



The History of Animal Law, Part I (1972 – 1987)

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Introduction

Animals have always been the subjects of litigation. Early legal literature is replete with cases that range from the conversion of a farmer's cow to the debate about who owns wildlife,¹ from criminal prosecutions of humans for cruelty to animals² to criminal prosecutions of animals for crimes that they allegedly committed.³ The purpose of this article is not simply to discuss the significance of individual cases involving animals, but rather to explore the roots of a large-scale, organized movement, which started in the early 1970s in the United States, spearheaded by attorneys and law students with the express purpose of filing lawsuits to protect animals and establishing the concept of their legal rights, regardless of the species of the animals or the ownership interest of humans. What we now call Animal Rights Law or Animal Law began when attorneys consciously considered animal-related legal issues from the perspective of the animal's interests, when they began to view the animal as the *de facto* client, and where the goal was to challenge institutionalized forms of animal abuse and exploitation.

Within the scope of a law review article, it is not practical to list all of the lawsuits filed from 1972 to 1987.⁴ The goal of this article is to trace the beginnings of animal law as a legal discipline and analyze the thought processes of its leaders, how the surrounding animal rights movement influenced the direction of animal law, and how the choices that were made shaped the foundation and growth of this area of the law. This article is written in the first person, because I don't wish to mislead the reader who might assume that I am a dispassionate historian. I am an animal rights lawyer; the people described herein are my respected colleagues and friends, and the development of animal law has been my life's work.

I. The 1970s: First There Was One. . . .

Henry Mark ("Hank") Holzer was a New York attorney who had practiced in the areas of constitutional and appellate law before joining the

1. See, e.g., *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

2. See, e.g., *United States v. Gideon*, 1 Minn. 292 (1856).

3. See generally E.P. EVANS, *THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS* (Faber & Faber Ltd. 1987) (1906); Jen Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals*, 9 ANIMAL L. 97 (2003).

4. See DAVID S. FAVRE, *ANIMALS: WELFARE, INTERESTS, AND RIGHTS* (2008); SONIA S. WAISMAN, PAMELA D. FRASCH, & BRUCE A. WAGMAN, *ANIMAL LAW: CASES AND MATERIALS* (3d ed. 2006) [hereinafter, WAISMAN, FRASCH, & WAGMAN]. These are the two casebooks currently used to teach most animal law classes. Even these sources do not include all cases, but rather, a selection of representative decisions.

faculty of Brooklyn Law School in 1972.⁵ His earliest involvement with animal rights came as a result of a small donation he made to the New York based group, Friends of Animals.⁶ Alice Herrington, then President of Friends of Animals, called Holzer, inviting him to join her for dinner at her home.⁷ They discussed a variety of issues, but what caught his attention, as a constitutional lawyer, was Herrington's description of the federal Humane Methods of Livestock Slaughter Act of 1958 (hereinafter, "Humane Slaughter Act" or "Act").⁸ The Humane Slaughter Act specified that in order for slaughter to be considered humane, livestock must 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 . . ."⁹ However, the Act also authorized, notwithstanding the previous definition of humane slaughter, "slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument . . ."¹⁰ Additionally, the Act created a specific exemption for ritual slaughter: "[R]itual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this [Act]."¹¹ Holzer thought the creation of an exemption to federal law that provided special protections to the dietary preferences of a particular religious group violated the Establishment and Free Exercise Clauses of the First Amendment.¹² Through his involvement with this case, Holzer established his place as the first animal rights lawyer.

II. Using the Legal System to Protect Animals' Interests

The first animal rights lawsuit grew out of this tension between those who sought to provide protections for farmed animals and those who sought to protect the religious practice of ritual or "kosher" slaughter.¹³ As traditionally carried out since ancient times, kosher slaughter had been considered

5. See Henry Mark Holzer, Introduction, <http://www.henrymarkholzer.com/introduction.html> (last visited Mar. 21, 2008).

6. Telephone Interview with Henry Mark Holzer, Professor Emeritus, Brooklyn Law School (June 20, 2006) [hereinafter Interview with Holzer (2006)].

7. *Id.*

8. *Id.*; Humane Methods of Livestock Slaughter Act of 1958, Pub. L. No. 85-765, 72 Stat. 862 (1958) (codified as amended at 7 U.S.C. §§ 1901-1906 (2007)).

9. 7 U.S.C. § 1902(a).

10. 7 U.S.C. § 1902(b).

11. 7 U.S.C. § 1906.

12. Interview with Holzer (2006), *supra* note 6.

13. *Jones v. Butz*, 374 F. Supp. 1284 (S.D.N.Y. 1974), *aff'd*, 419 U.S. 806 (1974).

“humane.”¹⁴ The animal would be held down on the ground and his carotid artery would be slit, quickly producing unconsciousness.¹⁵ Modern American health laws precluded holding the animal on the ground, so the “shackle and hoist” method was developed: the fully conscious animal would be chained by a rear leg and hoisted into the air, where his carotid artery would be slit.¹⁶ Sometimes a hip would dislocate, a leg would break, the terrified animal would struggle, and the artery would not be cleanly cut.¹⁷

Holzer approached the Board of Directors of Friends of Animals to request their support of a lawsuit to challenge the ritual slaughter exemption, but to no avail.¹⁸ The Board members, like many others, were concerned that such a challenge would be perceived as anti-Semitic.¹⁹ Holzer, a Jewish atheist, decided to bring the case anyway, representing himself as the plaintiff.²⁰ The filing of this lawsuit was covered by *The New York Times*, and, as a result, Holzer received telephone calls from approximately a half-dozen animal welfare organizations.²¹ Hoping to convince one or more of the groups to join him as co-plaintiffs, Holzer talked about the lawsuit and the goal of providing more realistic protections to farmed animals. Each organization’s representative thanked him for addressing an important issue and wished him luck. However, when he asked the organizations to join him as a co-plaintiff, each declined to become involved.²²

Then, Holzer received a call from Helen Jones.²³ Jones was one of the founders of the Humane Society of the United States (HSUS) and had served as its director of educational activities.²⁴ HSUS’s first major legislative endeavor was the introduction of the Humane Slaughter Act, and Jones’s sharp publicity skills were an essential component of that effort.²⁵ Soon after the bill was introduced, HSUS and the bill’s author, Hubert Humphrey, faced a coordinated

14. PETER SINGER, *ANIMAL LIBERATION* 153 (2d ed. 1990) (1975).

15. *Id.*; RICHARD H. SCHWARTZ, *JUDAISM AND VEGETARIANISM* 110 (3d ed. 2001).

16. SCHWARTZ, *supra* note 15, at 110; SINGER, *supra* note 14, at 153-54.

17. MARK ROWLANDS, *ANIMALS LIKE US* 115 (2002). Twenty-five years ago, I visited two slaughterhouses in Los Angeles to observe the slaughter of steer using the “ritual” method. In the slaughterhouse using the “shackle and hoist” method, I noted one instance in which the steer’s artery was not properly cut; thus the meat from this steer could not be considered “kosher.” The steer was moved off the kill floor, still hanging from the chain, and left to lose consciousness more slowly.

18. Interview with Holzer (2006), *supra* note 6.

19. *Id.*

20. *Id.*; see also Arnold H. Lubasch, *Suit Calls Kosher Slaughtering Unconstitutional*, N.Y. TIMES, Jan. 4, 1972, at 67; *Jews Challenging Contention in Suit on Ritual Slaughter*, N.Y. TIMES, Jan. 5, 1972, at 16.

21. Interview with Holzer (2006), *supra* note 6; see also Lubasch, *supra* note 20; *Jews Challenging Contention in Suit on Ritual Slaughter*, *supra* note 20.

22. Interview with Holzer (2006), *supra* note 6.

23. *Id.*

24. BERNARD UNTI, *PROTECTING ALL ANIMALS: A FIFTY-YEAR HISTORY OF THE HUMANE SOCIETY OF THE UNITED STATES* 3-5 (2004).

25. *Id.* at 42-45.

effort by leaders of the Jewish community to create an exception for their religious slaughter practice. It was the mid-1950s, a decade after the end of World War II and the Holocaust. The Jewish leaders reminded Congress that one of the first laws passed by the Nazis was a ban on kosher slaughter.²⁶ HSUS and Humphrey believed that opposing the exemption was politically naïve and would doom the bill.²⁷ They made the requested compromise and achieved passage of the first federal legislation setting humane standards for slaughter.²⁸ Jones, who had fought hard for the bill, was sorely angry about the ritual slaughter exemption, a compromise that she had opposed. She later left HSUS to form the National Catholic Society for Animal Welfare (later renamed Society for Animal Rights and even later, International Society for Animal Rights), and over the next 15 years, she looked for an attorney to challenge the kosher slaughter exemption.²⁹ When she read about Holzer's lawsuit, she gave him a call.

Jones opened the conversation by congratulating Holzer on his lawsuit. Frustrated with what he thought was yet another patronizing animal activist, he cut her off, saying: "Look Lady, don't call me to wish me luck, but tell me that you don't want to get involved or are afraid of looking like an anti-Semite."³⁰ Jones assured him that this was a battle she wanted to be actively involved in and offered to help in whatever way was needed. Holzer asked if she would be a plaintiff, and she not only jumped at the opportunity, she also helped to locate other plaintiffs.³¹

Holzer dismissed his first complaint and, in January 1973, filed *Jones v. Butz*³² in the United States District Court for the Southern District of New York. The new complaint listed a variety of plaintiffs, including Jewish, non-Jewish, and Atheist vegetarians, meat eaters, consumers, and taxpayers, selected so that somebody would have standing.³³ Jones was also listed as "next friend and guardian for all livestock animals now and hereafter awaiting slaughter in the United States of America."³⁴ The plaintiffs claimed a commitment to "the principle of the humane treatment of animals" and to "the principle of separation of church and state."³⁵ The defendants included Earl Butz, as Secretary of Agriculture, another Agriculture Department representative, and "John Doe," later identified as Rabbi Joseph Soloveitchik, the religious slaughter expert on the

26. *Id.* at 47.

27. *Id.* at 43-44.

28. *Id.* at 44-45.

