ and Stoker, J refused to consider the legality of the husbandry system, or any evidence that alternative systems may alleviate suffering.⁴¹ Where practices are *not* held to be common or inevitable in animal husbandry, the standard for determining cruelty shifts to whether the act or omission was 'unreasonable' by the standards of a reasonably humane and caring person. In the aforementioned *Hall* case, where a pig farmer failed to seek veterinary care for his arthritic animals, the defendant's conviction was upheld with the Court ruling that ordinarily competent and humane modern pig farmers would have acted differently.⁴² It is also suggested that such a standard may impose an evidential burden on the prosecution to show that a reasonable person would have acted similarly to the defendant where suffering is not held to be an inevitable consequence of a customary practice.⁴³

³² Animal Welfare Act, *supra* note 25, at § 4.

³³ *Isted v. CPS* [1998] Crim LR 194.

³⁴ *Id.* (Brook, L.J., concurring).

³⁵ *Tudhope v. Ross* [1986] SCCR 467.

³⁶ *Hall v. RSPCA*, QBD, 11 Nov 1993.

³⁷ *RSPCA v. Isaacs*, [1994] Crim LR 517.

³⁸ Alan Bates, *Detailed Discussion of the Offences of Cruelty to Domestic and Captive Animals*, Animal Legal and Historical Center, Michigan State University - Detroit College of Law (2002), <http://www.animallaw.info/nonus/articles/ddukukocdca.htm> (last visited June 22, 2012) [hereinafter Bates].

³⁹ *Id.*

⁴⁰ *Roberts v. Ruggiero* [1985] QBD, 3 April 1985.

⁴¹ *Id.*

⁴² Bates, *supra* note 38.

⁴³ *Id.*

Roberts v Ruggiero is said to represent a narrow approach to the interpretation of unnecessary suffering. Here, magistrates applied a far more restrictive test, whether suffering was beyond that which was expected in the particular type of animal husbandry rather than in animal husbandry in general.⁴⁴ For example, the courts, by this standard, would determine whether the practice in question promotes suffering which is beyond the standard expected in intensively farmed poultry, rather than in poultry farming generally or animal agriculture at large. In practice, this approach has led to an avoidance by the courts of consideration of alternative farming practices.⁴⁵ It can therefore be argued that this provision does not promote increased standards in animal welfare, favouring instead traditional and potentially antiquated practices with no regard for the interests of animals and without consideration of a general standard of suffering.

The findings in *Ford v Wiley*⁴⁶ differ from the approach taken in *Roberts v Ruggiero* and can be said to constitute a broader approach. The case, which involved the painful removal of horns from cattle, offers guidance on the matter of necessity that has since been largely replicated in the AWA. It was held that an act required a legitimate aim, and that it be carried out in a manner in which the pain inflicted was proportionate to the objective sought.⁴⁷ Crucially, the matter of alternative systems of husbandry was factored into the assessment of the ‘necessity’ of suffering. Clearly, much rides upon whether the court chooses to adopt a restrictive approach or broad approach. Its interpretation dictates whether the court will assess the proportionality of the means and objectives of the farming practice, and consider potentially beneficial alternative husbandry methods. In the words of Justice Hawkins, the “useful end sought to be attained must be reasonably proportionate to the extent of the suffering caused, and in no case can substantial suffering be inflicted, unless necessity for its infliction can reasonably be said to exist.”⁴⁸

Expanded versions of these principal findings are now enshrined in Section 4(3) of the AWA. In its assessment of unnecessary suffering this provision considers the reasonable reduction or avoidance of suffering, and whether suffering was in conjunction with relevant codes or practices. It also factors in the presence of a legitimate purpose benefiting the animal or protecting other animals, persons or property, the proportionality of the suffering and its purpose, and whether the

⁴⁴ D. Rook, *The legality of Factory Farming under UK Law*, J Animal Welfare L, June 2007 at 2 [hereinafter Rook].

⁴⁵ R (CIWF) v. Sec’y of State for the Env’t, Food & Rural Affairs [2004] EWCA (Civ) 1009.

⁴⁶ *Ford v. Wiley* [1889] 23 QBD 203.

⁴⁷ *Id.*

⁴⁸ *Id.*, (Hawkins J., concurring).

conduct was that of a reasonably competent, humane person.⁴⁹ This balancing act between the perceived human benefits and the interests of animals is a crucial consideration in establishing the ‘necessity’ of the suffering incurred, and is a standard that some scholars consider to be a major flaw of welfare legislation in general. Gary Francione argues that the balancing process “is nothing more than an illusion in which the outcome has been predetermined in light of the very different status of the supposedly competing parties.”⁵⁰ He submits that it is impossible to balance the interests of humans as property owners against the interests of animals that exist as property, a means to human ends. He illustrates the position by reference to the common justification of intensive farming practices on the basis of the demand for high volumes of cheap meat products. Clearly, scope for the increased marketability of animals and customary or accepted husbandry practices play a major role in the balancing act, and animals’ status as property places them in a position of weakness against human interests. The point is illustrated in a legal context by *Bowyer v Morgan*,⁵¹ where the branding of lambs with hot irons on the nose was held to be cruel, though the practice was allowed to continue since it was reasonably necessary for identification and because it remained an accepted farming practice in Wales. Despite the pain suffered by the lambs, human interests and customary practices prevailed. It may therefore be argued that property status severely limits the ascription of sufficient protection and bolsters welfare provisions, which ‘fail completely to recognize that animals have any non-tradable interests.’⁵²

Francione is not without opposition, with Jerrold Tannenbaum among others defending the property status of animals, the development of anti-cruelty legislation, as well as the concepts of ‘necessary suffering’ and ‘legitimate purpose.’⁵³ Tannenbaum classifies Francione’s arguments as ‘activist view,’ an approach that calls for ‘fundamental changes in the law’s conception and approach to animals.’⁵⁴ He argues instead that there exist numerous flexible approaches to defining the legal concepts of property and cruelty outside of the Blackstonian

⁴⁹ Animal Welfare Act, *supra* note 25, at § 4(3)(a)-(e).

⁵⁰ Gary L. Francione, *Animals as Property*, 2 Animal L. (1996), <http://www.animallaw.info/articles/arusgfrancione1996.htm> (last visited June 22, 2012) [hereinafter Francione].

⁵¹ *Bowyer v. Morgan*, 95 L.T.R. 27 (K.B. 1906) cited in G. L. Francione, *Animals, Property and the Law*, (Temple University Press, 1995) at 147.

⁵² Francione, *supra* note 50.

⁵³ Jerrold Tannenbaum, *Animals and the Law: Property, Cruelty, Rights*, 62 Soc. Research. 539, 539 (1995).

⁵⁴ *Id.* at 541.

definition of property rights as ‘that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.’⁵⁵ Tannenbaum asserts that the ‘concept of property is sufficiently flexible to allow some property to be animate, sentient beings, and to allow that owners of certain kinds or items of property have legal obligations to this property, and for this property to have legal rights.’⁵⁶ The last part of this statement is illogical in that property technically cannot enjoy legal rights—such is the campaign for the recognition of animals as legal persons—however the flexibility of property status is a sentiment similarly expressed by scholars such as David Favre, who has pioneered the concept of ‘living property.’⁵⁷

Tannenbaum acknowledges Francione’s recognition that animals do not exist merely as chattels in the Blackstonian sense, but maintains his assertion that “activists” view and condemn the law for its traditional treatment of animals as property.⁵⁸ Ultimately, Tannenbaum points to the differences in the definition of “real” and “personal” property,⁵⁹ the potential limitations which can be placed on the use of property by the law and government ownership,⁶⁰ the legal limitations with respect to the treatment of wild animals, and the ascription of rights to particular groups of protected animals (such as great apes and bonobos).⁶¹ As such, Tannenbaum believes that the property status of animals does not preclude the enactment of legal duties toward them.⁶² He further concludes that there is no inherent bias in the balancing of human/animal interests, noting that numerous bans have been made (such as blood sports) despite potential human interests.⁶³ For Tannenbaum, there is nothing preventing the law from ascribing greater prohibitions or weight to the interests of animals, and any objections made on the basis that it is wrong to use animals for any purposes are “fundamental and . . . destined to be ignored by the legal system.”⁶⁴

In counterargument, Francione states that property status “militates strongly against significant improvement in our treatment of

⁵⁵ 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, 2.

⁵⁶ Tannenbaum, *supra* note 53, at 582.

⁵⁷ David Favre, *Living Property: A New Status for Animals within the Legal System*, 93 MARQ. L. REV. 1021 (2010).

⁵⁸ Tannenbaum, *supra* note 53, at 544.

⁵⁹ *Id.* at 542-43.

⁶⁰ *Id.* at 593.

⁶¹ *Id.* at 555-56.

⁶² *Id.* at 594.

⁶³ *Id.* at 586.

⁶⁴ *Id.*

animals”⁶⁵ and that if his critics were correct, there should be evidence over the passing years⁶⁶ “reflecting at least a nascent recognition of the inherent value of animals as opposed to their exclusively extrinsic value as property.”⁶⁷ Indeed, Francione recounts numerous instances of failure in areas animal advocates consider significant. These include supposed improvements in slaughterhouse standards⁶⁸ and EU legislation which he suggests are motivated largely by economic efficiency,⁶⁹ the apparent legislative triumphs in banning gestation crates which were motivated by economic factors, impacted few farmers, and fell decidedly short of an outright ban,⁷⁰ and the extremely limited improvements in legal standing in the US.⁷¹ Francione further disagrees with the claims made by Robert Garner that in many European countries factory farming is diminishing and far nearer being phased out by state legislation than in the US,⁷² which Francione dismisses as ‘certainly not accurate.’⁷³

Clearly the debate surrounding the type of provision established by Section 4 of the AWA is far-reaching and contentious. As has been identified through analysis of existing case law, the judicial system assumes that it is not the goal of welfare legislation to limit farming practices where the “moral imperative to avoid causing unnecessary suffering has been subjugated to the maximisation of economic profitability or other human benefits.”⁷⁴ As such, any law passed by parliament reflects the moral contradiction between the demand for cheap products and the aspiration of increased welfare standards.⁷⁵ Indeed, this supports Francione’s view, demonstrating the impediments to welfare legislation providing any meaningful changes in the protection of farm animals. It has therefore been argued that intensively farmed animals are effectively excluded from the scope of the provisions of AWA, since

⁶⁵ Gary L. Francione, *Reflections on Animals, Property and the Law, and Rain without Thunder*, 70 LAW & CONTEMP. PROBS. 9, Winter 2007, at 12 [hereinafter Francione II].

⁶⁶ Tannenbaum’s criticisms were published in 1995.

⁶⁷ Francione II, *supra* note 65, at 71.

⁶⁸ *Id.* at 13.

⁶⁹ *Id.* at 14 (regarding Singer/PETA’s claim to a success in campaigning for raised standards in slaughterhouses).

⁷⁰ Francione II, *supra* note 65, at 22-23 (regarding Florida’s ban on gestation crates).

⁷¹ *Id.* at 27-28 (regarding Animal Legal Defense Fund, Inc. v. Glickman 154 F.3d 426 (D.C. Cir. 1998) (en banc)).

⁷² *Id.* at 27.

⁷³ *Id.*

⁷⁴ Alan Bates, *Case Note: R (Compassion in World Farming Limited) v Secretary of State for the Environment, Food and Rural Affairs, The Reality Gap Lives On*, 1 Journal of Animal Welfare Law 12 (2005) (unpublished comment, on file with Journal of Animal Welfare Law; available at <http://www.alaw.org.uk>) [hereinafter Bates II].

⁷⁵ *Id.*

protection is dependent on the tests utilised by the court as to whether alternative and arguably more humane methods should be considered against standard systems of husbandry.⁷⁶ Section 12 of the AWA will next be examined in further illustration of the economic and human interests that stem from property status.

2. Section 12 of the AWA

Section 12 permits the implementation of regulations for the purpose of promoting the welfare of animals for which a person is responsible or the progeny of such animals. The most recent regulations issued by the government in respect of farm animals are the Welfare of Farm Animals (England) Regulations 2007 (WFAR). The provisions are similar to those under the previous 2000 regulations⁷⁷ but with an increased focus on alignment with the AWA and the continued implementation of EU legislation. The regulations impose a duty on persons responsible to meet the general conditions of Schedule 1 in relation to accommodation, free movement, food, water, and breeding procedures, as well as record keeping and inspection. The subsequent Schedules focus on the specific needs of the various animals used in agriculture including poultry and various caging/breeding systems, as well as the rearing and keeping of calves, pigs, boars, piglets, and rabbits.

A useful illustration of the application of this provision is the case of *R (Compassion in World Farming Limited) v Secretary of State for the Environment, Food and Rural Affairs*,⁷⁸ which considered the practice of the restrictive feeding of broiler chickens under the 2000 Regulations. Both broiler and breeder chickens reach their optimum slaughter weight in just 6 weeks, and since breeder chickens are required to stay alive long enough to reach sexual maturity at 18–24 weeks, feeding is severely restricted with evidence demonstrating resultant “chronic[] hung[er.]”⁷⁹ European directives implemented at the time guaranteed animals an “appropriate” diet for “their age and species” in “sufficient quantity to maintain . . . good health” and feeding intervals “appropriate to their physiological needs.”⁸⁰ In judicial review, it was argued that member States were required to actively ensure the minimum standards were

⁷⁶ Rook, *supra* note 45.

⁷⁷ Welfare of Farmed Animals Regulations, 2000 (Eng.).

⁷⁸ *R (CIWF) v. Sec’y of State for the Env’t, Food and Rural Affairs* [2004] EWCA (Civ) 1009.

⁷⁹ J. A. Mench, *Broiler Breeders: Feed Restriction and Welfare*, 58 *World Poultry Science Journal* 23, 24 (Mar. 2002), *cited in* Rook, *supra* note 44, at n.4.

⁸⁰ 1998 O.J. (L 122) 23-27 [hereinafter Council Directive], *see especially* Annex ¶ 14, 15, at 27.

met and that the breeding of broilers did not comply with paragraphs 14 and 15 of the annex. Both arguments were rejected by Newman, J, who found the requirement of keepers to take “all reasonable steps” was sufficient action by the UK in implementation,⁸¹ and secondly that though the chickens may have been found to be hungry, they could not be said to be starving. “[A] regime of restricted feeding is not in itself contrary to the law”⁸² as the need to “achieve a balance in connection with the health of broiler breeders was an attendant aspect of intensive farming systems.”⁸³

An appeal was later sought on the grounds that paragraph 22 of Schedule 1 contained a second, distinct requirement to promote a positive state of well-being which was not met under the restrictive feeding regime. Compassion in World Farming further criticised the assumed legality of the intensive farming of chickens with selective fast-growing genotypes under the provisions made in Schedule 1 of WFAR,⁸⁴ and the balancing of the economic interests of intensive farming systems against minimum standards of protection. The appeal was rejected without consideration of the legality of such genotypes, and it was held that there was no contradiction between the requirement to provide an appropriate diet for the age and species of the chickens, and the requirement to promote a positive state of well-being. It was further suggested by Sedley, LJ that it might “nevertheless be for consideration whether, if the ingredients of an offence [were] otherwise present, the use of a genotype which [made] suffering unavoidable [would] afford a defence.”⁸⁵ As it stood, the court had missed an opportunity to consider the legality of the farming practice with regard to the minimum standards set out by the WFAR. Instead they considered the reach of the legislation to go “no wider than requiring a balance to be struck between the welfare consequences of adopting different alternative feedings regimes within the existing intensive farming system.”⁸⁶ In this case, the minimum standards gave way to the apparently accepted intensive farming practices that were already in place.

⁸¹ *Compassion in World Farming Ltd. v. Sec’y of State for the Env’t, Food & Rural Affairs* [2003] EWHC 2850 (Admin), ¶ 41 (Newman, J.).

⁸² *Id.* at ¶ 58.

⁸³ *Bates II*, *supra* note 74, at 14.

⁸⁴ *Welfare Farmed Animals Regulations, 2000*, Schedule 1, ¶ 22 (Eng.).

⁸⁵ *R (CIWF) [2004] EWCA (Civ) 1009*, ¶ 57, (Sedley, LJ.).

⁸⁶ *Bates II*, *supra* note 74, at 16.

III. PARALLELS WITH NEW ZEALAND

New Zealand preceded recent legislative development in England with the enactment of the Animal Welfare Act 1999. The legislation, praised by Singer⁸⁷ for the limited legal rights bestowed upon great apes in respect of scientific research, was seen as a major breakthrough in the animal rights movement.⁸⁸ Great apes are now guaranteed three basic rights: “the right not to be deprived of life, not to suffer cruel treatment, and not to be subjected to medical or scientific experimentation.”⁸⁹ Despite the description of the Act as a “fundamental shift in the country’s legal system,”⁹⁰ Peter Sankoff believes the achievements are potentially overstated. At the time the legislation was enacted, only 34 non-human hominids were present in New Zealand, and none of them were involved in scientific research.⁹¹ Sankoff therefore suggests that though legally ground-breaking in some respects, in practice the millions of animals produced in agriculture in New Zealand annually⁹² have felt little improvement.

Schultz notes the irony of the primary motivation for legislative reform in New Zealand emanating from the agriculture industry itself,⁹³ largely provoked by economic factors borne out of the European Union, which threatened to tighten import restrictions on the out-dated New Zealand agricultural systems.⁹⁴ Here, legislative reform was largely motivated by trade and other human values, rather than concern for animal protection. In the mid to late 1990’s, the European Union issued provisions to study the differences between the laws of its trading partners, the effects on economic competition with EU products, and

⁸⁷ Peter Singer, *Legislative Breakthrough for Great Apes in New Zealand*, 15 *Caring for Animals* 6 (Winter 2000), (newsletter of the Canadian Federation of Humane Societies), cited in Peter Sankoff, *Five Years of the “New” Animal Welfare Regime: Lessons Learned From New Zealand’s Decision to Modernize its Animal Welfare Legislation*, 11 *Lewis & Clark Animal Law Review* 7, 9 (2005).

⁸⁸ Sankoff, *supra* note 87, at 8.

⁸⁹ Joseph Lubinski, *Introduction to Animal Rights*, Michigan State University-Detroit College of Law (2d ed. 2004), available at <http://www.animallaw.info/articles/ddusjlubinski2002.htm> (last visited June 22, 2012).

⁹⁰ *Id.*

⁹¹ Paula Brosnahan, *New Zealand’s Animal Welfare Act: What is its value Regarding Non-Human Hominids?*, 6 *Animal L.* 185, 186, cited in Sankoff, *supra* note 87, at 9.

⁹² Ministry of Agric. & Forestry, MAF’s Animal Welfare Mission 4 (Nov. 1999) available at <http://www.biosecurity.govt.nz/files/regs/animal-welfare/animal-welfare-in-nz.pdf>.

⁹³ Libby Shultz, *ARLAN Seminar Explores History and Intention of the Animal Welfare Act 1999*, 2 *ARLAN Newsletter* No. 4, (May/June 2003), <http://www.arlan.org.nz/phocadownload/may2003.pdf> (last visited June 22, 2012).

⁹⁴ *Id.*

“the [potential] for obtaining wider international acceptance of the welfare principles.”⁹⁵ Studies have noted that requirements for trading partners to adhere to more stringent animal welfare laws could impact on a country’s trade,⁹⁶ which was very much the concern in relation to the EU and New Zealand.

As demonstrated, economic factors have the potential to play a reformist role in welfare legislation if increasing welfare protection serves to positively impact upon trade and profit from animal products. It may be argued that this influence does little to foster an incremental shift toward the recognition of animal rights and may serve instead to entrench the property status of animals. Economic interests may also serve to restrict legal development. It has been argued that the Treaty on the Functioning of the European Union (TFEU, formerly EC Treaty) and World Trade Organisation free-trade agreements are “designed to prohibit protectionism.”⁹⁷ Animals are grouped within the category of ‘goods’ under Article 34 TFEU (formerly Article 28 EC Treaty),⁹⁸ which prohibits trade “restrictions on imports and all measures having an equivalent effect,” with Article 38 extending the definition to agricultural products, including animals. The case *R v MAFF ex parte Compassion in World Farming (CIWF)*⁹⁹ pertains specifically to farm animals. Here, CIWF petitioned to ban the export of veal calves that were to be housed in veal crates outside of the UK. CIWF relied on the exceptions to the bans on trade restrictions contained in Article 36¹⁰⁰ “on grounds of public morality, public policy . . . protection of health and life of humans, animals or plants,” though they ultimately failed due to regulation of the issue in question by Directive 91/629¹⁰¹ that had not banned veal crates. As such, “[g]enuine concerns about animal protection . . . had to give way to trade imperatives.”¹⁰²

⁹⁵ Council Directive, *supra* note 80, at 24.

⁹⁶ Lorraine Mitchell, *Impact of Consumer Demand for Animal Welfare on Global Trade, Changing Structure of Global Food Consumption and Trade/WRS-01-1*, Econ. Research Serv. USDA, 2001 at 86.

⁹⁷ David Thomas, *When Free Trade Trumps Animal Protection*, 155 New L.J., 1270 (2005) [hereinafter Thomas].

⁹⁸ *As affirmed in R (on the application of the Countryside Alliance) v. AG, RSPCA intervening* (2005) EWHC (Admin) 1677, (2005) ALL E.R. (D) 482 (Eng.). Note that this case was decided prior to revisions made to the numerical order of the Articles by the Treaty of Lisbon which entered into force December 1, 2009.

⁹⁹ C-1/96, *R v. MAFF ex parte Compassion in World Farming*, 1998 E.C.R. I-1251.

¹⁰⁰ Consolidated Version of the Treaty of the Functioning of the European Union art. 36, Sep. 30, 2010, 2010 O.J. (C83) 47, 61.

¹⁰¹ Council Directive 91/629, 1991 O.J. (L340) 28 (EEC), *amended by* Council Directive 97/2, 1999 O.J. (L25) 24 (EC).

¹⁰² Thomas, *supra* note 97, at 1271.

Sankoff notes that the enactment of the Animal Welfare Act 1999 has highlighted “many troublesome flaws,”¹⁰³ though he does acknowledge some significant improvements including an expanded “range of obligations owed by owners to their animals,”¹⁰⁴ the imposition of duty of care similar to the current English legislation,¹⁰⁵ and increased definitional clarity. But Sankoff criticizes the “relatively vague standards about how animals should be treated,” with specifics being dealt with in codes of welfare, “a form of supplemental regulation.”¹⁰⁶ The codes of welfare to which he refers are, much like those referenced in the English legislation,¹⁰⁷ not legally binding and as such contravention will not constitute an offence directly. It has been suggested that the move to a code-based system in New Zealand furthers its status as a world leader in animal protection, since rather than definitions being left to judicial discretion, criteria for “acceptable use” are set out in welfare codes referenced in the statute.¹⁰⁸ Though the propensity towards change in the assessment of animal cruelty has many desirable attributes, such as determination by specialists rather than an inconsistent and unqualified judiciary and the speed in which the codes can be adapted and modernised,¹⁰⁹ many issues have arisen.¹¹⁰ Despite pledges for complete redrafting following enactment, five years later only two codes had been revised.¹¹¹

It is explicitly stated that “economics may constrain the speed of implementation of a change NAWAC [National Animal Welfare Advisory Committee] desires, or may prevent it,”¹¹² and it has been demonstrated that NAWAC has consistently ignored international industrialised farming trends despite provision for acknowledgement

¹⁰³ Sankoff, *supra* note 87, at 13.

¹⁰⁴ *Id.*

¹⁰⁵ Animal Welfare Act § 9.

¹⁰⁶ Sankoff, *supra* note 87, at 15.

¹⁰⁷ Animal Welfare Act, *supra* note 25, at § 14(3).

¹⁰⁸ Arnja Dale, *Animal Welfare Codes and Regulations*, in *ANIMAL LAW IN AUSTRALASIA*, 174, 175-76 (Peter Sankoff & Steven White eds., 2009) [hereinafter Dale].

¹⁰⁹ *Id.*

¹¹⁰ See Guide to the Animal Welfare Act 1999, BIO SECURITY NEW ZEALAND (last visited June 22, 2012) <http://www.biosecurity.govt.nz/legislation/animal-welfare-act/guide/index.htm#regulations>.

¹¹¹ Sankoff, *supra* note 87, at 15, 17 n. 50. See Animal Welfare (Broiler Chickens: Fully Housed) Code of Welfare 2003 (N.Z.); Animal Welfare (Rodeos) Code of Welfare 2003 (N.Z.).

¹¹² NAWAC Guideline 01: Approach to Consideration of Draft Codes of Welfare, NAWAC (last visited June 22, 2012) <http://www.biosecurity.govt.nz/animal-welfare/nawac/policies/guideline01.htm>.

in their guidelines.¹¹³ As such, it is argued that the process has served to delay progress to the benefit of the agriculture industry that has not yet had to adapt to any new standards,¹¹⁴ serving to entrench traditional farming practices, a criticism which is globally prevalent in respect of welfare legislation. In analysis of a recent revision of the codes relating to broiler chickens, it was suggested that slow progress on the grounds of little evidence or specific research from New Zealand were “stalling tactics” and evidence that “NAWAC is prepared to err on the side of productivity at the expense of animal welfare.”¹¹⁵ Indeed, Sankoff sees the code system under the new legislation as “simply finding ways to entrench it and legitimise established practice.”¹¹⁶

IV. THE POSITION IN UNITED STATES OF AMERICA

As demonstrated above, similar issues pervade animal welfare legislation in both Australasia and England. We turn next to the position in the United States, where despite the enormous number of animals utilised by the agriculture industry, regulation remains extremely loose. The main federal legislation operating in promotion of animal welfare in the U.S. is the Animal Welfare Act of 1966, which was most recently amended in 2008, though notably excludes from its provisions “livestock or poultry bred for food or fibre or . . . intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fibre.”¹¹⁷ Instead, animals raised for food are left to state anti-cruelty provisions, which regulate only some animals, since “over half the states have exemptions for common husbandry practices.”¹¹⁸ The only potentially relevant federal statutes are the Humane Slaughter Act (HSA)¹¹⁹ and the Twenty-Eight Hour Law,¹²⁰ which deal with humane methods of slaughter and transport respectively. The HSA makes allowance for slaughter in accordance with arguably cruel religious practices¹²¹ and does not apply to poultry

¹¹³ See, e.g., Dale, *supra* note 108, at 191 (banning of battery cages for laying hens).

¹¹⁴ *Id.* at 182-83.

¹¹⁵ Dale, *supra* note 108, at 193-94 (citing Cherie Gum, *New Codes of Welfare in Place for Broiler Chickens: It is New But is it Improved?*, ARLAN NEWSLETTER, Sept. 2003, at 4, 6).

¹¹⁶ *Id.*

¹¹⁷ Animal Welfare Act 7 U.S.C. § 2132 (g)(3) (2002).

¹¹⁸ Paige Tomaselli, *Overview of International Comparative Animal Cruelty Laws*, MICHIGAN STATE UNIVERSITY COLLEGE OF LAW (2003) (last visited June 22, 2012). <http://www.animallaw.info/articles/ovusicacl.htm>.

¹¹⁹ The Humane Slaughter Act, 7 U.S.C. §§ 1901-1906.

¹²⁰ The Twenty-Eight Hour Law, 49 U.S.C. § 80502.

¹²¹ See *Jones v. Butz*, 374 F. Supp. 1284, 1286 (S.D.N.Y. 1974) (relating to Kosher slaughter).

or birds. “Currently . . . only California requires the humane slaughter of broiler chickens,” a major concern, since around ninety percent of the animals involved in U.S. farming are chickens.¹²² The same can be said for the Twenty-Eight Hour Law, which basically prevents animals from being “transported across state lines for more than twenty-eight hours without” food, water, and five hours rest, unless they are travelling in a suitable vehicle.¹²³ “There has been no reported litigation under this [law] for over fifty years,” and transportation that does not cross state lines is not covered.¹²⁴ Ultimately, no federal law regulates the rearing, breeding, housing, or feeding conditions of chickens.¹²⁵

It would be sensible to assume that the lack of regulation at the national level would be offset by proper protection at the state level. At face value, this assumption appears true since every state boasts at least one anti-cruelty law, but in reality “thirty states specifically exclude farm animals (or fowl) and/or make exceptions for . . . ‘customary’ animal husbandry practice and eighteen . . . exclude animals slaughtered for food.”¹²⁶ The accusations of welfare protections failing to challenge ‘standard’ or ‘customary’ husbandry practices have been made in relation to all three jurisdictions, but the issue is arguably most apparent in the United States.

The most famous consideration of the issue focused on the inconsistency in allowing practices that would otherwise be considered cruel against domestic animals to be justified on the basis that they constitute customary farming practices. The case of *McDonald’s Corporation v. Steel (McLibel)*, involved the distribution of a pamphlet that criticised McDonald’s practices.¹²⁷ McDonald’s argued that the allegations were false and diminished the company’s reputation. From an animal law perspective, the case was landmark in that it provided lengthy and publicised analysis and rejection of the “reasoning underlying the United States’ modern statutory approach towards cruelty to animals raised for food or food production utilised by a majority of states.”¹²⁸

Since the case hinged on tortious liability, this permitted the court to scrutinise evidence of agricultural practices which would not normally reach the court and in a completely different manner. Instead of simply

¹²² Veronica Hirsch, *Legal Protections of the Domestic Chicken in the United States and Europe* ANIMAL LEGAL & HISTORICAL CTR., MICH. STATE UNIV. COLL. OF LAW, (2003), <http://www.animallaw.info/articles/dduschick.htm> [hereinafter Hirsch].

¹²³ *Id.*; see 49 U.S.C.A § 80502(c).

¹²⁴ Hirsch, *supra* note 122.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *McDonald’s Corp. v. Steel*, [1997] EWHC (QB) 366 (Eng.).

¹²⁸ D.J. Wolfson, *McLibel*, 5 ANIMAL L. 21 (1999) at 23 (citing D.J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 ANIMAL L. 123, 135 (1996)) [hereinafter Wolfson].

examining whether the practice violated a statutory definition of cruelty, the court was asked to examine “whether, according to a reasonable person, common farming practices were cruel.”¹²⁹ This unique approach hinged on the fact that if the statements made by Steel and Morris in the pamphlet were true, they would be afforded a full legal defence.¹³⁰ Thus, it was necessary to determine “whether [the] practices were cruel [by the standards] of a reasonable person” rather than a statutory definition, and since it was a civil action, “on the balance of probabilities rather than beyond reasonable doubt.”¹³¹

The court deliberated at length on the standard by which cruelty would be assessed. Justice Bell found the defendant’s assertion that “any practice which caused an animal to suffer any degree of stress or discomfort or transitory pain was necessarily cruel” was too broad. Similarly, the assertion of the plaintiffs that “any practice which accorded with the norm in modern farming . . . practices was thereby acceptable and not to be criticised as cruel” was also found to be unacceptable as it would constitute determination solely by the agriculture industry and its economic interests.¹³² Justice Bell, under expert guidance, ultimately adopted a standard based on the “number of animals involved[,] . . . the intensity of suffering[,] and the duration of suffering.”¹³³ He found numerous customary practices relating to poultry to be cruel within this definition, noting the severe restrictions on movement caused by battery cages, “culling . . . [via] carbon dioxide, the restriction [of] feed[ing], prestun [techniques], . . . cutting of throats [whilst] conscious,” and overstocking of broiler hens, though lack of access to fresh air or natural light were distinguished.¹³⁴ It was ultimately held that the defendants had proven enough “to justify the general charge that [both p]laintiffs [were] culpably responsible for cruel practices.”¹³⁵ Justice Bell went on to consider various additional examples of cruel common practices such as calcium deficiencies in hens in the UK and United States, feeding limitations placed on hens to prevent excessive growth as discussed above, and rearing breeders for appetite.¹³⁶ With specific reference to US law, criticism was leveraged by Justice Bell at the process of determining cruelty, commenting that the customary approach “hand[s]

¹²⁹ *Id.* at 30.

¹³⁰ See *Alexander v. N. E. Ry. Co.*, (1865) 122 Eng. Rep. 1221; 6 B. & S. 340; *Lewis v. Daily Telegraph* [1964] A.C. 234.

¹³¹ Wolfson, *supra* note 127, at 33.

¹³² *McLibel Verdict*, 8. *The Rearing & Slaughtering of Animals* McSPOTLIGHT.ORG, http://www.mcspotlight.org/case/trial/verdict/verdict_jud2c.htm (last visited June 22, 2012).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

the decision as to what is cruel to the food industry completely, moved as it must be by economic[s].”¹³⁷

The case served as a fact finding exercise to assess the truth of the statements distributed in the pamphlet by Steel and Morris, and has no direct legal impact on the statutory definition of cruelty or ‘unnecessary suffering.’ It is nevertheless alarming to note that ‘cruelty’ and ‘suffering’ may be measured by far more lenient standards under tort law than in legislation that specifically purports to protect animals. Indeed, welfare legislation appears to be doing the exact opposite in the case of farm animals, simply entrenching established practice and thus property status.

V. CONCLUSION

The current welfare provisions which purport to protect farm animals are severely limited by the pervasive justifications of suffering on the grounds of custom, economics, and the uneven balance between human and animal interests. Despite what could be construed as recent evidence of a move towards more robust legislative protection, the underlying status of animals as property continues to present concerning loopholes that undermine animal protection, visible in even the most progressive world legal systems. The only erosion of this legal position is the recognition of limited rights for great apes in New Zealand, which, whilst legally ground-breaking, fails to confront the suffering of billions of animals involved in the agriculture industry. Evidence militates strongly against those advocates who suggest that gradual improvements to animal protection are possible through reforms in the current welfare system, and that property status itself may eventually be dismantled in this manner. Despite the relatively recent legislative revisions in England and New Zealand, legal standards remain bound by human and economic concerns, effectively removing from consideration alternative husbandry practices and serving instead to entrench custom. Any stimulation of welfare reform borne out of economic factors evidences a process of refinement by the agriculture industry rather than a reflection of concern for animal protection. The antithetic quality of welfare legislation is particularly evident in the fallout of *McLibel*, where the threshold for assessing cruelty in animal husbandry was lower when conducted during the course of a tortious fact finding exercise than under legislation specifically designed for animal protection. The question of the extent to which the law should protect animals is no doubt dependent upon numerous subjective considerations, but the issues discussed above serve at least to ask important questions of those who purport to be animal advocates.

¹³⁷ *Id.*

OF NON-HUMAN BONDAGE: GREAT APES, BLIND EYES, AND DISORDERLY COMPANY

JORDAN CARR PETERSON*

I. INTRODUCTION

“Any chimp can play human for a day, use his opposable thumbs to iron his uniform; and run for office on Election Day, fancy himself a real decisionmaker.”

—Rilo Kiley¹

In 1859, English scientist Charles Darwin published his seminal work *On the Origin of Species* and postulated, based on massive amounts of empirical evidence, that virtually all animal species evolve in various ways over long periods of time.² In the broadest sense, the most scientifically influential effect wrought by the publication of Darwin’s magnum opus was the foundation of the field known in contemporary terms as evolutionary biology.³ Officially, however, the most cataclysmic of Darwin’s famous suggestions did not arrive until 12 years later with *The Descent of Man, and Selection in Relation to Sex*, in which Darwin explicitly applied his theories of biological evolution to the human race.⁴ Since the initial dissemination of Darwin’s revolutionary ideas,

* Graduate student in Political Science at the University of Southern California; J.D., University of Florida Levin College of Law; B.A., University of Southern California. His research interests include representation in American politics, American political behavior, and the advancement of animal rights by legislative institutions. Many thanks to Professor Mary Jane Angelo for all of her guidance and encouragement and to Christopher German for always being willing to listen.

¹ Rilo Kiley, *It’s a Hit*, on *More Adventurous*, (Brute/Beaute Records 2004).

² See generally CHARLES DARWIN, *ON THE ORIGIN OF SPECIES* (Morse Peckham ed., Univ. of Pennsylvania Press 2006) (1959). This description is a simplified but not misleadingly reductionist summary; Darwin suggested that animal species evolve not only on a small scale and in the short term “within” their own species, but on a monumentally larger and more long-term scale such that entirely new species are eventually created. *Id.*

³ *Id.*

⁴ CHARLES DARWIN, *THE DESCENT OF MAN, AND SELECTION IN RELATION TO SEX*, VOLUME 1 (2nd ed., John Murray 1888) (1871). Darwin, after noting a number of anatomical and biological similarities between humans and other mammals at large, devotes the majority of the work to specifically outlining both physical and mental similarities between humans and apes. *Id.*

humankind has, in the wake of voluminous scientific evidence, been forced grapple with the overwhelming (and, for many, bewildering) likelihood that humans and apes share evolutionary ancestors – or, as Darwin unambiguously maintained, that “the difference in mind between man and the higher animals, great as it is, certainly is one of degree and not of kind.”⁵

Opposition to Darwin’s assertions that humans and apes evolved from a common ancestor was swift, multifaceted, and vociferous and has either remained or perhaps even grown (in quantity, if not quality) during the intervening century and a half since the publication of Darwin’s work in evolutionary biology.⁶ Furthermore, in large part as a consequence of Darwin’s revolutionary contentions, apes occupy a unique place in the collective human imagination, which has been aptly reflected within the artistic realms of literature and film.⁷ The trend among both ethicists and legal academics to acknowledge the repercussions of humankind’s distinctive evolutionary relationship to apes progressed more slowly than that among authors and directors; but, there has developed within the past few decades a significant trend among philosophical and legal theorists to consider critically the moral-ethical and legal implications of Darwinian evolution for human self-conception.⁸ These examinations tend to intersect and dovetail with the broader movements in pursuit of animal welfare and animal liberation, respectively.⁹

⁵ *Id.* at 193.

⁶ Objections to Darwin’s ideas have been informed by a wide range of philosophies, but have tended to be concentrated in various forms of anthropocentrism, whether religious or secularized. See Rod Preece, *Darwinism, Christianity, and the Great Vivisection Debate*, 64 J. HIST. OF IDEAS 399, 400-05 (2003) (explaining the position that a deity intended for the permanently separate organization or classification of each particular creature - i.e., a divinely-ordered and entirely static caste system); see *contra* C. Staniland Wake, *Man and the Ape*, 2 J. ANTHROPOLOGICAL INST. OF GREAT BRITAIN AND IRELAND 315, 317 (1873) (offering up an early attempt at a biological refutation of Darwin’s theory of evolution by way of natural selection).

⁷ The human fixation on various qualities of non-human apes has been on display in myriad works of literature and film; a few representative examples should suffice. See, e.g., EDGAR RICE BURROUGHS, *TARZAN OF THE APES* (1914); *KING KONG* (RKO Radio Pictures 1933); PIERRE BOULLE, *PLANET OF THE APES* (1963); *RISE OF THE PLANET OF THE APES* (20th Century Fox 2011). Interestingly, the depiction of non-human apes has varied enormously in both quality and tone, with some works emphasizing the “non-human” (i.e., alien or savage) qualities of non-human apes, and others stressing the commonalities between human and non-human apes.

⁸ This essay will consider in depth a number of these moral-ethical and legal sources. See, e.g., PETER SINGER, *ANIMAL LIBERATION* (2002); JANE GOODALL, ET AL., *THE GREAT APE PROJECT: EQUALITY BEYOND HUMANITY* (Paola Cavalieri & Peter Singer eds., 1993); GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* (1995); STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* (2000).

⁹ See SINGER, *supra* note 8.

This essay examines the moral-ethical and legal considerations activated by the nascent movement to convey on great apes a legal (and, indeed, moral) status approximating if not in many regards equaling that enjoyed by humans. Part II provides a general overview of the moral-ethical considerations motivating and underpinning the animal rights movement, including an explanation of speciesism and the hazards it poses, as well as a description of animal liberationism and animal welfarism, two primary schools of thought comprising the movement. Part III describes the legal status of animals and critically inspects the notion that animals exist, in a legal sense, primarily within the realm of personal property. Part IV presents a comprehensive assessment of great apes themselves, paying particular attention to the cognitive and biological qualities that have afforded great apes special consideration with respect to how (and whether) their legal rights might potentially be exercised or asserted, provides several relevant examples of abuse and hardship suffered by great apes, and describes the legal issues facing great apes in particular. Part V details the practical realities that confront those individuals who strive to institute a functional system of (to borrow a phrase from Peter Singer, Paola Cavalieri, Jane Goodall, and their colleagues at the Great Ape Project) *equality beyond humanity*, especially when seeking to accomplish the transition of their ideas from the theoretical to the operational. Part VI concludes.

II. GROWING PAINS: THE BIRTH AND DEVELOPMENT OF THE ANIMAL RIGHTS MOVEMENT

*“I saw deep in the eyes of the animals the human soul
look out upon me.”*

—Edward Carpenter¹⁰

While the so-called animal rights movement¹¹ only entered popular consciousness within the past three or four decades, some philosophers have considered and advanced proposals for the mitigation, alleviation, or elimination of the suffering experienced by non-human animals for centuries.¹² Between the Enlightenment and the rise of

¹⁰ EDWARD CARPENTER, *TOWARDS DEMOCRACY* 175 (1942).

¹¹ Some scholars have considered the question whether, given ideological schisms in the movement, it exists in any meaningful form at all. Elizabeth L. DeCoux, *Speaking for the Modern Prometheus: The Significance of Animal Suffering to the Abolition Movement*, 16 *ANIMAL L.* 9, 27-41 (2009). I will address the primary ideological schism but will also employ the term “animal rights movement” to signify generally contemporary efforts by humans on behalf of non-human animals; disputes regarding nomenclature exceed the scope of this essay.

¹² See WISE, *supra* note 8, at 43-48.

contemporary continental and analytic philosophy at the dawn of the twentieth century, various prominent ethicists entertained considerations into what, if any, rights non-human animals truly possessed; but, such inquiries most typically occurred within the larger context of questions concerning the natural rights of humans.¹³ Though there had existed limited and sundry efforts (primarily legal ones, to be covered more thoroughly in Part III of this essay) to secure better *treatment* for non-human animals since nearly time immemorial, the first concerted and explicit efforts to comprehensively assert and advocate for the fundamental *rights* of non-human animals appeared at the end of the nineteenth century in the works of Henry Stephens Salt, an English author, critic, and activist.¹⁴ Salt produced a prodigious amount of literature concerning the rights of non-human animals. Many of his works even prophetically addressed the very problem which often plagues efforts to encourage higher rates of participation in the animal liberation movement today: the inherent laziness engendered by comfort.¹⁵ As early as 1892, Salt observed that “there is an accommodating elasticity in our social ethics that permits of the justification of almost any system which it would be inconvenient to us to discontinue.”¹⁶ Nevertheless, no public groundswell in support of natural or legal rights for non-human animals followed the publication of Salt’s rather visionary treatises, which were “left to gather dust on the shelves of the British Museum library until, eighty years later, a new generation formulated the arguments afresh” – in other words, until their revival by means of modern efforts on behalf of non-human animals.¹⁷

The philosophical treatment given to non-human animals by philosophers of the early Enlightenment was generally refracted through broader moral-ethical issues concerning humans.¹⁸ For example, in *An Enquiry Concerning Human Understanding*, David Hume devotes an entire section to the contention that non-human animals possess the capacity to recognize cause-and-effect relationships in a manner very similar to humans; simultaneously, however, Hume emphasizes a whole host of differences between human and non-human animals.¹⁹ Furthermore, Hume seems wholly unconcerned with the notion that

¹³ See HENRY STEPHENS SALT, *ANIMALS’ RIGHTS: CONSIDERED IN RELATION TO SOCIAL PROGRESS* 1-9 (1892).

¹⁴ See SALT, *supra* note 13; see also HENRY STEPHENS SALT, *THE LOGIC OF VEGETARIANISM: ESSAYS AND DIALOGUES* (1899); HENRY STEPHENS SALT, *THE HUMANITIES OF DIET* (1914). This distinction between the quest for better treatment and that for equal rights has been further crystallized and refined in the contemporary dichotomy between animal welfarism and animal liberationism. See DeCoux, *supra* note 11, at 17-18.

¹⁵ See SALT, *supra* note 13, at 24-35.

¹⁶ *Id.* at 24.

¹⁷ SINGER, *supra* note 8, at xv.

¹⁸ See SALT, *supra* note 13, at 1-9.

¹⁹ DAVID HUME, *AN ENQUIRY CONCERNING HUMAN UNDERSTANDING* 384-85 (Lewis Amherst Selby-Bigge & P.H. Nedditch eds., Clarendon Press 1974) (1748).

even his own direct observations regarding similarities between human and non-human animals might imply the existence of natural rights for the latter.²⁰ Many of the other works of philosophy between Hume and Salt which might potentially implicate certain fundamental rights of animals nevertheless do not confront the conundrum of animals' rights so directly as have Salt and subsequent ethicists and legal academics.²¹

At the end of the nineteenth century, Henry Stephens Salt articulated a number of arguments on behalf of non-human animals, which foreshadowed and influenced arguments advanced by participants in the contemporary animal rights movement in manner, tone, and content.²² At the very beginning of his most comprehensive tract, *Animals' Rights: Considered in Relation to Social Progress*, Salt announced his intention "to set the principle of animals' rights on a consistent and intelligible footing, to show that this principle underlies the various efforts of humanitarian reformers, and to make a clearance of the comfortable fallacies which the apologists of the present system [of animal exploitation] have industriously accumulated."²³ Even in this brief excerpt – appearing in the work's prefatory note – Salt employs the striking, unequivocal formulation of "animals' rights" and asserts, based on the existence of human rights, that the existence of such rights for non-human animals necessarily follows.²⁴ After tracing the historical development of natural (human) rights through time, Salt identifies two principal belief systems which permit (or even encourage) the exploitation of non-human animals: (1) Christian religious tradition and (2) secular philosophical thought.²⁵ Salt inculcates the longstanding Christian tendency to hierarchize animals on earth between (elevated) human animals and (subjugated) non-human animals for "placing the lower creatures out of the pale of hope, plac[ing] them at the same time out of the pale of sympathy, and thus la[y]ing the foundation for this utter disregard of animals in the light of our fellow creatures."²⁶ Salt views the organized Church as an enabler of sorts, providing humanity

²⁰ *See id.*

²¹ *See* JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 310-11 (J. H. Burns & H. L. A. Hart eds., Oxford Univ. Press 1996) (1781) (applying Bentham's signature and overarching philosophy of utilitarianism to the capacity of non-human animals to suffer); *see also* LEO TOLSTOY, *The First Step*, in *ESSAYS AND LETTERS* 82, 82-84 (1909) (emphasizing in great detail the suffering of animals in slaughterhouses but presenting the discussion as an extension of Tolstoy's firm adherence to and belief in asceticism). N.B. These qualifications are intended in no way to diminish the courage evinced by Bentham, Tolstoy, or anyone else when expressing such views at so early a point in history.

²² *See generally* SALT, *supra* note 13.

²³ *Id.* at v.

²⁴ *Id.*

²⁵ *Id.* at 8-13.

²⁶ *Id.* at 8-9.

at large with too easy an excuse for the abuse and exploitation of non-human animals (without question, this is not the only flaw he would have found, given his prominent role as a social reformer).²⁷

However, Salt does not, by any means, confine his blame for the abuse of non-human animals to the Church.²⁸ There existed then, and continues to exist today, a disconcerting propensity among academic philosophers to marginalize, dismiss, or deny outright either the importance or the existence of fundamental rights for non-human animals.²⁹ In fact, Salt contends that such philosophers have tended to adopt a position regarding the moral-ethical position of non-human animals much *more* radical than that which had been advanced by the Church.³⁰ Specifically, many philosophers before and during the late nineteenth century adhered to the rationalist idea, originally advanced by Descartes, of so-called “animal automatism:” namely, the notion that animals are “devoid of consciousness and feeling,” more akin to machines than to humans, which “could in no real sense be said to *live* at all.”³¹ Salt, in identifying this Cartesian philosophic principle as the primary source employed in defense of later opposition to the idea that non-human animals might have some fundamental rights, also prefigures the contemporary legal debate regarding abolition of non-human animals’ status as personal property.³² Salt references Schopenhauer in order to illustrate the underlying logical fallacy in the Cartesian idea of animal automatism; Schopenhauer blamed the rationalists’ fundamentally illogical conclusion that non-human animals lack consciousness and feeling on the characteristic inclination of these philosophers to reduce all matters to the impracticably abstract.³³ In order to defend the integrity of the abstract Cartesian practice of “rational psychology” (i.e., rather simply put, the analysis of psychological decision making by means of mathematical logic alone, rather than empirical experimentation), the rationalist philosophers “set themselves to work to hollow out between man and beast an enormous abyss, of an immeasurable wealth ... to prove to us, in contempt of evidence, an impassable difference.”³⁴

²⁷ *See id.*

²⁸ *Id.* at 10-12.

²⁹ *Id.*

³⁰ *Id.* at 10. Gary Francione has also maintained that the theological justifications for the subjugation of non-human animals, unlike Cartesian philosophical principles, do not automatically imply a qualitative inferiority or defectiveness of non-human animals with respect to human animals. FRANCIONE, *supra* note 8, at 37.

³¹ SALT, *supra* note 13, at 10.

³² *See id.* The debate regarding abolition draws on philosophical ideas but is ultimately a legal debate, which will be covered in more detail in Part III of this essay.

³³ *Id.* at 10-11.

³⁴ *Id.* (quoting HOWARD WILLIAMS, *THE ETHICS OF DIET: A CATENA OF AUTHORITIES DEPRECATORY OF THE PRACTICE OF FLESH-EATING* (Univ. of Illinois Press 2003) (1883)).

It should be of no surprise in consideration of the sweeping and comprehensive opposition to the idea that non-human animals might have fundamental rights—buttressed by both secular and religious philosophies—that, as previously noted, the writings of Henry Stephens Salt regarding the rights of non-human animals enjoyed little readership and even less acclaim during his lifetime.³⁵ Salt’s ideas were, however, rediscovered, vivified, and further developed by Australian ethicist Peter Singer in his landmark work *Animal Liberation*.³⁶ Perhaps the most widely known text of the animal rights movement, *Animal Liberation*, witnessed Singer’s attempts to animate and clarify many of Salt’s ideas, motivated by a healthy dose of utilitarian philosophy.³⁷ In what might be the two most revolutionary aspects of his famous work, Singer: (1) spoke explicitly of efforts to assert the rights of non-human animals as a “liberation movement,” to be viewed in historical terms alongside other liberation movements, without prejudice or hierarchy³⁸; and (2) introduced into popular consciousness the concept of *speciesism*—that is, that there exists a “prejudice or attitude of bias in favor of the interests of members of one’s own species and against those of members of other species.”³⁹

Singer’s two most revolutionary accomplishments in *Animal Liberation* share, as it were, a common central significance: they both serve to contextualize the animal rights movement as properly belonging within broader categories of struggle previously reserved for *efforts on behalf of humans alone*.⁴⁰ The first—the decision to characterize the animal rights movement as a liberation movement alongside similar struggles on the behalf of black, gay, native, and Latino American groups, respectively—places the animal rights movement firmly within a broader historical narrative that lends it socio-cultural legitimacy.⁴¹ The second—the prominent placement and relentless repetition of the crucial term *speciesism*, overtly compared with analog biases such as racism and sexism—locates prejudice on the part of humans toward non-human animals within a philosophical space *shared* by biases *between* humans themselves, and suggests by natural, logical extension that the protection of non-human animals and their rights is of the utmost necessity.⁴² These two rhetorical pillars erected by Singer demonstrate an awareness on his part of the reality that the struggle for non-human

³⁵ See generally SINGER, *supra* note 8.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at x-xiv.

³⁹ *Id.* at 7.

⁴⁰ See *id.*; see also *id.* at xii-xiii.

⁴¹ See *id.*

⁴² See *id.* at 6-17.

animals' rights will be neither short nor easy, and that it will demand a significant, even staggering, number of fundamental reconsiderations and recharacterizations on the part of humans the world over—in his words, that a “liberation movement demands an expansion of our moral horizons.”⁴³ The goal of Peter Singer in *Animal Liberation*—and of the animal rights movement itself, to whatever extent it exists – is exactly to accomplish this dramatic moral-ethical expansion.⁴⁴

In defining and describing speciesism, Singer finds the impulse for human prejudice toward non-human animals even further back in history than did Salt; in *Animal Liberation*, Singer reaches back into the Creation story of Genesis and points out that while man (human) has been made in God's image and thus occupies a special place among terrestrial creation, non-human animals enjoy no such likeness and instead exist under the “dominion” of man, as humans were “God-like” on earth.⁴⁵ At the very least after the fall of man (which, Singer wryly notes, the Bible blames on a woman and an animal), the killing of non-human animals was explicitly permitted by Hebrew religious texts.⁴⁶ Singer also cites similar, if less overtly barbaric, attitudes toward animals among ancient Greek philosophers, who generally focused on the difference in reasoning powers between human and non-human animals, respectively.⁴⁷

By tracing the development of speciesism through the rise of Christianity and the Renaissance, Singer eventually—and necessarily—arrives at Descartes, whose unarguably modern view on geometrics and mathematics unfortunately resulted in his subsequent classification of non-human animals as automata.⁴⁸ Descartes even compared the screams of unanesthetized animals undergoing experimentation to “the noise of a malfunctioning machine.”⁴⁹ Descartes' philosophy represented an important and unfortunate intersection of early modern science and Christian thought; he was only able to explain away the notion that humans (as a type of animal) might *also* be machines or at least mechanistic by positing the existence of a soul within human animals alone.⁵⁰ Singer notes that the radical reclassification of non-human animals as automata led to the widespread rise of experimentation on

⁴³ *Id.* at xiii.

⁴⁴ *See id.*

⁴⁵ *Id.* at 186-87.

⁴⁶ *Id.* at 187.

⁴⁷ *Id.* at 188-89. Singer does admit that the gulf between human and non-human animals perceived by Aristotle is neither particularly deep nor wide; this, as we have seen, stands in moderate contrast to attitudes in pre-Christian Jewish thought, as well as later rationalist philosophy. *Id.*; see also SALT, *supra* note 13, at 10-12.

⁴⁸ SINGER, *supra* note 8, at 189-200.

⁴⁹ FRANCIONE, *supra* note 8, at 38.

⁵⁰ SINGER, *supra* note 8, at 200.

non-human animals in Europe for allegedly scientific purposes.⁵¹ This occurred alongside countless oftentimes gruesome and violent instances of speciesism still persisting today, including, but not limited to, the use of non-human animals for experimentation, entertainment, and food.⁵²

Before moving on to a more thorough discussion of the legal status of animals, it is instructive to further explore an important theoretical divide within the animal rights movement. While it certainly seems that Peter Singer's theory of animal liberation as a cohesive, socially relevant *movement* suggests his belief in non-human animals' rights, there are certain influential scholars who have questioned whether Singer is truly a revolutionary animal liberationist (or abolitionist), or merely a refashioned form of the animal welfarist which has existed for centuries.⁵³ Most prominently, Rutgers Law professor, Gary L. Francione, has argued that the current of utilitarianism flowing through Singer's iteration of animal liberationism allows for continued exploitation of animals under certain circumstances, such as highly-controlled agricultural use.⁵⁴ Francione maintains that Singer represents a "more progressive version" of animal welfarism, which generally concerns itself only with the day-to-day well-being of non-human animals, *not* the abolition of their legal status as property.⁵⁵ Francione has identified four constitutive components of animal welfarism: (1) the continuing characterization of non-human animals as personal property; (2) the interpretation of such property status as justification for treating animals "as means to human ends;" (3) the acceptance of certain uses of non-human animals if related to a "generally accepted [human] social institution;" and (4) a unique and unorthodox interpretation of "cruelty" which allows for continued exploitation of non-human animals.⁵⁶ Abolitionists, in contrast, seek the complete abolition of the

⁵¹ *Id.* at 201. This practice, of course, has continued in earnest, not only in Europe but worldwide, right up to the writing of this essay, and is one of the animal rights movement's gravest concerns. *Id.* at 202-12.

⁵² *Id.* at 213.

⁵³ See generally Gary L. Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS L. REV. 397 (1996).

⁵⁴ Gary L. Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS L. REV. at 411-15.

⁵⁵ FRANCIONE, *supra* note 8, at 7. Francione writes that Singer's new strain of animal welfare "would require a drastic reduction in animal suffering but would permit animal exploitation when the consequences, properly characterized and considered, outweighed the animal's interest in not being exploited." *Id.*

⁵⁶ *Id.* at 26. The first three components are straightforward, but the fourth merits some further explanation. Francione notes that welfarist legal and ethical regimes tolerate certain practices in the use of non-human animals for agricultural purposes, such as castration and branding without anesthetization, and excludes them from the operation of animal cruelty laws despite the obvious and serious associated with these procedures. Francione hypothesizes that utilitarianism excuses these practices because they serve the higher-order purposes of efficiency and human use. *Id.*

property status of non-human animals.⁵⁷ The primary criticism leveled by abolitionists against welfarists concerns the efficacy of welfarism itself.⁵⁸ Abolitionists note that marginal and incremental attempts toward attaining better *treatment* for non-human animals, always in limited circumstances, have existed for centuries yet accomplished virtually nothing toward actually ending their exploitation.⁵⁹ Welfarists typically counter that abolitionism is unfeasibly “utopian” and that legislative incrementalism gradually led to better conditions for certain classes of humans, most particularly laborers.⁶⁰ As regards any further inquiry into the legal status of great apes and the Great Ape Project, the philosophical distinction between welfarism and abolitionism will generally lay comfortably in the background, unless otherwise noted.

III. THE LEGAL “RIGHTS” OF NON-HUMAN ANIMALS: A TALE OF SMOKE AND MIRRORS

“Might it not be the case that our concept of rights needs to be amplified so that we are able to acknowledge both the rights which are claimed and defended in human conflicts and those ‘rights in effect’ which we attribute to animals because we think they are something more than a material to be manipulated at will?”

—Thomas Auxter⁶¹

The Anglo-American common law is fundamentally conservative. The common law system, almost a millennium old, involves maintaining and occasionally building on precedent, or older decisions by other judges, except in the absence of some extremely compelling moral-ethical principle or policy consideration which motivates a deviation from precedent.⁶² This general hesitance among jurists to push the law too far in any one direction mirrors the skepticism among philosophers, like Descartes, who were suspect of superimposing a moral-ethical framework onto non-human animals too similar to that which governed humans. The relationship between non-human animals and the law is complex and often frustrating. This is due, in large part, to the centuries-long Western tradition of anthropocentrism—the idea flowing

⁵⁷ DeCoux, *supra* note 11, at 18.

⁵⁸ *Id.* at 17. Measures historically enacted in pursuit of animal welfare include traditional animal cruelty laws, to be examined more thoroughly in Part III. Francione, *supra* note 53, at 426.

⁵⁹ Francione, *supra* note 53, at 398-400.

⁶⁰ *Id.*

⁶¹ Thomas Auxter, *The Right Not to be Eaten*, 22 *INQUIRY* 221, 222 (1979).

⁶² See WISE, *supra* note 8, at 89-93.

from, among other places, the first pages of Genesis that the world was designed for humans—there has been “a thick and impenetrable legal wall” between human and non-human animals.⁶³ This wall represents a contrived gulf between one species and all others—between the chosen species and even its “most trivial interests” on the one hand, and the “legal refuse of an entire kingdom” on the other; it represents, most basically, the difference between being a person and being a thing.⁶⁴

The legal wall between human and non-human animals manifests itself most prominently in the classification of non-human animals as property.⁶⁵ The law regards non-human animals almost invariably as property and has regarded them as such for substantially all of relevant human history.⁶⁶ Whereas the author of Genesis envisioned a sort of existential dominion conferred on humans over non-human animals by a deity, humans (on the formidable shoulders of Genesis and Descartes) have erected via the law their own equally problematic system of what I will call proprietary dominion.⁶⁷ As a general rule in modern property law, persons have rights, while things (property) do not.⁶⁸ This explains why, under modern notions of human rights law, every human has a right to bodily integrity; in other words, humans are “legally disabled from invading each other’s bodies without consent.”⁶⁹ In a similar vein, every human has a legal right to bodily liberty and can thus avoid enslavement by other humans.⁷⁰ Non-human animals, by contrast, currently possess neither of these rights.⁷¹ Because non-human animals are (legally) property, any legal action brought on their behalf must be asserted based on an improper (i.e., illegal) *use* of the non-human animal because it is the property of a human, not based on any violation rights enjoyed by the animal itself.⁷² Francione maintains that, as a consequence of classifying non-human animals as the property of humans, non-human animals (the “property”) are, in a legal sense, nothing more than the means to some human end.⁷³ The common law system places rigorous restrictions on the state’s ability to regulate the use of property. Aside

⁶³ *Id.* at 4.

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ FRANCIONE, *supra* note 8, at 34. Interestingly, Francione notes that non-human animals were some of the earliest examples of personal property. Indeed, in many romance languages, the word for “property” is closely related in etymology to the word for “cattle” (e.g., Spanish: “ganadería” (property) and “ganado” (cattle)). *Id.*

⁶⁷ *Id.* at 36.

⁶⁸ WISE, *supra* note 8, at 4.

⁶⁹ *Id.* at 49.

⁷⁰ *Id.*

⁷¹ *Id.* at 4.

⁷² FRANCIONE, *supra* note 8, at 11.

⁷³ *Id.* at 46.

from employing its police power to abate nuisances caused by the human use of property, the state is legally proscribed from undue interference with an owner's economic or beneficial interests in the utilization of his or her own property.⁷⁴ As a result of their classification as property, non-human animals are automatically destined to lose any balancing test when their severely limited legal interests are measured against the interests of their owner *or* occasionally even other humans associated with a legal dispute.⁷⁵

The laws regarding veterinary malpractice serve as an illustrative example of the consequences wrought by classifying non-human animals as property.⁷⁶ Although they often occupy a place of emotional significance (if not centrality) in human households, common pets like dogs and cats are, of course, still considered the property of their owners.⁷⁷ The modes of recovery and varieties of damages awarded for veterinary malpractice claims, typically filed due to injuries caused to a non-human animal by a veterinarian, aptly demonstrate the unjust ramifications resulting from the property status of non-human animals.⁷⁸ Traditionally, aggrieved pet owners seeking redress under veterinary malpractice statutes have only been allowed to recover fair market value for injuries to non-human animals, i.e., "the difference between the monetary worth of the animal before the incident complained of and that after."⁷⁹ This calculation is made *neither* with regard to the emotional value of the non-human animal pet to the owner, *nor* with regard to the intrinsic value of the non-human animal as an independent life form.⁸⁰ Some states have gradually expanded the bases for recovery pursuant to veterinary malpractice statutes under theories of infliction of emotional distress, whether intentional or negligent.⁸¹ Nevertheless, these expansions have been exceedingly cautious and, moreover, transparently speciesist in nature.⁸² The decision to allow human pet owners to recover based on tortious infliction of emotional distress by no means threatens the property status of non-human animals.⁸³ In fact, allowing recovery by a human for infliction of emotional distress stemming from harm visited upon a non-human animal *necessarily* emphasizes the suffering of the human owner, not the actually aggrieved non-human animal.⁸⁴ Any interest

⁷⁴ *Id.* at 48.

⁷⁵ *Id.* at 49.

⁷⁶ *See id.* at 55-64.

⁷⁷ *Id.* at 55.

⁷⁸ *See id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 55-57.

⁸¹ *Id.* at 57-59.

⁸² *See id.* at 57-63.

⁸³ *See id.*

⁸⁴ *See id.*

that non-human animal pets might have in avoiding injury, suffering, or death passes unnoticed by veterinary malpractice statutes *except* to the extent that the injury, suffering, or death has caused emotional distress for the pets' human owners.⁸⁵ Under these laws, the value of non-human animal pets is unrelated to any inherent worth in the animals themselves; rather, it derives entirely from their status as the property of a human. To shamelessly and unequivocally assign higher value to the suffering of one species than to the suffering of another is speciesism on its face, and occurs as a direct result of classifying non-human animals as property. The interests of non-human animals in avoiding pain and suffering is recognized by veterinary malpractice statutes only insofar as injury to a non-human animal pet affects the emotional state or proprietary-pecuniary interests of his or her human owner.⁸⁶

In his book *Rattling the Cage: Toward Legal Rights for Animals*, Harvard Law professor and legal scholar, Steven M. Wise, set forth a comprehensive scheme advocating specifically for the extension of certain inalienable rights to chimpanzees and bonobos (the latter formerly known as a "pygmy chimpanzee" and subsequently subsumed within the umbrella classification "chimpanzee" for the purposes of this essay) which would render them legally somewhere between full personhood and full "thinghood."⁸⁷ A right, according to Wise, is "any theoretical advantage conferred by recognized legal rules," and legal rights implicate the interests of at least two legal persons and one legal thing.⁸⁸ It is for this reason that, under the current legal regime, great apes like chimpanzees do not have any cognizable interest at law which may be asserted on their behalf by humans, including legal standing under the already embarrassingly minimalist protections of Welfarist

⁸⁵ *See id.*

⁸⁶ *See id.* at 61. Francione observes some interesting anomalies resulting from recovery pursuant to veterinary malpractice statutes based on a human's emotional state and the property status of non-human animals. First, the system does little to protect non-human animals which have the misfortune of living with an owner indifferent to their suffering, as such owners likely bear little interest in commencing litigation on their non-human animals' behalf. *Id.* Likewise, humans acting on the behalf of stray non-human animals with which they have an emotional connection but which they do not legally own would be bereft of an opportunity to recover under such a statutory regime because the animals are not legally their property. *Id.*

⁸⁷ WISE, *supra* note 8, at 4.

⁸⁸ *Id.* at 53-54. The law of property governs relationships between "people" and "things." It is generally acknowledged that there are four main types of such relationships: (1) rights, which are legally enforceable claims by one person against another; (2) privileges, which represent the legal freedom to do or not do something "as against another;" (3) powers, or the ability to produce a change in a legal relationship by doing or not doing something; and (4) immunities, or the freedom of a person to resist a change in a legal relationship caused by another person. FRANCIONE, *supra* note 8, at 43 (citing *Restatement of the Law of Property*, §§ 1, 2, 3, 4 (1936)).

“reform” legislation like the Animal Welfare Act.⁸⁹ Wise blames the tendency of the law to ineffectively protect the interests of non-human animals on the existence of certain paradigms, which “blind believers to entities that are not supposed to exist.”⁹⁰ He posits that there exists a perceived “incommensurability” between human and non-human animals such that the former see themselves as intrinsically different from the latter, and that “[a]nimals are invisible to law today because paradigm-blinded lawyers and judges long ago stopped entertaining the thought that nonhumans could possibly be legal persons.”⁹¹ The extension of rights to non-human animals would prove of invaluable importance to the effective protection of non-human animals because rights, generally, may not be abrogated even if such abrogation results in direct or ancillary positive consequences for another party.⁹²

The earliest laws enacted mindful of certain interests (not rights) belonging to non-human animals were anticruelty statutes.⁹³ The first anticruelty statute was enacted in 1641, and in the past three and a half centuries every U.S. state has adopted some sort of anticruelty statute toward non-human animals.⁹⁴ While usually well-intended in origin, the effectiveness of many such statutes in operation is often either lackluster or dubious.⁹⁵ Often, these statutes are enacted not only with the goal of protecting animals but also with the rather ludicrous aim of conserving public morals (i.e., the protection of *humans!*).⁹⁶ It is particularly difficult for the judiciary to craft effective and sensible remedies for the protection of non-human animals even with the aid of anticruelty statutes precisely because of these animals’ property status.⁹⁷ For example, even after upholding Jean Jett’s conviction pursuant to the

⁸⁹ See DeCoux, *supra* note 11, at 17; 7 U.S.C. §§ 2131-2159 (2006). The Animal Welfare Act was enacted in 1966 and is the only federal law in the United States whose ostensible goal is the protection of non-human animals used in research and exhibition; it is riddled with qualifications and exceptions carved out for the protection of various interest groups. See, e.g., *id.* at § 2132(g) (excluding certain birds, rats, and mice, among other species, from the Act’s definition of “animal”).

⁹⁰ WISE, *supra* note 8, at 74.

⁹¹ *Id.*

⁹² FRANCIONE, *supra* note 8, at 21.

⁹³ Francione, *supra* note 53, at 426.

⁹⁴ *Id.* Many of these statutes are state analogs of the federal Animal Welfare Act. *Id.*; 7 U.S.C. §§ 2131-2159 (2006).

⁹⁵ FRANCIONE, *supra* note 8, at 119-33.

⁹⁶ *Id.* at 123. Most courts even consider the protection of human morality the *primary* purpose of anticruelty statutes, following the logic that cruel treatment of non-human animals begets cruel treatment of humans. *Id.* This echoes the philosophy of John Locke and Thomas Aquinas, both of whom encouraged humane treatment of non-human animals solely because they believed it, in turn, promoted humane treatment of other humans. *Id.* at 37-40.

⁹⁷ *Id.* at 120.

California anticruelty statute due to his severe mistreatment of Rocky, a 50-year-old Aldabra tortoise with infected eyes, a cracked shell, and diarrhea, the California Court of Appeals, nevertheless, *returned* Rocky to Jett's (purported) care by contrasting the owner-animal relationship with the relationship between a parent and child, stating simply that "Jett owns Rocky."⁹⁸ Under California law, Rocky's legal thinghood—and because the abuse and neglect he suffered did not involve having been forced to fight by a human—resulted in his being returned to the exact human owner who had abused and neglected him.⁹⁹ It is this same legal thinghood which protracted the enslavement of innumerable African-Americans in the antebellum American South, when their legal thinghood was most notoriously codified (eventually to be later overturned by an amendment to the U.S. Constitution) by the Supreme Court in *Dred Scott v. Sandford*.¹⁰⁰

Non-human animals, like African-Americans subject to *Dred Scott* standing jurisprudence, currently lack standing to sue; and furthermore, humans generally cannot bring suit in their stead.¹⁰¹ United States courts have routinely and consistently held that non-human animals lack standing to sue.¹⁰² Issues of standing are questions of jurisdiction and stem from the requirement in Article III of the Constitution that there exist an actual "case or controversy" in order for a lawsuit to proceed.¹⁰³ Although standing jurisprudence is notoriously muddled, it is generally accepted that proof of standing demands satisfaction of three constitutional requirements.¹⁰⁴ In order to satisfy the constitutional aspect of the standing requirement, a plaintiff must demonstrate the following: (1) an injury in fact; (2) causation between a defendant's conduct and the plaintiff's injury; and (3) the redressability of the plaintiff's injury by potential litigation.¹⁰⁵ When suing under the Administrative Procedure Act (in order to redress wrongs arising out of interpretations of a statute by a federal administrative agency), there is an additional "prudential" (i.e., non-constitutional) requirement that the injury asserted fall within the "zone of interests" of the statute

⁹⁸ *Jett v. Municipal Court*, 177 Cal. App. 3d 664, 670 (1986). The California anticruelty statutes precludes repossession of an abused animal so long as the animal has not been used for fighting. Cal. Penal Code § 599aa (2011). Quite distressingly, the court in *Jett* commented with ironically cruel sarcasm that it is unrealistic "[t]o say Rocky belongs in the ring." *Id.*

⁹⁹ *See id.*

¹⁰⁰ 60 U.S. 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

¹⁰¹ WISE, *supra* note 8, at 52-53.

¹⁰² *Id.*; *see generally* FRANCIONE, *supra* note 8, at 65-90.

¹⁰³ *Id.* at 67; U.S. CONST. art. III, § 2, cl. 1.

¹⁰⁴ FRANCIONE, *supra* note 8, at 67.

¹⁰⁵ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

in question.¹⁰⁶ The refusal of many courts to extend standing to non-human animals, or humans suing on behalf of non-human animals, is almost certainly motivated at least in part by both speciesism and anthropocentrism as it implicitly suggests that the entire network of legal relations is itself a network of *human* relations governing disputes and relationships between humans or other “legal persons.”¹⁰⁷

The property status of non-human animals serves to assist in justifying the exclusion of non-human animals and those acting on their behalf from the class of individuals with standing to bring lawsuits.¹⁰⁸ The grounds on which courts have found that various individuals lack standing to bring suit on behalf of non-human animals have been myriad.¹⁰⁹ The denial of standing in such cases is, however, very often predicated on the notion that the non-human animals in question are the private property of another person—courts generally reject the contention that the “concerned bystander” can sue on the behalf of non-human animals owned by someone else because the animals are the *property* of the other person.¹¹⁰ Individuals seeking to sue under the federal Animal Welfare Act (“AWA”) are further subject to the “prudential” standing requirement that the subject matter of their complaint fall within the zone of interests of a statute interpreted by a federal administrative agency.¹¹¹ This has proved a steep hurdle to clear for individuals acting on the behalf of non-human animals pursuant to the AWA.¹¹² For example, federal circuit courts have held that animal rights organizations fall outside the “zone of interests” of the AWA and thus lack standing if they sue merely for the “informational purposes” of publicizing animal

¹⁰⁶ See FRANCIONE, *supra* note 8, at 67; *Allen v. Wright*, 468 U.S. 737, 751 (1984).

¹⁰⁷ See FRANCIONE, *supra* note 8, at 67 (explaining that in contemporary American jurisprudence, animals are the objects rather than the possessors of legal rights).

¹⁰⁸ See *id.* at 72-78.

¹⁰⁹ See *Animal Lovers Volunteer Ass’n, Inc. v. Weinberger*, 765 F.2d 937 (9th Cir. 1985) (holding animal rights organization could not interfere with navy’s practice of killing goats on its property unless there was a “distinct and palpable” injury to members of the organization as a result); *Int’l Primate Prot. League v. Inst. for Behavioral Research*, 799 F.2d 934 (4th Cir. 1986) (holding that animal rights group lacked standing to sue on behalf of monkeys owned by a research institute).

¹¹⁰ *Id.* at 938 (maintaining that the monkeys were the property of the Institute for Behavioral Research in dismissing the action filed by private third parties seeking to establish legal guardianship of the monkeys).

¹¹¹ *Allen*, 468 U.S. at 751.