29. Interview with Holzer (2006), *supra* note 6; see also UNTI, *supra* note 24, at 4-5.

30. Interview with Holzer (2006), *supra* note 6.

31. *Id.*; see also Henry Mark Holzer, *The Last of the Giants: In Memoriam, Helen Jones*, <http://www.isaronline.citymax.com/f/Obituary.pdf> (last visited Mar. 10, 2008).

32. Complaint, *Jones v. Butz*, 374 F. Supp. 1284 (S.D.N.Y. 1974) (No. 73 Civ. 1) [hereinafter *Butz Complaint*].

33. Interview with Holzer (2006), *supra* note 6.

34. *Butz Complaint*, *supra* note 32, at 1.

35. *Id.* at 1-4.

advisory committee established pursuant to Section 5 of the Act.³⁶ Seven individuals and several organizations, said to “speak[] for a large number of the estimated 6 million Jews in the United States,” were allowed to intervene.³⁷ The plaintiffs alleged that the Act’s provisions relating to ritual slaughter were unconstitutional as written and as applied. The plaintiffs wrote that “[b]ecause [the provisions] provide separate treatment and special protection to the dietary preferences of a particular religious group, and for other reasons as well, they violate the Establishment and Free Exercise Clauses of the First Amendment to the Constitution of the United States of America.”³⁸ They requested the convening of a three-judge constitutional court, injunctive and declaratory relief, and an order in the nature of mandamus.³⁹

In April 1974, the court granted the defendants’ motion for summary judgment, holding that while the plaintiffs had standing, the Humane Slaughter Act did not violate the Establishment Clause. The court concluded that Congress had “considered ample and persuasive evidence to the effect that the Jewish ritual method of slaughter, and the handling preparatory to such slaughter, was a humane method.”⁴⁰ Accordingly, the court reasoned, “Congress did not create a religious preference, nor did it create an exception to any general rule.”⁴¹ Given the absence of such religious favoritism, the court saw the issue as simply a policy choice in the domain of the legislature: “The court cannot be asked to choose among methods of slaughter [or] pre-slaughter handling of livestock and to decide which is humane and which is not. We do not sit as a ‘super-legislature to weigh the wisdom of legislation.’”⁴² Similarly, the court dismissed the Free Exercise challenge, stating that the plaintiffs had failed to demonstrate that the Act had a coercive effect on their religious practices.⁴³ The United States Supreme Court affirmed the district court without opinion.⁴⁴

What differentiated this case from prior litigation involving animals was that, in *Butz*, the animals were not merely the subject or the object of the lawsuit; the sole reason for this lawsuit was to use the legal system to protect the animals’ interests. What Hank Holzer and Helen Jones experienced with this case is something that has plagued animal lawyers ever since: the difficulty of challenging a clearly inhumane practice through an entrenched legal system

36. *Id.* at 1, 4-5; *Butz*, 374 F. Supp. at 1286-87.

37. *Butz*, 374 F. Supp. at 1287.

38. *Butz* Complaint, *supra* note 32, at 8.

39. *Id.* at 9-10.

40. *Butz*, 374 F. Supp. at 1291.

41. *Id.*

42. *Id.* at 1291-92 (quoting *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952)).

43. *Id.* at 1293-94.

44. *Jones v. Butz*, 419 U.S. 806 (1974). Because the case was heard by a three-judge panel pursuant to the former 28 U.S.C. § 2282 (repealed 1976) and § 2284 (amended 1976, 1984), the plaintiffs had a right of direct appeal to the U.S. Supreme Court under 28 U.S.C. § 1253.

willing to look the other way, allowing a human interest to trump the interests of the animals.

The *Butz* case was Hank Holzer's entry into the world of animal rights and, after entering, he was open to learning all that he could about the abuse and exploitation of other species. He did not merely represent his client's interest in a single case; he joined the cause, consciously extending the concept of public interest law to the plight of animals. The connection between animal rights lawyers and animal rights activists was always a close one, and the activists impacted animal law in a variety of ways. In Holzer's case, it became a close, long-term partnership. Holzer became "Special Counsel" to Jones's group, Society for Animal Rights (SAR),⁴⁵ and he began to apply his knowledge as an appellate lawyer to the development of animal rights legal theories and plans of action. At SAR's annual meeting in 1972, Holzer delivered a speech titled "Lobbying in the Courts,"⁴⁶ explaining how nonprofit groups such as the NAACP, American Civil Liberties Union, National Consumer League, and others, had successfully used the courts to achieve gains in their fields. He noted that in just two decades, Jehovah's Witnesses had won forty-four out of fifty-five cases at the Supreme Court, dealing with freedom of speech, religious freedoms, and conscientious objection to the draft. SAR summarized Holzer's speech: "If five members of the Supreme Court of the United States can be convinced, the Senate, House and President can be circumvented. . . . One can 'lobby' successfully in court by convincing a few judges."⁴⁷ While this "judicial lobbying" had not worked in favor of animal rights interests in the *Butz* lawsuit, Hank Holzer held onto the belief that the courtroom was a forum in which animal law victories could be won.

III. Can We Shut Down This Zoo?

A few years later, Holzer and Jones filed a second lawsuit aimed at stopping another form of institutionalized animal abuse. In *Jones v. Beame*,⁴⁸ they challenged the conditions in which wild and exotic animals were kept at zoos in New York City, seeking declaratory and injunctive relief. The plaintiffs alleged that the city's zoo animals were subject to a lack of veterinary care, inadequate habitats, mistreatment by members of the public, and inadequate care by untrained staff, and they alleged that animals were being sold to persons

45. Holzer's professional affiliation with SAR (now ISAR) has spanned over three decades and continues as of this writing. See Henry Mark Holzer, Curriculum Vitae, <http://www.henrymarkholzer.com/page/page/3719314.htm> (last visited Mar. 14, 2008).

46. *Blueprint for the Animals' Protection*, SOC'Y FOR ANIMAL RTS., INC. REP. (Soc'y for Animal Rights, New York, N.Y.), Nov. 1972, at 1.

47. *Id.*

48. 380 N.E.2d 277 (N.Y. 1978).

unqualified to care for them. Their goal was to shut down the three zoos operated by the City of New York.⁴⁹ To Holzer and Jones, if the zoos were unable to provide minimally humane conditions for the animals held captive there, there was no logical reason these zoos should be allowed to continue to operate. After all, if the institutions involved had been housing and caring for humans, isn't that what would happen?⁵⁰ Judges, within a legal system that had long privileged human interests over the interests of animals, rejected the possibility of such an outcome.

The Court of Appeals acknowledged that the allegations of cruelty to the animals were true. "Indeed, many of the disturbing and even dreadful conditions to which they refer are matters of common knowledge."⁵¹ However, the court held that because New York City was in a budgetary crisis, its choice not to provide adequate funding for veterinary care or other basics to the zoo was a political question, best left to the executive branch and not reviewable by the courts.⁵² The conditions at the zoo were so egregious that, had the zoo been a private individual, that individual could have been prosecuted for cruelty. The court ignored that discrepancy, neatly dismissing the plaintiffs' concerns as political and not in the realm of the judiciary.⁵³ It may have been premature to expect a court to close down the city's zoos until the animals received care that reached minimum standards as expressed in the anti-cruelty laws, but the plaintiffs had landed on an issue where reform could be approached in other ways. While the lawsuit failed to provide relief to the animals in the zoos, it helped to raise public awareness of the problem and added voices to the call for improvement in the condition of zoos. Over the next twenty years, zoos introduced various reforms, improving the habitats as well as the care and treatment of captive animals and, more recently, acknowledging that certain species, such as African elephants, do not do well in captivity.

IV. The First Animal Law Class

In 1975, Australian philosopher Peter Singer published *Animal Liberation*,⁵⁴ and the terms "animal rights" and "speciesism" became heated topics of

49. Interview with Holzer (2006), *supra* note 6.

50. Oddly enough, the New York Court of Appeals combined the *Beame* case with *Bowen v. State Bd. of Social Welfare*, 390 N.Y.S.2d 617 (N.Y. App. Div. 1976), issuing a joint decision. In the *Bowen* case, a city was suing the State Board for prematurely placing mentally ill patients into private homes and hotels without adequate supervision, a chilling reminder of the lowly status of victims of mental illness.

51. *Beame*, 380 N.E.2d at 278.

52. *Id.* at 278-80.

53. *Id.* at 280.

54. SINGER, *supra* note 14.

discussion. For many of us who were uncomfortable with the pejorative use of the term “animal lovers,” *Animal Liberation* provided a philosophical base for our intuitive beliefs that animals were not mere objects to be used by humans however they wished.⁵⁵ In the next few years, this nascent animal rights movement began to make itself heard in the streets and newspapers, on the radio and television. Slowly, the academic legal community began to take notice. Jolene Marion, a long time animal activist studying law at Seton Hall Law School, urged the school to introduce a course examining the issue of animal rights from the legal perspective.⁵⁶ As a result, the first animal rights law course was taught at Seton Hall in 1977 by Adjunct Professor Theodore Sager Meth.⁵⁷

V. The Birth of a National Animal Law Organization

Though hardly noticed at the time, 1978 marked another milestone. Virginia Handley, who then ran the Fund for Animals office in San Francisco, California, had recently met two local attorneys each of whom had independently expressed an interest in animal rights. Laurence (Larry) Kessenick was a partner in a San Francisco law firm, and I was an associate with an Oakland law firm. Virginia introduced us, and Larry and I decided to place an ad in our local legal newspaper announcing a meeting for animal rights attorneys. Our first ad produced six more lawyers, who agreed to meet monthly at the Fund for Animals office. We named our group Attorneys for Animal Rights (AFAR).⁵⁸ Each month, a group member would present a report on some federal or California law relevant to animals, or on a recently published book or article on animal rights or animal abuse. Through this process, we taught ourselves

55. See JAMES M. JASPER & DOROTHY NELKIN, *THE ANIMAL RIGHTS CRUSADE: THE GROWTH OF A MORAL PROTEST* 92 (1991) (“For those already active and concerned with animals, [*Animal Liberation*] provided philosophical arguments and justification for what they wanted to do. It gave the incipient movement an ideology and a vocabulary.”).