¹¹² FRANCIONE, *supra* note 8, at 79-81 (noting several particular difficulties in operationalizing assertions of animals’ rights pursuant to the AWA).

abuse.¹¹³ There have been a few instances in which courts have held that individual humans do have standing to sue on behalf of both non-human animals and inanimate environmental resources; these cases, however, have tended to involve individuals suing on behalf of *ferae naturae*,¹¹⁴ rather than on behalf of non-human animals owned by a third party, subject to the robust yoke of human proprietary interest.¹¹⁵

The nearly categorical refusal on the part of courts to extend standing to non-human animals was most recently witnessed when the Federal District Court for the Southern District of California dismissed a complaint filed by the animal rights group People for the Ethical Treatment of Animals (“PETA”) on behalf of five orcas who perform in captivity at Sea World parks, including the well-known Tilikum, under the legal theory that the Thirteenth Amendment to the Constitution (which bans slavery) applies to the orcas.¹¹⁶ In dismissing PETA’s complaint against Sea World on behalf of the orcas on standing grounds, the District Court nevertheless reached some of the merits of the complaint, as the Article III case or controversy requirement demanded determining whether the constitutional amendment in question “affords

¹¹³ See, e.g., *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496 (D.C. Cir. 1994) (plaintiff animal rights organization, ALDF, suing for inclusion of birds, rats, and mice as “animals” pursuant to the AWA lacked standing when disseminating information is its only tie to the AWA zone of interests); *Animal Legal Def. Fund, Inc. v. Espy*, (29 F.3d 720) (D.C. Cir. 1994) (ALDF again lacked standing to challenge AWA regulations concerning canine exercise and primate psychological wellbeing at an experimentation facility).

¹¹⁴ The distinction between *ferae naturae* (wild animals) and *domitae naturae* (domesticated animals) was made by Blackstone in his treatise on property, and was influential in shaping the earliest legal authorities relegating animals to the class of personal property. FRANCIONE, *supra* note 8, at 41 (citing 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Callaghan & Co. 2d ed. 1872) (1769)).

¹¹⁵ *Animal Welfare Inst. v. Kreps*, 569 F.2d 1002 (D.C. Cir. 1977) (holding that plaintiffs have standing to sue because of an administrative decision jeopardizing their ability to observe and photograph the Cape fur seals in South Africa), *cert. denied*, 434 U.S. 1013 (1978); *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221 (1986) (finding plaintiff animal protection organizations had standing to require the Secretary of Commerce to confirm Japan was violating international whaling practices because damage to their interest in whale watching was sufficient injury in fact); *Alaska Fish & Wildlife Fed’n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933 (9th Cir. 1987) (holding plaintiffs could challenge U.S. Fish and Wildlife Service ruling permitting the hunting of migratory birds due to plaintiffs’ interest in observing or studying the birds), *cert. denied*, 485 U.S. 988 (1988); *Am. Horse Prot. Ass’n Inc. v. Frizzell*, 403 F. Supp. 1206 (D. Nev. 1975) (holding plaintiff conservationist organization had standing because its members had an interest in current and future enjoyment of lands in question).

¹¹⁶ *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm’t, Inc.*, No. 3:2011cv02476, (S.D. Cal Feb. 8, 2012) (Justia). [hereinafter *Tilikum Order*].

any legal protection to” whales.¹¹⁷ The court concluded that there was no indication that the Thirteenth Amendment, despite the ambiguity of its language, was ever intended to apply to any class of non-human animals.¹¹⁸ Regardless of the merits of PETA’s Thirteenth Amendment claim, the dismissal of the complaint brought on behalf of Tilikum and his fellow orcas at Sea World is unfortunately not an exceptional case. It is, rather, a fairly representative occurrence in terms of terminated or failed litigation efforts on behalf of non-human animals: the judicial system, superficially based on fairness and equality and replete with “protections” both procedural and substantive for non-human animals, succumbs to a myopically anthropocentric speciesism and preserves almost every injustice of the status quo.

IV. HUMANS AND GREAT APES: A CHOICE BETWEEN FELLOWSHIP AND BETRAYAL

“All one has to do is to ask [the experimenters] two questions. Question number one: ‘Why do you perform these experiments on the primates?’ And their answer is: ‘Because the [animals] are like us.’ Question number two: ‘Why it is morally okay to perform these experiments on these primates?’ And their answer is: ‘Because they are not like us!’ ... Now even my slowest students taking logic at Moorhead State see a problem here.”

—Charles R. Magel¹¹⁹

Taxonomical classifications of the living world are complicated ordeals which have beguiled human biologists and philosophers for millennia.¹²⁰ The philosophical and scientific debates regarding taxonomy very often involve questions regarding the level of consciousness displayed by non-human animals; factors bearing on this determination include non-human animals’ qualitative similarity to humans and sentience (i.e., ability to experience pain and pleasure).¹²¹ Despite discrepancies about the particularities of non-human animal

¹¹⁷ *Id.* at 3-4.

¹¹⁸ Tilikum Order at 4-7. Facial semantic ambiguity in the Thirteenth Amendment arises because the Amendment, in forbidding the existence of slavery and involuntary servitude, does not explicitly specify any class of beings among whom the prohibition on slavery and involuntary servitude applies. *See* U.S. CONST. amend. XIII.

¹¹⁹ Charles R. Magel, Professor of Philosophy, Moorhead State University, Address at the 1983 Mobilization for Animals Rally in Madison, Wisconsin (Apr. 24, 1983).

¹²⁰ WISE, *supra* note 8, at 134-41.

¹²¹ *Id.* at 122-23.

consciousness, there is general scientific consensus that non-human “[a]nimals can have conscious minds without sharing *all* the attributes of human consciousness.”¹²² What is most relevant is that non-human animals almost assuredly display some significant level of consciousness under the terms of almost any of the most prominent indicative theories of consciousness.¹²³ This assertion foreshadows the problematic argument made by those opposing the extension of fundamental rights to great apes, covered later in this section, that great apes need exhibit the exact same self-conception or theory of mind as that demonstrated by humans in order to qualify for fundamental rights.¹²⁴

There are a number of similarities between human culture and ape culture, primarily in terms of behavioral-psychological and physical factors. These factors are not dispositive but should be regarded as highly influential in the decision whether non-human apes should be afforded some set of fundamental (“human”) rights. Much like their human counterparts, non-human “primates thrive in social environments filled with complexities and rife with intrigues.”¹²⁵ Various developmental and scientific studies have also suggested that great apes need an adequate degree of socialization in order to attain the mental and emotional abilities typically associated with their individual species.¹²⁶ Chimpanzees, for instance, who were raised in socially and environmentally deprived conditions have tended to suffer significant cognitive deficits.¹²⁷ Apes also tend to demonstrate an understanding of relational categories, which involves the development of their inborn and “basic cognitive [abilities] into...complex and sophisticated cognitive skills.”¹²⁸ Quite simply, as concerns questions of taxonomy,

¹²² *Id.* at 126 (quoting TERRENCE W. DEACON, *THE SYMBOLIC SPECIES: THE CO-EVALUATION OF LANGUAGE AND THE BRAIN* 442 (1997)) (Emphasis added.).

¹²³ *See* WISE, at 130-31. Wise lists ten “outrageously simplified versions” of the ten best-known philosophical theories of consciousness: (1) identity theory; (2) eliminative materialism; (3) logical behaviorism; (4) emergent materialism; (5) functionalism; (6) biological naturalism; (7) constructive naturalism; (8) substantive dualism; (9) new mysteryianism; and (10) mind agnosticism. *Id.* The specific details of each school of thought regarding consciousness are less important than that each supports the hypothesis that non-human animals are capable of conscious existence. *See id.*

¹²⁴ *See id.*, *infra* note 184, at 181.

¹²⁵ *Id.* at 163.

¹²⁶ *Id.* at 163-64. Much of this research was conducted by Dutch primatologist Frans de Waal, who spent thousands of hours observing twenty-five chimpanzees in the world’s largest captive colony in the Netherlands, and eventually documented many aspects of the primates’ social lives, such as behavioral fixations on gaining advantages, power, sensitivity toward one another, conflict resolution, and reciprocal exchange. *Id.*

¹²⁷ *Id.* at 165-66.

¹²⁸ *Id.* at 165.

evolutionary biologist Richard Dawkins has made clear that “[t]here is no natural category that includes chimpanzees, gorillas, and orang-utans but excludes humans.”¹²⁹

There are also, as has become rather common knowledge today due to the rise of post-Darwinian evolutionary biology, a great many genetic similarities between humans and non-human great apes, particularly and perhaps most famously chimpanzees.¹³⁰ As few as 14 million years ago, there existed one creature representing a common ancestor for humans, chimpanzees, gorillas, and orangutans (collectively, the great apes).¹³¹ In the intervening period, orangutans, gorillas, chimpanzees, and humans all “broke off” into discrete evolutionary paths, resulting in the taxonomic situation as it exists today.¹³² Nevertheless, there are major consequences stemming from these genetic similarities—for example, the DNA of humans and chimpanzees, respectively, is over 98.3 percent identical—which include, among other things, manifest similarities between the brains of humans and chimpanzees.¹³³ There are numerous physical-structural similarities between human and non-human ape brains, including properties of neurons, synaptic connections, and combinations of neural connections.¹³⁴ Researchers and scientists have even suggested that in terms of evolutionary standards, the differences between human and chimpanzee brains are “remarkably minor.”¹³⁵ Gorillas and orangutans have also been proven to display numerous biological and cognitive similarities to humans.¹³⁶ For example, both gorillas and orangutans have shown capacities for complex use of communicative tools such as sign language.¹³⁷

The qualitative similarities between human and non-human apes can be contrasted with the widespread exploitation of great apes by humans. A few instructive examples serve to illustrate methods by which non-human apes could be more adequately protected if they were afforded some set of fundamental rights in order to be included in the so-called community of equals. Laboratory experimentation is the

¹²⁹ RICHARD DAWKINS, *Gaps in the Mind*, in THE GREAT APE PROJECT, *supra* note 8, at 82.

¹³⁰ WISE, *supra* note 8, at 131-32.

¹³¹ *Id.* at 132.

¹³² *Id.*

¹³³ *Id.* at 132-34.

¹³⁴ *Id.* at 133-34.

¹³⁵ *Id.* at 134 (quoting STEPHEN WALKER, ANIMAL THOUGHT 339 (1983)).

¹³⁶ *See generally* FRANCINE PATTERSON & WENDY GORDON, *The Case for the Personhood of Gorillas*, in THE GREAT APE PROJECT, *supra* note 8; H. LYN WHITE MILES, *Language and the Orang-utan: The Old ‘Person’ of the Forest*, in THE GREAT APE PROJECT, *supra* note 8.

¹³⁷ *Id.* at 46-50; PATTERSON, *supra* note 136, at 58-72. Not only can the apes communicate in sign language, but their use of this communicative mechanism is highly sophisticated, expressing ideas such as self-awareness and existence. *Id.*

most frequent way in which apes are exploited in the United States.¹³⁸ Of the several thousand chimpanzees living in the United States, two-thirds live in laboratories, with another third living in zoos, and a few used for various “entertainment” purposes.¹³⁹ Among orangutans and gorillas, a much higher percentage live in zoos than in laboratories (largely due to chimpanzees’ greater genetic similarity to humans, and presumed scientific “value”—a utilitarian calculus based, to be sure, on a proprietary notion of non-human animals).¹⁴⁰ The SEMA/Meloy laboratory facility in Rockville, Maryland—a representative example of a primate laboratory operation—housed chimpanzees along with a number of other primates in the late 1980s.¹⁴¹ SEMA/Meloy was contracted by the National Institutes of Health and infected the primates it studied with cancer, HIV, influenza, and hepatitis, among other diseases.¹⁴² At the SEMA/Meloy facility, chimpanzees, who are social animals by nature, were housed alone in cages known as “isolettes,” often in environments where they could hear and see other chimpanzees but not interact with them.¹⁴³ Many of the chimpanzees’ isolettes were caked with a combination of excrement, dust, and food particles, and were infested with vermin from roaches to rats.¹⁴⁴ Although some researchers have tried to stress potentially beneficial effects stemming from the “enculturation” of laboratory chimpanzees (that is, treating them as if they do possess complex mental abilities), most chimpanzees living in experimental conditions are nevertheless held in “concrete-and-steel laboratory settings that are stressful, sterile, frightening, isolating, and mentally and emotionally unhealthy.”¹⁴⁵ Detention in research facilities can also pose especially deleterious consequences for an intelligent and heavily socialized creature like a chimpanzee because, depending on their particular use on a given day in the facility, their “function” may

¹³⁸ DAVID CANTOR, *Items of Property*, in THE GREAT APE PROJECT, *supra* note 8, at 280.

¹³⁹ *Id.* While human use of chimpanzees is best-documented in laboratory experimentation, they also frequently experience unspeakable treatment in a variety of zoo operations. BETSY SWART, *The Chimp Farm*, in THE GREAT APE PROJECT, *supra* note 8, at 291-295. In her essay *The Chimp Farm*, Betsy Swart describes heinous, but not misrepresentative, conditions at a roadside zoo then operated (in a rather grotesque if predictable turn of events) by aging former vaudeville performers in Tarpon Springs, Florida, called the Noell’s Ark Chimp Farm (still in existence under the name Suncoast Primate Sanctuary). *Id.* at 291. The Noells, who started the facility, began their operation by forcing the chimpanzees to face one another in boxing matches. *Id.* at 292.

¹⁴⁰ CANTOR, *supra* note 138, at 280.

¹⁴¹ *Id.* at 280-81.

¹⁴² *Id.* at 281.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 283.

¹⁴⁵ WISE, *supra* note 8, at 169-71.

transform from that of a commodity (indicative of property status) to that of a personality (indicative of personhood) and back to that of a commodity again.¹⁴⁶ Moreover, despite their prevalence in laboratory operations in the United States, this is by no means the only way chimpanzees and other great apes undergo abuse at the hands of their human brethren.¹⁴⁷

For all the shortcomings in the United States regarding the treatment of great apes by humans, there is one form of exploitation of non-human apes many Americans are probably wholly unfamiliar with and unaware of. In west and central Africa, bushmeat (or wild animal meat) remains a means by which many humans choose to obtain protein and other resources.¹⁴⁸ Throughout west and central Africa, apes—including chimpanzees and gorillas—are hunted by humans for the purposes of both food and capture-transport.¹⁴⁹ Regularly, at places like the Ounze market in Brazzaville, Republic of Congo, passersby can purchase apes for consumption (smoked or fresh), as well as whole pieces of dead silverback gorillas, most usually hands and feet with one or several digits inexplicably missing.¹⁵⁰ Investigative journalists at the Mont Bouet market in Libreville, Gabon—“the most prosperous city of the most prosperous nation in Central Africa”—encountered for sale an entire chimpanzee leg, complete from the hip down with foot, toes, and hair intact.¹⁵¹ In many central African countries, such as Cameroon, selling ape meat is officially illegal, but “restaurateurs” and butchers—

¹⁴⁶ *Id.* at 171-72. Apologists for the laboratory research industry often fallaciously – and, I believe, disingenuously – assert that “enculturation” processes for non-human apes in laboratories differ in no meaningful regard from the educational process of “enculturation” for human children. *See id.* at 177. Wise notes, however, that there is a serious difference between “enculturated children, lovingly raised and nurtured in a language-drenched and socially rich natural environment, to chimpanzees raised in an apish Sing-Sing.” *Id.*

¹⁴⁷ *See* CANTOR, *supra* note 138, at 284-89.

¹⁴⁸ DALE PETERSON, *EATING APES* 24 (2003). More efforts have been made to combat the bushmeat trade industry in east Africa (where, for example, Jane Goodall lives and operates) than in west and central Africa, presumably due to more stable political conditions and lower food prices in the former. *Id.* at 35. Peterson is careful to concede, however, that in many west and central African nations there is a significant degree of religious and cultural diversity, and that many sects (such as Islamic culture and many indigenous tribes) categorically oppose the hunting of primates. *Id.* at 74. Nevertheless, he maintains that such protective practices represent the exception rather than the rule. *Id.*

¹⁴⁹ *Id.* at 39. Chimpanzees have proved much more resilient than gorillas in the terribly traumatic conditions under which they are shipped out of their native habitat. *Id.* at 41.

¹⁵⁰ *Id.* at 44. Continuity with their ancestral past has been offered up as a highly plausible reason that many (particularly rural) Africans, living near equatorial forests, place great cultural significance on the consumption of bushmeat. *Id.* at 66.

¹⁵¹ *Id.* at 67.

subject to virtually no governmental regulation or oversight—readily offer it for purchase despite its omission from the official menu.¹⁵² These gruesome details suffice to illustrate quotidian images of the trade in ape meat, but author Dale Peterson has noted the more broadly distressing development that “the trade in bushmeat has entered the economic mainstream of Central Africa in a major way, becoming a significant source of income for large numbers of people.”¹⁵³

There exists a dynamic, black-market orangutan trade in Southeast Asia, and by the 1990s only 20,000 orangutans could be found in the wild, completely sequestered on the islands of Borneo and Sumatra in Indonesia.¹⁵⁴ The solitary, arboreal orangutans’ rarity directly enhances their desirability to their human consumer-captors, and the species is highly sought after for both public entertainment and private collection.¹⁵⁵ Typically, orangutans are smuggled off of Borneo and Sumatra, intentionally mislabeled as some other sort of non-human animal, and confined in degrading conditions, which include the presence of disorders such as pneumonia, dehydration, parasitic invasion, liver and spleen disease, respiratory problems, and diarrhea.¹⁵⁶ Likewise, gorillas—while usually no longer used in research due to factors related to the cost-effectiveness of their maintenance¹⁵⁷—also experience the hazards of capture and enclosure by their human counterparts.¹⁵⁸ Gorillas kept in zoos (particularly those held in isolation) have also shown numerous disturbing physical and psychological traits such as antisocial tendencies, psychological unwillingness to reproduce (a common trait among many non-human animals in captivity), and physical complications with their reproduction systems.¹⁵⁹

The determination of which creatures hold fundamental rights under the law is a question of autonomy.¹⁶⁰ In other words, an animal’s tendency toward autonomous cognition—behaving with intention and

¹⁵² *Id.* at 48. The same is often true for elephant meat and skeletons. *Id.* In one such butcher shop, an enterprising Cameroonian man offered undercover investigators the opportunity to purchase baby elephant skulls then serving as ashtrays. *Id.*

¹⁵³ *Id.* at 116.

¹⁵⁴ CANTOR, *supra* note 138, at 284.

¹⁵⁵ *Id.* at 284-85.

¹⁵⁶ *Id.* at 285-86. The presence of such illnesses in orangutans traded on the black market nevertheless tends to result in punishment for their human captors due, predictably, to proprietary factors – e.g., mislabeling of containers. *Id.* at 285.

¹⁵⁷ *Id.* at 287. Gorillas (and orangutans) are classified as endangered species, demanding a relatively high standard of care in captivity, even for research purposes; contrariwise, chimpanzees are classified as “threatened,” not “endangered” – thus demanding a lower level of accountability for laboratory facilities which house them, and further explaining their prevalence among experimental operations. *See id.*

¹⁵⁸ *Id.* at 287-89.

¹⁵⁹ *Id.* at 287-88.

¹⁶⁰ WISE, *supra* note 8, at 179-80.

awareness—is what sets him or her apart, legally and philosophically, when the question of fundamental rights arises.¹⁶¹ Researcher Frans de Waal has written that humans tend to compare animal behavior with the “most dizzying accomplishments of our race and to be smugly satisfied” when a thousand monkeys given a thousand typewriters fail to compose Shakespeare.¹⁶² Fundamental rights and equality are, however, universal among humans; there is no outcome-determinative qualitative property among humans (e.g., the ability to re-compose Shakespeare) which results in the conferral of fundamental rights.¹⁶³ In *Rattling the Cage*, Steven Wise lists and describes seven relevant areas of cognition with the goal of demonstrating the cognitive abilities of great apes: (1) the capacity to feel pain; (2) mental representation; (3) self-conception; (4) logical and mathematical abilities; (5) tool use; (6) the knowledge that minds exist; and (7) nonsymbolic and symbolic communication, including language.¹⁶⁴ These are briefly described in the following three paragraphs.

First, there is widespread scientific consensus that great apes feel pain.¹⁶⁵ All primate brains contain nociceptors, or pain receptors, capable of detecting physical changes beyond a threshold (the so-called “pain threshold.”)¹⁶⁶ To be sure, there are very few certainties regarding the nuances and inner workings of neurological systems (e.g., the receptors which detect pain and suffering), whether with respect to human or non-human animals.¹⁶⁷ Nevertheless, numerous medical and scientific studies have reported that apes undergo a conscious perception of central nervous system activity as received by the nociceptors, and experience both fear (a relatively simplistic reaction to an impending threat) and anxiety (a more sophisticated and complicated fear of potential future threats).¹⁶⁸ Further, apes have demonstrated the tendency under both experimental and observational circumstances to form mental representations not only of the first but also of higher orders.¹⁶⁹ In terms of logical and mathematical abilities, many chimpanzees, for example, can demonstrate second-order thinking which involves relationships such as

¹⁶¹ *Id.* at 180.

¹⁶² *Id.* at 179 (quoting FRANS DE WAAL, GOOD-NATURED: THE ORIGINS OF RIGHT AND WRONG IN HUMANS AND OTHER ANIMALS 209 (1996)).

¹⁶³ See WISE, *supra* note 8, at 179.

¹⁶⁴ *Id.* at 180-222. Professor Wise, of course, focuses on these cognitive characteristics specifically as regards their presence in chimpanzees and bonobos, to whom he limits his proposed extension of fundamental rights in *Rattling the Cage*. See *id.* at 181. I, however, go a step further and respectfully recommend the extension of some kind of fundamental rights to all great apes – at the very least.

¹⁶⁵ *Id.* at 181-83.

¹⁶⁶ *Id.* at 182.

¹⁶⁷ See *id.* at 182-83.

¹⁶⁸ *Id.* at 182.

¹⁶⁹ *Id.* at 183-86. Higher-order perceptions demanding mental representation include object permanence capabilities. *Id.* at 184.

“sameness” and “difference,” which suggests an ability to classify and/or sort objects similar if not superior to, as Wise rather dryly observes, the abilities of many high school students facing the analogies portion of the SAT.¹⁷⁰ Chimpanzees have also exhibited a profound aptitude for counting, whether simply understanding Arabic numerals or performing mathematical operations using them (demonstrating quite clearly that our fellow hominoids understand the symbolism underlying the numerals themselves, surpassing the capacity for mere memorization).¹⁷¹

The cognitive abilities demonstrated by non-human apes have also been shown to include the ability to manipulate the physical environment in order to further their own goals.¹⁷² Jane Goodall, quite possibly the most culturally visible and internationally renowned proponent of the Great Ape Project, “startled the scientific world” when she, in 1960, first presented reports of a chimpanzee using a trimmed tree branch to fish for termites—i.e., his having bent the material world toward his own objectives.¹⁷³ The extensive clamor attending Goodall’s initial report quieted rather swiftly, though, as the scientific community accepted the acknowledgement “that nearly every wild and captive chimpanzee regularly uses tools and for a wide variety of purposes.”¹⁷⁴ This collective realization led to further consideration of apes’ mental abilities, which have been frequently reported by scientific analyses “to possess many, if not all, the elements of a theory of mind.”¹⁷⁵ The entire notion of a theory of mind is a concept whose breadth far surpasses the scope of this essay, but can be succinctly summarized in terms of *self-awareness* (understanding of one’s own existence, and, correspondingly, some nature of that existence) and *joint attention* (the ability to engage in or, at the very least, sympathize with the existential experiences of others—something even autistic human children lack the capacity to do).¹⁷⁶ Evidence of apes’ self-awareness can be seen in direct testimony from hunters in the bushmeat trade of central Africa.¹⁷⁷ Hunters have reported that “chimpanzees, when wounded and cornered

¹⁷⁰ *Id.* at 186.

¹⁷¹ *Id.* at 187-90.

¹⁷² *See id.* at 190-94.

¹⁷³ *Id.* at 190-91.

¹⁷⁴ *Id.* at 191. The number of ways in which apes, particularly chimpanzees, have exhibited a propensity for implementing the design and use of tools is manifest. *Id.* For example, chimpanzees in Tai National Park in Côte d’Ivoire have learned to use stones and wood as hammers against other stones or wood in order to open food, which concurrently suggests a complex, interworking knowledge of relationships between at least three objects (including, further, what Wise refers to as a “three-tool set”). *Id.*

¹⁷⁵ *Id.* at 194-95.

¹⁷⁶ *Id.* at 198-201.

¹⁷⁷ PETERSON, *supra* note 148, at 54-56.

and about to meet their death, will turn and beg for their lives . . . with precisely the sort of expressive postures and gestures . . . that hunters see among human beggars in the city.”¹⁷⁸ There have even been suggestions that apes can empathize, i.e., picture themselves in the place of other individuals.¹⁷⁹

The final consideration regarding the cognitive abilities of non-human apes involves the communication function.¹⁸⁰ Non-human hominoids have exhibited an extraordinary capacity for comprehension and subsequent communication (whether linguistic or nonlinguistic, i.e., symbolic) that meets many of the standards put forth by preeminent linguist Steven Pinker.¹⁸¹ Just as non-human apes do need not display the ability to form mental representations on par with that of the average human ape, it is irrelevant for the purposes of a discussion regarding the extension of fundamental rights to non-human great apes whether any such ape “ever will be a great language producer.”¹⁸² The most salient reality, rather, is that non-human apes have consistently demonstrated a capacity to *understand* such communication. In fact, they have been proven to exhibit passive and active cognition of linguistic communication, even if they are not able to respond to such communication via human linguistic speech.¹⁸³

No reasonable proponent of non-human animal rights should fall victim to the specious “rebuttal” often proffered by their opponents that the self-conception or theory of mind present in great apes does not exactly equal that displayed by humans.¹⁸⁴ Regardless, the merits of the straw man argument are ultimately irrelevant because great apes (just like human children who have not yet fully developed complex skills like self-conception, or moreover like developmentally disabled human adults who will *never* fully develop such skills) do not exhibit perfection in any or all of these categories.¹⁸⁵ As Professor Wise has noted, we are approaching an age in which “[j]udges must recognize that even using a human yardstick, at least some nonhuman animals are entitled to recognition as legal persons.”¹⁸⁶ This determination should

¹⁷⁸ *Id.* at 54.

¹⁷⁹ WISE, *supra* note 8, at 211.

¹⁸⁰ See WISE, *supra* note 8, at 214-22. In fact, language has been described as the criterion to which “[m]any of those who would defend the traditional barrier between *Homo sapiens* and all other species cling” in order to preserve such barrier. PATTERSON, *supra* note 136, at 61.

¹⁸¹ WISE, *supra* note 8, at 214-22; Pinker authored *The Language Instinct*, a hallmark of introductory linguistics courses at institutions of higher learning the world over. *Id.* at 217; STEVEN PINKER, *THE LANGUAGE INSTINCT* (1995).

¹⁸² WISE, *supra* note 8, at 221.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 181.

¹⁸⁵ *Id.*; see also Goodall, et al., at 158-70.

¹⁸⁶ STEVEN M. WISE, *DRAWING THE LINE* 240 (2002).

be made based on evaluation of objective and empirical criteria such as those listed above, rather than stubborn adherence to rigidly-drawn taxonomical lines. The sentient and cognitive abilities of many non-human animals are sufficient with respect to the criteria in each above category so as to warrant some extension of rights beyond the deplorably minimalist protections they are currently afforded.¹⁸⁷

V. THE GREAT APE PROJECT: A NEW HOPE OR SPECIESISM IN DISGUISE?

“We demand the extension of the community of equals to include all great apes: human beings, chimpanzees, gorillas, and orang-utans. ‘The community of equals’ is the moral community within which we accept certain basic moral principles or rights as governing our relations with each other and enforceable at law. Among these principles or rights are the following: (1) The Right to Life . . . (2) The Protection of Individual Liberty . . . (3) The Prohibition of Torture.”

—The Editors and Contributors
to *The Great Ape Project*, in
‘A Declaration on Great Apes’¹⁸⁸

In the early 1990s, a prolific and multinational group of philosophers, primatologists, anthropologists, and other intellectuals and scientists founded an organization and published a comprehensive proposal, supported by a book containing thirty essays, which advocated for the adoption of a universal declaration on the fundamental rights of great apes.¹⁸⁹ These efforts are collectively known as the *Great Ape Project*, and the participants have continued up until the present day to vocally support the extension of certain fundamental rights to all great apes.¹⁹⁰ The most visible element of the *Project* since its inception has been its *Declaration on Great Apes*.¹⁹¹ The signatories to the declaration advocate for three primary, fundamental rights which they maintain should be extended to a community of equals encompassed by humans, chimpanzees, gorillas, and orangutans: (1) the *right to life*, which includes freedom from being killed besides “very strictly defined circumstances;” (2) the *protection of individual liberty*, referring to protection from imprisonment in the absence of adequate procedural

¹⁸⁷ *See id.*

¹⁸⁸ GOODALL, ET AL., *supra* note 8, at 4.

¹⁸⁹ *Id.* at 4-7.

¹⁹⁰ *See id.*

¹⁹¹ *Id.*

safeguards and guaranteeing to all members of the community of equals a right to appeal such confinement; and (3) the *prohibition of torture*, proscribing members of the community of equals from deliberately inflicting severe pain on other members of the community.¹⁹² The signatories readily acknowledge that “[t]he inclusion, for the first time, of nonhuman animals into this community is an ambitious project,” but provide in the declaration itself an overview of the general qualities and characteristics (already detailed in Part IV of this essay) signaling that non-human great apes merit consideration for membership into (and, thus, the protections afforded to) the community of equals.¹⁹³ It should not be surprising, due to Peter Singer’s influence within the Project, that the declaration directly confronts the speciesism intrinsic in the human use and abuse of non-human animals, stating that “[n]ever before has our dominion over other animals been so pervasive and systematic,” but that this was the first moment when, “within that very Western civilisation that has so inexorably extended this dominion, a rational ethic has emerged challenging the moral significance of membership of our own [human] species.”¹⁹⁴ This unambiguous reference to speciesism is coupled with an invocation of the golden rule, after which the drafters of the declaration note that the ever-murkier distinction (in terms both taxonomical and moral-ethical) between some species and others mirrors the often rhetorically acrobatic distinctions between the perceived “value” of various races, national origins, and religions that, with time, receded quite rightly into ridicule.¹⁹⁵

The *Declaration on Great Apes* was a bold proclamation, to be sure.¹⁹⁶ The challenge for the drafters has been to attract sufficiently broad-based support for their proposals, which includes securing cooperation both by bodies capable of legal enactment and enforcement (e.g., legislatures and governments) as well as groups which can provide popular, citizen-based support on the ground (e.g., animal rights organizations and grassroots operations). Despite the assertion by the drafters of the declaration that humankind seemed uniquely primed for so bold a maneuver as they attempted, progress toward enacting further protection for great apes (whether or not based on theories of fundamental rights), much like that for other non-human animals at large, has been small in scale, slow to occur, and extremely cautious.

¹⁹² *Id.*

¹⁹³ *Id.* at 5.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ To wit: the declaration’s third prong calls for the prohibition of torture as committed against all members of the great ape community. *Id.* This, however, is not even something – nearly two decades after the declaration’s drafting – that *human* rights organizations have managed to guarantee for human beings, much less other great apes.

Nevertheless, the Project itself is significant in that it represents an attempted operationalization of theories like those put forth by Singer and Gary Francione, widely seen as either legally untenable or wanting in detail, into a functional legal framework geared toward the protection of great apes.

Since the publication of the *Declaration*, a few jurisdictions have taken steps toward equalizing treatment among human and non-human great apes. For example, the British government banned the use of great apes for the purposes of biomedical research in 1996.¹⁹⁷ The government cited the apes' "cognitive and behavioural characteristics and qualities" in an effort to bolster their apparent moral-ethical convictions.¹⁹⁸ Further, the Parliament of New Zealand passed a statute in 1999 which forbade the use of a nonhuman hominid in research testing or teaching, barring one exception grantable by the New Zealand governmental official responsible for animal welfare.¹⁹⁹ More significantly, the only possible exception to the ban on non-human hominid research in New Zealand involves cases in which it would prove beneficial to the interests of the *non-human animal* him-or herself.²⁰⁰ Although this statute did not assert the inalienable rights of great apes so unequivocally as animal rights activists had originally wished, it nevertheless represented a bold and significant step forward in terms of non-human hominid rights and, more relevantly, would almost certainly not have passed without the efforts of the New Zealand chapter of the Great Ape Project.²⁰¹

Prominent members of the animal rights movement have criticized the efforts of the international Great Ape Project. Most notably, Gary Francione has suggested that regional or national efforts aligned with or similar to the Great Ape Project stand for the classic axiom that the road to hell is paved with good intentions: Francione maintains that the theoretical basis motivating such efforts is inextricably informed by speciesism and that their integrity is compromised or undercut as a result.²⁰² Francione rejects the notion that great apes should be afforded fundamental rights solely due to any genetic, biological, behavioral, or

¹⁹⁷ WISE, *supra* note 8, at 75.

¹⁹⁸ *Id.*

¹⁹⁹ *Animal Welfare Act 1999*, PARLIAMENTARY COUNCIL OFFICE: NEW ZEALAND LEGISLATION http://www.legislation.govt.nz/act/public/1999/0142/latest/DLM51200.html?search=sw_096be8ed805b9ff8_hominid_25&p=1&sr=3 (last visited Oct. 12, 2012).

²⁰⁰ *Id.* (emphasis added).

²⁰¹ Rowan Taylor, *A Step at a Time: New Zealand's Progress Toward Hominid Rights*, 7 ANIMAL L. 35, 35-40 (2001).

²⁰² Gary L. Francione, *The Great Ape Project: Not So Great*, ANIMAL RIGHTS: THE ABOLITIONIST APPROACH, <http://www.abolitionistapproach.com/the-great-ape-project-not-so-great/> (last accessed Oct. 1, 2012).

cognitive similarities to humans that they might demonstrate.²⁰³ While Francione professes agreement (in earnest, without question) with the idea that non-human great apes should not be used for the purposes of experimentation or entertainment, he sweepingly accuses movements including but not limited to the Great Ape Project with having embraced what he labels the “similar minds” hypothesis, creating a moralized hierarchy among species and placing at the top of such hierarchy species most qualitatively similar to humans.²⁰⁴

Professor Francione’s assertions are not without merit—the plague of speciesism is by no means a mere specter, and its implications are widespread, pervasive, and insidious—but his argument is ultimately an extension of the most narrow and absolutist speciesist argument that it is irresponsible to concentrate on non-human animal suffering in the wake of so much well-documented human suffering. To contend, as Francione does, that a movement whose goal is the extension of fundamental rights to great apes utilizes speciesist-imbued rhetoric because it invokes the unassailable proposition that non-human apes exhibit a dramatic number of similarities to humans is tantamount to the textbook speciesist argument, persistently proffered by those who oppose almost all efforts (legal or otherwise) on behalf of non-human animals, that an attempt to equalize or equate suffering between humans and other animals somehow diminishes the gravity of human suffering itself. Politicians and philosophers skeptical of extending fundamental rights to non-human animals often ask: “Why chimpanzees, rather than humans?” Simultaneously and correlatively, Francione might question: “Why chimpanzees, rather than armadillos?” These superficially incisive inquiries are both shallow and hollow, as they rely on the fallacious notion that accentuating the suffering of any single species necessarily operates unfavorably toward any other species. In actuality, there exists so much suffering among *all* animal species that constant assistance and enduring advocacy by every sentient being on every other’s behalf would likely accomplish precious little toward eliminating it. A system of hierarchization among different modes of suffering—which compartmentalizes and almost automatically encourages competition and rivalry between them—detracts from the overarching reality that where much suffering exists, much help is needed. While proponents of the Great Ape Project have chosen to emphasize the exploitation of

²⁰³ *Id.* Francione is similarly critical of efforts such as Project R&R: Release and Restitution for Chimpanzees in U.S. Laboratories and the New England Anti-Vivisection Society, both of which advocate for precisely what their names respectively imply. *Id.* He has perhaps presented a flawed argument in this instance, as non-human apes’ taxonomical similarity to humans is not the *only* basis on which the Great Ape Project rests its support for extending fundamental rights to non-human hominids. *Id.*

²⁰⁴ *Id.*

one subset of non-human animals, they do not do so to the detriment of other non-human animals, either in rhetoric or in reality. As Peter Singer has noted, “great apes are . . . an ideal case for showing the *arbitrariness* of the species boundary.”²⁰⁵ The Great Ape Project, though ostensibly concentrated on exacting certain measures of justice for a narrow group of non-human animals, sees as its broader goal the exposure and eradication of the distinction between different species for moral and legal purposes as the distinction is taxonomically understandable but ethically disquieting.

VI. CONCLUSION

*“So it must be said that if a man starts thinking a bit he
gets into what one might call pretty disorderly company.”*

—Robert Musil²⁰⁶

To write of non-human animal suffering after the human carnage during the twentieth century seems to many either irresponsible or misdirected. For many people who—admirably—seek to contribute to the struggle against non-human animals’ suffering on a day-to-day basis, “[s]ending a check to the conservation establishment to save some tigers or whales represents the kind of convenient excuse that allows for a good night’s sleep.”²⁰⁷ This checkbook advocacy is not limited to the realm of animal rights, but suffering by non-human animals is frequently so remote that it is particularly difficult to concretely envisage how such payments might contribute toward the alleviation of non-human animals’ suffering. The property status of non-human animals serves to perpetuate their exploitation and anguish, and neither of these is morally consonant with the emergent ethical and philosophical notions that there should be a set of fundamental rights for all sentient beings. To support the extension of certain fundamental rights to non-human great apes amid demonstrable, worldwide human discord and turmoil is to some extent controversial. Nevertheless, it would be disingenuous for thoughtful people everywhere to allow any perceived unpopularity or controversy surrounding the proposed expansion of fundamental rights to life and liberty beyond the boundaries of human exclusivity to permit turning a blind eye toward suffering or to dissuade them from acknowledging that there indeed exists equality beyond humanity, regardless how disorderly the company that acknowledgement might require keeping.

²⁰⁵ SINGER, *supra* note 8, at xiii (emphasis added).

²⁰⁶ ROBERT MUSIL, *THE MAN WITHOUT QUALITIES* 130 (Eithne Wilkins & Ernst Kaiser trans. Secker & Warburg 1961) (1930).

²⁰⁷ PETERSON, *supra* note 148, at 212.

PSYCHOLOGICAL ASPECTS OF CRUELTY TO ANIMALS: A CLINICIAN'S PERSPECTIVE

ELIZABETH A. WAIESS*

I. INTRODUCTION

The Humane Society's website informs on the vast area of animal cruelty that the Society addresses through legislation and education.¹ In psychology, cruelty to animals is not an area of specialty but is subsumed under other forms of aggressive or anti-social behavior, such as spouse and child abuse. From the perspective of a psychologist and psychoanalyst, it is assumed that individual psychology and learning history are involved, as well as group dynamics, which result in the abuse of animals. In order to work clinically, i.e., one-to-one, with an individual involved in any form of animal abuse, it is necessary to have a culture that makes it clear that many forms of cruelty are not sanctioned. There are forms that have been institutionalized where there is a profit motive, such as the treatment of farm animals, racing animals, highly desirable breeds of dogs and cats, and exotic and wild animals, that require enlightenment, legislation, and financial inducement to effect broad societal change. Still other forms are immoral but not illegal. Entire unexplored areas in psychology include institutionalized cruelty to animals, such as "puppy mills," cruelty to domestic animals that are processed for food (notably cattle, pigs and chickens), other abuse of animals for the purposes of cultural status, religion, sadistic entertainment, sport and/or money.

This paper focuses narrowly on the individual. One of the primary ways for a human being to truly change an unwanted behavior is to first experience an internal conflict about the behavior—that is, to want to act in a certain way and to feel guilt or shame about that action. While imposing an external moral prohibition or law (e.g., for example, "Thou shalt not kill.") can often result in stopping behavior through fear of punishment or exclusion, this approach can break down when the individual experiences powerful enough emotions and impulses or is in

* Elizabeth A. Waiess, PsyD, is a psychoanalyst and psychologist. She works in full-time private practice in East Lansing, Michigan, and she is on the Adjunct Faculty at Lansing Community College. She is president of the Michigan Psychoanalytic Council. Dr. Waiess has worked clinically for 30 years with adults, teenagers, and children. This article is dedicated to Dr. Bertram Karon, PhD.

¹ See generally THE HUMANE SOCIETY OF THE UNITED STATES, www.humanesociety.org.

a setting which weakens the effect of the consequences. Everyone has witnessed a parent humiliating or hitting a child in a store just before holidays. While a parent can have the internal intention to not hit his or her child, this intent can be overcome when tired, frustrated, in physical discomfort, or when the parent is already in an angered state. One important reason for this is that the parent's past experience of being hit by their own parent can overwhelm the good intent. What happened to the parent in childhood can be re-enacted in a way that the parent quickly regrets.²

In the privacy of the home and in our most important relationships, the wish to be loved can be a powerful emotional motivator to inhibit destructive impulses. For example, the author worked with a middle-aged woman whose husband was developing dementia. His incessant worry and raging were examples of uncharacteristic behaviors for him. She said, "I would like to slap him, but he stood by me through my own problems I don't want to hurt him." Her love assisted in inhibiting her impulse to slap him even though she had grown up in an incredibly assaultive and neglectful home where she was beaten. When she finally did throw something at her husband, the couple decided it was time to get professional advice or to divorce.

Psychologists and social workers often work with clients in private practice and clinics who have difficulty managing destructive behavior towards dependents, for example, their supervisees, patients, customers, clients, students, children, elderly parents in their care, and the world at large, such as pets and livestock and even land and water. "Dependents" have a lower power status than the client, come to the client for specific types of assistance or knowledge, or literally rely on the client for safety, food and other basic life necessities. This also includes stewardship.

When a clinician works with an individual who describes hurting or killing a pet or animal, it is imperative that he or she be aware of his or her own emotional reactions. For example, while killing a deer under any circumstances is considered cruelty by some individuals, it is advisable that the psychologist who holds this belief realizes that not everyone in our culture would agree with that standard and to continue listening carefully to the patient. This author listens for the emotion the individual describes in stalking and killing the animal. Does the person get sadistic pleasure in "blowing something away" and use hunting as a socially permitted way to vent his impulse to kill humans, or is it done consciously, skillfully, with respect for the animal and with the

² DANIEL J. SIEGEL & MARY HARTZELL, *PARENTING FROM THE INSIDE OUT: HOW A DEEPER SELF-UNDERSTANDING CAN HELP YOU RAISE CHILDREN WHO THRIVE* 193-94 (2003).

goal of making a clean kill and to cause no suffering. These are very different emotional motivations and reflect very different learning about relationships. Both are destructive in the sense of taking a life of an animal, but one contains the sense of entitlement and selfish power and is a venting of rage and reversal of helplessness and fear. The other contains a sense of purpose, the sense of some empathy for the animal, pride in making a clean kill, and regret for any suffering that is caused by a shot that misses the mark. The first individual would raise a red flag and the therapist would be very concerned regarding his treatment of people, especially those who depend on him or of lower status. The second individual would not raise any concerns at all.

In clinical work, therapists are generally very interested in the relationships the client has with equals such as a spouse and coworkers, those who have some authority over him, and anyone who is dependent on him. Therapists generally place household pets, domestic animals, and other animals very close to the level of children and physically or mentally disabled adults in terms of requiring special empathy and concern by those responsible for their care and continued well being.

Psychological understanding of behavior can provide a means of preventing further destructive behavior. Understanding a behavior and excusing a behavior are very different mental abilities that humans have. "Excusing" is often a means of quickly moving forward; this very often circumvents understanding while implying a "no hard feelings" mentality and conveys no consequences. Understanding searches for sources, meanings, and even a deeper process of attempting to relate to that person, whether it is deserved or not. This is truly mature thinking. It is very difficult to step into the place of someone who has caused deliberate pain to an animal. However, understanding a behavior does not include removing cultural responsibility for actions. In discussing the psychological reasons why someone cruelly treats, destroys, or hurts an animal—when it is not done for food, protection of self or property, or out of compassion for a suffering animal—it is helpful to start with human psychological development.

The human child is "born [l]oveable, [s]ociable and [n]on-violent."³ The "bad seed" is a myth. Psychologists have understood the critical importance of the early relationship between baby and parent for the very life of the child, physical and psychological.⁴ As the baby is raised, so will that individual raise his/her own children, with very important exceptions to the rule.⁵ Within the parent-child relationship

³ Bob Johnson, *Emotional Health*, 15 (2002).

⁴ *Id.* at 42.

⁵ Daniel J. Siegel & Mary Hartzell, 154-156 (2003).

the child learns what it means to be human and comes to think about himself and others accordingly.⁶ Is it good to be in contact with humans, or is it filled with risk, uncertainty, even pain? Do the adults seem to be willing or even pleased to be able to meet the child's needs, or do the needs cause fear, stress, anger, and resentment? These are very different learning experiences in regards to neediness and dependence. Children take in emotional information by observation and direct contact with the primary caretakers on a moment-to-moment basis. They learn from experience what emotions are, whether it is permissible to have them, how to express them, how not to express them, the difference between feelings and actions and much more.⁷

Developmentalists have known for a long time that the human child is born with the capacity for aggression and other life-sustaining behaviors that are motivated by physical and emotional need.⁸ It is impossible to imagine a child being born without that capacity. Humans all have the original capacity for assertiveness along with parents who managed their impulses well enough otherwise no human would survive childhood. The following is a typical description a developmentalist would expect when the child has had optimal parenting. The one year old is not expected to be able to know he is hurting the mother when he bites, for example; however, the caretaker does not willingly allow herself to be hurt. The older child is beginning to recognize the capacity to injure/hurt the caretaker and thus compromise what he wants or needs – the parent makes a loud noise, or withdraws. Even older (about two and a half to three years) the child can begin to empathize and to use memory of how that might feel to the other person based on his own experience. This requires actual maturation of the brain, ability to retain learning and retrieve it, and patterning of emotional response, which the parents modulate. When the child is four to six years old,⁹ he is ready and willing to take in the “rules” of social conduct, although this learning is easily overcome by the child's intense emotions.¹⁰

Children require the assistance of adults to engage with them in finding ways to modulate uncomfortable emotions of anger, fear, boredom, powerlessness, and frustration. This is what is referred to as conscience or superego. From the author's experience, it is very

⁶ Bob Johnson, *Emotional Health*, 42 (2002).

⁷ Daniel J. Siegel & Mary Hartzell, 57-59 (2003).

⁸ Stanley I. Greenspan & Nancy Thorndike Greenspan, *THE CLINICAL INTERVIEW OF THE CHILD*, 64-65 (American Psychiatric Press, 2nd ed. 1991).

⁹ LOUISE BATES AMES ET AL., *THE GESELL INSTITUTE'S CHILD FROM ONE TO SIX: EVALUATING THE BEHAVIOR OF THE PRESCHOOL CHILD*, 39 (Harper & Row, 1979).

¹⁰ STANLEY I. GREENSPAN & NANCY THORNDIKE GREENSPAN, *THE CLINICAL INTERVIEW OF THE CHILD*, 70-73 (American Psychiatric Press, 2nd ed. 1991).

difficult to raise a human child to be deliberately and consciously cruel to others and animals. The human being longs to be in safe connection and empathy with others. While it is possible that a psychologically solid child can have an experience in adolescence that is distressing and painful enough to cause significant changes in the basic stance toward others, from the author's experience this would not be the usual source of the unconscious tendency toward cruelty. Examples of adolescent tragedy would include a significant threat to life, such as rape or being shot at, or an unexpected violent death of a parent. The key in these examples would be the response of the important adults in their lives. Did the adolescent experience justice and protection, or is the adolescent having to fend for himself, thus tempted to become the perpetrator rather than the prey?

A. Case One

A 16 year old was referred to this author for therapy by the court for delinquency. The 16 year old, comfortably and with a grin, told the author about torturing to death a stray cat with the assistance of his cohorts. This was not the reason the youth had been referred to treatment. The cat suffered and was terrified before it died. Part of the torture involved burying the animal up to its neck. The author was frozen in place by the details and also his ease in being able to commit this atrocity. He read the author's reactions accurately, because he followed up by saying, "oh yeah – we tie the tails of cats together too and throw them over a fence – I hate cats." Knowledge of the teen's background provided an understanding of how he was capable of this cruelty. The cat symbolized himself; he had been a toy for sadistic adults. Children who are raised in dangerous and neglectful homes, whether the danger is from the parents, older siblings, the neighborhood, or the predominant culture, will learn to stop thinking and feeling, i.e., to dissociate the experience.¹¹ This is a psychological defense, which is outside conscious control.¹² Because the experience is "traumatic," it is re-enacted all too easily under circumstances that are reminders of the original trauma.¹³ While it is known generally in the clinical field that "geographical cures" are often attempted, sometimes by moving from state to state or country to country, the individual carries the past

¹¹ SANDRA WIELAND, DISSOCIATION IN TRAUMATIZED CHILDREN AND ADOLESCENTS, 2-7 (Sandra Wieland 2011). See also INTERNATIONAL SOCIETY FOR THE STUDY OF TRAUMA AND DISSOCIATION, <http://www.isst-d.org/education/faq-dissociation.htm#cause> (last visited Nov. 29, 2012).

¹² *Id.* at 2-7.

¹³ *Id.*

with them. This teen attempted a geographical cure by skipping school, which is how he became court-ordered for therapy. This teen seemed comfortable with his cruel actions and enjoyed the discomfort of the therapist. If he had been raised in home environment that taught him not to hurt those weaker than himself, he likely would have felt guilt or shame while telling about this atrocity. That he felt enjoyment in the telling suggests normalization at an early age of cruel behavior toward dependents.

Harry Stack Sullivan, an American psychologist, has worked with teen delinquents. He thought the roots of delinquency were in the experience of a young child, around age three, who had been raised fairly well to that point in time. At around that age, the three year old becomes quite bossy—basically wanting the parents and siblings to be slaves to his whims. This is another very trying time for parents who do not want to crush the child's self-confidence. Sullivan found that, in his delinquents, this was about the time that the parents stopped being empathic with their child.¹⁴ Refusing to work with the child who wanted a servant, they humiliated, insulted, and belittled the child.¹⁵ Deliberate and conscious setting up of the child occurred—for example, promising a trip to the park later in the day to a demanding child, and then laughing at the child for expecting the parent to keep the promise. Sullivan observed the change in the young child to be a “malevolent transformation.”¹⁶ The child then begins to view adults as “the enemy,” and eventually those younger or weaker than himself are contemptible and are treated in cruel ways, just as he was treated.¹⁷

The child who has been raised in the way described by Sullivan may eventually learn that cruelty generally is not acceptable in their culture. He then learns to restrict his cruel behavior to times he is with others who also are cruel or by himself in secrecy. He will learn to lead two different lives: the socially acceptable life and a secret life of cruelty. However, the child who finds that his wider culture (i.e., extended family, adults associated with the parents, school, neighborhood, etc.) establishes the same sort of cruel relationship with him and other dependents as his parents will then behave openly in cruel and sadistic ways. Further, he may react with dismissal or even aggressively when presented with an opposing outside viewpoint. After all, becoming an adult means establishing an oppressor relationship with those who are dependent

¹⁴ HARRY STACK SULLIVAN, M.D., *THE INTERPERSONAL THEORY OF PSYCHIATRY*, 211 (Helen Swick Perry & Mary Ladd Gawel eds., 1953).

¹⁵ *Id.* at 213.

¹⁶ *Id.* at 214.

¹⁷ VAMIK VOLKAN, *BLOODLINES: FROM ETHNIC PRIDE TO ETHNIC TERRORISM*, 45 (Basic Books 1998).

or different. The psychoanalyst Vamik Volkan describes in detail the relationship that many cultures require parents to have with their children. Details of centuries-old atrocities and grievances are passed down through the generations.¹⁸ Thus, hatred is kept fostered and can result in present-day wars and genocide, which collapse the past and present.¹⁹

B. Case Two

A woman in her early twenties was referred to the author in response to very serious symptoms of self-mutilation and repeated suicide attempts. She had threatened her previous therapist with a knife in public. She had spent a lot of her young adult life in the psychiatric hospitals and some time in jail.

This young woman eventually relaxed and started working in therapy. She was one of several children in her family. The parents had many problems of their own and had very little physical contact with the children other than when hitting them. She became a fearful child and a scapegoat in school from first grade on. Her parents told her she was the problem when she came home crying about the bullying she was enduring at school. She began establishing sadistic/masochistic relationships with others as well as toward herself. She went out for sports for the sole purpose of being able to hit other players. She mutilated her own arms but fortunately she was limited in her ability to be destructive toward others; she threatened a mental health worker with a knife, but it was a dull two-inch knife she had taken from her mother's kitchen. I never really felt I was in danger when I was working with her.

Young women and men eventually talk about their thoughts of becoming parents, and sometimes this begins with a discussion of pets they have owned. There was a family cat when the author started working with her, but she did not describe any mistreatment of the animal. However, she did tell me when she had her own apartment she had taken in a puppy to keep her company. Instead of being compliant, the puppy was a lot of work. When she shut the dog into a room so it would not get into everything, it cried non-stop. Her emotions were already in conflict about the dog. She had wanted to be loved, instead she had a puppy that was dependent and required her love – a disappointment. This paper began with the capacity for aggression that all humans have and this begins with the infant's cry. This person had been taught to hit, to become forceful when feeling frustrated and to

¹⁸ *Id.* at 34-35.

¹⁹ *Id.*

be frightening. However, there was a hierarchy: her father had wanted to sleep during the day and when the children made too much noise, he would erupt from the bedroom and start beating the children and throw them outdoors. When she was a young child, crying for her mother to pick her up, the mother would come, but she would come yelling and frighten the baby—creating a freeze reaction in the child. As a young adult, she had been taught in various ways that it is very wrong for her to be threatening to others (they can be threatening to her but not the other way around). This was all very confusing to her. However, what she learned was that fighting someone with whom she had an authority relationship was wrong; fighting someone who had an equal relationship was expected; fighting someone or something in a dependent relationship was condoned if done secretly.

Rather than even think of giving the puppy away, my young patient drowned the puppy. She had never told anyone what she had done. She was not proud of it, but she was filled with fear—and from the look on her face, was sure I was going to verbally beat her up. She was ready to defend herself if necessary. The puppy was long gone, and this was a young woman who was sexually active and fully capable of becoming pregnant and having a baby. It was imperative as her therapist that the author tries to help her with the dilemma she was facing. The way she talked about this cruelty was very different than how the sixteen-year-old told the author about the tortured cat. She had internal conflict about cruelty, which indicates that she had experienced kindness and protection, as well as destructive behavior as a child.

As a loving person, she was continually struggling with her impulses to be cruel to those who were dependent on her and her need to be constructive and supportive of life. She continuously chose to punish herself with attacks on her body and with self-imposed isolation. The self-mutilation was a compromise. Better herself than someone else was her reasoning. While she had encounters, she did not have friends. With the assistance of therapy, she was able to begin making decisions that were better compromises. For example, she feared her aggressive impulses toward infants (because of her experience with the puppy) and so made sure she was on a contraceptive which did not require her to remember to take it every day. She could not have taken that action prior to being in therapy.

II. CONCLUSION

As is often the case, pets and other animals help us. They serve to inform the therapist of potential trouble down the road when working with patients, as illustrated in the above examples. They can be an indicator of growth and strengthening of capacity to manage intense emotions when the owner reports becoming more empathic towards a pet, noticing the animal's affection for the first time and needs, as was the case recently with a patient who is autistic. They can indicate that the patient is becoming more attuned to taking care of themselves, for instance when an owner realizes that a horse is being neglected where it is boarded and needs to be moved to a better place. Generally this would indicate that the patient is getting the idea that he needs to take care of himself better.

At present, there is not a body of theory and research on the specific topic of animal cruelty. There are only case studies and surveys, primarily of criminals. In talking with colleagues, they also were unaware of any specific literature on the topic. The field of social work in veterinary medicine shows promise of developing into an important resource and at this time incorporates animal cruelty under the umbrella of domestic violence.

UNDERSTANDING BLOOD SPORTS

MARIA A. ILIOPOULOU & RENE P. ROSENBAUM*

“Thinking is the place where intelligent actions begin. We pause long enough to look more carefully at a situation, to see more of its character, to think about why it’s happening, to notice how it’s affecting us and others.”

— Margaret J. Wheatley

I. INTRODUCTION

In this paper, we explore and discuss theories that explain why men are attracted to dogfighting, cockfighting, and bullfighting. We selected three theories and will provide an overview of each theory separately. Next, we proceeded with a discussion regarding common conceptual themes that emerge through these three theories and their significance in understanding blood sports as a first step in preventing them. The three theories we selected are the following:

1. Theory of why men are attracted to dogfighting as a sport, by Rhonda Evans, DeAnn K. Gauthier, and Craig J. Forsyth;¹
2. Theory of why men are attracted to cockfighting, by Clifford Geertz;²
3. Theory of why men are attracted to bullfighting, by Garry Marvin.³

* Maria A. Iliopoulou, DVM, MS, Ph.D. candidate, CARRS, MSU. Rene P. Rosenbaum, Ph.D., Associate Professor Community Economic Development, CARRS, MSU.

¹ Rhonda Evans, DeAnn K. Gauthier, & Craig J. Forsyth, *Dogfighting: Symbolic Expression and Validation of Masculinity*, 39 *SEX ROLES* 11-12, 825-37 (1998).

² CLIFFORD GEERTZ, *Deep Play: Notes on the Balinese Cockfight*, *THE INTERPRETATION OF CULTURES*. 412-53 (1973).

³ Garry Marvin, *On Being Human in the Bullfight*, *The Animals Reader* 197-208 (Linda Kalof & Amy Fitzgerald eds., 2007).

II. THEORIES REGARDING WHY MEN ARE ATTRACTED TO BLOOD SPORTS

A. *Why Men are Attracted to Dogfighting*

The theory of why men are attracted to dogfighting is developed by Evans, Gauthier and Forsyth.⁴ Evans et al. conducted an ethnographic fieldwork study in the southern United States, for two years.⁵ During this period, they interviewed 31 men that fight dogs (referred to as “dogmen” by Evans et al.) and attended 14 dogfights and pre-fight meetings.⁶ They argued that the blood sport, in the context of the southern dogfighting subculture, serves as a symbolic arena where (predominately) working class men are given an opportunity to express and validate their masculine identities.⁷ The authors also argued that for working class men (predominately white in their study) dogfighting might be the only alternative way for achieving honor and status, as compared to middle class and professional men.⁸

Evans et al. supported the theory that men are attracted to dogfighting because some elements of the blood sport offer them the opportunity to attain and maintain masculine identity.⁹ In this context, masculinity is equated with honor and status.¹⁰ Manhood is a status that “must be achieved through socially constructed means.”¹¹ Particularly in cultures with patriarchal societies, such as the United States, manhood appears to be highly appreciated and associated with privilege and power.¹² Traits of the “ideal man” and “ideal American” include the following qualities: to strive for success, to be assertive, to be aggressive, and to be strong and competitive.¹³ All of these male qualities that focus on action have been integrated and promoted through competitive sports.¹⁴

Furthermore, competitive sports have played a major role, not only in redefining manhood, but also as a means for “training in the fighting virtues” and “building manly character.”¹⁵ In that context, competitive sports progressed from contests between men or teams of

⁴ Evans, *supra* note 1, at 825.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 825-26.

⁸ *Id.* at 825.

⁹ *Id.* at 825-26.

¹⁰ *Id.* at 825, 830.

¹¹ *Id.* at 825.

¹² *Id.* at 826.

¹³ *Id.* at 825-26, 828.

¹⁴ *Id.* at 826.

¹⁵ *Id.*

men to contests in which men do not compete directly but are being represented by animals.¹⁶ Thus, these fights between animals (in which they represent men) offer a symbolic arena where men can still “express and validate masculinity” without being directly violent to each other and without risking physical damage to their bodies.¹⁷ Thus, one of the main reasons men are attracted to dogfighting is because the blood sport offers the opportunity for men to gain status, “validate their masculine identities,” and “build[] solidarity... against a common ‘enemy’” all without risking physical injury.¹⁸ This is exactly the role of modern-day dogfighting as a sport: a symbolic arena to validate masculinity, to gain power and status, and to build solidarity among men.¹⁹

Another reason why that makes dogfighting popular among working class men is because it is a context that gives them the unique opportunity to compete and gain status that is not accessible to them through their occupational success.²⁰ This is very important for working class men of the southern United States who lack this opportunity to gain honor and status through other avenues.²¹ This is supported by the findings of the Evans et al. study. The majority of committed dogmen were drawn from the working class, while the middle and upper classes were barely represented.²² Additionally, it has been argued that various subcultures and social classes have different definitions and contexts for expressing and validating masculinity.²³ Men from middle and upper classes might have more and different opportunities for expressing and obtaining masculine identity through occupational success; thus, dogfighting is just a hobby for them. However, for working class men, dogfighting plays a central and important role in their lives. The Evans et al. study included the following statement by a working class dogman: “I eat, sleep, and drink bulldogs. That’s the only thing I live for. This is my life. . . .”²⁴ Men from lower-class backgrounds have limited opportunities to validate masculinity through occupational success and thus rely on the more accessible routes of competitive sports through strength and violence.²⁵ In dogfighting, there might be different meanings for why men are attracted to the blood sport, based on their socioeconomic statuses and the associated lack of opportunities to express and validate masculinity through other avenues.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 827.

¹⁹ *Id.* at 825, 830-31.

²⁰ *Id.* at 829.

²¹ *Id.*

²² *Id.* at 833-34.

²³ *Id.* at 834-35.

²⁴ *Id.* at 834.

²⁵ *Id.* at 829.

An additional reason that explains the popularity of dogfighting among men is because it offers dogmen the opportunity to gain status through the heroic actions of their dogs.²⁶ The fighting dogs serve as symbols for the traditional masculine ideal of heroism.²⁷ In the southern culture of honor, where honor is directly associated with violent behaviors that are manifested through “pride of manhood in masculine courage, physical strength, and warrior virtue,” there is a strong union of the man with “the instrument of his prowess.”²⁸ Thus, a dog that fights like a hero is worshiped as a hero, and reflects the same qualities, privileges and status to his owner. In this case, the hero is the fighting dog or American Pit Bull Terrier.²⁹ Porpora provided the definition of the term “heroes” in the context of the dogfighting subculture:

[H]eroes are better conceptualized not as idols of worship, but as an idealized reference group: one seeks to stand with one’s heroes rather than to be one’s heroes in actuality, and heroes thus are one mechanism we use to tell ourselves what it is we stand for. For those who have them, then heroes are an important inner marker of identity. They are part of the landscape of the soul.³⁰

The authors argue that dogmen perceive themselves as heroes-makers. Dogmen’s perception of their role in dogfighting is that they create dog-heroes by training dogs to fight. The fighting dog is expected to fight bravely and “take it like a man.”³¹ Furthermore, the dogfighting rules are very strict and penalize “cur” dogs—which are dogs that behave cowardly—and their owners.³² Additionally, dogfighting rules give priority in acknowledging dogs that fight bravely by rewarding their owners with honor and status.³³ A very important meaning for the context of dogfighting is that fighting dogs are symbols of their owners. This is evident by the following statement provided by a dogman interviewed by Evans et al.: “[m]ean and tough guys have the kind of dog that [demonstrate] they are men.”³⁴ Thus, all personality traits of the dogs are also attributed to their owners. Dogfighting in this context is not only about monetary gain and profit; it is about gaining status and honor.

²⁶ *Id.* at 831.

²⁷ *Id.*

²⁸ *Id.* at 828, 830.

²⁹ *Id.* at 830.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 830-31.

³³ *Id.* at 831.

³⁴ *Id.*

Furthermore, another potential reason explaining why men of the working class are attracted to dogfighting is because it offers an equal opportunity to win.³⁵ The authors argued that in dogfighting the playing field is leveled between men of different classes, color and financial status. The most important determinant for winning is gameness, “heroism,” and strength.³⁶ A supporting argument is that winning and participating in the blood sport are much more important for working class men than for middle and upper class men. Thus, working class men might be attracted to dogfighting because this is one of the few social contexts in which they have an equal opportunity to win.³⁷

Finally, the authors argue that there are two potential reasons for the persistence of dogfighting among working class men. The first is that once certain institutions of the society are considered reputable and honorable by the upper classes, they become accepted as habitual by all classes and thus, are resistant to change. Once standards are established by the upper class, the lower classes are committed to them as a means of pursuing status. The second reason is that the camaraderie of this dogfighting subculture gives a sense of masculinity and group identity, while also playing a major role of belonging for dogmen. They share the similar risks of betting and illegal activities, and thus, they develop a sense of solidarity. This sense of solidarity is one of the reasons why most attempts to leave the group fail.³⁸

The authors conclude that the southern working class subculture is similar to the larger culture of masculinity in the United States.³⁹ Thus, violence is perceived as a culturally legitimate means to validate masculinity and define the male roles in society. Manhood and status play a major role in our society. Furthermore, due to certain socioeconomic inequalities in the United States, men might have limited access to legitimate and legal alternative routes for attaining and earning masculine status through their career. Thus, for men of lower class backgrounds, an alternative way for emphasizing competitiveness and aggression is through competitive sports such as boxing, wrestling, and, as it was discussed by Evans et al., dogfighting.⁴⁰ In those instances, failure to attain the culturally accepted ideals of masculinity is perceived as much worse than any legal penalties associated with dogfighting.⁴¹

³⁵ *Id.* at 835.

³⁶ *Id.* at 831.

³⁷ *Id.*

³⁸ *Id.* at 834.

³⁹ *Id.* at 836-37.

⁴⁰ *Id.* at 829.

⁴¹ *Id.* at 836-37.

B. Why Men are Attracted to Cockfighting

Geertz conducted an ethnographic study in Bali.⁴² According to Geertz, Balinese men are attracted to cockfighting because: a) the birds are an extension of their owner's narcissistic ego and thus, the cock's victory is a way for the owner to attain status and masculinity;⁴³ b) Balinese cockfighting is a form of gambling for status, virtue, and honor through the concept of "deep play;"⁴⁴ c) cockfighting is a social phenomenon that represents the Balinese society and a means for men to attain political power and prestige;⁴⁵ and d) participation in cockfighting is an indirect way to express rivalry as well camaraderie among men.⁴⁶ As Geertz argued, "[e]very people, the proverb has it, loves its own form of violence. The cockfight is the Balinese reflection on theirs. . . ."⁴⁷

In cockfighting, cocks represent men; thus, the victory of the cock is a means of status and prestige for his owner.⁴⁸ There is an undeniable psychological identification between Balinese men and their fighting cocks.⁴⁹ The cocks are also masculine symbols for Balinese, and this is evident by the metaphoric meaning of the word for cock in Balinese. It means, among others, "hero, tough guy, warrior, champion, and lady killer."⁵⁰ Cockfights are compared to "[c]ourt trials, wars, [and] political contests."⁵¹ Thus, cockfighting plays a central role in the life of the Balinese men involved in it. These men admire their cocks in a self-absorbed way. The enthusiasts of the sport perceive themselves as "cock crazy."⁵² This madness has to do with the cock symbolizing the owner's ego as well as the aversion of the Balinese to any animal-like behaviors.⁵³ In this cultural context, the cockfight is also perceived as a sacrifice in order to pacify the demons.⁵⁴ For these men, the cock symbolizes the ideal self, the penis, and the animalistic demons.⁵⁵ Thus, one of the reasons men are attracted to it, is for status, but also as a culturally acceptable way to participate in collective life.⁵⁶

⁴² GEERTZ, *supra* note 2, at 419.

⁴³ *Id.*

⁴⁴ *Id.* at 432-33.

⁴⁵ *Id.* at 434-35.

⁴⁶ *Id.* at 449-50.

⁴⁷ *Id.* at 449.

⁴⁸ *Id.* at 417, 436.

⁴⁹ *Id.* at 417.

⁵⁰ *Id.* at 418.

⁵¹ *Id.*

⁵² *Id.* at 419.

⁵³ *Id.* at 419-20.

⁵⁴ *Id.* at 420.

⁵⁵ *Id.*

⁵⁶ *Id.* at 417-18.

Additionally, Balinese men are attracted to cockfighting for the thrill of risking or gambling.⁵⁷ In this context, the serious gambling involved is far beyond the monetary capacities of a manual laborer and is referred to as “deep play.”⁵⁸ Gambling in the Balinese cockfighting equals an attempt to offer a “deep match” associated with a highly unpredictable outcome.⁵⁹ This is accomplished by placing a high bet and matching two birds that are equally good.⁶⁰ Men are wagering in cockfighting not in order to “break even,”⁶¹ but for the ultimate triumph. The higher the bets, the higher the status and masculinity that are put at stake publicly.⁶² According to Geertz, these men are attracted to cockfighting because it gives a significant meaning to their life.⁶³ The associated monetary risks are compensated because of the importance of finding a meaningful reason to live for. This is about “status gambling,” not about monetary gain.⁶⁴ The men are attracted to cockfighting because “deep play” or serious and risky gambling serves as a way to attain masculine status.⁶⁵

Furthermore, Geertz argues that men in this context are attracted to cockfighting in order to gain political strength and prestige.⁶⁶ In this culture, the same people that dominate the cockfighting ring dominate the society as well.⁶⁷ The cockfight is a representation of the Balinese society and the fight for status and hierarchy. Balinese royalties and cultural heroes were in the past enthusiasts and great supporters of the sport of cockfighting.⁶⁸ Furthermore, Balinese men in this context have the opportunity to express, indirectly, social rivalries and tensions as well as build solidarity among their group. In this context, cockfighting is almost a political structure through which people can still “play with fire” but do not get caught.⁶⁹ The author concludes that “[i]n the cockfight, man and beast, good and evil, ego and id, the creative power of aroused masculinity and the destructive power of loosened animality fuse in a bloody drama of hatred, cruelty, violence, and death.”⁷⁰

⁵⁷ *Id.* at 449.

⁵⁸ *Id.* at 426.

⁵⁹ *Id.* at 441.

⁶⁰ *Id.*

⁶¹ *Id.* at 440.

⁶² *Id.* at 433-34.

⁶³ *Id.* at 434.

⁶⁴ *Id.* at 434-35.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 439-40.

⁶⁸ *Id.* at 441-42.

⁶⁹ *Id.* at 440.

⁷⁰ *Id.* at 420-21.

C. Why Men are Attracted to Bullfighting

Marvin argued that Andalusian people are attracted to bullfighting because their culture gives a major priority in the concept of “what it means to be civilized.”⁷¹ The Andalusian people believe the blood sport of bullfighting is a public representation of that meaning.⁷² Marvin argues that bullfighting (“*corrida*” in Spanish) is a public, dramatic expression of the symbolic conflict and eventual dominance of human culture over nature.⁷³ In this cultural context the bull represents nature and the matador (Spanish for killer) represents human culture.⁷⁴ Thus, bullfighting is a dramatic representation of the superiority and triumph of human will and control over animality; this is an effort to culturalize and civilize nature.⁷⁵ The spectacle is not about seeing an animal being killed, but rather about a drama demonstrating the way by which the matador is able to control his fear and confront and “tame” the bull by imposing his will over a dangerous and untamed other.⁷⁶ Thus, the public is attracted because they want to watch a dramatic performance based on the matador’s artistry to control. Artistry in this context means the matador’s capacity to control himself, his fear, and the bull with elegance.⁷⁷ The bullfight itself represents the different stages of “taming” that are completed with the death of the animal (nature).⁷⁸

However, in this cultural context, only men are allowed to play the role of the matador.⁷⁹ This is because “*corrida*” is also a way to express what it means to be a “human male in the Andalusian culture.”⁸⁰ Marvin argues that in order to understand why people are attracted to *corrida*, we have to reach out and understand the cultural context and the significance, as well as the symbolism, of the blood sport within this context.⁸¹ Bullfighting is a male-oriented event that demonstrates the accepted masculine values of the Andalusian culture through the blood sport. Masculinity in the context of the Andalusian culture means willfulness, assertiveness, sexual potency, independence, and self-

⁷¹ Garry Marvin, *On Being Human in the Bullfight*, *The Animals Reader* 197 (Linda Kalof & Amy Fitzgerald eds., 2007).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 198.

⁷⁵ *Id.* at 199.

⁷⁶ *Id.* at 201.

⁷⁷ *Id.* at 206-07.

⁷⁸ *Id.* at 207.

⁷⁹ *Id.* at 200.

⁸⁰ *Id.* at 198.

⁸¹ *Id.*

control.⁸² Interestingly, the ideal character traits for women are exactly the opposite. Furthermore, tame animals and to some extent women are perceived to be passive, to lack sexual assertiveness and to be unable to exercise self-control. This is also an opportunity for the matador to gain reputation, prestige, and masculinity. Masculinity in this cultural context is perceived as a way to control and dominate others. This is a competition of human intelligence and maleness over physical animal strength. The man is expected to control and deceive the bull with his intelligence, his mastery, and by exhibiting self-control. Thus, the more difficult and challenging it is to control and dominate the bull, the greater the opportunity for the matador to attain masculinity and prestige. Corrida poses a challenge and offers an opportunity for a dramatic reaffirmation of “male humanity.”⁸³ The matador voluntarily takes the risk to publicly confront an unpredictable challenge in order to prove his status and his masculinity.⁸⁴

Additionally, Andalusian people are attracted to the blood sport because it is a popular public performance. This is a public, cultural, and institutionalized event that takes place in the town square (plaza), during a holiday; there is music, lights, and costumes that exaggerate the status of the matador.⁸⁵ The plaza is a popular place for the wealthy and upper classes to live. Furthermore, this is a place that is associated with the absolute representation of human control in an urban center. The concepts of ambience, close social contact, social activity, cultural, and educational events are indicative of civilization and control. In this context, bullfighting offers a live drama; it is an emotional, unpredictable, cultural symbolism of domestication. Bullfighting is a dramatic cultural statement that emphasizes the appropriate relationship between human and animal, as well as civilization and nature.⁸⁶

⁸² *Id.* at 200.

⁸³ *Id.* at 206.

⁸⁴ *Id.*

⁸⁵ *Id.* at 202.

⁸⁶ *Id.* at 201.