56. See Letter from author to Joan Cunningham (Nov. 17, 1980) (on file with author).

57. The course was entitled *The Law and Animals*. Telephone Interview with Theodore Sager Meth (Dec. 11, 2007). Professor Meth recalled teaching the course only once, in 1977, as a seminar. Email from Gary Bavero, Assistant Dean for Academic Affairs and Policy, Seton Hall Law School, to Matthew Liebman, Staff Attorney, Animal Legal Defense Fund (Dec. 10, 2007) (on file with author) (noting that Meth was teaching animal rights law in 1977, and perhaps earlier). Professors Les MacRae and Geoffrey R. Scott taught the second animal law course at the Dickinson School of Law at Penn State University beginning in the fall of 1983. Memorandum from Geoffrey R. Scott and Leslie MacRae, Professors, Dickinson School of Law, to Edward W. Haughney, Chairperson, Curriculum Committee, Dickinson School of Law (Feb. 10, 1984) (on file with author). Jolene Marion instituted the third animal law course, a seminar at Pace Law School, beginning in the fall of 1985. Jolene Marion, *Animal Law Seminar Syllabus*, Pace Law School (1985) (on file with author).

58. In 1984, the group changed its name to the Animal Legal Defense Fund. Certificate of Amendment of Articles of Incorporation, Animal Legal Defense Fund (filed Nov. 5, 1984).

about a wide variety of animal law related issues. In April 1979, Larry Kessenick received a short note from Holzer, who introduced himself and requested that he be added to the AFAR mailing list.⁵⁹

VI. “That Which We Call Justice”

Early on, animal rights attorneys recognized that the body of law built by the environmental movement provided effective tools to protect wildlife. In May 1979, Marcelle Philpott-Bryant, a Los Angeles attorney, filed an action in the U.S. District Court for the Central District of California on behalf of the Fund for Animals and the Animal Defense Council (ADC), a small Arizona-based organization, seeking declaratory and injunctive relief to prohibit the U.S. Department of Interior’s Fish & Wildlife Service and the U.S. Navy from conducting aerial shooting to exterminate approximately 4,000 feral goats on nearby San Clemente Island.⁶⁰ Philpott-Bryant claimed that the federal agencies failed to prepare an Environmental Impact Statement, as required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, and further, that the method of killing violated the California anti-cruelty law, Penal Code § 597(b).⁶¹

The plaintiffs succeeded in obtaining a temporary restraining order and later, a preliminary injunction to defeat the government’s plan to kill.⁶² The trial court judge found “that the decision of the Government was arbitrary, capricious and [an] abuse of discretion in that all relevant factors were not considered, and on that basis that the plaintiffs will prevail on the merits of their action.”⁶³ He further stated, “Thank goodness, in a civilized society, expediency is tempered by that which we like to call justice.”⁶⁴

This was not the first time NEPA was used to protect wild animals, but Philpott-Bryant had successfully used NEPA in a way that environmentalists had not envisioned and likely would not support: to protect the lives of a group of animals who were not endangered, nor even native to the island. A new breed of lawyer was beginning to appear, one that recognized the inherent value of individual animals, not just their group value in the face of species extinction.

59. Letter from Henry Mark Holzer to Laurence Kessenick (Apr. 24, 1979) (on file with author).

60. Complaint, *Fund for Animals v. U.S. Dep’t of Interior*, No. 79-1953 (C.D. Cal. filed May 29, 1979).

61. *Id.* at 7-9, 10.

62. *Fund for Animals v. U.S. Dep’t of Interior*, No. 79-1953 (C.D. Cal. May 29, 1979) (temporary restraining order); Transcript of Record at 28, *Fund for Animals*, No. 79-1953 (C.D. Cal. June 8, 1979) (preliminary injunction).

63. Transcript of Record at 28, *Fund for Animals*, No. 79-1953.

64. *Id.*

Soon after that victory, Philpott-Bryant met Larry Kessenick and me and, following our lead, organized a Los Angeles chapter of Attorneys for Animal Rights, which held its first meeting in February 1980.⁶⁵

While Holzer worked to reach out to other legal professionals, our San Francisco AFAR group initially tried to keep a low profile. We were concerned that animal activists would expect us to provide legal advice and representation, which we felt ill-equipped to do. The members of our fledgling group were all volunteers with full-time jobs or law school responsibilities; we had no office, equipment, or support staff—none of the basics for operating a public interest law firm or handling litigation. Inevitably, however, we could not avoid the call to duty.

VII. “Our Dog Sido”

When a San Francisco woman named Mary Murphy was discovered dead in her apartment, her dog, Sido, was taken to the San Francisco Society for the Prevention of Cruelty to Animals (SPCA).⁶⁶ In her will, Ms. Murphy had directed that her dog be put to death by a veterinarian, due to her concern that Sido might fall into the hands of an uncaring animal shelter or some worse fate.⁶⁷ Richard Avanzino, the President of the SPCA, took personal possession of Sido and refused to deliver the dog to the executrix of the estate for euthanasia.⁶⁸ The executrix filed a request for instructions from the Probate Court, and the ensuing case drew attention from the media on a national basis. Over two hundred people contacted the SPCA offering to adopt Sido, and over three thousand letters of support were offered into the record.⁶⁹ The California Legislature took the unusual step of passing a bill providing, in essence, that Sido should not be killed.⁷⁰

In its first official court filing, AFAR submitted an amicus curiae brief supporting the SPCA’s position and offering two arguments.⁷¹ First, AFAR argued that a will provision directing the deliberate and unnecessary destruction

65. *Bulletin Board*, ANIMAL RTS. L. REP. (Soc’y for Animal Rts., Clark’s Summit, Pa.), Apr. 1980, at 13.

66. Frances Carlisle, *Destruction of Pets by Will Provision*, 16 REAL PROP. PROB. & TR. J. 894, 894 (1981).

67. Brief for Attorneys for Animal Rights as Amicus Curiae Supporting Respondent at 1, *Smith v. Avanzino*, No. 225-698 (Cal. Super. Ct. June 16, 1980) [hereinafter *Avanzino* Amicus Brief].

68. Carlisle, *supra* note 66, at 894.

69. Transcript of Record at 3, *Avanzino*, No. 225-698 (Cal. Super. Ct. June 17, 1980) [hereinafter *Avanzino* Transcript].

70. *Id.* at 4; see also Carlisle, *supra* note 66, at 894 n.5.

71. *Avanzino* Amicus Brief, *supra* note 67.

of a healthy dog should be deemed unenforceable as against public policy.⁷² Second, AFAR argued that the court should amend the will under the doctrine of *cy pres*, so that the SPCA would be directed to find an appropriate home for Sido.⁷³ Doing so would ensure that the actual intent of the testatrix (to protect her dog) would be realized.⁷⁴ Larry Kessenick made an appearance at the hearing on behalf of AFAR, and reported to Holzer that “it had all of the drama and animal interest that one characteristically finds in the movies but seldom finds in real life.”⁷⁵ The proceedings were interrupted by a telephone call from the California Governor’s Office, advising the probate judge that the governor had signed the bill and, therefore, that the issue was moot.⁷⁶ Nonetheless, the judge, referencing *In re Capers Estate*,⁷⁷ a 1964 Pennsylvania case, concluded that it would be contrary to law and public policy to carry out the provision of the will:

Now, stray dogs, abandoned dogs, have rights under our statute which must be carefully followed. Our dog Sido cannot be deemed an abandoned dog or a stray dog. Her plight resulted due to the death of her mistress. Her Sido is entitled to nothing less than [that] which we afford to stray dogs.

To permit the direction of the decedent here to be carried out would, again, violate existing statute and be contrary to public policy.⁷⁸

Moreover, the judge ordered the immediate distribution of the property (Sido), expressing concern that Sido had “been waiting since December for a home” and expressing his confidence that the SPCA and Pets Unlimited would act “in the best interests of the dog.”⁷⁹

The SPCA had stumbled upon one of the anomalies of animal rights law: in a society that tolerates and, in many cases, encourages the suffering and exploitation of large numbers of animals—that is, those raised for food, used in research and testing, hunted, or trapped—there was a completely different judicial reaction and result when one little dog was faced with death due to the will provision of a caring yet misguided guardian. In this very limited circumstance, the dog’s best interests and right to remain alive were not only considered, but respected.⁸⁰ However, to the extent that we viewed the Sido case

72. *Id.* at 2-4.

73. *Id.* at 5-8.

74. *Id.* at 8.

75. Letter from Laurence Kessenick, Attorneys for Animal Rights, to Henry Mark Holzer, Editor, *Animal Rights Law Reporter* (June 19, 1980) (on file with author).

76. *Avanzino Transcript*, *supra* note 69, at 4.

77. 34 Pa. D. & C.2d 121 (Ct. Comm. Pleas 1964).

78. *Avanzino Transcript*, *supra* note 69, at 9.

79. *Id.* at 13-14, 16.

80. *Id.* at 9. In a later case, *In re Estate of Brand*, when a testator provided that his horses be killed upon his death, the animals’ interests actually “willed out” over the testator’s. In response

as an indicator that American society was becoming more willing to acknowledge the interests and rights of animals, we were mistaken. We soon found out that, in most other contexts, the court system was fervently opposed to such an expansion of the concept of rights or even protection.

VIII. “The Ever Widening Circle”

What existed at this early stage of animal law were pockets of interest and activity, and Holzer sensed the need for an organizing agent. He wanted to find other attorneys who were committed to establishing legal rights for animals.⁸¹ The filing of *Jones v. Butz* and *Jones v. Beame* helped him in that regard, because as news of the lawsuits spread, either in the general media or in animal rights/protection literature, attorneys saw the coverage and contacted him.⁸² Jones’ organization, The Society for Animal Rights, published announcements of Holzer’s work and asked attorneys to assist him.⁸³ By doing literature searches in the Index of Legal Periodicals, Holzer identified those with published law review articles on the subject and contacted them.⁸⁴ One of those contacts was David Favre,⁸⁵ a professor at Detroit College of Law, who had recently written an article on the relationship between humans and wild animals.⁸⁶ That article marked an important intellectual and emotional transition for Favre: he had shifted from the traditional environmental law perspective of viewing animals as a group or species to thinking about them as individuals.⁸⁷

IX. The Whole Consists of the Sum of its Parts

The most effective outreach tool developed by Holzer was a publication called Animal Rights Law Reporter (ARLR). Through this vehicle, Holzer was able to identify those attorneys and law students interested in animal rights,

to the estate’s contention that the testator’s provision “intended to prevent future cruelty to his horses,” the court noted “that a death sentence imposed upon healthy, if aging, animals might be considered cruel in its own right. Surely any person who has observed an animal threatened with harm can attest to [her] preference for survival over death.” *In re Estate of Brand*, No. 28473, at 6 (Vt. Prob. Ct. Mar. 17, 1999).