III. DISCUSSION

The theories mentioned above addressed the issue of blood sports in three different countries, and cultural contexts. Evans et al. explored the subculture of dogfighting in southern United States even though they mention that there are similarities to the larger culture of masculinity in US.⁸⁷ Geertz explored the blood sport of cockfighting in Bali. Finally, Marvin explored the cultural meaning of bullfighting in Spain.⁸⁸ The reason we chose three theories regarding different countries and blood sports, is because they present some significant common patterns or conceptual themes. These themes appear to be cross-cultural and offer a significant insight in understanding why people are attracted to blood sports and why these blood sports still exist. This understanding has the potential to be the first step in preventing them. The following conceptual themes emerged: 1) Blood sports are popular among men because they represent a symbolic arena to validate and express masculinity; 2) Fighting animals represent men and the blood sport gives meaning to the owner's life; 3) Socioeconomic class and social inequalities are associated with the popularity of blood sports. These conceptual themes are discussed below.

A. Theme 1: Blood Sports are Popular Among Men Because They Represent A Symbolic Arena to Validate and Express Masculinity

In order to further understand this connection, it is important to address the similarities regarding the definition of the term masculinity among these three cultures. In the context of the Andalusian culture masculinity is associated with willfulness, assertiveness, bravery, sexual potency, independence, honor, self control, control and dominance over others, violence, status, power and prestige.⁸⁹ For Balinese men masculinity is linked to sexual potency, bravery, dominance, risk taking, status, heroism, violence, self control, narcissistic male qualities, power, competitiveness and prestige.⁹⁰ For the southern subculture of dogfighting, masculinity is equated with honor and status, assertiveness, heroism, bravery, aggression, power, competitiveness, violence, and prestige.⁹¹ Thus, violence, power, control, and aggression are common themes associated with masculinity for all three contexts and might explain why the animal cruelty associated with blood sports becomes

⁸⁷ Evans, *supra* note 1.

⁸⁸ Marvin, *supra* note 71, at 197.

⁸⁹ *Id.* at 200.

⁹⁰ GEERTZ, *supra* note 2, at 436, 449-50.

⁹¹ Evans, *supra* note 1, at 825-26, 830-31, 835-37.

“legitimized” or “normal” in an effort to achieve manhood. Another important component is the perceived definition of sports in this context.

Evans et al. stated that sports are a socially constructed means though which men can achieve manhood.⁹² Traits of the ideal man are integrated though competitive sports. Evans et al. argued that blood sports represent competitive sports in which men do not compete directly but are represented by animals and thus avoid physical injury to themselves and their opponents.⁹³ This statement is true for dogfighting and cockfighting; however, in bullfighting the matador still is in risk of physical injury.⁹⁴ This theme adds an important component in the study of blood sports; there might be an association between the definition of masculinity for each culture or subculture and the prevalence of blood sports. Furthermore, it seems that the concepts of violence, aggression, and blood sports are connected through the definition of masculinity and competitive sports.⁹⁵

This theme adds several important relevant concepts in understanding why blood sports still exist as well as why they are perpetuated. For children that are raised in communities where blood sports and violence are prominent there are several challenges. First of all, according to Bandura’s “reciprocal determinism,” there is a reciprocal and interactive relationship between environment and a person’s behavior.⁹⁶ Thus, their violent environment might influence children raised in communities with high prevalence of blood sports. Furthermore, if their family members and peers are involved in dogfighting, those role models may become an example to follow for these children, considering that behavior is learned through modeling and observation.⁹⁷ Additionally, if the definition of masculinity is associated with violence, aggression, and blood sports in the children’s cultural context, involvement in dogfighting might be related with motivation for effective modeling.⁹⁸ Lave and Wenger further support this argument by arguing that learning is situated and that learning can occur unintentionally in the context of culture.⁹⁹

⁹² *Id.* at 825-27.

⁹³ *Id.* at 826-27.

⁹⁴ Marvin, *supra* note 71, at 202, 203.

⁹⁵ Evans, *supra* note 1, at 825-29.

⁹⁶ *Social Cognitive Approach to Personality: Albert Bandura (1925-)*, MONASH UNIVERSITY (2001), available at <http://condor.admin.cuny.cuny.edu/~hhartman/SOCIAL%20COGNITIVE%20APPROACH%20TO%20PERSONALITY%20ALBERT%20BANDURA%20%281925-%29.htm>.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ JEAN LAVE AND ETIENNE WENGER, SITUATED LEARNING: LEGITIMATE PERIPHERAL PARTICIPATION, 11, 14, 34, 70 (1991).

B. Theme 2: Fighting Animals Represent Men and The Blood Sport Gives Meaning to The Owner's Life

The second common theme is that the fighting animals represent men, and the blood sport gives meaning to the owner's life. This is supported in the study of dogfighting by Evans et al., by stating that a dog that fights like a hero is worshiped as a hero and reflects the same qualities and privileges to his owner.¹⁰⁰ Dogmen gain status through their dogs, as there is a strong union of the man with "the instrument of his prowess."¹⁰¹ Furthermore, these men perceive themselves as hero makers, and the fighting dogs they create are "an important inner marker of identity" and "are part of the landscape of the soul."¹⁰² Similarly, in cockfighting there is an undeniable psychological identification between Balinese men and their fighting cocks; the birds are perceived as an extension of their owner's narcissistic ego.¹⁰³ Additionally, cockfighting gives Balinese men a meaningful reason to live for.¹⁰⁴ A similar theme was not found in the context of bullfighting.

It has been supported that the popularity of blood sports in the renaissance has been attributed to a "psychological and moral crisis," a breakdown of the traditional values, and an increase in individualistic attitudes and behaviors.¹⁰⁵ Furthermore, the baiting spectacles were associated with scape-goatism, and the popularity of these sports manifested "a site of humanity's confusion about itself."¹⁰⁶ It would be difficult to define a moral crisis in the cultural contexts of dogfighting and cockfighting today; however, we argue that in the context of blood sports there might be evidence of certain behavioral traits associated with personality disorders as narcissistic,¹⁰⁷ conduct,¹⁰⁸ and antisocial¹⁰⁹ personality disorders. These personality disorders can be manifested by a low self-esteem, a lack of empathy, a sense of entitlement to exploit others, and a psychological projection.¹¹⁰ Low self-esteem (today) might

¹⁰⁰ Evans, *supra* note 1, at 830-31.

¹⁰¹ *Id.* at 830.

¹⁰² *Id.* (quoting Porpora, D.V. *Personal Heroes, Religion, and Transcendental Metanarratives*, 11 *SOCIOLOGICAL FORUM* 209, 211 (1996).

¹⁰³ GEERTZ, *supra* note 2, at 436, 449-50.

¹⁰⁴ *Id.* at 443-44.

¹⁰⁵ See LINDA KALOF, *LOOKING AT ANIMALS IN HUMAN HISTORY* 92 (2007).

¹⁰⁶ *Id.* at 91 (quoting ERIC BARATAY & ELISABETH HARDOUIN-FUGIER, *ZOO: A HISTORY OF ZOOLOGICAL GARDENS IN THE WEST* 237 (2002)).

¹⁰⁷ THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, § 301.81 (Am. Psychiatric Ass'n 4th ed.) (2000).

¹⁰⁸ *Id.* at Diagnostic Criteria for Conduct Disorder.

¹⁰⁹ *Id.* at § 301.7.

¹¹⁰ J. REID MALONY, *GABBARD'S TREATMENTS OF PSYCHIATRIC DISORDERS*, Chapter 51, (Glen O. Gabbard et. al. eds, 4th ed. 2007).

be due to current socioeconomic inequalities, as well as loss of traditional values.¹¹¹ Psychological projection could be associated with the way the fighting dogs and cocks are treated. Sigmund Freud described the term as a defense mechanism where a person subconsciously projects their own bad trait onto someone else and thus, “avoiding seeing it in oneself.”¹¹² As Geertz mentioned, the birds are an extension of their owner’s narcissistic ego; thus, the cock’s victory is a way for the owner to attain status and masculinity.¹¹³ Evans implies that the same is true for the fighting dogs; however, in both cases the welfare of the animals is not taken into consideration, allowing us to perceive a sense of entitlement to exploit them and project on them their insecurities when they lose and die.

In the context of understanding why people are attracted to blood sports and why they still exist, we argue that the way the fighting dogs are perceived by the dogmen manifests a lack of understanding towards the basic needs and welfare of the dogs. This lack of understanding could lead to a lack of empathy though objectification. According to scientific evidence, dogs attach to humans in a way that parallels the attachment behaviors developed between child and parent.¹¹⁴ Dogmen do not appear to be aware of the way their dogs relate to them and their basic needs. This could be attributed to a lack of education regarding basic animal care, behavior, and welfare. It has been argued that objectification is about feeling entitled to exhibit control and dominance over another human through abuse and even homicide.¹¹⁵ Dogmen appear to feel entitled to exhibit control and dominance over fighting dogs through abusive training, neglect, and a painful death.¹¹⁶

It has been argued that there are several commonalities among cases of victim exploitation in cases of domestic violence, as well as in cases of animal abuse through dogfighting. Both are based on “objectification that comes into being through the obliteration of

¹¹¹ Robert F. Solomon Jr., *No Curs Allowed: Exploring the Subculture of Dogmen* (2008) (unpublished M.A. thesis, The University of North Carolina at Greensboro) (on file with University of North Carolina Digital Online Collection of Knowledge and Scholarship).

¹¹² R. Baumeister et al., *Freudian Defense Mechanisms and Empirical Findings in Modern Social Psychology: Reaction Formation, Projection, Displacement, Undoing, Isolation, Sublimation, and Denial*, 66:6 *J of Personality* 1029 (Dec. 1998).

¹¹³ GEERTZ, *supra* note 2, at 419.

¹¹⁴ Linda Kalof & Maria Iliopoulou, *Abusing the Human–Animal Bond: On the Making of Fighting Dogs*, in *THE PSYCHOLOGY OF THE HUMAN-ANIMAL BOND* 321, 321 (Christopher Blazina et. al. eds., 2011).

¹¹⁵ *Id.*

¹¹⁶ KALOF, *supra* note 105, at 324-26.

empathic identification” with the victims’ dignity and individuality.¹¹⁷ We previously argued that there might be a potential for association of certain behavioral traits linked with antisocial, conduct, and narcissistic personality disorders in blood sports and particularly dogfighting. It would be important to further explore whether children that are exposed to dogfighting have values and behaviors that are influenced by the associated violence. A challenge in this case would be how one could empower these children in the context of Foucault’s definition: “the right . . . to rediscover what one is and all that one can be.”¹¹⁸

C. Theme 3: Socioeconomic Class and Social Inequalities are Associated with the Popularity of Blood Sports

A third emerging theme concerns the socioeconomic class and social inequalities associated with the popularity of blood sports. According to Evans et al., the low socioeconomic status of dogmen gives them a reason to adhere to a sport that was once reputable among the leisure class in an effort to gain status.¹¹⁹ Similarly, in Balinese society, royals and cultural heroes were in the past enthusiasts and great supporters of the sport of cockfighting.¹²⁰ Thus, it appears that once standards are established by the upper class, the lower classes are committed to them as a means of pursuing status.¹²¹ Similarly to dogfighting, cockfighting was introduced by the upper classes and became part of the culture.¹²² A similar connection is implied by Marvin regarding bullfighting as the plaza where the blood sport takes place is a popular place where the wealthy and upper classes live. Furthermore, Evans et al. argue that while men from middle and upper classes might have more opportunities for obtaining masculine identity through occupational success, men from lower-class backgrounds have limited opportunities to validate masculinity through occupational success.¹²³ Thus, they rely on the more accessible routes of competitive sports and dogfighting through strength and violence.¹²⁴

¹¹⁷ Tomo Shibata, ‘Pornography’, *Sexual Objectification and Sexual Violence in Japan and in the World* 12 (Lund University, Sweden, Centre for East and South-East Asian Studies, Working Paper Nov. 27, 2008), available at http://www.lu.se/images/Syd_och_syдостасиенstudier/working_papers/shibata_final.pdfhttp://www.lu.se/images/Syd_och_syдостасиенstudier/working_papers/shibata_final.pdf.

¹¹⁸ GAVENTA & CORNWALL, 175 (2008).

¹¹⁹ Evans, *supra* note 1, at 828-29.

¹²⁰ GEERTZ, *supra* note 2, at 441-42.

¹²¹ Evans, *supra* note 1, at 828, 829.

¹²² GEERTZ, *supra* note 2, at 441-42.

¹²³ Evans, *supra* note 1, at 829.

¹²⁴ *Id.*

Furthermore, it appears that dogmen develop a sense of solidarity because they share similar risks such as betting and illegal activities.¹²⁵ Even though monetary gain as a motive is only implied by Evans, according to Bechtel, dogfighting arises to support gambling.¹²⁶ Dogfighting is considered to be “like the Saturday night poker game for hardened criminals,” where “[t]ens of thousands of dollars [are] wagered on the fights.”¹²⁷ Similarly, Balinese cockfighting is a form of gambling for status, virtue, and honor through the concept of “deep play” and the thrill of risking.¹²⁸ Furthermore, both blood sports offer an equal opportunity to win since the playing field is leveled between men of different classes and financial status.¹²⁹ The same concept regarding the thrill of public risk taking is mentioned in bullfighting without monetary gain. In this cultural context, the more challenging it is for the matador to control and dominate the bull, the greater the opportunity for the matador to attain masculinity and prestige.

An important and challenging task in understanding the context of blood sports, is to explore whether the compromised quality of life of children and adults due to adverse socioeconomic conditions has an impact on their perceptions regarding animal and human abuse, and whether they are able to recognize them when they happen.¹³⁰ Salomon stated that “[d]ogfighting, as a subculture, is a pure reflection of society.”¹³¹ It has been argued that gambling and betting through cockfighting and dogfighting offer an opportunity for individuals who have limited access through mainstream society to “live above a poverty stricken status.”¹³² Furthermore, another challenge associated with the youth of the working poor is that these children are disconnected from the mainstream society. As a consequence, they have limited opportunities for success through legitimate activities, and thus engage in deviant behaviors associated with subcultures and gangs.¹³³ In this context, it is very important to explore and provide alternative legitimate avenues for these children so they do not engage in criminal activities. Furthermore, it is very important to empower them with education regarding animal abuse and human abuse so they can identify them when they happen.

¹²⁵ *Id.*

¹²⁶ *Id.*; STEFAN BECHTEL, DOGTOWN: TALES OF RESCUE, REHABILITATION, AND REDEMPTION 4-5 (National Geographic Society 2009).

¹²⁷ BECHTEL, *supra* note 126, at 4.

¹²⁸ GEERTZ, *supra* note 2, at 449.

¹²⁹ *Id.* at 441; Evans, *supra* note 1, at 215.

¹³⁰ Solomon, *supra* note 111.

¹³¹ *Id.*

¹³² *Id.* at 15.

¹³³ *Id.* at 11.

IV. CONCLUSION

Dogfighting has been associated with many social maladaptive activities, including use of guns, gang membership, drug and gambling addictions, domestic violence, and other illegal activities.¹³⁴ Thus, in an effort to understand motivations that lead to participation in blood sports, it would be important to take into consideration the reciprocal relationship between the prevalence of violent behaviors in a community and the associated socioeconomic components of poverty, race, changes in family structure, and low educational level. These socioeconomic components, in combination with neighborhood exposure to violence, association with delinquent peer groups, and family member/peer involvement in deviant behaviors¹³⁵ all may play a significant role in personality disorders.¹³⁶ As Geertz argued, “[e]very people, the proverb has it, loves its own form of violence.”¹³⁷ However, violence is a significant public health issue all over the world.¹³⁸ Due to violence, 1.6 million people are killed every year, and the numbers of people being harmed is even higher.¹³⁹ Based on extensive theoretical and empirical evidence there is an undeniable link between animal abuse and human directed violence.¹⁴⁰ Thus, it is important to consider the implementation of programs that reduce violent interactions and promote positive behaviors towards all sentient beings. Considering that violence and aggression are common themes associated with masculinity in all three discussed cultural contexts associated with blood sports, maybe it is time to consider redefining our global definition of masculinity and exclude the terms aggression and violence from it. . . .

¹³⁴ Charles Siebert, *The Animal-Cruelty Syndrome*, N.Y. Times Magazine, June 11, 2010, available at http://www.nytimes.com/2010/06/13/magazine/13dogfighting-t.html?pagewanted=all&_r=0.

¹³⁵ BECHTEL, *supra* note 126.

¹³⁶ DSM-IV, *supra* note 107, at § 93-9.

¹³⁷ GEERTZ, *supra* note 2, at 449.

¹³⁸ Elanora Gullone, *Conceptualising Animal Abuse with an Antisocial Behaviour*, ANIMALS 1, 145 (2011).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 145-47.

INTERNATIONAL COOPERATION CONCERNING THE EXTINCTION OF TIGERS

CAITLIN BRATT*

I. INTRODUCTION

Historically, there were nine tiger species, and tigers could be found in just about every Asian country. Tiger populations have dropped dramatically in the past century due to tiger poaching for use in traditional Chinese medicine, tigers as a status symbol, and developments encroaching on tiger habitats.¹ Due to these factors, as well as others, it is estimated that tigers have lost more than 90 percent of their historic habitat range.² Many countries, mainly China and other Asian nations, have played a major role in tigers' population decrease. Even though tiger populations are scarce, there continues to be a high demand for tigers and tiger parts throughout the world, both within and outside of Asian countries. Without the implementation of more strict tiger anti-trade and anti-poaching laws, tigers will continue to be in danger of becoming extinct. Other factors, such as increased tracking of tigers in the wild and education of people in tiger-bearing countries, are also likely to benefit tiger populations. These tiger solutions, as well as others, are likely to be successful with resources and support from international organizations and tiger protection programs.

Section II of this paper addresses the general history of tigers and the current status of tigers throughout the world. Section III focuses on the negative consequences of tigers becoming extinct. Section IV deals with the problem of tiger poaching and the incentives for poachers to continue poaching, despite the fact that tiger populations are in decline. Section V of this paper concentrates on some of the many international organizations and agreements that work to protect tigers through funding and the implementation of international programs.

* Caitlin Bratt is graduating from Michigan State University College of Law in May 2013. Caitlin was on the 2012-2013 Editorial Board for the *Journal of Animal & Natural Resource Law*. She attended State University of New York at Oswego for her undergraduate education.

¹ IRINA TITOVA, *Tiger Extinction: Tigers Could be Extinct in 12 Years if Unprotected*, THE HUFFINGTON POST, http://www.huffingtonpost.com/2010/11/22/tiger-extinction-tigers-c_n_786659.html (last visited Mar. 12, 2012).

² Tiger Map, THE WORLD WILDLIFE FUND, http://assets.panda.org/img/original/tigermap_08_02_b.jpg (last visited Apr. 22, 2012) [hereinafter Tiger Map].

The international organizations and agreements in this section include the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Convention on Biological Diversity, the World Wildlife Fund, the International Union for Conservation of Nature, and TRAFFIC: the Wildlife Monitoring Trade Network. Section VI looks at the problem of decreasing tiger populations in individual countries, where illegal tiger trade and poaching are of serious concern, and the efforts these countries have taken to increase tiger populations. The countries included in this section are China, Russia, India, Myanmar, and the United States. Section VII includes solutions and policies that tiger countries should implement to protect the tigers and, hopefully, improve tiger populations.

II. THE STATUS OF TIGERS

The World Wildlife Fund and other experts say that there are 3,200 tigers remaining in the wild; this number is dramatically lower than the estimated 100,000 tigers found in the wild only a century ago.³ At this rate, tigers will be extinct within 12 years if more is not done to protect them.⁴ “The tiger is the largest member of the felid (cat) family.”⁵ Tigers typically occupy tropical or evergreen forests, woodlands, and grasslands as their habitat. There were nine tiger species that existed in the world. In the past 70 years, three tiger species, the Balinese, the Javan, and the Caspian, have become extinct.⁶ Despite recent efforts to save the tigers, conservation groups have reported that tiger populations continue to fall at a rate of 40 percent in just the last decade.⁷ Map 1 in the Appendix shows the areas that tigers inhabited in the past and the much smaller areas that tigers currently inhabit.⁸ The only remaining tiger species are the Bengal, Indochinese, Sumatran, South China, and the Amur tigers.⁹ The South China tiger, located in central and eastern China, is the most rare tiger subspecies and is the closest to extinction.¹⁰

³ TITOVA, *supra* note 1.

⁴ *Id.*

⁵ Basic Facts About Tigers, DEFENDERS OF WILDLIFE, <http://www.defenders.org/tiger/basic-facts> (last visited Apr. 3, 2012).

⁶ TITOVA, *supra* note 1.

⁷ *Id.*

⁸ Tiger Map, WORLD WILDLIFE FUND, *supra* note 2.

⁹ U.S. Department of the Interior, U.S. Fish & Wildlife Services & Division of International Conservation, RHINOCEROS & TIGER CONSERVATION ACT SUMMARY REPORT 2001-2003, 7 (Spring 2004), *available at* http://library.fws.gov/ia_pubs/rhino_tigerconservationfund01-03.pdf.

¹⁰ The Trade in Tiger Parts, TIGERS IN CRISIS, http://www.tigersin crisis.com/trade_tigers.htm (last visited Apr. 20, 2012) [hereinafter Trade in Tiger Parts].

In contrast, the Bengal tiger has the largest remaining tiger population, but even the Bengal tiger population is below 2,000 in the wild.¹¹ Currently, China, Taiwan, Japan, South Korea, the United States, and various European Nations are the countries involved in tiger trade.¹²

One of the greatest threats to tigers is the massive demand for tiger bone in traditional medicines. Use of tiger bone in traditional Chinese medicine is not a new development, but the increased standard of living in Southeast Asia, making this type of medicine available to more people, has fueled the demand for tiger bone.¹³ This growing demand for tiger bone for traditional medicine is taking place despite the fact that trade in tiger bone has been banned since 1987.¹⁴ Even non-Asian communities are supplementing their Western style of medicine with traditional Chinese medicine, creating a demand for tiger parts that far exceeds what can be supplied while keeping tiger populations at a sustainable level.¹⁵ The Environmental Investigation Agency (“EIA”) figures that, at minimum, one tiger is killed per day for the use of its parts in traditional Chinese medicine.¹⁶ The rising demand for tiger parts and the increase in price and value of tiger bone are irresistible incentives for poachers. Because tigers sold for medicinal purposes are so profitable to poachers, there continues to be a monetary incentive for poachers to break the laws that are currently enacted.¹⁷ As the human population continues to grow all over the world, the line between poaching tigers for trade and poaching tigers as a source of food is becoming blurred, both of which are endangering tiger populations.¹⁸ Tiger poaching is not the only challenge that tigers face in their efforts to survive. Unexpected disasters, such as bad weather conditions, disease, or even reproductive issues can also be detrimental to tiger populations, in addition to the tiger-poaching problem.¹⁹ As the changing climate continues to warm the planet, tigers are losing their costal habitats as a result of rising sea levels and land erosion.²⁰ This moves tigers closer to human populated areas,

¹¹ DEFENDERS OF WILDLIFE, *supra* note 5.

¹² Trade in Tiger Parts, *supra* note 10.

¹³ *Id.*

¹⁴ Commission for Environmental Cooperation of North America and the North American Wildlife Enforcement Group, *ILLEGAL TRADE IN WILDLIFE: A NORTH AMERICAN PERSPECTIVE* 9 (2005).

¹⁵ Trade in Tiger Parts, *supra* note 10.

¹⁶ *Id.*

¹⁷ Laws and Support Protecting Tigers: The Solution, *TIGERS IN CRISIS*, http://www.tigersincrisis.com/laws_and_support.htm (last visited Apr. 20, 2012) [hereinafter *Laws and Support*].

¹⁸ RICHARD ELLIS, *TIGER BONE & RHINO HORN: THE DESTRUCTION OF WILDLIFE FOR TRADITIONAL CHINESE MEDICINE* 16. (2005).

¹⁹ Trade in Tiger Parts, *supra* note 10.

²⁰ DEFENDERS OF WILDLIFE, *supra* note 5.

increasing the likelihood of tiger-human conflict, even though tigers rarely attack humans or domesticated cattle.²¹ In addition, deforestation and other consequences of development greatly reduce the number of prey, making local tigers more susceptible to extinction.²² Of course, it is not likely that tiger poaching will become completely eradicated, despite any future efforts that are made.²³ However, “scientists believe that [] healthy tiger population[s] can tolerate a reasonable amount of hunting.”²⁴ For that reason, as long as tiger poaching does not exceed the surplus, it is believed that “tiger population[s] will remain stable.”²⁵

III. WHAT ARE THE CONSEQUENCES OF TIGERS BECOMING EXTINCT?

When one important species is removed from the ecosystem, it has great effects on the biodiversity in that ecosystem. Therefore, if tigers are completely removed from the ecosystem, by becoming extinct, there will be impacts on both the ecosystem environment and the other species that share the tigers’ habitat. Tigers, being at the top of the food chain, keep populations of deer, pig, antelope, and other animals in balance.²⁶ Without tigers feeding on these animals, the populations would expand, depleting vegetation.²⁷ Without plentiful vegetation in forests and jungles, other animals and insects will not be able to survive. If insects and small animals were forced to move to farms to find a food source, there could be impacts on crop yields, leading to increased hunger around the world. There are many species that live alongside the tigers in the wild, all of which will likely be affected by the extinction of tigers. Some species may even be endangered or near endangerment themselves, such as species of leopards, orangutans, rhinoceroses, elephants, and the sloth bear.²⁸ At this point, even small changes in the ecosystem will harm these already endangered and vulnerable species.

²¹ *Id.*

²² U.S. Department of the Interior, *supra* note 9, at 9.

²³ Kai- Ching Cha, *Can the Convention on Biological Diversity Save the Siberian Tiger?*, 24 UCLA J. ENVTL. L. & POL’Y 20, available at <http://environs.law.ucdavis.edu/issues/24/2/articles/cha.pdf>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ What If Tigers Did Become Extinct?, THE WORLD WILDLIFE FUND, http://wwf.panda.org/what_we_do/endangered_species/tigers/last_of_the_tigers/what_if_tigers_did_become_extinct/ (last visited Apr. 3, 2012).

²⁷ *Id.*

²⁸ *Id.*

There are also many other foreseeable consequences if tigers were to become extinct. Just because a species becomes extinct does not mean that poachers will stop hunting. “When the Bali and Javan tigers became extinct . . . poachers set their sights on the Sumatran tiger.”²⁹ If all species of tigers become extinct, it is not hard to comprehend that poachers will just move onto hunting a different animal to make their money. Another serious potential consequence of tigers becoming extinct would be climate change.³⁰ Since tigers are currently protected in many countries, so are tiger habitats. If tigers became extinct, it is possible that their habitats, consisting of forests and jungles, would be targeted for illegal logging or used for agriculture and development purposes.³¹ These uses of the lands for these purposes would create increased carbon dioxide emissions, leading to further climate change and global warming. Current estimates state that deforestation is responsible for approximately 15 percent of global greenhouse gas emissions.³²

IV. POACHERS REDUCING THE TIGER POPULATIONS FOR PROFIT

Even when countries do enact and enforce legislation banning the hunting of tigers, hired staff do not always have the means to enforce anti-hunting or anti-poaching laws.³³ Often, the staff hired to enforce the anti-hunting laws is restricted from searching for or confiscating weapons or prosecuting poachers.³⁴ Also, the staff does not always have the authority to carry guns to protect the tigers, or themselves, from harmful poachers.³⁵ Another problem with anti-hunting laws is that they only protect the tigers, not the tigers’ prey. If poachers are killing the tigers’ prey, they leave tigers without a vital food source. Furthermore, anti-hunting or anti-poaching laws do not extend outside specific protected areas, so if the tigers roam outside of the protected areas, the laws created for their protection no longer protect them.³⁶ Lack of funding, organization, motivation, night patrols and training also add to the ineffectiveness of anti-hunting laws and inability to save endangered tigers from poachers. A good example of how expensive it can be to monitor reserves and enforce anti-hunting laws would be

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ The Loss of Habitat for Tigers, TIGERS IN CRISIS, http://www.tigersin crisis.com/habitat_loss.htm (last visited Feb. 18, 2013) [hereinafter Loss of Habitat].

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

within India's reserves.³⁷ It would cost approximately 15 million dollars per year in India to give tigers adequate protection from poachers to combat their extinction.³⁸ Tiger poachers do not weigh the consequences of their actions since they are so heavily influenced by the profit they will receive. Tiger poachers do not realize, or care, that one poached tiger may have a bigger impact than just the death of one individual tiger. The death of a female tiger that takes care of her cubs, or the death of a resident male tiger that protects the tiger cubs' home may be detrimental to the tiger cubs' health, since the tiger cubs cannot adequately care for themselves.³⁹ Therefore, the death of one male or one female tiger could result in additional tigers dying as well.

V. INTERNATIONAL AGREEMENTS AND ORGANIZATIONS TO PROTECT TIGERS

A. *Convention on International Trade in Endangered Species of Wild Fauna and Flora*

The Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), is an international agreement between the governments of the member countries, also referred to as states.⁴⁰ The purpose of CITES is to protect endangered species and wildlife by means of trade regulations.⁴¹ CITES was first formed in the 1960s when regulation of trade for conservation purposes was a new topic of international discussion.⁴² The trade regulations are diverse, ranging from limits on trade of live animal and plant species to different products derived from plants and animals, such as skins, carvings, and medicines. CITES was entered into force in 1975 at the agreement of 80 member states.⁴³ CITES has one of the largest memberships among conservation agreements, currently with 175 member states, and protects over 30,000 plant and animal species.⁴⁴ CITES contains three Appendices, each Appendix of which affords a different level of protection based

³⁷ See, e.g., Tiger Habitat Protection: The Solution, TIGERS IN CRISIS, http://www.tigersincrisis.com/habitat_protection.htm (last visited Apr. 22, 2012) [hereinafter Habitat Protection].

³⁸ *Id.*

³⁹ ELLIS, *supra* note 18, at 8.

⁴⁰ What is CITES? CITES, <http://www.cites.org/eng/disc/what.php> (last visited Mar. 14, 2012).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

on research and findings that determine what level of protection is necessary to preserve the plant or animal.⁴⁵ “Appendix I lists the species that are considered to be the most endangered” or the closest to becoming extinct.⁴⁶ All species of tigers are protected under Appendix I of CITES.⁴⁷ Appendix II contains a list of species that are not currently threatened with extinction but are at risk of becoming extinct if trade of that species is not regulated.⁴⁸ The species listed under Appendix III varies based on the requests of each member state and contains a species which that member state already regulates but is not covered under the other two appendices.⁴⁹ Appendix III is necessary so other countries can help the country that listed the species under Appendix III prevent unsustainable or illegal trade of that species. Species can be removed from Appendix I and II at the Conference of the Parties, based on a two-thirds vote of the parties.⁵⁰ Parties to the Convention meet every two to three years to ensure that international trade is sustainable and not a threat to wildlife.⁵¹ Most of the countries where tigers currently live are members of CITES, which completely bans the trade of endangered tiger parts.⁵²

One of the most important aspects of CITES is that efforts to regulate trade requires international cooperation by the member states to prevent trade of prohibited species from crossing international borders. Several Asian countries, examples being China, Nepal, Japan, South Korea, and Thailand, have endorsed tough protections for tigers through CITES.⁵³ After joining CITES, countries are to enact laws banning the trade of tigers and their parts, preserve tiger habitat, and form a regional network to put an end to tiger trade. The problems of unstable governments and susceptibility of government officials to corruption have frustrated enforcement of wildlife protection agreements that these nations have committed themselves to uphold. The more endangered the tigers become, the more valuable their bodies and parts become.⁵⁴

⁴⁵ The CITES Appendices, CITES, <http://www.cites.org/eng/app/index.php> (last visited Mar. 14, 2012).

⁴⁶ *Id.*

⁴⁷ Tigers: Conservation & Research, SEAWORLD, <http://www.seaworld.org/animal-info/info-books/tiger/conservation.htm> (last visited Apr. 20, 2012).

⁴⁸ The CITES Appendices, CITES, *supra* note 45.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Illegal Wildlife Trade, THE WORLD WILDLIFE FUND, <http://www.worldwildlife.org/threats/illegal-wildlife-trade> (Mar. 24, 2012) [hereinafter *Illegal Wildlife Trade*].

⁵² Trade in Tiger Parts, *supra* note 10.

⁵³ *Id.*

⁵⁴ Tiger, Politics and Money, TIGERS IN CRISIS, http://www.tigersincrisis.com/politics_and_money.htm (last visited March 11, 2012) [hereinafter *Politics and Money*].

Higher prices and rewards are an incentive to poachers to be more willing to bribe government officials to ignore their illegal behavior.⁵⁵ Lack of financial resources is another limit on the efforts of countries to enact and enforce domestic laws to prevent tiger trade. The administrative costs of CITES are financed through the CITES trust fund, “which is replenished from contributions from the Parties to the Convention based on the United Nations scale of assessment. . . .”⁵⁶ Other funding, which can be used to do things such as strengthen the implementation capacity of developing nations or science-related activities, comes from the donation by an individual country. Consequently, for the most part, countries are financially on their own to implement and enforce trade laws and regulations. Another problem with the enforcement of trade regulations, when CITES member states have them in place, is detecting tiger parts at international borders. Tiger bone used in medicines has become very popular on the black market and can also be very hard to monitor.⁵⁷ Unlike something as noticeable as “tiger skin, tiger bones can be crushed and made odorless, and can be disguised as other types of [animal] bones.”⁵⁸ This makes detection nearly impossible without extensive training of all border officials in every country, which is nearly impossible to coordinate.

B. Convention on Biological Diversity

The United Nations Conference on Environment and Development, also known as the Rio de Janeiro Earth Summit, was where the Convention on Biological Diversity (“CBD”) was ratified and entered into force on December 29, 1993.⁵⁹ Nearly 200 countries have accepted the CBD, including China, Russia, Japan, the European Union, Myanmar, and India.⁶⁰ The United States has signed but not ratified this treaty.⁶¹ The CBD attempts to preserve biodiversity by building upon existing biodiversity conventions.⁶² The Convention was created because of the threat of species extinction and the harm done to the

⁵⁵ *Id.*

⁵⁶ How is CITES Financed?, CITES, <http://www.cites.org/eng/disc/fund.php> (last visited March, 14, 2012).

⁵⁷ Trade in Tiger Parts, *supra* note 10.

⁵⁸ *Id.*

⁵⁹ Cha, *supra* note 23; Introduction, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/intro/> (last visited Apr. 5, 2012).

⁶⁰ List of Parties, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/information/parties.shtml> (last visited Apr. 5, 2012).

⁶¹ *Id.*

⁶² Cha, *supra* note 23, at 21.

ecosystem being the greatest it has ever been.⁶³ Unlike other species and habitat conservation conventions, the CBD does not include lists of species to protect.⁶⁴ Not including specific species to protect does not change the fact that the CBD is known as “‘hard’ treaty law that creates legally binding obligations” for the countries that signed it.⁶⁵ Similar to CITES, the parties to the Convention are responsible for implementing their own laws to comply with the CBD provisions.⁶⁶ Also similar to CITES, the CBD states overall goals and policies rather than precise obligations of the parties. The CBD meets regularly, and the parties can amend the Convention by a two-thirds vote of all parties.⁶⁷

The downside to the CBD is that there are no concrete goals for the countries to follow or a timeline to achieve these goals within.⁶⁸ This makes the document unenforceable on an international scale. Similarly, although Articles Six, Seven, and Eight can be read to have the goal of preserving tigers and their habitat, in reality, these Articles have little effect on Russian conservation efforts.⁶⁹ Article Seven, Section C suggests that the party members “[i]dentify processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and monitor their effects through sampling and other techniques. . . .”⁷⁰ A perfect example would be the protection of tigers and the conservation of their habitat, but the CBD does not specifically state this. Another downside to the CBD is that the preamble of the document addresses that the economic and social development take priority over preserving biological diversity.⁷¹ The preamble could be translated to actually condone tiger poaching and to benefit people economically rather than prevent tiger extinction.

⁶³ History of the Convention, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/history/> (last visited Apr. 5, 2012).

⁶⁴ Cha, *supra* note 23, at 21.

⁶⁵ *Id.*

⁶⁶ *Id.* at 22.

⁶⁷ *Id.*

⁶⁸ *Id.* at 24.

⁶⁹ *Id.* at 23-24.

⁷⁰ Article 7, Identification and Monitoring, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/convention/articles/?a=cbd-07> (last visited Apr. 5, 2012).