81. Telephone Interview with Henry Mark Holzer, Professor Emeritus, Brooklyn Law School (Mar. 6, 2007) [hereinafter Holzer Interview (2007)].

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. David Favre, *Wildlife Rights: The Ever Widening Circle*, 9 ENVTL L. 241 (1979).

87. Interview with David Favre, Professor of Law, Michigan State University, in Cotati, Cal. (Feb. 22, 2007) [hereinafter Interview with Favre].

provide them with resources, and build a base for the nascent movement. ARLR contained information about animal rights and, more often, to Holzer's dismay, animal welfare cases currently in the federal and state courts. It also contained information about pending legislation, law review articles, and other available resources, as well as a bulletin board, which contained items such as a short description and contact information for Attorneys for Animal Rights.⁸⁸ The first issue of ARLR, listing Society for Animal Rights as the publisher and Holzer as the Editor, was published in January 1980.⁸⁹ Holzer hoped that ARLR would become "the central clearinghouse for animal rights law information,"⁹⁰ and it was just that. In the third issue of ARLR, published in July 1980, the Editor's Comment section contained the following message from Holzer:

Having reported on a wide variety of issues, having been asked for assistance by several attorneys around the country, having been sent some material to share with our readers, having received many requests for ARLR and increased our mailing list for it substantially, I began to wonder just how extensive is the animal rights law movement in America. How many lawyers are out there, involved in these matters even on a part-time or occasional basis? What kinds of cases are they handling? Are they winning or losing, and why? Where are they located, mostly? Where are they getting their clients? How is the reception in court? Do they see progress? What is the prognosis for animal rights law? Who are these lawyers? Why do they do this kind of work? How did they get started?

There are dozens of such questions—all directed to one central point: what is going on out there in animal rights law?

Since the whole consists of the sum of its parts, ARLR would very much like to be informed about those parts. Please let us know, and we'll pass on the information.⁹¹

Holzer used the Editor's Comment section of ARLR to share his vision for the growth of the movement. "[M]uch is needed: more and more groups of

88. See, e.g., *Bulletin Board*, ANIMAL RTS. L. REP. (Soc'y for Animal Rights, Clark's Summit, Pa.), Jan. 1980, at 9.

89. ARLR ceased publication in October 1983, having published sixteen issues in four years. In his final Editor's Comment, Holzer grouched: "Conceived as the informational arm of the incipient animal rights law movement, and born of much optimism and a bit of naiveté, too often during its life the *Animal 'Rights' Law Reporter* has found itself having to report about not animal rights, but animal welfare." *Editor's Comment*, ANIMAL RTS. L. REP. (Soc'y for Animal Rts., Clark's Summit, Pa.), Oct. 1983, at 12. Holzer was done reporting on the latter and vowed to focus his energies solely on animal rights.

90. *Editor's Comment*, ANIMAL RTS. L. REP. (Soc'y for Animal Rights, Clark's Summit, Pa.), Oct. 1980, at 10.

91. *Editor's Comment*, ANIMAL RTS. L. REP. (Soc'y for Animal Rights, Clark's Summit, Pa.), July 1980, at 13.

attorneys for animal rights; a body of animal rights law in published form . . . ; law school courses on animal rights law; and, in a couple of years, the first national conference of all lawyers concerned with the legal rights of animals.”⁹² He later said: “I was attempting to create or identify some cohesion in whatever might have been out there, which was virtually nothing.”⁹³

X. There Are Burros in China Lake

In the spring of 1981, the fledgling San Francisco and Los Angeles AFAR chapters responded to the imminent killings of feral burros and forged a closer working relationship.⁹⁴ On a Thursday afternoon in late March, each of us received phone calls from animal protection organizations, informing us that in less than two days, the U.S. Navy would shoot and kill 300 to 500 feral burros located at the Naval Weapons Testing Center in China Lake, California. Having conducted two prior “emergency reduction plans,” killing a total of 648 burros earlier that month, the Navy contended that the burros created a safety hazard by wandering onto an airfield and adjacent roads.⁹⁵ The Navy’s not unreasonable concern was that a burro on the runway would cause a plane to crash. What the animal protection groups objected to was the Navy’s assumption that wholesale killing of burros was the appropriate solution to the problem. Marcelle Philpott-Bryant and I spoke by phone and agreed that, given the shortness of time, both of us would file suit against the Navy; my plaintiff was the Animal Protection Institute of Sacramento, California, and hers was the Fund for Animals.

We had less than twenty-four hours to prepare pleadings and get a temporary restraining order in place. Using Marcelle’s San Clemente goat pleadings as a template, we alleged that the Navy’s failure to prepare, circulate, and consider an environmental impact statement regarding the planned killing constituted a violation of NEPA, and that the method of killing (use of a helicopter and sharp shooters) violated California Penal Code Section 597(b).⁹⁶

The next morning, I flew to Fresno, California and filed a complaint and motion for temporary restraining order in U.S. District Court for the Eastern District of California.⁹⁷ Marcelle filed a substantially similar lawsuit in the

92. *Editor’s Comment*, ANIMAL RTS. L. REP. (Soc’y for Animal Rights, Clark’s Summit, Pa.), Oct. 1980, at 10.

93. Holzer Interview (2007), *supra* note 81.

94. *The Burros of China Lake*, ATT’YS FOR ANIMAL RTS. NEWSL. (San Francisco, Cal.), Nov. 1981, at 1 [hereinafter *Burros*, AFAR NEWSL.].

95. Complaint at 4-6, *Animal Prot. Inst. v. U.S. Dep’t of Def.*, No. 81-124 (E.D. Cal. filed Mar. 27, 1981).

96. *Id.* at 7-9, 10-11.

97. *Id.*

Central District. I obtained the TRO⁹⁸ and soon after, we consolidated the lawsuits. The Navy then drafted and published an environmental impact statement (EIS), which concluded that killing the burros was the preferred alternative course of action.⁹⁹ We attacked the draft EIS as conclusory and dismissive of other available options, including fencing and live removal of burros.¹⁰⁰ Marcelle and I were privately concerned that, as flawed as the EIS was, a judge might be convinced to find it sufficient to withstand the plaintiffs' attack and refuse to grant a preliminary injunction.

As the case progressed, the parties agreed to meet at the Naval Weapons Testing Center. The Navy's lawyers and representatives were initially mystified by and suspicious of the plaintiffs. Cleveland Amory, the media-savvy, blustery, larger-than-life president of the Fund for Animals, would dominate meetings with a combination of storytelling, showmanship, and bravado. The Navy representatives expressed their concern about burros causing a plane crash, and in response, Amory offered to remove burros, upon request. A temporary agreement was reached, which would be in effect until the hearing on the preliminary injunction, and soon after, the Navy made its first request for removal. They were impressed with the methods used by the Fund's cowboy removal team and shot video footage of the roundup. The parties moved toward common ground, building trust, and, within professional parameters, a certain amount of genuine camaraderie.

At the hearing for the preliminary injunction, the judge directed the parties to reach a settlement, which the parties did, based on the working relationship they had developed during the course of the lawsuit. In their settlement agreement, the Fund for Animals agreed to remove all burros within a 275 square mile area; the Navy agreed to reimburse the Fund fifty dollars per burro so removed and to release all rights and interests in the removed burros.¹⁰¹ As a result of the settlement, the lawsuit was dismissed and no further killings of burros occurred.

While this case didn't establish new rights for animals, it achieved several things. First, it saved the lives of an estimated 2,000 to 3,000 feral burros.¹⁰² Second, building on the San Clemente goat case, it signaled to agencies of the federal government that, while environmentalists might not utilize NEPA to halt the mass slaughter of a non-endangered and, in this case, non-native species, animal rights lawyers would. Third, it fostered the move toward professional

98. *Animal Prot. Inst. v. U.S. Dep't of Def.*, No. 81-124 (E.D. Cal. Mar. 27, 1981) (order granting temporary restraining order).

99. *Burros*, AFAR NEWSL., *supra* note 94, at 1.

100. Arthur L. Margolis, et. al, Comment on Department of Navy Draft Programmatic Environmental Impact Statement (June 19, 1981) at 2, 4-6.

101. Stipulated Settlement & Motion to Dismiss at 1-2, *Animal Prot. Inst.*, No. 81-124 (filed Oct. 22, 1981).

102. *Burros*, AFAR NEWSL., *supra* note , at 1.

collaboration between the few identifiable animal rights lawyers, and finally, it led to the creation of the first full-time paid job for an animal rights lawyer. Within a few months after the issuance of the temporary restraining order, the Animal Protection Institute provided a \$6,000 grant to Attorneys for Animal Rights, allowing me to become AFAR's first full time staff attorney in June 1981.¹⁰³

XI. The Prosecution of Dr. Taub

Back on the East Coast, in May 1981, Alexander Pacheco, a college student, had obtained a volunteer position at the Institute for Behavioral Research (IBR) in Takoma Park, Maryland.¹⁰⁴ A year earlier, Pacheco and Ingrid Newkirk had started a new group called People for the Ethical Treatment of Animals (PETA), and Pacheco wanted to observe animal research firsthand.¹⁰⁵ The abuses that he found and documented formed the basis of a criminal investigation and prosecution that would galvanize the animal rights movement and crystallize its battle with the research industry.¹⁰⁶ It also turned a talented young prosecutor into an animal rights attorney.

In September 1981, police raided the IBR and seized seventeen monkeys, who later came to be known as the "Silver Spring Monkeys." Edward Taub, the principal investigator at IBR, was charged with seventeen counts of violating the Maryland anti-cruelty law.¹⁰⁷ The case was receiving a lot of media attention, and the Montgomery County State's Attorney's Office assigned one of its best litigators to handle the trial. Roger Galvin, a former Mid-Westerner who described himself as a "blissfully ignorant meat-and-potatoes guy,"¹⁰⁸ generally prosecuted the most violent criminals accused of felonies. He was angered and confused to be assigned to a mere misdemeanor trial involving animals.¹⁰⁹ Equally confusing to Galvin was the reaction of the scientific community, which appeared to be blindly defending Taub, when it would seem more logical to adopt a "wait and see" attitude and, if a conviction occurred, make a concerted

103. Letter from author to Belton P. Mouras, President, Animal Protection Institute (June 16, 1981) (on file with author).

104. KATHY SNOW GUILLERMO, *MONKEY BUSINESS* 11, 13 (1993).

105. *Id.* at 13, 34.

106. For a horrifying account of the suffering the monkeys endured in Taub's lab, see Alex Pacheco & Anna Francione, *The Silver Spring Monkeys*, in *IN DEFENSE OF ANIMALS* 135 (Peter Singer ed., 1985).

107. *Taub v. State*, 463 A.2d 819, 820 (Md. 1983).

108. *Quoted in* GUILLERMO, *supra* note 104, at 85.

109. Telephone Interview with Roger Galvin, former prosecutor, State's Attorney's Office, Montgomery County, Md. (June 26, 2006) [hereinafter Interview with Galvin].

effort to distance itself from a researcher who had violated the state anti-cruelty law.¹¹⁰

Epiphany struck when, as part of his research and evidence gathering, Galvin, accompanied by Newkirk, went to visit the surviving monkeys. Newkirk brought grapes and other snacks to feed to the monkeys, most of whom were crab-eating macaques. When Galvin offered a grape to Sarah, the only rhesus macaque in the group, she grabbed onto his finger. He was surprised that her hand looked like a miniature version of his own. "The way she grabbed my hand was not aggressive; it was . . . dependent. From that moment on, I felt more of a sense of responsibility for their future than in just another criminal case."¹¹¹ He "began to notice personalities, not just animals"¹¹² and realized that he would have to think about these animals and their situation more deeply.

The case was all-consuming, and Galvin worked on it seven days a week until the trial.¹¹³ Early on, it was clear to him that a key to the case was proving to the jury that the standard of care had been violated. "If a dog owner beats his dog, that's clearly cruelty. But, jurors had never been faced with deciding on the standard of care for a group of monkeys in a research laboratory."¹¹⁴ Galvin knew that he had to establish what the standard of care would be and then find experts who would testify that the standard of care had not been met. In his judgment, the fact that the monkeys were fed inedible food and forced to live in their own feces would not be enough to convict Taub.¹¹⁵ He thought that the lack of veterinary care was the key element, and he needed experts. Pacheco and Newkirk were instrumental in introducing Galvin to primatologist Dr. Geza Teleki, veterinarian Dr. Michael Fox, and others who became key expert witnesses for the prosecution.¹¹⁶

After Galvin gathered the evidence, the photographs of the monkeys, the radiographs of broken limbs, and photographs of conditions at the lab, he thought the charges were provable.¹¹⁷ However, the huge volume of evidence was problematical. His job, as he saw it, was to winnow it down to tell the story, so that he could cover the main themes and use the evidence that would work most effectively.¹¹⁸ Trial was held in the Montgomery County District Court, presided over by Judge Stanley Klavan. Because the charges were misdemeanors, with a maximum penalty of 90 days, there would be no jury. It was the most

110. *Id.*

111. *Id.* See also GUILLERMO, *supra* note 104, at 89.

112. Quoted in Kenneth Weiss, *The Monkeys: Lawyer Forsakes Meat*, MONTGOMERY J. (Rockville, Md.), Aug. 17, 1983, at A6.

113. Interview with Galvin, *supra* note 109.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

publicized trial in Montgomery County history.¹¹⁹ Galvin never doubted that he would win the case.¹²⁰ But, he was surprised at the callousness of the scientists who testified for the defense. "I guess I believed from the high school science course that scientists were totally objective. . . . I found them to be subject to the same biases and vested interests as anyone else . . ." ¹²¹ On November 23, 1981, the court found Taub guilty of failing to provide necessary veterinary care for six of the monkeys.¹²² Taub was acquitted of all other charges.¹²³

Taub appealed the conviction to the Circuit Court where the case was heard *de novo* as to the conviction on six counts of cruelty. This time, there would be a jury, and the three week trial was presided over by Judge Calvin Sanders. After three days of deliberation, the jurors found Taub guilty of one charge of failure to provide veterinary care to one of the monkeys.¹²⁴ Several jurors later told Galvin that the verdict had been a compromise: eleven jurors wanted to convict on all six counts, but the twelfth juror staunchly refused.¹²⁵ "[M]any of the jurors were in tears and were barely able to choke out the verdict. . . . Most of the jurors were distressed that they could not convict him on all the charges."¹²⁶

Then, a shocking reversal occurred. The Maryland Court of Appeals granted *certiorari* and reversed the conviction, holding that the state anti-cruelty law "simply is inapplicable to Dr. Taub and the laboratory" and that it did not apply to research conducted pursuant to a federal program.¹²⁷ The court reviewed the legislative history of Maryland's anti-cruelty law and observed that "the legislature has consistently been concerned with the punishment of acts causing 'unnecessary' or 'unjustifiable' pain or suffering."¹²⁸ Ignoring the gratuitous nature of Taub's cruelty, the court then concluded that pain caused in research is "purely incidental and unavoidable." The court also reasoned that the Maryland legislature knew of the federal Animal Welfare Act and left regulation of research to that Act, which, the court believed, "provides a comprehensive plan for the protection of animals used in research facilities."¹²⁹

This is the only case in U.S. history in which an animal researcher has been convicted (in the lower court) for cruelty to animals as a result of the conditions in which the animals were kept in the laboratory.¹³⁰ Other criminal prosecutions did not flow from this case. Rather than shun Taub, it seemed to

119. *Id.*

120. *Id.*

121. Quoted in Weiss, *supra* note 112, at A6.

122. *Taub*, 463 A.2d at 820.

123. *Id.*

124. *Id.*

125. GUILLERMO, *supra* note 104, at 124-25.

126. Quoted in Weiss, *supra* note 112, at A6.

127. *Taub*, 463 A.2d at 820.

128. *Id.* at 821.

129. *Id.*

130. Weiss, *supra* note 112, at A6.

those of us watching this case that the research community circled its wagons around him and responded with all of its might to quell the growing animal rights demands that the use of animals in research be abolished or more carefully regulated. At the appellate level, the *Taub* case shows the legal system grappling with a highly controversial issue—the use of animals in research—and, ultimately, taking the easy and intellectually dishonest way out instead of holding a wrongdoer responsible for his actions.¹³¹ The prosecution of Edward Taub helped put the issue of the treatment of animals used in laboratory research on the front pages of some of the nation’s most prestigious newspapers.¹³² It also catapulted PETA, Pacheco, and Newkirk to fame.¹³³ For the “simple country lawyer,” as the self-deprecating Galvin called himself,¹³⁴ it marked a change of life. As a result of the case and all of the literature that he read, Galvin became a vegan and stopped wearing leather.¹³⁵ Within the next few years, he joined the Board of Directors of Attorneys for Animal Rights¹³⁶ and left the State’s Attorney’s office. In 1986, Galvin, along with Valerie Stanley and Holly Hazard, formed one of the first animal rights law firms in the U.S.¹³⁷

XII. The First National Conference on Animal Rights Law

At the start of 1981, Holzer had announced that he and SAR wanted to hold a conference: “[T]he next logical step for the movement, if the interest exists, is to bring together in one place as many animal rights lawyers as possible—in order to exchange ideas, to fuel each other’s and the movement’s activities, and to publicly demonstrate that there is an animal rights law movement populated by serious, competent professionals.”¹³⁸ Holzer asked his readers to respond with a show of interest, geographical preference for the site, preferred time of year, and willingness to present a paper or lead a workshop.¹³⁹ Thus, the “First

131. For a critical analysis of the appellate decision in *Taub*, see Larry Falkin, Comment, *Taub v. State: Are State Anti-Cruelty Statutes Sleeping Giants?*, 2 PACE ENVTL. L. REV. 255, 265 (1985), and Elizabeth L. Decoux, *In the Valley of the Dry Bones: Reuniting the Word “Standing” with Its Meaning in Animal Cases*, 29 WM. & MARY ENVTL. L. & POL’Y REV. 681, 716 (2005).

132. See, e.g., Sandra Saperstein, *Case of Md. Researcher: Cruelty Decision Reversed*, N.Y. TIMES, Aug. 11, 1983, at C1; Stephen Zak, *Cruelty in Labs*, N.Y. TIMES, May 16, 1983, at A19.

133. GUILLERMO, *supra* note 104, at 12.

134. Interview with Galvin, *supra* note 109.

135. *Id.*; Weiss, *supra* note 112, at A1.

136. Minutes of Annual Membership Meeting, Attorneys for Animal Rights (Oct. 21, 1984) (on file with author).

137. Executive Staff: Holly Hazard, http://www.humanesociety.org/about_us/board_and_staff/experts/experts/holly_hazard.html (last visited June 17, 2008).

138. *Editor’s Comment*, ANIMAL RTS. L. REP. (Soc’y for Animal Rights, Clark’s Summit, Pa.), Jan. 1981, at 11.