⁷¹ *Id.*

C. World Wildlife Fund

The World Wildlife Fund's ("WWF") "mission is to conserve nature and reduce the most pressing threats to the diversity of life on Earth."⁷² TRAFFIC, the Wildlife Trade Monitoring Network of the WWF, and the World Conservation Union ("IUCN") work with governments and communities of different nations to ensure that CITES is effective in its regulation of wildlife trade.⁷³ The WWF works with 100 countries and about five million people globally in its conservation efforts.⁷⁴ Some of the goals of the WWF are to protect and restore species and their habitats, strengthen local communities' ability to conserve the natural resources they depend upon, and to mobilize people to support conservation. WWF is important because wildlife trade is an expensive business.⁷⁵ Because there is so much money and profit to be made from illegal trade, it has become unsustainable, causing many different species of plants and animals to become endangered or extinct. It is important that there are organizations, such as the WWF, because illegal trade is very often well organized and creates black markets for smuggling and trading of rare species. Even though most trade is legal and regulated, there is still a significant portion of trade that is unreported or illegal throughout. TRAFFIC, a joint program of the WWF, works to prevent illegal trade and encourage the sustainability of legal trade by completing field investigations and working with governments to enact and enforce legal trade regulations.⁷⁶ TRAFFIC works through agencies in the United States, Canada, and Mexico at 25 international offices.⁷⁷ Funding for the WWF comes from individual contributions, government grants and contracts, foundation contributions, corporate contributions, and WWF network revenues.⁷⁸ By a very large majority, the funds go directly towards program expenses.⁷⁹

⁷² About WWF, THE WORLD WILDLIFE FUND, http://wwf.panda.org/who_we_are/wwf_offices/usa/ (last visited Mar. 24, 2012).

⁷³ Unsustainable and Illegal Wildlife Trade, WORLD WILDLIFE FUND, http://wwf.panda.org/about_our_earth/species/problems/illegal_trade/ (last visited Feb. 18, 2013).

⁷⁴ About Us, THE WORLD WILDLIFE FUND, <http://worldwildlife.org/about> (last visited Mar. 24, 2012) [hereinafter About Us].

⁷⁵ Illegal Wildlife Trade, *supra* note 51.

⁷⁶ About Us, *supra* note 74.

⁷⁷ TRAFFIC, THE WORLD WILDLIFE FUND, <http://worldwildlife.org/initiatives/traffic-the-wildlife-trade-monitoring-network> (last visited Feb. 18, 2013).

⁷⁸ Financial Info., THE WORLD WILDLIFE FUND, <http://www.worldwildlife.org/about/financials> (last visited Mar. 24, 2012).

⁷⁹ *Id.*

In 1972, the WWF responded to the endangered tigers crisis by creating “Operation Tiger,” an international conservation fund in an effort to preserve the tigers in the Indian subcontinent, Indochina, and Indonesia.⁸⁰ Operation Tiger created the financial support and international pressure necessary to convince many countries to create stronger wildlife protection laws, ban the hunting of tigers, and establish or create additional tiger protection areas. Some of the countries that reacted positively to Operation Tiger were Indonesia, Bhutan, India, Nepal, Bangladesh, Malaysia, and Thailand. India responded very quickly, forming the Tiger Task Force in 1973 by the group Project Tiger.⁸¹ Tiger Task Force established India’s first tiger reserves and economic support from the government to fund habitat conservation and tiger protection.

WWF and TRAFFIC created the Wildlife Trade Tracker, which “is a new interactive online mapping tool that represents global wildlife trade data. . . .”⁸² It contains two components, the first being the LEMIS tracker, which provides maps showing trade flows by species, seizures information based on information from the country of export, or a cross reference of species and source country.⁸³ The second component of the Wildlife Trade Tracker is the Tiger Trade Tracker, which plots all tiger seizures, their parts, and products in Asia.⁸⁴ The Tiger Trade Tracker “analyzes data from 11 of the 13 Tiger range States,” which comes from governments, NGOs, and other sources of Tiger seizure data.⁸⁵ Future updates to the Tiger Tracker will show poaching incidents, marker observations of tiger products internationally, and distribution and illegal trade in India.⁸⁶ The purpose of this information will help decision-making and allocation of resources to protect tigers.

D. IUCN Support for Tiger Conservation

The IUCN’s mission is to conserve biodiversity internationally by addressing world problems such as minimizing climate change and achieving sustainable energy.⁸⁷ The IUCN has more than 1000 member organizations, which includes more than 80 countries, over 110 governmental agencies, and more than 800 non-governmental

⁸⁰ Loss of Habitat, *supra* note 33.

⁸¹ *Id.*

⁸² South-East Asia Focus, 23 TRAFFIC Bulletin 3 81 (Oct. 2011).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ What We Do, IUCN, <http://www.iucn.org/what/> (last visited Apr. 22, 2012).

organizations (“NGOs”).⁸⁸ The IUCN created the Red List, which assesses the risk of species extinction of both plants and animals.⁸⁹ It is important to have this risk assessment completed to be able to put forward efforts to prevent extinction, which in turn prevents biodiversity loss. The aim of the Red List is to portray, to the public and policy makers, the urgency and necessity of conservation efforts to eliminate, or at least reduce, species extinction.⁹⁰ Tigers are one of the threatened species on the IUCN’s Red List.

The IUCN is very confident in achieving success when targeted conservation efforts are used to revive threatened species, such as the tiger.⁹¹ Recent data shows that, from the IUCN’s Red List, the decline of at least 64 major species has been reversed through global conservation efforts.⁹² In addition, the rate of biodiversity loss has been decreased by 20 percent.⁹³ The IUCN commends tiger range countries, which have come together in developing the Global Tiger Recovery Program (“GTRP”).⁹⁴ The GTRP’s conservation strategy works to protect tiger habitats, fight illegal trade of tiger parts, encourage participation by local communities, strengthen both national and international policies on tiger conservation, promote transboundary cooperation, and attract the resources necessary to carry out tiger conservation efforts.⁹⁵ Through implementation and raising awareness about the importance of the GTRP, it is hoped that the number of tigers will be doubled by the year 2022.⁹⁶

VI. EXTINCTION OF TIGERS AROUND THE WORLD

A. China

As previously mentioned, the increased standards of living in parts of Asia has had a negative effect on tiger populations, increasing the demand for tiger parts and traditional Chinese medicines that contain tiger parts. The use of traditional Chinese medicine has begun to resurface in Chinese Society in recent years, fueled by cultural pride.⁹⁷ Another reason

⁸⁸ About IUCN, IUCN, <http://www.iucn.org/about/> (last visited Apr. 22, 2012).

⁸⁹ The IUCN Red List, IUCN, http://www.iucn.org/about/work/programmes/species/our_work/the_iucn_red_list/ (last visited Apr. 22, 2012).

⁹⁰ *Id.*

⁹¹ IUCN Council Statement of Support for Tiger Conservation, IUCN, <http://www.iucn.org/?6481/IUCN-Council-statement-on-the-tiger> (last visited Apr. 22, 2012).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Trade in Tiger Parts, *supra* note 10.

for the surge in traditional Chinese medicines is the growing sentiment that western medicine contains shortcomings with regard to treating illnesses. Tiger parts, such as the bones, eyes, whiskers and teeth, are used in medicines to treat ailments and diseases.⁹⁸ In traditional Chinese medicine, it is said that tiger parts can heal or stop diseases ranging from insomnia and malaria to meningitis and acne.⁹⁹ The newly affluent population also has increased its demands for tiger parts to be served as food at private banquets or special events because tiger parts are seen as a delicacy in that culture.¹⁰⁰ Use of tiger parts in medicines or consuming tigers as a delicacy is a representation of one's high status and wealth. Even using the smallest traces of tiger parts in medicines encourages the continued slaughter of tigers. The city of Hong Kong is a major importer of Chinese tiger products.¹⁰¹ These tiger products create so much revenue that they account for about half of Hong Kong's annual business.¹⁰²

Even though China has been a member state of CITES since 1981,¹⁰³ the laws that have been created to protect endangered tigers are largely ignored and unenforced. Despite CITES, and the laws created by China after joining CITES, China remains a primary importer of India's tiger products.¹⁰⁴ New trade policies and laws in China have not prevented the state from continuing to be a major player in the endangerment of tigers.¹⁰⁵ In 1959, the Chinese government declared the South China tiger a pest and encouraged that it be exterminated.¹⁰⁶ Since China eradicated most of its own tiger population, it has looked to Bangladesh and Nepal as new tiger sources.¹⁰⁷ Even after joining CITES and creating stricter tiger trade laws, it is doubtful that the South China tiger will survive in the wild.¹⁰⁸ "The World Wildlife Fund estimates that one-third of the breeding-age female tigers were lost between 1989 and 1991 in this area."¹⁰⁹ It is important to mention, since so many tigers are killed for medical products, that Western medical experts often discount claims that tiger bone has "any curative power in tiger bone,

⁹⁸ Traditional Medicine, TIGERS IN CRISIS, http://www.tigersin crisis.com/traditional_medicine.htm (last visited Mar. 11, 2012) [hereinafter Traditional Medicine].

⁹⁹ *Id.*

¹⁰⁰ Trade in Tiger Parts, *supra* note 10.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ List of Contracting Parties, CITES, <http://www.cites.org/eng/disc/parties/alphabet.php> (last visited Mar. 14, 2012) [hereinafter Contracting Parties].

¹⁰⁴ Trade in Tiger Parts, *supra* note 10.

¹⁰⁵ *Id.*

¹⁰⁶ Politics and Money, *supra* note 54.

¹⁰⁷ Trade in Tiger Parts, *supra* note 10.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

as they do the rhinoceros horn ...” another product used in traditional Chinese medicine.¹¹⁰ Moreover, it is well known that aspirin has similar properties, such as being an anti-inflammatory drug, and produces similar results as to what tiger medicines are to accomplish in patients.¹¹¹

Even when accepting the fact that China plays a major role in the endangerment of tigers, China has made some efforts to protect the tigers. As mentioned above, China is a member state of CITES. And, in 1993, “China banned the internal trade in tiger bone.”¹¹² As a result, other Asian countries, with the exception of Japan and North Korea, also followed suit.¹¹³ “In 1998, China outlawed the sale of all tiger parts” and demanded that Chinese medical manufacturers seek substitutes for tiger medicines.¹¹⁴ These efforts are an attempt to lessen the illegal traffic and trade of tigers. Although, lack of enforcement continues to be a problem in making these programs and laws successful.

B. Russia

Russia has played a large role, and has become a major supplier, in tiger trade due to its “political, economic, and social instability.”¹¹⁵ Development and the building of the Chinese Railway have also played a large role in the endangerment of tigers.¹¹⁶ Siberian tigers, in the past, would roam throughout the forests of Korea, China, along the east coast of Russia, and into Siberia.¹¹⁷ These tigers, for the most part, were left alone and had little interaction with humans from these areas. When Russian settlers came to the Far East to build the Eastern Chinese Railway in the nineteenth century, they purposely eradicated Siberian tigers from the land.¹¹⁸ The 1930s census states that as few as twenty or thirty tigers were able to survive the settlers’ invasion and extermination.¹¹⁹ It was not until 1952, with Siberian tiger populations being very low, when Russia became the first country to ban tiger hunting.¹²⁰ Once tigers obtained legal protection, their numbers were able to grow. Even with legal protections, poachers, however, will still hunt for tigers as long as they are making a large profit. Estimates state that poaching one tiger

¹¹⁰ Traditional Medicine, *supra* note 98.

¹¹¹ *Id.*

¹¹² Cha, *supra* note 23.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Trade in Tiger Parts, *supra* note 10.

¹¹⁶ *Id.*

¹¹⁷ Politics and Money, *supra* note 54.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

can bring in profit similar to a ten-year income on the black market.¹²¹ Once China depleted its tiger resources for medicinal purposes, poachers began looking outside of China for more tigers.¹²² With the collapse of communism in Russia and the opening of the Russia-China border, unemployment rose; and as a result, so did tiger poaching.¹²³ Estimates from the years of 1992-1994 are that the value of a tiger body jumped “from \$3,000 dollars to as much as \$10,000.”¹²⁴

Due to economic problems, the Russian government began selling off their old-growth forests, which double as prime tiger habitat, to raise revenues.¹²⁵ The Siberian Forest covers more than two million square miles, an area equivalent to the size of the United States.¹²⁶ The ecosystem of the Siberian Forest is very fragile; this is due to the slow tree growth because of the long and severe winters.¹²⁷ When the trees in the Forest are cut down for logging operations, the sun exposure on the permafrost turns the Forest into swampland.¹²⁸ The swamp-like conditions make it hard for seedlings to take root, so it is not likely that the cut down trees will grow back.¹²⁹ The trees were the habitat of native animals, which tigers hunted as their prey, such as moose, bear, and deer.¹³⁰ Losing the habitat of the tigers’ source of food makes it hard for Siberian tigers to find enough prey for nourishment. This makes it necessary for Siberian tigers to roam areas ranging from over 100 square miles to as large as 620 square miles, just to find prey.¹³¹ Logging effects on tigers can also be seen from the example of the Hyundai Corporation of South Korea, which signed a joint venture agreement to log half a million acres of forest in the Russian Far East.¹³² This area was located in Siberian tiger habitat and was completely logged within just one year.¹³³ Although numbers of Siberian tigers were able to increase after they gained legal protection, it is likely that as much as 40 percent of the tiger population was lost between 1990 and 1994 because of their struggles after losing much of their forest habitat.¹³⁴ It is estimated that there are currently 400 Siberian tigers living in the wild in Russia.¹³⁵

¹²¹ Politics and Money, *supra* note 54.

¹²² Cha, *supra* note 23, at 11.

¹²³ *Id.*

¹²⁴ *Id.* at 12.

¹²⁵ Trade in Tiger Parts, *supra* note 10.

¹²⁶ Cha, *supra* note 23, at 7.

¹²⁷ *Id.* at 8.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Trade in Tiger Parts, *supra* note 10.

¹³² Cha, *supra* note 23, at 9.

¹³³ *Id.*

¹³⁴ Politics and Money, *supra* note 54.

¹³⁵ *Id.*

Since Vladimir Putin became the Russian Prime Minister, he has attempted to draw attention to the struggles that tigers face.¹³⁶ In addition, Russia's Natural Resource Minister Yuri Trutney said that Russia and China would work together and pull together their resources to create protected areas along their borders in an attempt to combat poaching.¹³⁷ Even further, Russia hosted a tiger summit, which approved a program with the goal of doubling the world's tiger population.¹³⁸ This is to be done with support from the thirteen countries that still have tiger populations: Bangladesh, Bhutan, Cambodia, China, India, Indonesia, Laos, Malaysia, Myanmar, Nepal, Thailand, Vietnam, and Russia.¹³⁹ This program has the goal of protecting tiger habitats, eliminating poaching, smuggling and the illegal trade of tiger parts, as well as to create incentives for communities to participate in protecting tigers.

C. India

India has had a problem with decreasing tiger populations in recent years. The increased problem of poaching tigers in India is due to the decreasing tiger populations in China, as well as the increasing human population in India.¹⁴⁰ In India, when it is not practical to use firearms, poison or traps are used to capture the tigers; poison is put in the carcasses of tiger prey, such as buffalo or cows, or is placed in water sources.¹⁴¹ Sometimes, for poachers, poisoning tigers is the best option, because it keeps the skins intact, so the tiger parts sell for a higher profit.¹⁴² But, selling the tiger parts for traditional medicine is not the only reason tigers are killed. Tigers are also killed when they prey on livestock, and then their remains are then sold for profit.¹⁴³ The ever-growing population in India is also threat to the tigers. As the population in India grows, their settlements are expanding into tiger habitats.¹⁴⁴

The Wildlife Protection Society of India ("WPSI") works along with government enforcement agencies to catch tiger poachers and put a stop to the tiger trade in India.¹⁴⁵ The Indian government does not

¹³⁶ TITOVA, *supra* note 1.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ ELLIS, *supra* note 18, at 2.

¹⁴¹ *Id.*

¹⁴² *Id.* at 3.

¹⁴³ *Id.* at 2.

¹⁴⁴ *Id.* at 5.

¹⁴⁵ *Id.* at 3.

systematically compile data on tiger poaching, so the WPSI must rely on enforcement authorities and other sources for data, which usually underestimate the totals of poached tigers.¹⁴⁶ The WPSI claims that it is very hard to know the extent of tiger poaching, but it is important to note that “[c]ustoms authorities multiply known offenses by ten to estimate the size of an illegal trade.”¹⁴⁷ Another effort taken in India to protect tiger populations was “Project Tiger” in 1973, which the IUCN and the WWF created in an effort to raise support for tiger conservation programs in India.¹⁴⁸ In support of the program, Prime Minister Indira Gandhi set aside nine national parks to protect and preserve the then 1,500 tigers.¹⁴⁹ In the early years of the program, there was a noticeable decrease in tiger poaching and an increase in tiger populations.¹⁵⁰ In 1984, Prime Minister Indira Gandhi was assassinated.¹⁵¹ This factor, along with the population in India growing to 300 million,¹⁵² was not beneficial to the program’s success.¹⁵³ Support for Project Tiger dissolved, mainly because it was not given the resources necessary to remain effective. Today, Project Tiger is still in existence, but many settlers, who view tigers as a nuisance, have invaded the tiger reserves in search of food. Settlers began killing tigers because tiger farmers assumed that tigers would interfere with the farming or be a threat to the farmers themselves.¹⁵⁴

One major problem with the poaching and tiger trade in India is that even when poachers are caught, they are rarely punished. According to the WPSI, between the years of 1994 to 2003, there were almost 800 cases of tiger, otter, or leopard skin seizures.¹⁵⁵ Of the more than 1,400 individuals accused of tiger poaching, there are records of only fourteen convictions and sentences.¹⁵⁶ This data shows that despite laws being in place, law enforcement is seriously lacking in India.

¹⁴⁶ *Id.* at 4.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 6.

¹⁴⁹ *Id.* at 6-7.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² The population estimate of 300 million was from the 1980s. The population in India is now well over one billion. India Census: Population Goes Up To 1.21bn. BBC NEWS, March 31, 2011, available at <http://www.bbc.co.uk/news/world-south-asia-12916888> (last visited Apr. 20, 2012).

¹⁵³ ELLIS, *supra* note 18, at 7.

¹⁵⁴ *Id.* at 8.

¹⁵⁵ *Id.* at 4.

¹⁵⁶ *Id.*

D. Myanmar

Myanmar, formerly known as Burma, which became a member of CITES in 1997,¹⁵⁷ is known to participate in illegal trade of endangered species, including the illegal trade of tigers.¹⁵⁸ It is estimated that there are only 150 tigers left in Myanmar.¹⁵⁹ Tigers are listed under the Protection of Wild Life and Wild Plants and Conservation of Natural Areas Law, which is the local law of Myanmar to protect plant and animal species.¹⁶⁰ The Myanmar forest department will not give out permits for hunting tigers;¹⁶¹ therefore, no parts of any tigers originating from Myanmar should be traded. The Myanmar Forest Department is also the Myanmar CITES Management Authority.¹⁶² Any one found to be in possession of, or trading, protected species can be punished by a fine of up to Myanmar Kyat 50 thousand, which is equivalent to \$7,450 in the United States, and/or imprisonment for up to seven years.¹⁶³

As of 2008, despite Myanmar's laws to protect threatened and endangered species, such as the tiger, Myanmar's national legislation is still not considered adequate for the effective enforcement of CITES.¹⁶⁴ Reasons for the inadequate enforcement and implementation of CITES can be seen from the example that all eight species of "Asian big cats" that are listed under CITES Appendix I and II, which can be found in Myanmar, including the tiger, have been openly observed for sale in Myanmar markets.¹⁶⁵ A total of 483 cat parts from all of the different native cat species that are protected under CITES were observed in open markets during studies done by TRAFFIC, the wildlife trade monitoring network of the WWF.¹⁶⁶ The blatant disregard for CITES and specific Myanmar laws in the open markets demonstrates the lack of enforcement of the laws and regulations by Myanmar authorities.

¹⁵⁷ Contracting Parties, *supra* note 103.

¹⁵⁸ See generally CHRIS R. SHEPARD & VINCENT NIJMAN, THE WILD CAT TRADE IN MYANMAR 1 (TRAFFIC Southeast Asia 2008).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 2.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 10.

¹⁶⁶ SHEPARD, *supra* note 158, at 11.

E. The United States' Efforts to Prevent Tiger Extinction

The United States, working with CITES, created the U.S. Endangered Species Act to place controls on the sale and trade of rhinoceros and tiger parts and products.¹⁶⁷ Despite international and domestic laws, rhinoceros and tiger populations continued to suffer due to poaching and habitat destruction.¹⁶⁸ In response to the dwindling tiger and rhinoceros populations, the United States passed the Rhinoceros and Tiger Conservation Act of 1994, which was amended again in 1998.¹⁶⁹ The Act created the Rhinoceros and Tiger Conservation Fund (the "Fund") to assist in efforts to conserve populations of rhinoceros and tigers.¹⁷⁰ The Fund, which was implemented by the United States Fish and Wildlife Service, gives grants from supporting conservation programs and the CITES Secretariat.¹⁷¹ The Fund is used to support conservation projects, strengthen law enforcement for existing conservation laws, acquire information needed from population surveys and monitoring species, develop local support and educate communities on the importance of species conservation, and promote sustainable development by humans to reduce destruction of species' habitats.¹⁷² The Act, through the Wildlife Conservation Society, has been working in cooperation with China and Russia to protect Amur tigers, a species that is seriously endangered, by establishing new nature reserves and appropriate land-use regimes on both sides of the China-Russia border.¹⁷³ The Fund, through support of the International Workshop to Develop a Recovery Plan for the Wild Amur Tiger Population, developed a recovery plan, setup an international meeting to standardize prey surveys, tiger monitoring services, environmental education activities, and facilitated continuing contacts between the relevant agencies of both China and Russia.¹⁷⁴ The Amur tiger recovery plan is just one example of the positive international cooperation and programs created as a result of the Rhinoceros and Tiger Conservation Act.¹⁷⁵

The case of *Byron-Marasek v. Department of Environmental Protection* is an example of the regulations that the United States has created to protect tigers. In this case, Joan Byron-Marasek applied for renewal of a permit allowing her to possess tigers, a protected species under the New Jersey Administrative Code (N.J.A.C.) 7:25-4.2, -4.6,

¹⁶⁷ U.S. Department of the Interior, *supra* note 9, at 11.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 7.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

-4.8(a).¹⁷⁶ In *Byron-Masek*, the respondents, Division of Fish and Wildlife in the Department of Environmental Protection (DEP), contended that Byron-Marasek has failed to show that she met the criteria required for such a permit.¹⁷⁷ The DEP administers the Endangered, Nongame and Exotic Wildlife regulations of exotic species that are not indigenous to New Jersey.¹⁷⁸ Byron-Marasek claimed that she owns tigers because she owned an animal theatrical agency. But, for a permit to be issued, the criteria in N.J.A.C. 7:25-4.9 must be met.¹⁷⁹ Some of the criteria include providing a proper diet, housing the animal so as to prevent disease or injury to the animal and to allow the animal to perform normal behavior patterns of the species, ensuring that the method of acquiring the species does not violate federal or state law, and ensuring that the person applying for the permit have education and knowledge on handling and caring for the desired species.¹⁸⁰ In this case, Byron-Marasek did not comply with the New Jersey statute in that her tiger facilities were barren and lacked a naturalistic setting allowing the tigers to do normal day-to-day tiger activities.¹⁸¹ Also, she had not submitted any records to the Division of Fish and Wildlife at the DEP to explain the discrepancy that, during the inspection, only 17 of her claimed 23 tigers at her facility could be accounted for.¹⁸² The court and the DEP that the applicant would comply with the necessary criteria, so her permit application was denied.¹⁸³

VII. WHAT MORE CAN BE DONE?

A. *General Solutions Applicable to All Tiger-Bearing Countries*

Despite losing over 90 percent of the tiger populations and historical habitats over the last decade, studies show that tigers, especially in the India sub-continent, remain genetically viable.¹⁸⁴ Since it is possible to revive populations of at least some of the remaining tiger species, the question remains: how do we go about achieving this? Most importantly, there needs to be improved domestic or national legislation and continuing international cooperation and support to prevent illegal

¹⁷⁶ *Byron-Marasek v. Dep't of Env'tl. Protection*, No. EFG 4386-99, 2000 WL 641681, at *1 (N.J. Adm. Apr. 26, 2000).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at *28.

¹⁷⁹ *Id.* at *1.

¹⁸⁰ *Id.* at *29.

¹⁸¹ *Id.* at *35.

¹⁸² *Id.* at *8.

¹⁸³ *Id.* at *11.

¹⁸⁴ Threats to Tigers, DEFENDERS OF WILDLIFE, <http://www.defenders.org/tiger/threats> (last visited Feb. 18, 2013).

trade and poaching. In order to improve international and domestic legislation, in favor of tiger protection, the creation and enforcement of the laws will need to be funded. Without training and equipment, park guards and staff will not be adequately prepared to enforce the newly created laws.¹⁸⁵ Additionally, without proper funding, equipment, staff and enforcement, the strengthened laws will have little positive effect.¹⁸⁶ This is considered to be “on-the-ground” protection of tigers and is necessary to prevent tigers from becoming victim to illegal poaching.¹⁸⁷ Reducing the amount of tiger poaching could be achieved by making monetary and penal sanctions against poachers and traffickers so great, that it would not be economically possible for them to stay in business if they were caught.¹⁸⁸ Making the monetary punishment greater than the profits a poacher or trafficker would receive may be the only way to deter this behavior. It has been suggested that since international trade of tiger parts is considered to be organized crime, punishment for engaging in international trade of tiger parts should be proportional to the penalties one is given for participating in other types of organized crime, such as drug trafficking.¹⁸⁹

Along with a stronger action against poaching, it's necessary to set up specialized reserves for tigers and restore and conserve forests outside them to let tiger populations expand.¹⁹⁰ This is something that each tiger country should do. It can be done on their own, in cooperation with boarder countries, or with help from organizations such as CITES, WWF, or the IUCN, which may be able to help fund the reserves. These specialized tiger reserves should be staffed at all hours of the day so tigers are protected from illegal poaching. Similarly, it has been suggested that eco-tourism would be a great way to raise money and protect the tigers. An example of eco-tourism would be a tiger park or reserve near an airport.¹⁹¹ Advertisements through the airlines will help encourage people to visit tiger reserves. Having the reserve near the airport will make it easier for tourists to be able visit the tiger reserves. Because tourists would be willing to spend money to visit the tigers at the reserves, the money raised can go toward funding the reserves and further protection of the tigers. Although, setting up a properly sized tiger reserve would be nearly impossible in a country, such as India, that

¹⁸⁵ Habitat Protection, *supra* note 37.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Lions, Tigers and Bears (Oh My): How to Stop Endangered Species Crime, 11 *FORDHAM ENVTL. L.J.* 545, 573-74 (2000).

¹⁸⁹ MILAN DALAL, Tiger, Tiger Flickering Light, 31 *B.C. INT'L & COMP. L. REV.* 103, 115 (2008).

¹⁹⁰ TITOVA, *supra* note 1.

¹⁹¹ DALAL, *supra* note 189, at 117.

is already overpopulated, with little land mass to spare. Moreover, ecotourism could lead to more tiger attacks on people, since the tigers will feel threatened from the increasing number of people in their habitat.

B. Specific Solutions for Countries That Use Tiger Parts in Traditional Medicines

Pharmaceutical industries in the United States would benefit greatly from expanding their business to countries in Asia, such as China, due to China having the largest population in the world. There will continue to be the cultural issue of people not wanting to switch from traditional to Westernized medicines. But, it is likely that this problem could be overcome by the realization that Western medicines are just as effective as traditional medicines, even though this process is likely to take quite a while. Many pharmaceutical companies have the money and resources to send free trials of their products to doctors in China or other Asian countries. These pharmaceutical products would, of course, be tiger-free. It is not feasible to anticipate that the switch from traditional medicines to Westernized medicines will happen overnight, but once these products are accepted in Asian societies, tiger populations will benefit greatly. The United States could also assist in this change by putting pressure on each of the countries to switch to tiger-free medicines. Once tiger-free pharmaceutical products become the medicines of choice, demand for tiger parts will be dramatically reduced. Reduced demand for tiger parts correlates with less tiger poaching in the wild and increased tiger populations. Pharmaceutical industries should be encouraged to do this based on the large profits they will receive when Asian countries decide to regularly use a pharmaceutical company's tiger-free medicines.

Replacing traditional Chinese medicines will only be effective if there are just as strong tiger-free alternatives available and they must be well-advertised and available to the Chinese public.¹⁹² The problem with getting people to switch from traditional medicines to more Westernized medicines is that these changes go against their cultural way of life, as well as appear to impair efforts to end human sickness and suffering.¹⁹³ As mentioned in Section VI, studies show that tiger medicines have little value other than for their anti-inflammatory properties, so people need to be made aware of this. If it is advertised to the Chinese public that aspirin is less harmful to tigers and biodiversity over all, while retaining the same medicinal properties, hopefully aspirin will become

¹⁹² Laws and Support, *supra* note 17.

¹⁹³ COMMISSION FOR ENVIRONMENTAL COOPERATION OF NORTH AMERICA AND THE NORTH AMERICAN WILDLIFE ENFORCEMENT GROUP, *supra* note 14, at 9.

more popular than tiger bone medicines in China. It will certainly take time to get reasonable percentage of the Chinese population to change their ways. But, even if just 10 percent of Chinese people switch to aspirin, it will significantly reduce demand for tiger parts and, in turn, hopefully decrease tiger poaching and trade.

It is also crucial to improve domestic legislation and see greater enforcement of existing anti-poaching and anti-tiger trade laws, to lessen the number of tigers for traditional Chinese medicine and other purposes. China must focus its domestic laws toward tiger and habitat protection. If China is able to strengthen and enforce its laws to prevent illegal poaching and trade, the number of tigers that will be found on the black market will be greatly reduced. But, to be able to fund tiger conservation efforts and increased enforcement of anti-poaching laws, the Chinese government must be willing to put forth economic resources. The Chinese government must make endangered tigers a priority and be willing to cooperate with neighboring tiger inhabited countries to give conservation efforts any chance at being effective. Unlike some countries, China does have the economic resources to put forth conservation efforts. Other countries that are not as fortunate could get funding and other financial resources from CITES, the WWF, or the IUCN, if the countries are willing to put forth serious conservation efforts. All of these organizations are willing to help fund important tiger conservation efforts to prevent tigers from becoming extinct throughout the world.

C. Solutions Specific to the Need to Protect Tigers in Myanmar

The problem of tiger trade in open markets in Myanmar should be a priority for law enforcement to solve in Myanmar. Because tiger parts are sold openly in markets in Myanmar, detection and enforcement should be much easier than detection and enforcement in black market tiger trade. Since trade of any amount of tiger parts in Myanmar is illegal, law enforcement should already have programs in place to enforce these laws; yet, enforcement of tiger protection laws is clearly not sufficient. Myanmar should work with countries like China and Thailand to improve enforcement of their laws, even though China does not have sufficient enforcement of domestic laws at this time either. If these countries work together, and encourage one another to increase enforcement of domestic laws, domestic laws in each of these countries should improve. CITES would be able to help these countries work together to reach this goal. Most importantly for Myanmar, they need to not only intensify domestic laws and enforce them, but they also must prosecute those who break tiger poaching, selling, or trade laws to the full extent for every violator.¹⁹⁴

¹⁹⁴ SHEPARD, *supra* note 158, at 12.

D. Basis Education on the Problems That Tigers Face and the Importance of Tiger Preservation

It is important to educate communities and consumers about the benefits of protection of tigers. Laws that are created need to be accompanied by public education that demonstrates the seriousness of preventing tiger extinction and the importance of conservation.¹⁹⁵ Community-based programs also need to be enacted regarding the importance of sustainable development. As mentioned above, logging and climate change can negatively affect tiger populations, not just poachers. Rural households can have just as negative of an effect on the forests and tigers' habitats since these households may rely on the natural resources of the forest, diminishing tigers' habitats. Governmental departments, non-governmental organizations and conservation groups are who should step up and educate the community on alternative resources that will have a less harmful effect on tiger habitats, since these are the groups that are most likely to have the resources to do so. It is important to have the community involved in the protection of tigers because government officials and officers are not the only people that can have an impact on the enforcement of existing laws. By educating the community, hopefully less people will be lured by the temptation of money on the black market and to break laws created to protect the tigers. Similarly, the educational programs need to address that, especially for poor communities, choosing between their own livelihood and the survival of the tigers is not always a sustainable solution.

E. Captive Breeding to Increase Tiger Populations

Captive breeding is another way to protect tigers and is even likely to increase tiger populations. Conservation groups work with tiger specialists to research tiger nutrition, health, and zoological facilities and management to create environments that are the most beneficial to tiger breeding. Hopefully, breeding tiger in captivity, where they are safe from outside harm, will produce future generations of healthy tiger cubs and increase tiger populations. Conservation breeding specialists and zoologists are even cooperating internationally. International breeding programs, such as Global Animal Survival Plan ("GASP") have been around since 1987.¹⁹⁶ GASP became the Tiger Global Survival Plan in 1992.¹⁹⁷ Captive breeding and programs, such as GASP are important not only to increase tiger populations, but also for maintaining genetic

¹⁹⁵ Laws and Support, *supra* note 17.

¹⁹⁶ Tiger, SAN DIEGO ZOO, <http://library.sandiegozoo.org/factsheets/tiger/tiger.htm> (last visited Apr. 20, 2012).

¹⁹⁷ *Id.*

materials on tigers.¹⁹⁸ After being captive-bred, some tigers may be released into the wild, increasing wild tiger populations. The downside to releasing the tigers into the wild is that tigers no longer have access to the same nutrition and protections of captivity. Tigers born and raised in captivity also do not have the same survival and killing instincts that tiger born in the wild have.¹⁹⁹

F. Domestic Tiger Farming for Medicinal Purposes

Domestic farming of tigers has been suggested as a solution to increase tiger populations and allow legalization of hunting of farmed tigers.²⁰⁰ Domestic farming of tigers is very different from breeding tigers in captivity for zoological and population-saving purposes. Domestic tiger farming is focused more on increasing tiger populations so tiger parts can be legally retrieved for medicinal and other purposes.²⁰¹ The domestic tiger farming solution is based on the argument that since there are more Siberian tigers living in captivity than in the wild, it is not likely to be difficult for tiger pharmaceutical corporations to successfully establish domestic farming operations.²⁰² But, it is important to point out that domestic tiger farming for medical corporations will not improve tiger populations in the wild. In addition, this solution makes no efforts to protect wild tiger habitats or to stop illegal poaching in the wild. On the other hand, if demands for illegally poached tigers decrease, because the supply of tigers from domestic tiger farming is sufficient, then wild tiger populations may be able to stabilize on their own. Domestic farming of tigers unquestionably has its downsides, but if it does allow wild tiger populations to grow, it is at least a foundation from which other tiger protection ideas and programs can grow.

VIII. CONCLUSION

Recent data shows that tigers are currently endangered and at risk of becoming extinct if serious efforts are not made to prevent this from happening. There are only 3,200 tigers left in the wild, which is well below the 100,000 tigers in the wild just a century ago. Some of the reasons that tigers are endangered include the use of tiger parts for traditional medicine, development encroaching on tiger habitats, and climate change. Ever since 1987, the trade of tiger bone has been illegal,

¹⁹⁸ Habitat Protection, *supra* note 37.

¹⁹⁹ Reintroduction, THE TIGER FOUNDATION, <http://www.tigers.ca/Tigerworld/W3B9.htm> (last visited Feb. 18, 2013).

²⁰⁰ Cha, *supra* note 23, at 15.

²⁰¹ ELLIS, *supra* note 18, at 169.

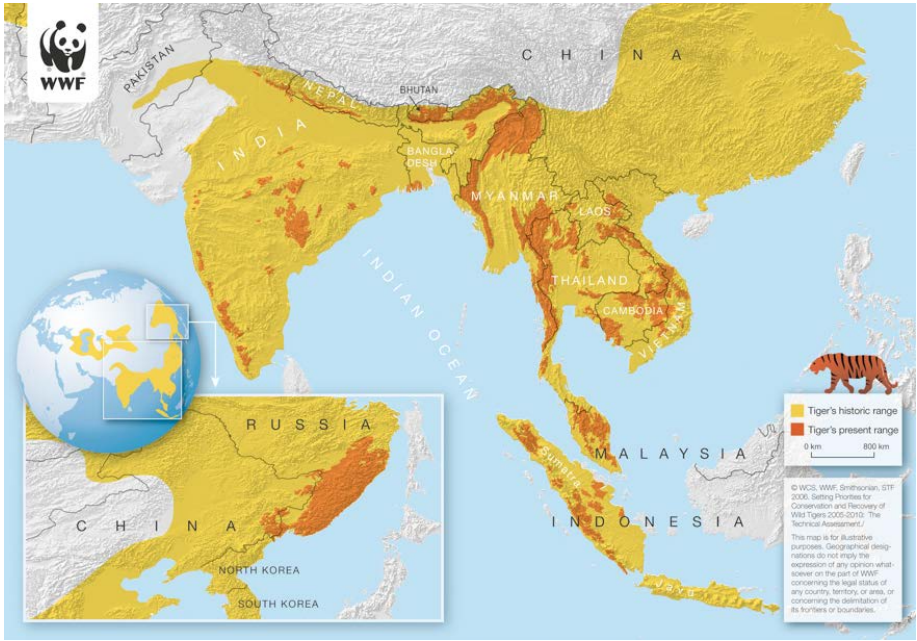
²⁰² Cha, *supra* note 23, at 15.

yet trade of tiger bone and other tiger parts still takes place all over the world. Trade of tiger parts and poaching is especially prevalent in China and other Asian countries, where traditional Chinese medicines made of tiger bone are a part of their culture. Since China has exhausted the tiger population in its own country, it has had to rely on nearby countries, such as India and Russia, to supply China with tigers. Development has also been a serious threat to tigers, their habitat, and their prey. As development continues, more forests, which make for prime tiger habitat, are going to suffer. Similarly, logging of forests, both legal and illegal, harm tiger habitats if national or local laws do not protect the areas. These threats to tigers' safety, along with many other threats, are potentially going to wipe out all species of tigers, which is likely to have a negative effect on ecosystems that rely on tigers.