139. *Id.*

National Conference on Animal Rights Law” was organized and sponsored by the Animal Rights Law Reporter and the Society for Animal Rights and held at Carnegie Conference Center in New York City.¹⁴⁰ Holzer described the conference as follows:

On November 27 and 28, 1981, there came together in New York City about sixty people, from all over the United States. And for those of us who were there, it was magic. Unfortunately, it is not possible to capture on paper (or even on tape) the special quality of what went on for those two days: One’s discovery that there were others in the legal profession who shared some of your deepest values; the sense of solidarity arising from open discussions of those values, and how to protect and implement them through law; the intellectual excitement as speaker after speaker explained how the law could be enlisted in the widening battle for animal rights; the feeling that something could indeed be done about the virtually endless problems that animals confront; the satisfaction that speaker and attendee alike experienced merely from being a part of what was happening; the strengthened ability which resulted from exposure to challenging new legal ideas; the knowledge gained; the awareness that everyone there stood at the threshold of something brand new; for those two days, at least, frustration took a back seat to hope.¹⁴¹

The agenda for the conference looked remarkably similar to those of later animal law conferences.¹⁴² Nancy Jane Shestack, an Assistant Professor of Law at the University of Connecticut Law School, opened the workshops by drawing parallels between animal rights, women’s rights, slavery and other social movements.¹⁴³ Peter Lovenheim, of HSUS, shared his knowledge of the Freedom of Information Act and other resources available to animal rights lawyers. Eleanor Molbegott, General Counsel for the ASPCA, explored how private attorneys could help SPCAs do their job better.¹⁴⁴ The first afternoon included a three hour session on test case litigation, with Holzer addressing the issue of standing to sue, Laurence Kessenick discussing prospective cases and underlying theories, and Marcelle Philpott-Bryant addressing how to deal with courts and adversaries.¹⁴⁵ In a separate workshop, Kessenick also spoke about the potential for a new measure of damages for the intentional or negligent death or injury of

140. Holzer Interview (2007), *supra* note 81.

141. *Editor’s Comment*, ANIMAL RTS. L. REP. (Soc’y for Animal Rights, Clark’s Summit, Pa.), Jan. 1982, at 15.

142. *See, e.g.*, Agenda, 2007 Future of Animal Law Conference (Harvard Law School, Cambridge, Mass.) (on file with author).

143. *Editor’s Comment*, ANIMAL RTS. L. REP. (Soc’y for Animal Rights, Clark’s Summit, Pa.), Oct. 1981, at 15.

144. *Id.*

145. *Id.*

an owned animal, which, Holzer declared, “promises to be groundbreaking.”¹⁴⁶ The next morning, Frances Carlisle, an estate planning attorney, addressed the “Sido problem,”¹⁴⁷ intestate or testamentary disposition of an animal, and how lawyers can help their clients to protect their companion animals through their wills. I followed with a talk on providing for the care of animals when their guardians become incapacitated or die. A good part of the day was spent on animal rights legislation, including presentations by Professor David Favre of Detroit School of Law and Professor William Reppy of Duke Law School. Helen Jones discussed techniques for lobbying the legislature, and former Connecticut legislator Aloysuis Ahearn provided an “insider’s” view on animal legislation.¹⁴⁸ Alex Pacheco and Ingrid Newkirk of the newly formed PETA attended the conference and reported on the status of the criminal prosecution of Edward Taub.¹⁴⁹

Nancy Jane Shestack returned to the podium to present a proposed curriculum for the teaching of animal rights.¹⁵⁰ Holzer lobbied for the creation of an encyclopedia of animal rights law, because “until animal rights law is ‘codified’ between hard covers, so that lawyers can go to one source for all they need to know about at least the ‘hornbook’ level of animal rights law, there will be no recognized field.”¹⁵¹ The workshops closed with an announcement by Larry Kessenick and me that our San Francisco group would now become a national organization of lawyers dedicated to the establishment of legal rights for animals: Attorneys for Animal Rights.¹⁵² Holzer commented: “No one knowledgeable about animal rights law in the United States today can have any doubt that this is an idea whose time has come – nor that five years from now the efforts of such an organization on the national scene will be considered no differently from those of other already recognized legal action organizations like the ACLU, NAACP, Sierra Club.”¹⁵³

146. *Id.*

147. *Id.*

148. *Id.* at 16.

149. Telephone Interview with Steven M. Wise (June 27, 2007) [hereinafter Interview with Wise].

150. *Editor’s Comment*, ANIMAL RTS. L. REP. (Soc’y for Animal Rights, Clark’s Summit, Pa.), Oct. 1981, at 16.

151. *Id.* Holzer repeated this idea in ARLR, but the project stalled. *Encyclopedia of Animal Rights Law*, ANIMAL RTS. L. REP. (Soc’y for Animal Rights, Clark’s Summit, Pa.), Jan. 1982, at 11-13; *Encyclopedia of Animal Rights Law*, ANIMAL RTS. L. REP. (Soc’y for Animal Rights, Clark’s Summit, Pa.), Apr. 1982, at 16-17; *Encyclopedia of Animal Rights Law*, ANIMAL RTS. L. REP. (Soc’y for Animal Rights, Clark’s Summit, Pa.), July 1982, at 16-17. The first animal law casebook did not come into existence until 2000, almost twenty years later. See WAISMAN, FRASCH, & WAGMAN, *supra* note 4.

152. *National Organization of Animal Rights Lawyers Formed*, ANIMAL RTS. L. REP. (Soc’y for Animal Rights, Clark’s Summit, Pa.), Jan. 1982, at 11; *Editor’s Comment*, Animal Rts. L. Rep. (Soc’y for Animal Rights, Clark’s Summit, Pa.), Oct. 1981, at 16.

153. *Editor’s Comment*, Animal Rts. L. Rep. (Soc’y for Animal Rights, Clark’s Summit, Pa.), Oct. 1981, at 16.

XIII. The Growth of an Animal Law Movement

The significance of this gathering cannot be overstated. It brought together in one room most of the identified attorneys and law students who were focused on the development of animal rights law. It provided Larry Kessenick and me with a base for a “national” board of directors, which initially included David Favre (Detroit); Laurence Kessenick, Nancy Ober, Laurens Silver, and me (San Francisco); Marcelle Philpott-Bryant and Arthur Margolis (Los Angeles); Jolene Marion, whom I had known in college (New York City); and Steven Wise (Boston).¹⁵⁴ Over the next few years, Roger Galvin, Valerie Stanley, and Peter Lovenheim (Washington, D.C.); Sarah Luick (Boston); Nancy Jane Shestack (Connecticut); Steve Ann Chambers (Seattle); Katie Brophy (Louisville, KY); Stephanie Nichols-Young and Richard Katz (Phoenix); and Kenneth Ross (Chicago) joined the Board.¹⁵⁵

This was the core group that worked closely together in the early years, developing legal theories and exploring what legal rights for animals meant in the context of a court of law. We were excited about the opportunity to work with like-minded attorneys to explore new legal terrain. We understood that, in most cases, this would be the first time that judges had heard such arguments, and we discussed at great length what it would take to convince judges to treat animals as beings whose lives and interests matter. Friendships formed, as the members of this small group supported each other emotionally and intellectually. In 1981, there were no animal law classes or law student groups, no casebooks or animal law committees of bar sections, so we looked to each other and to other social movements, such as the civil rights and environmental movements, for guidance in the development of both our organization and the new legal theories we would explore.

In 1983, a book called *Animal Law* was published.¹⁵⁶ This much-needed resource was co-authored by David Favre and Murray Loring and, while it was not a casebook, it provided the young animal law movement with a discussion of

154. Minutes of First Meeting of National Board of Directors, Attorneys for Animal Rights (Sept. 1, 1982) (on file with author). Holzer was invited to serve on the Board, but declined: “Your offer to join the Board is very much appreciated, but I have to decline because of being overcommitted.” Letter from Henry Mark Holzer, Professor of Law, Brooklyn Law School, to Laurence W. Kessenick, Attorneys for Animal Rights 2 (May 11, 1982) (on file with author).

155. Minutes of Annual Meeting of Board of Directors, Attorneys for Animal Rights (Apr. 10, 1983, Oct. 19, 1984, Oct. 12, 1985, Nov. 3, 1986, & Oct. 25-26, 1987) (on file with author).

156. DAVID S. FAVRE & MURRAY LORING, *ANIMAL LAW* (1983).

the case law and the public policies influencing the case law. In a private letter prior to publication of the book, Favre wrote, "I have recently finished the chapter on cruelty law for my book and have come to two conclusions. First, the statutes are in even more of a disarray than I have imagined. Second, the use of a criminal cruelty statute as a private cause of action needs to be addressed by all of us interested in animals. If citizen suits . . . could be brought, a tremendous tool would be made available."¹⁵⁷

Another exciting development was the establishment, in 1984, of an Animal Protection Committee of the American Bar Association's Young Lawyers Division.¹⁵⁸ The Committee began publishing an "Animal Law Report" edited by Elinor Molbegott, General Counsel of the ASPCA, with information about pending legislation, new laws, and cases concerning animal rights and animal protection.¹⁵⁹ And, in 1985, at the request of David Favre, the ALDF Board formed an International Wildlife Committee, enabling Favre to attend the biennial meetings of the Convention on International Trade in Endangered Species of Flora and Fauna (CITES),¹⁶⁰ bringing attorneys into the international animal protection sphere on a level that was previously unknown.¹⁶¹

From the start, there were mundane details for the Board to attend to. At our first meeting, held by conference call, the Board discussed mainly administrative matters, such as the development of a membership directory, the continued development of a centralized pleadings file, and the potential for liability if AFAR supplied the contact information of animal rights attorneys to people asking for legal advice and representation.¹⁶² I voluntarily resigned from the Board and was selected to serve as the executive director, AFAR's first paid employee.¹⁶³ The list of demands, both on me and the Board, was a long one: lawsuits that had to be attended to, an increasing number of letters and calls from members of the public seeking legal advice and representation, outreach to

157. Letter from David S. Favre to Laurence K. Kessenick (Apr. 19, 1982) (on file with author).

158. *About the Animal Protection Committee*, ANIMAL L. REP. (Animal Prot. Comm., Am. Bar Ass'n, New York, N.Y.), Summer 1984.

159. *Id.*

160. See CITES Website, <http://www.cites.org> (last visited June 27, 2008). See also Animal Legal & Historical Center: CITES, <http://www.animallaw.info/treaties/itcites.htm> (last visited June 27, 2008) ("CITES is a mature international treaty which, as of the Fall of 2002, has over 150 countries as members. The purpose of the treaty is to control the international movement of listed wild plants and animals, alive or dead, whole or parts thereof ('specimens' of species) in such a manner as to be assured that the pressures of international trade do not contribute to the endangerment of the listed species. States must issue permits for international movement of listed species.").