Despite the troubling data and the projected extinction of tigers in the wild, tiger populations remain genetically viable. If countries and international organizations take action and work together, it is possible for tiger populations to become stable in the future. It may take a while for Asian countries to accept and begin to regularly use Western medicines, but pharmaceutical companies in the United States could help speed up this transition. The United States government can also help by putting pressure on countries, such as China, to encourage them to find alternate medicines and prevent tiger poaching. Advertising and education on the importance of protecting tigers may be the only way that people in rural Asian countries will realize the dangers tigers face and consider alternative ways of life that work toward sustainability of the tiger species. To prevent development and logging from invading tiger habitats, more protective laws need to be put into place. Or even better, tiger reserves should be set up and well protected to ensure tigers are able to live freely from negative human interaction. Tiger reserves will not only protect tigers, but can also raise funds from tourists visiting tiger reserves. If eco-tourism is used at the reserves, the funds raised will go toward protecting tigers and helping improve tiger populations. It seems like such a simple solution to claim that there needs to be stricter laws and more enforcement, but for tiger bearing countries, this is true. In countries like Myanmar, where the illegal sale of tiger parts takes place in open markets, enforcement should not be very difficult. If countries are willing to put laws in place to protect tigers and create tiger protection programs, resources are available to help. International Organizations, such as WWF and IUCN, are in place to financially aid countries in their efforts to protect tigers. If countries make tiger survival a priority and enforce laws to protect tigers, tiger populations will be able to multiply to the levels they once were.

APPENDIX

Map 1: Historic and present tiger range.²⁰³



²⁰³ Tiger Map, *supra* note 2.

IMPROVING THE WELFARE OF EGG-LAYING HENS THROUGH ACKNOWLEDGEMENT OF FREEDOMS

AMANDA WRIGHT*

I. INTRODUCTION

Over 90 percent of the 10 billion agricultural animals raised and slaughtered in the United States are chickens; yet, chickens are the least protected agricultural animal in terms of animal welfare laws in our country.¹ Each year egg producers in the United States use over 337 million battery-hens or egg-laying hens and each year those hens lay 80 billion eggs.² Unfortunately, 97 percent of the nation's 80 billion eggs come from birds, who suffer the confinements of small battery cages.³

While the United States has usually led the way for laws that protect animal welfare, our country has fallen drastically behind many European countries and the European Union.⁴ However, the United States has newly proposed legislation known as the Egg Products Inspection Act Amendments of 2010 or H.R. 3798. This bill is a product of the United Egg Producers and the Humane Society of the United States. If passed, H.R. 3798 would be the first and only Federal legislation that provides for the welfare of egg-laying hens and puts restrictions on the egg-producing industry.⁵ This paper analyzes the flaws in H.R. 3798

* She would like to thank Christopher J. Malia for his consistent and tireless support of her writing.

¹ Sarah Cranston, Note, *So Sue Me: How Consumer Fraud, Antitrust Litigation, and Other Kinds of Litigation Can Effect Change in the Treatment of Egg-Laying Hens Where Legislation Fails*, 9 RUTGERS J.L. & PUB. POL'Y 72, 72-75 (2012); Veronica Hirsch, *Brief Summary of the Legal Protections of the Domestic Chicken in the United States and Europe*, ANIMAL LEGAL & HISTORICAL CENTER (2003), <http://animallaw.info/topics/tabbed%20topic%20page/spuschickens.htm> (last visited March 2, 2012).

² Cranston, *supra* note 1, at 72-75; Hirsch, *supra* note 1; A. Bryan Endres & Nicholas R. Johnson, *Integrating Stakeholder Roles In Food Production, Marketing, And Safety Systems: An Evolving Multi-Jurisdictional Approach*, 26 J. ENVTL. L. & LITIG. 29, 96 (2011) (stating that from 1999 to 2009, egg production in the United States increased from eighty-four to ninety-one billion eggs per year).

³ Bill Marsh, *How Hens are Confined*, N.Y. TIMES, Aug. 14, 2010, <http://www.nytimes.com/interactive/2010/08/15/weekinreview/15marsh-grfk.html>.

⁴ Jessica Braunschweig-Norris, *The U.S. Egg Industry - Not All It's Cracked Up to be for the Welfare of the Laying Hen: A Comparative Look at United States and European Union Welfare Laws*, 10 DRAKE J. AGRIC. L. 511, 512-14 (2005).

⁵ Cranston, *supra* note 1, at 76.

and explains that the proposed legislation cannot adequately protect hens' welfare in a system that seeks to exploit these animals. The paper proposes that in order to remedy the egg-producing industry's pervasive animal abuse and influence over egg-production legislation, our government should adopt an acknowledgement of enumerated animal rights or freedoms and implement it into H.R. 3798.

First, this paper provides a brief history of factory farming as used in the egg-producing industry. This section of the paper discusses the consequences of factory farming on the lives of egg-laying hens and the evidence of suffering as a result of utilizing these practices. This first section demonstrates a need for regulations and reveals the egg-producing industry's ability to control, influence, and prevent useful progressive regulations.

Next, this paper examines and compares the current laws protecting egg-laying hens abroad, specifically in the European Union and the United States. This section explains the European Union's success in implementing regulations that protect the hens' welfare and how Europe succeeded in passing these laws despite the egg-producing industry's influence. This section of the paper also examines the proposed bill in the United States, H.R. 3798, and the egg-producing industry's influence and control over this bill.

Finally, this paper proposes a solution for creating legislation in the United States that adequately protects the welfare of egg-laying hens. The paper proposes adopting the "Five Freedoms," promulgated by the United Kingdom and now "expressed in various animal-welfare recommendations, codes, and legislation in Europe." Five Freedoms has helped eliminate or decrease the suffering of millions of egg-laying hens.⁶ This section explains the need for an acknowledgment of enumerated rights for hens in order to combat the egg-producing industry's pervasive control and potential abuse of the legislative process.

⁶ Gaverick Matheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, And Trade*, 70 *LAW & CONTEMP. PROBS.* 325, 341-42 (2007) (the Five Freedoms are now expressed in various animal-welfare recommendations, codes, and legislations in Europe, North America, and Australasia, as well as in the World Animal Health Organization's office international des Epizooties (OIE) guiding principles).

II. FACTORY FARMING IN THE UNITED STATES

A. *The History and Development of Factory Farming*

Prior to World War II, small family farms raised our country's chickens, and independent producers accounted for nearly all egg production.⁷ These farms were the romanticized images of farms we were exposed to as children. The chickens would roam free for most of the day, foraging and scratching for food and the individual farmer or farmers fed, watered, and slaughtered the chickens for food, sale, and consumption.⁸

Just prior to World War II, farmers began specializing "in the production of chickens to meet the constant demand for more eggs and meat."⁹ These farmers realized that by adding Vitamin D to the chickens' diet, chickens could be raised indoors without the need for sunlight.¹⁰ Mass indoor production of eggs and meat lead to problems for the birds and farmers because disease spread quickly throughout the poorly ventilated indoor facilities and birds pecked at each other, fighting for space.¹¹ If it were not for the intervention of science and technology, these problems might have halted the development of factory farming in its tracks.

Unfortunately, pharmaceutical companies, feed companies, and engineers recognized an opportunity for profit and worked to remedy the obstacles facing farmers.¹² Patents on the "automatic debeaking machine," hormones for the genetic production of perfect hens, and richer feed allowed indoor farming to survive and profit.¹³ Egg-laying hens were unique to other animals raised on factory farms, in that farmers kept their birds indoors for extensive periods of time to increase and control egg production.¹⁴ For this reason, farmers needed a method

⁷ Endres, *supra* note 2, at 31; JIM MASON & MARY FINELLI, BRAVE NEW FARM, reprinted in IN DEFENSE OF ANIMALS 104, 106 (Peter Singer, ed., Blackwell Publishing 2006); HAROLD D. GUITHER 86 ANIMAL RIGHTS: HISTORY AND SCOPE OF A RADICAL SOCIAL MOVEMENT (Southern Illinois University Press 1998); Veronica Hirsch, *Overview of the Legal Protections of the Domestic Chicken in the United States and Europe*, ANIMAL LEGAL & HISTORICAL CENTER (2003), <http://animallaw.info/topics/tabbed%20topic%20page/spuschickens.htm> (last visited Mar. 2, 2012); Aurora Paulsen, *Catching Sight Of Credence Attributes: Compelling Production Method Disclosures On Eggs*, 24 LOY. CONSUMER L. REV. 280, 280-85 (2011).

⁸ KAREN DAVIS, PRISONED CHICKENS AND POISON EGGS: AN INSIDE LOOK AT THE MODERN POULTRY INDUSTRY 15-16 (1996).

⁹ MASON, *supra* note 7, at 105.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 106.

¹⁴ *Id.* at 105.

to remove the chicken's waste so as not to interrupt egg production.¹⁵ Farmers, or rather now more accurately called producers, "discovered that they could keep their hens in wire-mesh cages, suspended over a trench to collect the droppings."¹⁶ This discovery birthed the battery cage.

As factory farming techniques improved, farms needed fewer people to watch after and maintain the hens. One worker reported that "[w]e used to have one person for every 10,000 [chickens]. Now we have one for every 150,000."¹⁷ Factory farming allowed producers to more easily control their flocks, and cut down on chores such as feeding and waste removal.¹⁸ With the aid of a technological revolution, the constant improvement of antibiotics helped farmers diagnose and treat diseases efficiently and quickly.¹⁹ These mechanisms allowed farmers to increase production, and decrease time spent caring for and interacting with the chickens, providing the essential pieces to the basic formula of farming factory that allowed producers to increase profitability while keeping prices low. In fact, producers even managed to beat inflation; the average price of a dozen large eggs in the year 2000 was 67 cents and was less than the average price paid in 1984, of 84 cents.²⁰ With cheap products for consumers flowing from factory farming and the growing number of businesses and industries profiting from the sale of antibiotics, cages, machines, genetically-engineered birds and more, the fate of the egg-laying hen was sealed for many years. In fact, it is this unique formula of factory farming that presents an unparalleled challenge for anyone seeking reform that would benefit the welfare of egg-laying hens, because reform seekers must negotiate with a multi-billion dollar industry built on vertical integration, that includes scientist, producers, engineers, entrepreneurs, and some of the best lawyers in the country.

Even a cursory examination of the current egg consumption in the United States per year demonstrates that the egg-producing conglomerate is amongst the richest and the most powerful industries in our country; yet no federal laws exist to regulate the treatment of our nation's 337 million birds, which are so vital to our country's enormous egg consumption.²¹ According to a survey by the NPD Group, a market-research firm in Port Washington, New York, published in Real Simple

¹⁵ *Id.* at 106.

¹⁶ *Id.*

¹⁷ *Id.* at 107.

¹⁸ *Id.* at 111.

¹⁹ Hirsch, *supra* note 1.

²⁰ *Id.*

²¹ KAREN DAVIS, PRISON CHICKENS POISONED EGGS: A LOOK AT THE MODERN POULTRY INDUSTRY 85 (Book Publ'g Co. rev. ed. 2009).

Magazine, nine out of ten U.S. families reported that eggs are one of the top three groceries always kept in the house.²² According to the U.S. Poultry and Egg Association, in 2010, the per capita egg consumption was reported to be 246, which means that the average person in the United States used or consumed 246 eggs that year.²³ In the same year, the value of egg production was up six percent and estimated to be \$6.52 billion dollars.²⁴ The growth of this industry, combined with our country's massive egg consumption, has left those who desire increased regulation of the industry fighting an economic powerhouse with insurmountable influence over the legislative process.

*B. The Consequences of Factory Farming on the Life of
Egg-Laying Hens*

In order to shape legislation that protects hens' welfare and regulates the egg-producing industry, it is essential to understand factory farming's inhumane processes that must be restricted, banned, or regulated. Some of the most prominent processes that will be discussed in this paper are the battery cage system, the debeaking process, forced molting, and other unnatural processes used to increase egg production; the most logical consequences of which include the hens' inability to engage in their natural behaviors, resulting in the inhumane suffering of these birds.

Unregulated factory farming allows producers to impose several unnatural processes on egg-laying hens. These hens lead a season-free life without natural light or fresh air.²⁵ Crowded and unnatural conditions mean that the hens cannot engage in normal behaviors.²⁶ Hens cannot walk, fly, perch, preen, nest, peck, dust-bathe, or scratch for food.²⁷ Hens may not even be able to stand up and their feet may grow into their cages' wire flooring. In close confines, hens cannot establish a pecking order, and as a result, they peck and injure each other, or become cannibalistic. All of these unnatural behaviors result in suffering, evidence of which is unique to each nefarious process used on factory farms, and will be examined in the next section.

²² Anahad O'Connor, *What's in Your Kitchen?*, NYTIMES.COM (Dec. 13, 2011), <http://well.blogs.nytimes.com/2011/12/13/whats-in-your-kitchen/>.

²³ *Industry Economic Data*, US POULTRY, (2010) http://www.uspoultry.org/economic_data/ (last visited Mar. 23, 2012).

²⁴ *Id.*

²⁵ Braunschweig-Norris, *supra* note 4, at 515.

²⁶ GUITHER, *supra* note 7, at 86.

²⁷ *Id.*

1. Battery Cages

The most infamous practice producers utilize is the confinement of hens in a battery cage. Producers house egg-laying hens in twelve inch by eighteen inch wire cages that may hold up to six birds, giving the birds between 32 to 50 square inches of space.²⁸ Some sources, such as the New York Times, report that on some factory farms these cages can house up to 11 birds.²⁹ The United Egg Producers, a national trade group, set minimum “guidelines” for battery cage space at 67 square inches per bird, which is not even enough room for the birds to fully spread their wings or turn around without bumping into another hen, or the walls of the metal cages.³⁰ Producers stack these cages on top of each other “in dark layer houses that can house up to 80,000 birds.”³¹

2. Debeaking

Next, and almost as notorious as battery cages, producers debeak their baby chicks. During the process, producers cut off three millimeters of the top beak and two and a half millimeters of the lower beak with a hot blade, to prevent the hens from pecking at each other in their close confines.³² Ironically, if hens lived in their natural habitat, their pecking at each other would hardly ever become a problem because hens would establish a pecking order and the birds lower in the hierarchy would be able to escape their oppressors. Thus, debeaking is an unnecessary result of the system of the factory farming system.

3. Forced Molting

Thirdly, producers use a process known as “forced molting” to increase egg production.³³ Forced molting causes hens to produce more eggs because the producers induce the hens’ natural egg-producing

²⁸ Marsh, *supra* note 3; Hirsch, *supra* note 7; Paulsen, *supra* note 7, at 291-92 (reporting the average battery cage is between 48 and 54 square inches).

²⁹ *More Humane Egg Production*, N.Y. TIMES, Feb. 14, 2012; Hirsch, *supra* note 1.

³⁰ Marsh, *supra* note 3; Cranston, *supra* note 1, at 72; (last visited Mar. 2, 2012); Animal Husbandry Guidelines for U.S. Egg Laying Flocks, UNITED EGG PRODUCERS, 21 (2010 ed.), available at http://www.unitedegg.org/information/pdf/UEP_2010_Animal_Welfare_Guidelines.pdf; A. MENCH & J.C. SWANSON, DEVELOPING SCIENCE-BASED ANIMAL WELFARE GUIDELINES 3 (citing M.S. Dawkins & S. Hardie, Space Needs of Laying Hens, 30 Brit. Poultry Sci. 413 (1989)), available at <http://animalscience.ucdavis.edu/Avian/mench.pdf>; NORM PHELPS, THE LONGEST STRUGGLE: ANIMAL ADVOCACY FROM PYTHAGORAS TO PETA 182 (2007); Paulsen, *supra* note 7, at 291-92.

³¹ Hirsch, *supra* note 7.

³² Hirsch, *supra* note 1; GUITHER, *supra* note 7, at 93.

³³ Hirsch, *supra* note 7.

process through food and water withdrawal. During forced molting periods, hens are not given food for two weeks at a time and not given water for three days at a time.³⁴ As a result, hens lose up to 25 percent of their body weight.³⁵ The weight loss and the lack of food and drink causes stress. In response to such stress, the hens molt, or shed their feathers. After which time, food and water are reinstated, and the hens produce “bigger eggs in greater numbers.”³⁶ Egg-laying hens start to produce eggs when they are sixteen to 22 weeks old, and it is not uncommon for these hens to produce up to 300 eggs by 70 weeks, if the hen survives that long.³⁷ Producers slaughter battery-cage hens after about one year because they stop producing eggs at an acceptable rate to producers.³⁸

4. Slaughter of Male Chicks

Lastly, an ill effect of egg-laying hen practices that is not often recognized is the fate of male chicks born to egg-laying hen breeders. Male chicks cannot become layers, and producers consider their meat inferior to that of broiler chickens, so they are rarely used as meat chickens, or boilers. As a result, the producers utilize many inhumane methods to kill the chicks such as suffocation either by piling them into garbage bags or by asphyxiating them with carbon-dioxide. The producers might also decapitate, bury alive, or grind the baby chicks up alive for animal feed.

C. Evidence of Suffering as a Result of Practices Utilized on Factory Farms

A major obstacle facing the creation of legislation to protect the welfare of egg-laying hens in the United States is that many people do not believe or are not aware that egg-laying hens suffer. In order to promulgate effective laws, “suffering must be recognizable in some objective way.”³⁹ If we do not recognize how a specific animal suffers, the laws we create may fall short of increasing animal welfare and reducing suffering.⁴⁰ Therefore, in order to promulgate legislation, it is essential to understand the unique and real ways in which hens suffer as a result of the processes producers force them to endure.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ GUITHER, *supra* note 7, at 91.

⁴⁰ *Id.*

1. Evidence of Suffering as a Result of Battery Cages

Egg-laying hens inevitably suffer because of their close confinement in battery cages, and the lack of daylight and fresh air. In a 1996 report of the Scientific Veterinary Committee of the Animal Welfare Section (SVC) in Brussels, the committee acknowledged a hen's unique behavioral needs and the harm to their welfare caused by current caging practices.⁴¹ The committee reported such negative effects as being prevented from "performing natural behaviors," and thus, "degeneration from lack of exercise."⁴² The committee also noted the physical complications hens face when their claws grow to great lengths from being denied the ability to forage and scratch.⁴³ Often, the hens' claws grow so long that the claw becomes permanently stuck to the wires of the cages, causing the claw to be torn off when the hens are removed from the cages and sent to slaughter.⁴⁴ The committee concluded that "battery cage systems provide a barren environment for the birds . . . it is clear that because of its small size and its barrenness, the battery cage as used at present has inherent severe disadvantages for the welfare of hens."⁴⁵

2. Evidence of Suffering from Debeaking

Our society is accustomed to mutilating animals natural appearances to fulfill our own needs. Dogs' floppy ears are often cropped to meet breed standards, pigs' long, curly tails are cut to stop biting in close confinement,⁴⁶ cattle's hides are scorched for branding, and baby chicks' beaks are burned off. Often, we do not recognize that mutilation practices that we consider "useful" or "necessary" to meet food production and other demands produce real suffering. "Poultry ethologist Dr. Ian Duncan explains that the tip of the beak is richly innervated and contains pain receptors."⁴⁷ Thus, the young hens experience acute pain after trimming, cutting, or heating the beak.⁴⁸

⁴¹ CLARE DRUCE & PHILIP LYMBERY, *OUTLAWED IN EUROPE* (Archimedean Press 2002) *reprinted in* IN DEFENSE OF ANIMALS 123, 129-131 (Peter Singer, ed., Blackwell Publishing 2006).

⁴² *Id.* at 129.

⁴³ MASON, *supra* note 7, at 113.

⁴⁴ DRUCE, *supra* note 41, at 129.

⁴⁵ *Id.* at 130.

⁴⁶ Nicolette Hahn Niman, *The Unkindest Cut*, N.Y. TIMES, Mar. 7, 2005, http://www.nytimes.com/2005/03/07/opinion/07niman.html?_r=0 ("The pork industry's rationale for tail docking is that pigs bite each other's tails and that the tails can then become infected.")

⁴⁷ MASON, *supra* note 7, at 113.

⁴⁸ *Id.*

“[T]he behavior of debeaked birds is radically altered for many weeks, which, along with neurophysiological evidence, indicates the birds experience chronic pain” from this process.⁴⁹

3. Evidence of Suffering from the Unnatural Increase of Egg Production

Through practices such as forced molting, producers have engineered a bird that can lay an “unnatural number of eggs.”⁵⁰ Precisely, most egg-laying hens will produce an average of 223 eggs in a year as opposed to the average wild hen which will lay about one to two dozen eggs a year.⁵¹ Producers and scientists genetically select hens for early egg production so as to “reduce the time and money required to feed and house growing birds.”⁵² As a result, when hens start laying eggs, the hens’ bodies are usually too small and immature to lay the overly large eggs that are induced by forced molting.⁵³ As one author described the result:

The uteruses can prolapse, pushing through the vaginas of the small, cramped birds forced to strain day after day to expel huge eggs. The uterus protrudes, hangs, and ‘blows out,’ inviting infection and vent picking by cell mates, from whom the prolapse victim, in severe pain, cannot escape except by dying.⁵⁴

III. THE REGULATION OF EGG-LAYING HENS IN THE PRESENT LEGAL SYSTEM

There is major disparity between European countries’ legislation and the United States’ legislation regulating the egg-production industry. In the last decade, European countries enacted progressive legislation to regulate the animal agricultural industries and, most notably, ensuring egg-laying hens’ welfare. On the other hand, the United States has yet to pass any Federal legislation protecting these birds, leaving the birds “at the mercy of the industry.”⁵⁵ This section provides a general overview of Europe’s legislation, while comparing it to the current and proposed

⁴⁹ *Id.*

⁵⁰ DAVIS, *supra* note 8, at 49.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Braunschweig-Norris, *supra* note 4, at 512.

laws in the United States, because European legislation provides a sound template for how the United States might proceed in passing new legislation.⁵⁶

A. History of the Progressive Change in Europe and the Egg-Laying Hen Directive

Europe's movement to protect the welfare of egg-laying hens was largely a movement of "ordinary citizens."⁵⁷ Lobbying organizations and new media groups evidenced Europe's changing public opinions regarding meat and egg production.⁵⁸ A public survey of British citizens in 1990 revealed that people "generally disapproved of intensive farming systems."⁵⁹ This general disapproval was associated with a growing public awareness for how food is produced and a "demand for food that is labeled as having been produced under certain standards."⁶⁰ Despite the fact that the ordinary citizens' financial resources were miniscule in comparison to the industry that they were battling, the European Union succeeded in passing a directive that "changed the lives of millions of animals," including the reduction of suffering in the lives of egg-laying hens.⁶¹

While public opinion was the greatest driving force to improve animal welfare in Europe, "two major players in the development of animal welfare policy in the European Union included the European Union Scientific Committee on Animal Health and Welfare and the Council of Europe."⁶² These groups helped promulgate the Five Freedoms, which was a part of a movement in England to "advise the British government on the need for welfare standards."⁶³ In 1979, the United Kingdom Agricultural Ministry's advisory body, the Animal Welfare Council, defined the Five Freedoms, stating that animals have

⁵⁶ *Id.* (discussing how legislative movements usually start in Europe and then come to the United States).

⁵⁷ DRUCE, *supra* note 41, at 130; GUTHER, *supra* note 7, at 31 (stating that "European consumers seem more concerned about humane treatment than in the United States."); Matheny, *supra* note 6, at 341 (The legal protection of farm animals in Europe can be credited to Europe's long history of animal-protection outreach and educational campaigns, public awareness of farming practices, and investment in animal-welfare research.).

⁵⁸ Braunschweig-Norris, *supra* note 4, at 535; Hirsch, *supra* note 1.

⁵⁹ GUTHER, *supra* note 7, at 31.

⁶⁰ *Id.*

⁶¹ DRUCE, *supra* note 41, at 130.

⁶² Braunschweig-Norris, *supra* note 4, at 534; Hirsch, *supra* note 7; *Five Freedoms*, FARM ANIMAL WELFARE COUNCIL, <http://www.fawc.org.uk.freedoms.htm> (last visited Mar. 2, 2012).

⁶³ *Id.* at 534.

a right to freedom from hunger and thirst, freedom from pain and injury, freedom from discomfort, freedom from fear and distress, and freedom to express natural behaviors.⁶⁴ The Committee concluded that “the confinement of animals in intensive farming situations should be evaluated and the stresses of confinement considered [to determine] the appropriate methods for rearing.”⁶⁵ The promulgation of the Five Freedoms and the committee’s general disapproval of “the degree of confinement” on factory farms gave the European Union the ability and the momentum to pass its first progressive animal welfare law.⁶⁶ Ultimately, these Five Freedoms provided the context for the European Union to create the European Union’s Minimum Standards for the Rearing of Egg Laying, hereinafter referred to as “The Directive.”⁶⁷

B. The Egg-Laying Hen Directive

As previously described, prior to the European Union adopting the Directive, the primary housing for egg-laying hens was the battery cage.⁶⁸ The Directive identified three types of “rearing systems for laying hens either currently in use or to be implemented in the European Union: non-enriched cage systems where hens have at least 550 square centimeters of cage area per hen, enriched cage systems where laying hens have at least 750 square centimeters of cage per hen (which still does not provide the hens with adequate space to perform all of their natural behaviors), and non-cage systems” which utilize nests for confinement (at least one nest for every seven hens), and provides “adequate perches where the stocking density does not exceed nine laying hens per square meter of usable area.”⁶⁹ The Directive can be characterized as “phase out” legislation, in which the goal was to eliminate the use of non-enriched systems, which are synonymous with the term battery cages, by the year 2012.⁷⁰ And, for those non-enriched systems that are retained, the Directive requires strict guidelines for minimum space, feed troughs, and drinking systems.⁷¹

⁶⁴ *Id.* at 534; DAVID FAVRE, ANIMAL LAW, WELFARE, INTERESTS, AND RIGHTS 281-82 (Wolters Kluwer Law & Business 2011) (stating “Before considering a batch of differing agricultural animal welfare standards, there should be established a context in which to judge the standards.”); GUITHER, *supra* note 7, at 26-27.

⁶⁵ Braunschweig-Norris, *supra* note 4, at 534.

⁶⁶ *Id.* at 536; Matheny, *supra* note 6, at 339-41.

⁶⁷ Braunschweig-Norris, *supra* note 4, at 537; FAVRE, *supra* note 64, at 281-82.

⁶⁸ Braunschweig-Norris, *supra* note 4, at 536-38.

⁶⁹ *Id.* at 518-19.

⁷⁰ *Id.*

⁷¹ *Id.*

Enriched cage systems are similar to battery cages, but are equipped with more amenities to provide for the health and welfare of egg-laying hens.⁷² The Directive requires a minimum cage area per hen, nests, litter, and perches, and sets forth a system for facility inspections.⁷³ The Directive requires all regulated facilities register and be “given a distinguishing number to be used for identifying and tracing the eggs that originate from that system.”⁷⁴ The requirements were to be implemented by the Member States on January 1, 2002.⁷⁵ However, “some countries have done more to enforce the new law than others, creating a price discrepancy” for eggs across Europe, allowing “cheaper imports from countries that aren’t following the rules.”⁷⁶ According to Food Safety News, the European Commission plans to take legal action against thirteen countries that are not enforcing the rules.⁷⁷ These countries include: Hungary, Italy, Latvia, Spain, Greece, Belgium, Bulgaria, Cyprus, Poland, Portugal, Romania, Slovakia, and the Netherlands.⁷⁸

The last category of rearing system, non-cage systems, refers to what is commonly known as the “free range” system.⁷⁹ The Directive implements many of the same requirements in non-cage systems as it does for enriched cage systems.⁸⁰ However, what is unique about the non-cage system is that it recognizes “the sociological well-being of the bird by allowing hens to engage in their natural behaviors,” such as scratching and foraging.⁸¹

The Directive and other European Union legislation also placed limits and restrictions on debeaking and forced molting, though both practices are still legal.⁸² The Directive allows debeaking “only when necessary to prevent feather pecking and cannibalism” and only when performed by qualified staff or “trained crews.”⁸³ However, with the implementation of the new rearing systems, it is likely that debeaking will become obsolete as hens will not become cannibalistic if they are allowed enough space to engage in their natural behaviors and the

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 519-20.

⁷⁶ James Andrews, *European Union Bans Battery Cages for Egg-Laying Hens*, FOOD SAFETY NEWS, Jan. 19, 2012, <http://www.foodsafetynews.com/2012/01/european-union-bans-battery-cages-for-egg-laying-hens/>, (last visited Mar. 30, 2012).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Braunschweig-Norris, *supra* note 4, at 518-520.

⁸¹ *Id.* at 520.

⁸² *Id.* at 522-23.

⁸³ *Id.* at 522.

victims of pecking will have enough space to escape their tormentors.⁸⁴ Additionally, the Directive recognizes forced molting as an effective egg-producing strategy but restricts this practice after the birds “have lost up to thirty percent of their starting weight.”⁸⁵

Lastly, many other regulations set minimum standards for the transportation and slaughter of domestic birds and egg-laying hens.⁸⁶ The regulations prohibit an injured animal from being “transported without first receiving proper veterinary care.”⁸⁷

C. Current Legislation in The United States

Legislation in the United States extends little protection to agricultural animals, especially egg-laying hens. Federal legislation such as the Animal Welfare Act does not apply to agricultural animals; and most states exempt “accepted husbandry practices” from their animal cruelty statutes, leaving the protection of these animals in the hands of the industry that seeks to exploit them.⁸⁸

Besides states such as Michigan and California, which implement their own regulations on egg-production, the egg industry has attempted to implement its own standards, such as labeling options, which give customers a false sense that their eggs were produced in a humane way. Labeling schemes such as the ‘Animal Care Certified’ logo were claimed by the Better Business Bureau to be “misleading,” and the Bureau brought a suit against the Federal Trade Commissions, requesting that the federal government examine and regulate the logo’s use.⁸⁹ Lastly, the United Egg Producers have published recommendations, or voluntary guidelines for the use of battery cages and other husbandry practices, but none that adequately protect the hens’ welfare.⁹⁰

Additionally, in response to some consumer demand, many major corporations implemented guidelines for egg-producers to follow if egg producers want to have their products purchased by major consumption industries, such as the fast food industries.⁹¹ With fast food chains, such as McDonald’s selling more than one billion eggs a year, these industries have an opportunity to make major improvements to the

⁸⁴ *Id.*

⁸⁵ *Id.* at 523.

⁸⁶ *Id.* at 524.

⁸⁷ Braunschweig-Norris, *supra* note 4, at 524.

⁸⁸ 7 U.S.C SEC. 2131-2159 (West 2012); MASON, *supra* note 7, at 120.

⁸⁹ Cranston, *supra* note 1, at 97. Braunschweig-Norris, *supra* note 4, at 531; *The Facts About Farm Animal Welfare Standards*, FARM SANCTUARY, http://www.upc-online.org/welfare/standards_booklet_FINAL.pdf (last visited Mar. 20, 2012).

⁹⁰ Marsh, *supra* note 3; Braunschweig-Norris, *supra* note 4, at 528.

⁹¹ Braunschweig-Norris, *supra* note 4, at 528-29.

welfare of egg-laying hens.⁹² As an example of the voluntary adoption of care standards, McDonald's introduced the "Laying Hen Welfare Guidelines" to its suppliers.⁹³ The guidelines required a 50 percent increase in the hens' housing space, elimination of forced molting, and the stated goal of eliminating beak trimming.⁹⁴ While suppliers are not legally required to adhere to these guidelines, McDonald's expressed that it would "implement a purchasing preference policy" to those suppliers who adhered to their desires and met the stated goals of their welfare guidelines.⁹⁵ If McDonald's and other fast food chains adhered to a purchasing preference, this industry could cause major changes to egg production.

D. H.R. 3798: The Proposed Legislation in the United States

If passed, the Egg Products Inspection Act Amendments of 2012, or H.R. 3798, would be the first and only federal legislation which provides for the welfare of egg-laying hens and puts restrictions on the egg-producing industry. However, the bill is still a long way from becoming law. It has currently been assigned to a congressional committee and will be considered before sending it to the senate. Despite the fact that the bill might never pass, it is worth knowing the impetus for this proposed legislation, and it is helpful to this paper to compare the bill to the legislation passed by the European Union.

1. The History and Impetus for the Proposed Legislation and the Role Played by the Egg Producing Industry

Unlike legislation in the European Union, which came almost entirely from ordinary citizens fighting the egg-producing industry, the impetus for the Egg Products Inspection Act Amendments of 2012, hereinafter H.R. 3798, or "the proposed legislation," came from a joint effort of two longtime adversaries: the Humane Society of the United States and the United Egg Producers.⁹⁶ While the United States has seen a desire from consumers for better treatment of agricultural

⁹² Cranston, *supra* note 1, at 97-100. Peter Singer, *The Forgotten Animal Issue: The Big Mac, Ethics into Action*, (Rowman & Littlefield Publishers, Inc. Feb. 25, 2000), <http://econ2.econ.iastate.edu/classes/econ362/hallam/Readings/BigMac.pdf> (last visited Mar. 2, 2012); Mark Bittman, *OMG: McDonald's Does the Right Thing*, N.Y. TIMES, Feb. 12, 2012, <http://opinionator.blogs.nytimes.com/2012/02/13/omg-mcdonalds-does-the-right-thing/>.

⁹³ *Id.*

⁹⁴ Singer, *supra* note 92.

⁹⁵ Braunschweig-Norris, *supra* note 4, at 528-29, 536.

⁹⁶ Mark Bittman, *Debate Over the Egg Industry Agreement*, N.Y. TIMES, Jul. 14, 2011. <http://bittman.blogs.nytimes.com/2011/07/14/debate-over-the-egg-industry-agreement/> (last visited Feb. 23, 2012).

animals and a preference for products which provide for the welfare of agricultural animals, it is clear that the egg industry played a strong role in forming H.R. 3798.⁹⁷ The egg-producing industry agreed to support and to help pass this legislation because producers faced economic risk and uncertainty as more states, such as California, Michigan, and Ohio, implemented varying standards for egg production through ballot initiatives and compromise. The unpredictability of costs and the economic consequences of various standards among the states led the industry to play a strong role in this legislation. It is important to understand the industry's motive for working with the Humane Society of the United States to pass such regulations and the industry's role in its formation, as the main goal of this paper is to provide a practical solution to remedy the egg-producing industry's insurmountable influence over the proposed legislation.

2. Critics of the Legislation

Critics of the proposed legislation cite several wins by the egg industry to support their position. One of the biggest is the long phase-in period for the elimination of battery cages or the increased housing space requirements.⁹⁸ The act requires double the current standards for "enriched cages," which would provide brown hens a minimum of 116 square inches of individual floor space and white hens a minimum of 101 inches of individual floor space, giving the egg producers between fifteen and eighteen years to meet "full compliance" with the minimum standards.⁹⁹ In comparison to the Directive passed by the European Union, in which the phase-out period was 12 years, critics worry that it will be difficult to monitor the changes, and hold facilities accountable for implementing the new requirements over such a long period of time.¹⁰⁰ Under the current plan, the United Egg Producer's certification program will monitor the changes and producer compliance, but critics are skeptical about the United Egg Producer's misleading certifications

⁹⁷ Michele Simon, *Who Really Benefits from the Egg Industry Deal?*, FOOD SAFETY NEWS, Jul. 12, 2011, <http://www.foodsafetynews.com/2011/07/who-really-benefits-from-the-egg-industry-deal> (last visited Feb. 23, 2012).

⁹⁸ *Id.*

⁹⁹ *Id.*; Egg Products Inspection Act Amendments of 2012, H.R. 3798, 112th Cong. (2012) (Except for California which would comply with the new requirements by 2015 because of a 2008 ballot measure passed there).