161. Minutes of Regular Board Meeting at 5, Animal Legal Defense Fund (Oct. 12-14, 1985) (on file with author); Minutes of Annual Membership Meeting at 2, Animal Legal Defense Fund (Nov. 3, 1986) (on file with author).

162. Minutes of Board Meeting, Attorneys for Animal Rights (Sept. 1, 1982) (on file with author).

163. *Id.* at 2.

attorneys and law students, planning for annual animal law conferences, a myriad of administrative details, and the need to raise money to support the work of the new nonprofit. In 1982, we developed and implemented a reorganization of AFAR, clarifying the relationship between the national group and the chapters, as we considered how best to build the organization, allocate scarce funds, and carry out activities.¹⁶⁴

XIV. The Policy Debate

The ALDF Board members conducted lengthy and continuing discussions about the development of policy positions for the organization. The animal rights movement of that time seemed to focus largely on the issue of the use of animals in research and testing, and it was deeply divided between abolitionists, who opposed all use of animals, and regulationists, who were willing to work for incremental improvements in the care and treatment of animals in labs. AFAR was acutely aware of this tension, and in 1982, David Favre recommended that the Board develop a policy position on the use of animals in research.¹⁶⁵ No position was developed. In mid-1983, Favre sent another letter to the Board of Directors, this time encouraging the Board to develop policy statements on a variety of animal-related topics and asking the Board members to suggest the “topics, scope and depth of AFAR’s primary policy positions.”¹⁶⁶ The only response David received was from Roger Galvin, who wrote that, “[w]hile still rising from the rubble of the *Taub* case,” he had been “pondering, of late, what ‘rights’ we are supposedly committed to establishing for animals” and suggested “the following as fundamental and essential rights for *all* sentient beings on earth”:

164. Memorandum from author to Laurence Kessenick (Feb. 9, 1982) (on file with author); Letter from Henry Mark Holzer to Lawrence Kessenick (May 11, 1982) (on file with author); Letter from David Favre to Laurence Kessenick (May 13, 1982) (on file with author); Letter from Steven Wise to Laurence Kessenick (May 18, 1982) (on file with author) (“On one hand, we [the Boston chapter] believe that there needs to be some national AFAR oversight of the projects bearing the name of the national organization. On the other hand, we see a clear need for autonomy of the chapters We suggest that the Project and Litigation Review Committee be restricted to reviewing those projects receiving national AFAR funds or using the national AFAR name. Local chapters should be free to use their own names after getting chapter approval of projects.”); Letter from Arthur Margolis to Lawrence Kessenick (June 2, 1982) (on file with author); Letter from author to Steven Wise (Aug. 9, 1983) (on file with author) (“I feel strongly that a centrally based national organization is crucial. And, I can understand that until the national AFAR provides some impetus for chapter allegiance, the chapters are going to be reticent about joining.”).

165. Letter from David Favre to author (Oct. 13, 1982) (on file with author) (form letter sent to all Board members).

166. Memorandum from David Favre to Board of Directors, Attorneys for Animal Rights (Aug. 15, 1983) (on file with author).

1. All sentient beings have a right to live out their lives according to their nature, instincts and intelligence.
2. All sentient beings have a right to live in a habitat ecologically sufficient for meaningful existence.
3. All sentient beings have a right to live free from exploitation.¹⁶⁷

This “pondering” later led Roger to develop a law review article, entitled *What Rights for Animals? A Modest Proposal*.¹⁶⁸ On October 6, a frustrated David Favre wrote to the Board members again, complementing Roger’s approach and asking the rest of them to try harder to grapple with the issue.¹⁶⁹ Nancy Ober responded, taking a different approach. “My emphasis is on trying to define what AFAR as an organization of lawyers is about.”¹⁷⁰ She suggested that AFAR could set the following goals:

1. To secure the legal recognition of animals as persons with rights.
2. To educate the public about human exploitation of animals and denial of their rights, particularly where exploitation occurs on a massive or intensive scale.
3. To protect animals in the shrinking wild from further human incursions.¹⁷¹

About three weeks later, Larry Kessenick entered the discussion, responding at length to Roger’s letter: “Roger’s statements of goals are provocative but they point out how very difficult it is to tie a concept of legal rights to broad philosophical statements.”¹⁷² Larry raised several pointed questions about Galvin’s approach, which highlighted the major philosophical differences within the group:

I have real difficulty accepting [Roger’s first listed “right”] on a number of levels. . . . Animals are killed by other animals all the time. . . . [A]re we saying that human beings do not have the right to spray insects to preserve crops, kill predators to preserve livestock, raise and eat livestock, etc.? I have difficulty knowing precisely what we are saying by this statement, and I am troubled by the possible implications.¹⁷³

The Boston chapter of AFAR discussed and debated the policy positions at length, and Steven Wise reported back to the Board:

I would now like to suggest, for several reasons, that AFAR *not* operate from a broad general set of premises, as Nancy and

167. Letter from Roger W. Galvin to David S. Favre (Aug. 21, 1983) (on file with author).

168. Roger W. Galvin, *What Rights for Animals? A Modest Proposal*, 2 PACE ENV’T L. REV. 245 (1985).

169. Memorandum from David Favre to Board of Directors (Oct. 6, 1983) (on file with author); Memorandum from author to Board members (Sept. 8, 1983).

170. Letter from Nancy Ober to David Favre (Oct. 23, 1983) (on file with author).

171. *Id.*

172. Letter from Laurence Kessenick to David Favre 3 (Nov. 14, 1983) (on file with author).

173. *Id.* at 1-2.

Roger have suggested. First, AFAR runs a substantial risk of greatly reducing its potential pool of support, financial and otherwise, from more traditional animal welfare organizations Second, it might reduce significantly its chances of recruiting new attorney members. Third, it might result in having AFAR perceived in the press, and elsewhere, as a utopian and therefore ineffective organization.

. . . .

I do not think that we should underestimate the sophistication of the concept of animal rights or overestimate the sophistication of the average potential member. Further, I think the conflicts that will almost certainly be engendered by the enunciation of sweeping principles are unnecessary at this time. As the nature of our common law legal system mandates evolutionary and incremental change, we cannot hope to win truly fundamental victories in the courts until we have won the more peripheral ones.¹⁷⁴

This exchange illuminates the dichotomy that was present from the inception of animal law: even its earliest proponents were not of one mind on the issue of rights versus welfare, abolition versus regulation.¹⁷⁵

A week later, David Favre sent a short, handwritten note to the Board: “So much for pie-in-the-sky goals. I agree with Larry & Steve and will not at this point pursue the issue further.” And, paraphrasing the famous Nixon quote, he jokingly signed off: “You won’t have my memos to kick around anymore. David.”¹⁷⁶

This “failed experiment” of Favre’s was anything but. It provided the group with the opportunity to consider and define what its long term goals were and forced it to grapple with a fundamental choice faced by any progressive organization advocating broad-reaching societal change: whether to opt for philosophical rigor or avoid hard line policies in order to attract and keep a broader base of support. Pressure to develop policy positions came both from within and beyond the group, from attorney members and activists, alike. The decision reached by the early Board frustrated some, but nurtured the growth of a larger, more broad-based animal law movement – they chose to be inclusive rather than exclusive. The Board members of AFAR could foresee that purity of doctrine would have to take a backseat to the role of the attorney as the engineer

174. Letter from Steven Wise to David Favre (Nov. 14, 1983) (on file with author).

175. Compare the suggestions made by Roger Galvin and Nancy Ober to Larry Kessenick’s response. The differences in approach are startling, and one might wonder how it is that these attorneys continued to work closely together with such core disagreements. In fact, they did work together and were respectful about their differences.

176. Note from David Favre to Board Members (Nov. 21, 1983) (on file with author). Thankfully, there have been many more memos, on a variety of topics, emanating from Favre.

of legal strategies and the representative of a wide range of viewpoints in the context of individual cases. Further, many legal professionals attracted to animal law would be unwilling to embrace the more radical “rights” concept, and part of AFAR’s role would be that of the educator. In order to build a larger movement, we agreed that AFAR would have to embrace diversity of opinion.¹⁷⁷ In 1984, the issue arose again, this time in the context of who had the authority to speak on behalf of the newly renamed Animal Legal Defense Fund (ALDF).¹⁷⁸ The Board saw the need to tighten its control and agreed that “no member, other than the President . . . shall be permitted to represent the official position of the Animal Legal Defense Fund without prior approval of the Executive Committee . . .”¹⁷⁹

XV. So, How Are We Going to Pay for This?

A very practical and equally perplexing question for AFAR was how to bring in the funds needed to support the work of the organization. By 1983, AFAR’s annual budget was approximately \$30,000;¹⁸⁰ the organization was limping along financially with no reliable source of income. The Board members and I, all lawyers, had no prior fundraising experience and were ill-equipped to deal with the growth and development of a nonprofit organization. At its April 1983 meeting, the Board formed a “National Fundraising Committee,” and appointed Larry Kessenick, Steven Wise, Jolene Marion, David Favre, and Frances Carlisle to raise money,¹⁸¹ in part to support chapter activities. But the in-depth discussions that ensued took the committee members down a different path, and they resolved to work to build the national organization into a much larger entity with full-time paid staff. On behalf of the committee, I sent a report to the Board in April, 1984:

177. Interview with Sarah H. Luick, Administrative Magistrate, Mass. Div. of Admin. Law Appeals, Board member, ALDF (June 15, 2007) [hereinafter Interview with Luick]. (“I think that this link to the animal rights protests—the label of animal rights to AFAR-Boston, Inc. and to AFAR national—caused a loss of some of the early folks.”).

178. The name was formally changed by the Certificate of Amendment of Articles of Incorporation of Attorneys for Animal Rights, filed on November 5, 1984 with the Office of Secretary of State of California. The decision to change the name from Attorneys for Animal Rights to the Animal Legal Defense Fund was a practical one: a consultant advised us that people do not trust attorneys. See Memorandum from author to Board of Directors at 3 (Apr. 4, 1984) (on file with author).