¹⁰⁰ *Id.*; EU Council Directive 1999/74/EC of 19 July 1999 lays down minimum standards for the protection of laying hens; *European Union Directive and Other International Developments on Layer Hen Housing*, AUSTRIAN GOVERNMENT, DEPARTMENT OF AGRICULTURAL, FORESTRY, AND FISHERY, <http://www.daff.gov.au/animal-plant-health/welfare/reports/layer-hen/eu> (last updated Apr. 12, 2007).

in the past, as discussed earlier in the paper, as well as “Congress’s current propensity for cutting both FDA and USDA’s budget.”¹⁰¹

Another huge industry win is what originally coerced the industry to work with the Humane Society of the United States, uniformity in legislation.¹⁰² If federal law is implemented, the uniformity in restrictions and phase-out requirements could save the industry billions of dollars in coordinating plans and expenses, rather than having to adhere to varying state laws at various intervals.¹⁰³

In addition to uniformity, the proposed law contains a provision that restricts States from passing laws which provide greater welfare to egg-laying hens than H.R. 3798, or, in other words, the proposed legislation creates a ceiling instead of a floor for battery-cage requirements.¹⁰⁴ The proposed legislation states:

Requirements within the scope of this chapter with respect to minimum floor space allotments or enrichments for egg-laying hens housed in commercial egg production which are in addition to or different than those made under this chapter may not be imposed by any state or local jurisdiction.¹⁰⁵

This feature of the act is not only out of step with the United States legal system in which the Federal Government setting floors, not ceilings, has been a trend which has survived for many years, but it is also distinguishable from the European Union Directive, in which the Member States are free to implement space allotments, or protections for egg-laying hens that exceed the legislation’s minimums. This means that the hard-fought victories in implementing egg-producing regulation in states such as California and Michigan would be overturned in favor of H.R. 3798.¹⁰⁶ Critics of the proposed legislation explain that “in exchange for a national standard [for the egg-producing industry], the Humane Society of the United States agreed to stop seeking stricter state-level egg standard laws.”¹⁰⁷

¹⁰¹ Simon, *supra* note 97.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Egg Products Inspection Act Amendments of 2012, H.R. 3798, 112th Cong. §4 (2012).

¹⁰⁶ *New Federal Bill to Provide Protections for Egg-Laying Hens*, ANIMAL LAW COALITION, Jan. 24, 2012, <http://www.animallawcoalition.com/farm-animals/article/1679> (last visited Mar. 18, 2012).

¹⁰⁷ Helena Bottemiller, *Bill Introduced to Improve the Welfare Standard for Egg-Laying Hens*, FOOD SAFETY NEWS, Feb. 23, 2011, <http://www.foodsafetynews.com/2012/01/bill-introduced-to-improve-welfare-standard-for-egg-laying-hens>.

In conclusion, many critics concerned with the welfare for egg-laying hens oppose the proposed legislation because of the egg industry's hand in forming H.R. 3798. Critics view the impetus for the legislation as big industry "strong arming" states into giving up their right to form their own legislation, or implementing more protective legislation.¹⁰⁸ In fact, the Humane Farming Association says, "the bill is only saving an industry which is crippled by the public demand for cage-free eggs."¹⁰⁹ These critics lament losing the opportunity to achieve potentially greater protection at the State level.

3. Progressive Aspects of H.R. 3798

Despite the potentially negative role the egg-producing industry played in forming the proposed legislation, supporters of H.R. 3798 claim that the proposed legislation provides a lot of protection for egg-laying hens and would improve the welfare of the 337 million egg-

laying hens in the United States. In order to analyze the effectiveness of H.R. 3798, if passed, it is essential to understand the positive progress the proposed legislation embodies as viewed by its supporters.

First, the proposed legislation categorizes housing into three groups: existing caging devices, new caging devices, and caging devices in California.¹¹⁰ All caging devices are required to provide hens with adequate "environmental enrichments" at various phase-in periods.¹¹¹ The proposed legislation requires implementation of "adequate environmental enrichments," which it views as perch space, dust bathing, scratching areas, or nest space and is a huge victory for egg-laying hens who currently live out their lives in cages, providing for none of these amenities.¹¹² Supporters of the bill claim that these environmental improvements would likely allow hens the space to perform more of their necessary natural behaviors and relieve much suffering.

Next, the proposed legislation increases floor space in a graded system, phasing in more floor space, until all existing caging devices must provide a minimum of 144 square inches of individual floor space per brown hen and 124 square inches of individual floor space per white hen.¹¹³ This requirement exceeds the European Union's Directive.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Egg Products Inspection Act Amendments of 2012, H.R. 3798, 112th Cong. § 7A(a)(1)-(3) (2012).

¹¹¹ Bottemiller, *supra* note 107.

¹¹² Egg Products Inspection Act Amendments of 2012, H.R. 3798, 112th Cong. § 2 (2012).

¹¹³ *Id.* at § 7A(b)(2).

While the European Union's Directive phases out most battery cages, the Directive only requires that the "cages which are retrained provide at least 85 square inches per hen."¹¹⁴ The proposed legislation also requires a minimum of 144 square inches of individual floor space per brown hen and 124 square inches of individual floor space per white hen to be implemented in new caging devices after fifteen years, but with more phase-in periods.¹¹⁵

Other requirements include air quality control, which requires that egg facilities provide "acceptable air quality, which does not exceed more than 25 parts per million of ammonia during normal operations."¹¹⁶ While the act does not define "normal operations" or "acceptable air quality," it is significant that the legislation recognizes the hens' interest in breathing fresh air.

The proposed legislation also exceeds the European Union's Directive in outlawing forced molting. After two years, the proposed legislation restricts egg handlers from engaging in "feed-withdrawal or water-withdrawal molting."¹¹⁷ H.R. 3798 clearly defines both feed-withdrawal and water-withdrawal molting as "the practice of preventing food [or water] intake for the purpose of inducing egg-laying hens to molt."¹¹⁸

Lastly, the proposed legislation authorizes only euthanasia that is "[a]cceptable' by the American Veterinary Medical Association," and requires egg handlers to provide this euthanasia when necessary.¹¹⁹

IV. CONSIDERING THE EGG PRODUCING INDUSTRY'S INTERESTS

England and the European Union recognized animal welfare rights in the form of freedoms over 30 years ago and promulgated legislation regulating egg production over a decade ago. However, proposed legislation such as H.R. 3798 in the United States was nonexistent a decade ago. Thus, it must be conceded that, despite some of the criticisms surrounding the H.R. 3798, the proposed legislation is undoubtedly a step in the right direction. However, if the United States wants to pass meaningful and lasting laws that adequately protect the

¹¹⁴ Braunschweig-Norris, *supra* note 4, at 518 (citing Council Directive 1999/74, art. 5 1999 O.J. (L 203)).

¹¹⁵ Egg Products Inspection Act Amendments of 2012, H.R. 3798, 112th Cong. § 7A (2012).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at § 2.

¹¹⁹ *Id.* at § 7A.

welfare of egg-laying hens, the United States must take an additional essential step by recognizing that egg-laying hens have an interest in certain freedoms and enumerate those freedoms so as to have a basis for measuring the hens' interest against that of the industry, or to provide a context in which to form regulations.¹²⁰ While many of the restrictions in the proposed act seem to be similar to the Egg Laying Hen Directive such as, the eventual ban on forced molting, the requirement for enriched environments, the regulations of air quality, and the phase-out period for battery cages, I surmise that without an acknowledgment of freedoms or rights for egg-laying hens, the restrictions lack the ware withal to withstand new industrial developments, or to survive the phase-in period with meaningful improvements made for the welfare of hens.

The key distinction between the European Union's Egg-Laying Hen Directive and H. R. 3798 is the impetus for the legislations and the enumeration of rights, or lack thereof, for egg-laying hens. The Egg-Laying Hen Directive came largely from "public opinion," consumer demand, and consumer willingness to pay more for their eggs with the promise that the welfare of egg-laying hens would be protected.¹²¹ Additionally, the directive followed the promulgation of a clear articulation of freedoms, which provided the catalyst to pass progressive animal welfare acts because it recognized that animals had an interest in certain freedoms that could be weighed against the human interest in using animals as a source of food and capitol. Conversely, H. R. 3798, while retaining some of the restrictions seen in the Egg-Laying Hen Directive, found its impetus in the egg producing industry's fear of state-initiated regulation. Despite that the proposed legislation is a joint venture of two long-time adversaries, the Humane Society of the United States and United Egg Producers, it is not unreasonable to believe that the United Egg Producers got into bed with their adversaries as a preemptive action to control the formation of new regulations.¹²² And while it is not uncommon for the American legal system to create strange bedfellows, it is not practical to consider the industry's interests when implementing laws to protect the welfare of egg-laying hens without a clear articulation of the rights and freedoms of egg-laying hens.

¹²⁰ GARY L FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* 4 (Temple Univ. Press, 1995) (discussing the rights of animals weighing against those of humans); FAVRE, *supra* note 64, at 280 (stating "Before considering a batch of differing agricultural animal welfare standards, there should be established a context in which to judge the standards.").

¹²¹ GUITHER, *supra* note 7, at 31 (stating that "European consumers seem more concerned about humane treatment than in the United States").

¹²² Bottemiller, *supra* note 107 (stating that the bill would actually save the Egg Producing Industry from consumer demand for animal welfare conscious egg production).

A. The Need for Enumerated Rights for Egg-Laying Hens

Most animal cruelty laws in the United States are based on whether suffering is “unnecessary” or on whether treatment is inhumane. In forming H.R. 3798, ideally the goal is to eliminate inhumane treatment and unnecessary suffering and provide standards for the respectful use of these birds. To decide when suffering becomes unnecessary or treatment inhumane we balance the interest of the animal with that of the human. However, in our society, humans have the advantage of having affirmative rights such as the right to own property and the right to use that property for their own gain. And there are no rights of animals to balance against the rights of humans, only an abstract interest in preventing what is unnecessary suffering framed from the human perspective.¹²³ Thus, the rights of chickens (and all animals) are conspicuous by their absence because the United States has yet to acknowledge that these animals have any rights.

The underlying problem of considering the industry’s interests in promulgating federal law is that the proposed legislation does not examine the fundamental assumption that is the basis for creating law in any legal system: that the welfare of the beings bound by the legal system’s laws can be protected within that system.¹²⁴ More specifically, in the case of egg-laying hens the presumption that H.R. 3798 makes is that chickens can be adequately protected within this system of exploitation without the acknowledgement of rights.¹²⁵ If we do not stop to consider whether or not chickens can be protected in this system without enumerated rights, the proposed legislation is merely an illusion of protection.

Let’s use the formation of our own government as an example. No sooner do school children begin to learn American History, they learn about the importance of the Bill of Rights, which enumerates what has come to be known as the basic individual rights of United States citizens. As active participants in our government, and as those subject to its laws on a daily basis, we recognize the importance of the Bill of Rights on a very basic level, even if, as a whole, we do not understand the nuances of the first ten amendments to the United States Constitution. The average citizen when confronted with a statute that suppresses his/her ability to formulate words into coherent thoughts and

¹²³ FRANCIONE, *supra* note 120, at 4 (discussing fundamental assumptions in a system of exploitation).

¹²⁴ *Id.*

¹²⁵ FAVRE, *supra* note 64, at 280 (stating “[b]efore considering a batch of differing agricultural animal welfare standards, there should be established a context in which to judge the standards); Cranston, *supra* note 1, at 86 (Farm animal satisfaction can only be measured by the extent to which human consumers value animal welfare when making their economic decisions.).

express themselves in a meaningful manner will cry out, “*but the United States Constitution gives me the Freedom of Speech.*” Some of our founding fathers also recognized the importance of the Bill of Rights, as they refused to support the Constitution without an explicit guarantee of individual rights or a clear articulation of what the federal government could not do. The existence of the Bill of Rights represents the fear that the welfare of the beings bound by the newly created legal system could not be protected within that system without the enumeration of rights. This fear that the government could not adequately protect its governed is rooted in, what was viewed by the framers, as the exploitation of the colonies by England. Therefore, to create a legal system which could adequately protect the welfare of its governed, enumerated rights were added to curb the power of the federal government.

While, this paper does not propose an extension of the Bill of Rights to egg-laying hens, this point is made to show a fundamental flaw in the assumption of H.R. 3798, which is that it can function to protect the welfare of egg-laying hens in a system which exploits them as a means to ends of industry interests. Because the industry sits at the negotiating table with the power to influence the laws to strongly favor its interests over that of animal welfare, egg-laying hens need enumerated rights to curb the industry’s power in completely controlling the legislation’s formation and implementation. In essence, H.R. 3798 has no context in which to the judge the standards that it has created to protect the welfare of egg-laying hens. This lack of context is dangerous because before we consider making standards for agricultural animals, we should have a clear indication of the protections we want these animals to receive.¹²⁶ Furthermore, H.R. 3798 has not yet been promulgated and the egg-producing industry will continue to wield its influence over the bill throughout the rest of its life in the legislature. Thus, without acknowledgment of the rights of agricultural animals, it is impossible to fairly consider their welfare in conjunction with an industry that seeks to exploit them.

To illustrate an application of this theory, most European animal welfare laws are based on the Five Freedoms, as identified earlier as the right to: freedom from hunger and thirst, freedom from pain and injury, freedom from discomfort, freedom from distress, and freedom to express natural behaviors.¹²⁷ By recognizing animals as more than merely a means to an ends for human desires, many European nations and the European Union have framed laws that have adequately protected animals, especially egg-laying hens for which the European Union boasts one of the most progressive and protective legislations.

¹²⁶ Braunschweig-Norris, *supra* note 4, at 535.

¹²⁷ GUITHER, *supra* note 7, at 31 (stating that many producers now recognize that public opinion cannot be ignored if they are to maintain a market for their products).

Additionally, as a result of a strong commitment to the rights of animals, producers' attitudes towards animal welfare legislation in these countries have changed.¹²⁸ For example, in England, "producers are consulted as new animal welfare regulations are developed, but . . . must accept the final policy decision."¹²⁹ In this system, the National Farmers Union respects the recommendations made to the UK Ministry of Agriculture, Fisheries and Food by the Farm Animal Welfare Council.¹³⁰ This is in stark contrast to the attitudes of the egg-producing industry in the United States, which not long ago tried to give itself complete control of the regulation of egg production in Michigan and Ohio by launching a preemptive strike against the Humane Society of the United States, who was campaigning to pass ballot initiatives in various states.

While the proposal of enumerated rights may come under scrutiny as a "rights theory" for animals, and thus, too drastic to implement into the proposed act, it is essential to note that the Five Freedoms do not enumerate legal rights that are co-extensive to humans, and this is not what this paper suggests. In fact, the campaign for animal rights, as we think of it in the United States, has been limited in many European countries.¹³¹ Clearly, humans possess broader rights than the specific rights to freedom from hunger, pain, injury, and discomfort and freedom to express their natural behaviors. Human rights, formulated broadly, are seemingly limitless; humans have the right to privacy, to freedom of speech, and the right to due process when life, liberty, or property is at stake. However, as extensive as human rights are, "human rights are not absolute."¹³² For example, it is widely known that the right to freedom of speech is not absolute, and most people agree that it is worth curtailing that right to prevent people from yelling "Bomb!" on a plane, or "Fire!" in a movie theater. We also agree that even in the case of a public forum, the government can put meaningful time, place, and manner restrictions on our speech. Similarly, the Five Freedoms are also not absolute. Promulgating these Five Freedoms, or similar rights, does not mean that these rights will always trump human rights or that they will always be in direct conflict with human rights. Rather, recognizing these rights would provide a basis or context in which to measure human interest and chicken interest against each other.¹³³ Additionally,

¹²⁸ *Id.* at 27.

¹²⁹ *Id.*

¹³⁰ *Id.* at 33 (stating that most animal activism in Europe has been animal welfare and reformist oriented...however, Europeans may see more animal rights activism in the future).

¹³¹ FRANCIONE, *supra* note 120, at 10 (discussing the limitations of human rights).

¹³² FRANCIONE, *supra* note 120, at 10.

¹³³ PAUL WALDAU, *ANIMAL RIGHTS: WHAT EVERYONE NEEDS TO KNOW* 93 (Oxford University Press, 2011).

rights are useful when promulgating new laws because legal rights can provide specificity, and also provide context from which to judge the intent of the legislature.¹³⁴

Recognizing these rights would also emphasize an inherent value in egg-laying hens beyond being used for human sustenance or for the exploitation of the egg-producing industry. “That our trivial interest in the taste of meat [or eggs] now trumps the pain endured by 17 billion farmed animals may best measure of how far we are from considering their interests equally.”¹³⁵ Thus, this paper proposes that our legislatures take the necessary steps to acknowledge that egg-laying hens, as beings subjected to the laws of our legal system, have an interest in certain freedoms or rights, which although not coextensive with human rights are worth formally recognizing because our actions have the ability to, and do affect these animals’ interests.

B. Why Egg-Laying Hens?

Egg-laying hens need an acknowledgment of rights because these animals, along with many other agricultural animals, are the least represented and the least protected in our society. Traditionally, when faced with protecting the interest of underrepresented persons or groups, our government extends rights to such persons. Within the context of the animal world, egg-laying hens are analogous to those underrepresented groups in our society.

Our society already agrees that we should protect companion animals, and legislatures in various states have promulgated laws to prevent cruelty to animals. However, states exempt agricultural animals from these protections by stating that “traditionally animal husbandry practices” are not regulated by these laws. When the United States first wanted to recognize the rights of other people beyond the limited category of ‘white males,’ the Fourteenth Amendment was added to our Constitution to provide equal protection to all persons. Although courts initially interpreted the Fourteenth Amendment as limited in its scope to the protection of African Americans, the courts have broadened this interpretation. The courts have used the Fourteenth Amendment to extend most of the Bill of Rights to apply to State governments, and the courts have interpreted the word “persons” broadly. For example, the equal protection clause of the Fourteenth Amendment is not limited to the protection of citizen’s rights. Conversely, the equal protection clause also protects the rights of immigrants and resident aliens, even if those persons’ rights are not coextensive to citizens’ rights. For example,

¹³⁴ DRUCE, *supra* note 41, at 129.

¹³⁵ Egg Products Inspection Act Amendments of 2012, H.R. 3798, 112th Cong. §2A (2012).

although these groups might have certain fundamental rights, these groups cannot exercise the right to vote or participate in other forms of self-government. Egg-laying hens are similar to underrepresented groups in our society, such as immigrants, because the protection that we extend to companion animals, who are analogous to ordinary citizens, has not been extended to egg-laying hens. However, similar to how resident aliens' rights are not coextensive to that of citizens, this paper does not propose that chickens' rights be coextensive with that of companion animals. For example, it is illegal to eat dogs and cats in our society, but this paper does not propose that it be illegal to eat chickens. This point is made to show that chickens are the underrepresented animals in our society, putting chickens at a greater risk for exploitation; thus, in greater need of enumerated rights.

C. Drafting an Acknowledgment of Rights into H.R. 3798

As explained earlier in this paper, the proposed legislation is centered on providing better “housing” facilities for egg-laying hens in the form of “adequate environmental enrichments” which would allow hens to engage in their natural behaviors. The proposed act defines the term “adequate environmental enrichments” as “adequate perch space, dust bathing or scratching areas, and nest space,” but as defined by whom?¹³⁶ Well, according to the proposed act, as defined by the “Secretary of Agriculture, based on the best available science, including the most recent studies available at the time that the secretary defines them.”¹³⁷ So, the law as it is proposed now requires the Secretary to base his definition on “the best available science” and “most recent studies,” which overlooks the basic assumption that these studies can be the basis for adequately protecting the welfare of egg-laying chickens trapped in a system of exploitation. There is a strong argument that this cannot be true. In our legal system and in our society there is an inherent presumption that it is acceptable to kill animals or subject them to suffering, so long as they are treated as “humanely as possible.”¹³⁸ Often times the “as humanely as possible” standard is measured against the human interest in the animal as property and “maximizing the value of this property.”¹³⁹ Thus, it does not take very long for those concerned with the welfare of egg-laying chickens to ask the questions: Who will conduct these scientific studies? How will these studies be funded? Will the most cost-effective way for the egg-producers to operate take precedence over the effects on chicken welfare?

¹³⁶ *Id.*

¹³⁷ FRANCIONE, *supra* note 120, at 6.

¹³⁸ *Id.* at 105.

¹³⁹ *Id.*

For example, suppose a scientific study concluded that it would be only “slightly” more beneficial for chickens to have four hours a day to perform their natural behaviors than six hours a day in space as defined by the study, when measuring the benefit to chickens against the increased cost of the industry to provide the two extra hours. It would seem that according to the proposed act, the Secretary would be allowed to and in fact is required to consider his/her definition of “adequate environmental enrichments” on the basis of a study that takes into greater consideration the interests of the industry. Thus, while studies such as this are useful and this paper does not reject that studies can serve a useful place in law formation, the proposed act clearly falls short of protecting the welfare of egg-laying hens without the inclusion of some rights, freedoms, or interests of the hens.

For these reasons, this paper proposes amending the language of Section 2, Hen Housing, and Treatment Standards, of H.R. 3798 to read:

“The term ‘adequate environmental enrichments’ means adequate as defined by the Secretary of Agriculture, based on the following acknowledged freedoms for agricultural animals: (1) freedom from hunger and thirst, (2) freedom from pain and injury, (3) freedom from discomfort, and (4) freedom to express natural behaviors. The Secretary shall issue regulations defining this term which are consistent with the aforementioned acknowledged freedoms of agricultural animals no later than January 1, 2017, and the final regulations should go into effect on December 31, 2018. In defining this term and forming regulations, the Secretary is charged with safeguarding egg-laying hens’ interests in these acknowledged freedoms.”¹⁴⁰

If the United States were to add this freedom acknowledgment to the proposed act, we would have a more effective law that adequately protects the welfare of egg-laying chickens because the Secretary of Agriculture would be required to consider these interests when forming regulations, and the charge to safeguard these freedoms would be an adequate guard against the influence of the egg-producing industry. Furthermore, if the Secretary defined “adequate environmental enrichments” in such a way as to deny egg-laying chickens this freedom, interest groups

¹⁴⁰ The dates used in this language are borrowed from the dates proposed in H.R. 3798 so as to not conflict with the remainder of the act’s phase-in period as currently written. These dates are not meant as a timeline proposal by this author.

would have reason to call into question the Secretary's actions through administrative proceedings. This new language gives the hens' interests (and all those considered with the hens' interests) a fighting chance against the industry's influence.

V. CONCLUSION

The Supreme Court of New Jersey in *New Jersey Society for the Prevention of Cruelty to Animals v. New Jersey Department of Agriculture* stated that the promulgation of laws regarding agricultural animals and their interpretation:

requires a balancing of interests of people and organizations who would zealously safeguard the well-being of all animals, including those born and bred for eventual slaughter, with the equally significant interests of those who make their living in animal husbandry and who contribute, through their effort, to our food supply.¹⁴¹

But what if we did not balance the interest of two opposing human groups; what if we balanced the interest of egg-laying hens directly with that of the industry? Presumably, the interest of people and organizations that would zealously safeguard the well-being of the hens have the hens' best interest in mind, but this is clearly not adequate protection for hens in our legal system because these people do not have any legal rights in the animals' well-being, whereas the industry has legal rights in using the animals. The addition of the Five Freedoms to H.R. 3798 would give the hens' interests acknowledgement and charge the Secretary with an obligation to guard that interest.

More importantly, by recognizing the intrinsic value of chickens and other agricultural animals, the United States can stand on equal moral footing with governments such as the European Union and England, which have already done so.

¹⁴¹ *New Jersey Soc. for Prevention of Cruelty to Animals v. New Jersey Dept. of Agriculture*, 196 N.J. 366, 955 A.2d 886, 2008 N.J. LEXIS 894 (N.J. 2008).

CASE LAW REVIEW

KJIRSTEN SNEED

907 Whitehead Street, Inc., d.b.a. Ernest Hemingway Home and Museum v. Secretary of U.S. Dept. of Agriculture
 701 F.3d 1345 (11th Cir.)

SUMMARY OF THE FACTS	SUMMARY OF THE HOLDING
<p>While Ernest Hemingway resided at 907 Whitehead Street in Key West, Florida, his friend gave him a polydactyl cat named Snowball. Since that time, Snowball's progeny (the "Hemingway cats") have thrived and wandered around the property. When the Hemingway property was purchased in 1961, the cats were present at the house. The house was opened as a museum and incorporated in 1994. The museum has always kept, fed, and provided weekly veterinary care for the Hemingway cats. The cats live and roam freely on the grounds, enclosed by a brick fence around the perimeter, and most are spayed or neutered. Several years ago, a museum visitor complained to the USDA about the museum's care of the cats. Inspectors visited the museum after determining that the museum was an animal exhibitor subject to USDA regulation under the Animal Welfare Act, and the inspectors demanded that the museum obtain an exhibitor's license; contain and cage the cats in individual shelters at night, or alternatively construct a higher fence or an electric wire atop the existing brick wall, or alternatively hire a night watchman to monitor the cats; tag each cat for identification purposes; construct additional resting surfaces for the cats; and pay fines for the museum's non-compliance with the AWA. The museum filed a complaint against the Secretary of Agriculture and its veterinarian, who determined the museum was an exhibitor.</p>	<p>Following a bench trial, the Eleventh Circuit reviewed the district court's findings of fact for clear error and its conclusions of law de novo. The museum argued that it was not an "exhibitor" under the AWA, and even if it was, that the AWA was unconstitutional as applied to the museum and its Hemingway cats. The court disagreed, holding that the district court had correctly found that the museum qualifies as an animal exhibitor under the AWA because the animals were "distributed" and the museum's use of the Hemingway cats fell within the reasonable interpretation of the AWA by the USDA. The court also concluded that the museum's exhibition of the cats substantially affects interstate commerce and can therefore be regulated by Congress under the Commerce Clause. While the museum argued that its activities were local, the court found that the local character of an activity does not necessarily exempt it from federal regulation. Specifically, the court said that the exhibition of the Hemingway cats is integral to the museum's commercial purpose, and thus their exhibition affected interstate commerce. The court noted the museum's unique situation, but declined to evaluate the wisdom of federal regulations that were implemented according to Congress's constitutional powers.</p>

Adams v. Sharp
 2012 WL 1900146 (KY Ct. of App.)

SUMMARY OF THE FACTS

Appellants were farmers in Western Kentucky, where they operated hog barns for the beneficial use of the manure as a soil supplement and fertilizer. Appellants had agreements with Tosh Farms to raise hogs owned and supplied by Tosh in exchange for monthly compensation. To house the hogs, appellants proposed building two deep pit barns to house 2,480 hogs each. The manure storage pits constitute "agricultural waste handling systems" subject to Kentucky Energy and Environment Cabinet Division of Water ("Cabinet") permit requirements. Such systems are also required to obtain a construction permit and either a No-Discharge permit or a Kentucky Discharge Elimination System ("KPDES") permit. Appellants initial application for a KPDES was denied and the Cabinet issued a Notice of Deficiency and requested revised CNMPs. Appellants then submitted applications for No-Discharge permits, which the Cabinet issued. Individuals who own land near appellants' proposed operations challenged the issuance of No-Discharge permits on various grounds. An evidentiary hearing was held and the Hearing Officer affirmed the construction permits but vacated and remanded the operational permits and applications. The Officer made seven recommendations, and the parties excepted. The Cabinet Secretary issued a final order, ordering appellants to revise the CNMPs, and directing that the Division of Water conduct a thorough substantive review of the amended plans. The Secretary otherwise upheld the permits.

SUMMARY OF THE HOLDING

The court of appeals affirmed in part, reversed in part, and remanded. The court held that the appellant farmers were not required to obtain KPDES operating permits. The court also held that there was substantial evidence to support the Secretary's finding that hog farmers, not the owner of hogs that farmers were raising, were the individuals primarily responsible for day-to-day operations of the farms. With regards to the state statute prohibiting water pollution, the court held that water-quality regulation governing construction of sewage system facilities does not require an individualized evaluation of each operation's potential for discharges of air pollutants. The evidence supported the Cabinet's decision not to impose specific conditions for control of discharges containing pathogens as constituent of animal waste. Finally, the Cabinet acted within its discretion in determining distances for setbacks.

<p>Decker v. Northwest Environmental Defense Center 2013 WL 1131708</p>	
<p>SUMMARY OF THE FACTS</p>	<p>SUMMARY OF THE HOLDING</p>
<p>Petitioner has a contract with Oregon to harvest timber from a state forest. After a rain, water runs off logging roads into ditches, culverts, and channels that discharge the water into nearby rivers and streams. The discharges often contain large amounts of sediment that are harmful to fish and other aquatic organisms. Respondent filed suit against state and local governments and officials, and logging companies, invoking the citizen-suit provision under the Clean Water Act and alleging that defendants had failed to obtain NPDES permits before discharging stormwater runoff into two rivers. The District Court dismissed the action for failure to state a claim and the Ninth Circuit reversed. The Ninth Circuit held that the conveyances – ditches, culverts, and channels – were point sources under the Silvicultural Rule. It also concluded that the discharges were “associated with industrial activity” under the Industrial Stormwater Rule, and the discharges were not exempt from the NPDES permitting scheme. Petitioners appealed.</p>	<p>The Supreme Court held that a provision of the Clean Water Act governing challenges to agency actions is not a jurisdictional bar to this lawsuit. That provision, according to the Court, is the exclusive vehicle for suits seeking to invalidate certain agency decisions, such as the establishment of effluent standards and the issuance of permits. The Court also held that the EPA’s recent amendment to the Industrial Stormwater Rule does not make the case moot, and that a live controversy continues to exist regarding whether petitioners may be liable for unlawful discharges under the earlier version of the Industrial Stormwater Rule. The preamendment version of the Industrial Stormwater Rule, as permissibly construed by the EPA, exempts discharges of channeled stormwater runoff from logging roads from the NPDES permitting scheme. The Court said that the regulation was a reasonable interpretation of the statutory term “associated with industrial activity.” Further, when an agency interprets its own regulation, the Court defers to it unless the interpretation is plainly erroneous or inconsistent. In this case, it was reasonable for the EPA to conclude that the regulation extends only to traditional industrial buildings such as factories and associated sites and other relatively fixed facilities. In exercising the broad discretion the Act gives the EPA regarding stormwater runoff, the agency could reasonably have concluded that further federal regulation would be duplicative or counterproductive in light of Oregon’s extensive rules on the subject.</p>

O’Keefe v. Gist
 2012 WL 3561782 (C.D. Ill.)

SUMMARY OF THE FACTS

Plaintiff had a pet purebred English mastiff dog named Boomer. A microchip with an identifying registration number was imbedded in Boomer that could be scanned to determine ownership. Plaintiff registered Boomer and the chip registration number with the county Animal Control Office. Boomer escaped from Plaintiff without a collar or identification tags. Defendant Gist was a Girard police officer authorized to enforce Girard’s municipal code of ordinances. Gist heard that a lost dog was present on a Girard business property, approximately fifteen to twenty miles from the residence from which Boomer escaped. Gist removed the dog and drove to another business to investigate and determine the identity of the owner. During the investigation Gist determined that a woman, Laurent, had initially found the dog and gave it to a second woman, Lewis, who in turn gave the dog to a third person, from whom he escaped. No one claimed ownership and Gist did not attempt to scan Boomer for microchip identification. Gist informed Lewis that she was the owner of the dog, and she relinquished her claim. Gist then took Boomer to Girard police headquarters where he was called by Hagan, who was interested in becoming the owner. Gist turned the dog over to Hagan, and shortly after, Plaintiff discovered that Hagan had possession of Boomer. Plaintiff demanded the dog back, but Hagan refused and Plaintiff brought § 1983 action against Gist and the city, alleging they violated his due process rights when Gist gave his dog to another person without a hearing and without his consent. Defendants moved to dismiss.

SUMMARY OF THE HOLDING

The District Court held that Plaintiff’s right to procedural due process was not violated, and granted defendants’ motion to dismiss. In order to state a claim for violation of due process, a plaintiff must allege that he had a property interest, that he was deprived of that property interest, and that the deprivation was without due process. In this case, plaintiff was deprived of his property, so the remaining issue is whether that deprivation was without due process of law. An individual is presumably entitled to notice and an opportunity for a hearing, but in some circumstances a post-deprivation hearing satisfies due process. Courts consider three factors in to determine whether due process requires a pre-deprivation hearing: (1) private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and any value of additional or substitute procedural safeguards; and (3) the government’s interest. In this case, the dog owner was not entitled to pre-deprivation notice and hearing prior to the placement of the dog with the other person, where the dog was not wearing an identification tag and was not otherwise identifiable through visual inspection, and the owner of the dog was unknown.

<p>People v. Levigne 297 Mich.App. 278</p>	
<p>SUMMARY OF THE FACTS</p>	<p>SUMMARY OF THE HOLDING</p>
<p>Defendants were charged with a misdemeanor violation for using trained hunting dogs to assist a Native American hunter in capturing and killing a bear out of hunting season. Defendants argued that they did not break the law because their no-kill tags permitted them to participate in a bear hunt out of season, so long as they did not kill the bear. Both the state and the lower courts determined that defendants, by working in concert with the hunter, “took” the bear when they utilized dogs to tree the bear prior to its shooting. The parties agreed that defendants did not utilize a firearm, crossbow or bow and arrow while assisting the hunter.</p>	<p>Neither state law nor Wildlife Conservation Order 3.203(4) prohibited an unarmed individual from assisting someone with the lawful taking of a bear. There was also no prohibition against taking a bear without a firearm, crossbow or bow and arrow. The court also held that the conviction was not supported by evidence that the defendants used hunting dogs to assist a lawful Native American hunter in capturing and killing a bear out of hunting system.</p>

Safari Club Int'l v. Salazar
281 F.R.D. 32

SUMMARY OF THE FACTS

Sport hunting rights organizations brought actions alleging that Department of the Interior (DOI) and Fish and Wildlife Service (FWS) violated the Administrative Procedure Act (APA) by withdrawing captive-bred exclusion of three species of endangered antelope from Endangered Species Act's (ESA) prohibition on taking, exporting, reimporting, or selling endangered species. After actions were consolidated, animal protection organizations moved to intervene.

SUMMARY OF THE HOLDING

The District Court held that while two organizations could intervene as of right, the two organizations had in this case failed to establish injury in fact. To determine whether a movant qualifies for intervention of right, a court should consider: (1) timeliness of motion; (2) whether applicant claim interest relating to property or transaction that is subject of action; (3) whether applicant is so situated that disposition of action may as a practical matter impair or impede applicant's ability to protect that interest; and (4) whether applicant's interest is adequately represented by existing parties. The proposed intervenor must also establish standing. In this case, animal protection organizations failed to establish injury in fact required to establish standing because the organizations relied solely on three-year old declarations previously submitted in another proceeding, and there was no indication that facts attested to three years earlier remained in effect.

<p style="text-align: center;">U.S. v. One Etched Ivory Tusk of African Elephant 871 F. Supp. 2d 128 (E.D.N.Y.)</p>	
<p style="text-align: center;">SUMMARY OF THE FACTS</p>	<p style="text-align: center;">SUMMARY OF THE HOLDING</p>
<p>Government brought action under the Endangered Species Act (ESA) and the African Elephant Conservation Act (AECA), seeking forfeiture and condemnation of an elephant tusk which had been etched with an image of big game animals prior to being imported into the United States. Claimant, the alleged owner of the tusk, moved to dismiss and for summary judgment, and Government cross-moved for summary judgment.</p>	<p>The District Court held that the Fish and Wildlife Service (FWS) had discretion to promulgate the rule defining terms “sports-hunted trophy” or “hunting trophy”; but the tusk did not fit the definition of “sports-hunted trophy” or “hunting trophy”; and the Act of State doctrine did not bar the District Court from granting judgment to Government on issue of whether the tusk had been exported from Zimbabwe without a valid CITES permit. Under the Act of State doctrine, the courts of one country will not sit in judgment on the acts of the government of another done within its territory. Therefore, the District Court held that as CITES is to be enforced by all of its member nations, a signatory cannot be surprised that other signatories nations might enforce its provisions by scrutinizing permits.</p>

<p>Wilkins v. Daniels 2012 WL 6644465</p>	
<p>SUMMARY OF THE FACTS</p>	<p>Plaintiffs were owners of exotic animals and brought action seeking injunction against enforcement of the Ohio Dangerous Wild Animal and Restricted Snakes Act. Under the Act, all individuals and facilities possessing dangerous wild animals are required to register with the Ohio Department of Agriculture, and each registered animal must be microchipped at the time of registration. Plaintiffs initiated the suit claiming that it was a violation of the First Amendment right of association to compel Plaintiffs under the Act to join and fund private organizations such as the AZA or ZAA; that their due process rights were violated because the Act does not provide a procedure for objecting to or obtaining an exemption from microchipping their animals; and that the microchipping requirement is a taking without compensation in violation of the Fifth Amendment.</p>
<p>SUMMARY OF THE HOLDING</p>	<p>The District Court held that there was no First Amendment violation because the Act does not force membership in either the ZAA or the AZA, but makes an exception to the ban on dangerous wild animals for organizations that meet accreditation requirements of the ZAA or the AZA. The court pointed out that Plaintiffs had the alternative to seek a wildlife shelter permit, but Plaintiffs argued that was not a viable alternative because to obtain the permit they would need to implant a microchip into the animals, which they contended is harmful. Regardless, the court found that options are provided under the Act and Plaintiffs' choice is self-imposed. On the due process claim, the court found that Plaintiffs cannot claim an "entitlement" to possession of a dangerous wild animal where the ownership of such animals is prohibited or otherwise restricted, as in this case. The court found that defendants sufficiently set forth a legitimate government purpose behind the enactment of the Act – to protect animal welfare and public safety from threats posed by certain dangerous wild animals. Accordingly, the court held that there was sufficient evidence to establish a rational basis between the Act and the state's legitimate interest, and therefore plaintiffs failed to prove a due process violation. On the Fifth Amendment claim, the court analyzed Plaintiffs' allegations as a possible regulatory taking and found that even though the Act will increase the cost of owning dangerous wild animals, these circumstances do not effectuate a taking under the U.S. Constitution, and Plaintiffs' regulatory takings claim accordingly fails.</p>