179. Minutes of Regular Board Meeting at 4, Animal Legal Defense Fund (October. 19, 1984) (on file with author).

180. AFAR’s 1983 Income Statement (on file with author) showed total income of \$30,723.88 and total expenses of \$24,613.05.

181. Minutes of Annual Meeting, Board of Directors, Attorneys for Animal Rights (Apr. 10, 1983) (on file with author). The Committee’s membership later changed to: Galvin, Wise, Favre, Marion, Luick, and Tischler.

When the committee began discussing fundraising, the members started to think about AFAR in a different way. They looked at other movements, such as the civil rights and environmental movements and made comparisons between those movements and animal rights. In reality, at the core of advances in each “recognized” movement are significant advances in litigation and legislation. This [animal rights/protection] movement has never addressed litigation in any sort of rational manner, and until it begins to use litigation and legislation hand-in-hand, it will remain in the 19th Century, to the extreme detriment, as usual, of the animals. With that sort of view, the committee began to see the need for an AFAR that could act similarly to the litigation arms of other movements--bringing case after case, pecking away at the status quo. We have yet to define ‘pain’, ‘humane,’ and a host of other terms which are essential to any legal discussion of interests or rights. We have a lifetime of work cut out for us, but it has to be done well and professionally - that means full time staff attorneys, secretaries, litigation funds, and so on. And, that means a lot more money than we have been accustomed to thinking about.¹⁸²

The fundraising committee’s “comprehensive fundraising scheme” included a “seed money proposal” that would be sent to six of the largest humane organizations, asking them to share our vision of “a fully functioning legal arm for the animal rights movement” to “pursue precedent setting litigation, write law review quality articles, publish a scholarly journal, and provide research and advice to the animal rights community.”¹⁸³ The proposal would request \$50,000 from each organization, to sponsor a new “Animal Legal Defense Fund,” establish four litigation offices, and provide the other services mentioned above.¹⁸⁴ The fundraising committee also planned to submit grant proposals to fifteen foundations for specified projects and general operating funds, and to establish a direct mail fundraising campaign to provide a stable, long-term source of income.¹⁸⁵ The “seed money proposal” was a naïve approach to movement leaders far more accustomed to competing for scarce resources than working cooperatively, and the organizations that responded to AFAR’s proposal gently encouraged us to develop more realistic and modest plans.¹⁸⁶ It was to be several more years before the agency began to achieve a stable source

182. Memorandum from author to Board of Directors at 4 (Apr. 4, 1984) (on file with author).

183. *Id.* at 1.

184. *Id.*

185. *Id.* at 1-2.

186. *See, e.g.*, Letter from John A. Hoyt, President, Humane Soc’y of the U.S. to Steven M. Wise (May 15, 1984) (on file with author); Letter from George J. Trapp, Managing Director, National Anti-Vivisection Soc’y, to Steven M. Wise (July 6, 1984) (on file with author); Letter from author to John Hoyt (Nov. 6, 1984) (on file with author) (thanking HSUS for offering a matching grant of \$25,000).

of income from its direct mail campaign and thus be able to expand its staff and activities.

XVI. It Shouldn't Happen to a Dog

I continued work on a veterinary malpractice case, in which I attempted initially to have a guardian *ad litem* appointed for a dog and to sue on behalf of the dog for his pain and suffering,¹⁸⁷ a wild horse case, a challenge to an elk hunt, and an amicus curiae brief arguing that tenants with companion animals were unfairly discriminated against.¹⁸⁸ And then, there was Snowball. Snowball, a large white Samoyed dog, had been part of a research experiment conducted jointly by Stanford University and the Palo Alto Veterans Administration Hospital.¹⁸⁹ One evening, a third year medical student found Snowball collapsed at a door of the research laboratory.¹⁹⁰ Snowball's breathing was labored and he had open wounds on all four of his legs. Unable to secure the help of the Stanford campus veterinarian, the student took Snowball to an emergency clinic, where the veterinarian on duty confirmed that Snowball was suffering greatly, with little likelihood of recovering.¹⁹¹ Snowball was euthanized that evening and the necropsy of his body showed advanced emaciation, pneumonia, open and infected wounds on all four limbs, and dehiscid (open) surgical wounds. The necropsy report concluded that he had been "suffering tremendously" and "was not receiving proper medical or nutritional treatment."¹⁹² Larry Silver, an ALDF Board member, Martin Eichner, a Palo Alto attorney, and I assisted three local humane societies who were investigating the incident and attempting to work with the local prosecutor and the U.S. Department of Agriculture. When the local prosecutor refused to take action and the USDA stalled, we sued the Veterans Administration, Stanford, and the individual researcher in charge of the project for violations of the requirements of the federal Animal Welfare Act (AWA). We sued the USDA for failing to enforce the Act and sought injunctive and declaratory relief and mandamus.¹⁹³ The District Court granted the defendants' motion for dismissal, concluding that the humane societies lacked standing and

187 Complaint, *Berg v. Gunn*, No. 258590 (Cal. Super. Ct. filed Oct. 27, 1981).

188. 1984 – *The Year in Review*, ALDF NEWSL. (Animal Legal Def. Fund, San Francisco, Cal.), Nov. 1, 1985, at 1.

189. Complaint at 5, *Peninsula Humane Soc'y v. Walters*, No. 84-2010 (N.D. Cal. filed Apr. 12, 1984); *Stanford University and Veterans Administration Sued for Death of Snowball and Other Violations of Animal Welfare Act*, AFAR NEWSL. (Att'ys for Animal Rts., San Francisco, Cal.), Spring 1984, at 1-2.

190. *Death of Snowball*, *supra* note 189, at 1.

191. *Id.*

192. *Id.*

193. Complaint at 10-11, *Peninsula Humane Soc'y*, No. 84-2010.

failed to state a claim,¹⁹⁴ an early indicator of the problems we would later face in attempting to gain standing to sue under the AWA.

In addition to my litigation, I suggested the development of a book on “How to Protect Your Companion Animal,” aimed at providing general legal information in response to the most common questions the group received from people living with companion animals. I thought it would provide a service to animal advocates and pet lovers, get AFAR’s name out to a larger segment of the public, and provide some needed income from the sales.¹⁹⁵ However, the idea was considered secondary to the filing of lawsuits.¹⁹⁶

XVII. Challenging the Intensive Confinement of Veal Calves

The Boston chapter had been advertising its meetings, and, finally, a small group had emerged that was consistently attending meetings and willing to work on projects. The group included Steven Wise, Sarah Luick, Patricia Petow, Karen Levitt, Ruth Flaherty, Michael Rich, and Wilma Rosenberg.¹⁹⁷ Their activities included compiling a compendium of Massachusetts laws relevant to animals, serving as counsel for the Eastern region of the Mobilization for Animals coalition, and lobbying to repeal the Massachusetts pound seizure law.¹⁹⁸ Meanwhile, in Maryland, Dr. Edward Taub had filed a petition for *certiorari* to the Maryland Court of Appeals, and, for their first major writing project, Steven Wise, the Boston chapter, and David Favre drafted and filed an *amicus curiae* brief on behalf of the national group, in support of the State of Maryland’s opposition to Taub’s petition.¹⁹⁹ Roger Galvin, soon to be an ALDF board member himself, was pleased to receive the support and thanked them on behalf of his office.²⁰⁰

For over a year, the Boston chapter of ALDF had been searching for a lawsuit to bring.²⁰¹ The BAN VEAL campaign was in vogue, and Steven Wise proposed bringing a lawsuit to challenge the practice of raising male calves in intensive confinement and feeding them a diet deficient in iron.²⁰² The chapter

194. Peninsula Humane Soc’y v. Walters, No. C 84-2010 SAW (N.D. Cal. Feb. 5, 1985).

195. Letter from Joyce Tischler to David S. Favre and Laurence Kessenick (Sept. 9, 1983) (on file with author).

196. Letter from David Favre to author (Sept. 14, 1983) (on file with author).

197. Interview with Luick, *supra* note 177.

198. Minutes of First Meeting, Board of Directors, Att’ys for Animal Rts. (Sept. 1, 1982) (on file with author); Letter from Steven M. Wise to author (Sept. 20, 1982) (on file with author).

199. Brief for Attorneys for Animal Rights et al. as Amici Curiae Supporting Appellee, Taub v. Maryland, No. 123 (Md. Apr. 25, 1983); Letter from Steven M. Wise to Lawrence (sic) Kessenick (Feb. 4, 1983) (on file with author).

200. Letter from Roger W. Galvin to Steven Wise (Apr. 26, 1983) (on file with author).

201. Interview with Luick, *supra* note 177.

202. *Id.*

members debated the idea thoroughly. They researched potential state and federal laws that could enable them to overturn the intensive confinement system and provide relief to the calves. They neither owned nor possessed the calves, so standing would be a major hurdle. “We learned about veal, about the crate, and about viable alternatives to that such as pen raising used in the UK . . . how this practice had developed and why, . . . what big companies in the US were doing this . . . about the weird milk diet, filled with antibiotics to keep the calves borderline anemic and alive . . . [that they] were kept in darkness and with minimal human contact to keep them quiet . . . about the health risks to the humans consuming such animals fed such an unnatural diet. We found a researcher at Tufts Medical School examining the human health risks of antibiotics in meat consumed. We covered every angle.”²⁰³ “We explored and honed the theory of: if the consumer of Provimi veal had knowledge of how the calves were raised and about the anti-biotics in the diet fed them that this would be the kind of significant fact that would be important to a consumer in her decision to purchase that meat or not”²⁰⁴

They decided to proceed on two basic theories: that the intensive confinement violated state anti-cruelty laws and that the sale of “tainted” meat from anemic calves violated consumer protection laws.²⁰⁵ The chapter members divided up the research. Sarah Luick was assigned to research the Massachusetts anti-cruelty laws; Steve Wise focused on the federal law issues and secured information from Tufts Medical School researchers on the dangers of antibiotics in the human diet.²⁰⁶ Several members researched Massachusetts consumer protection law and regulations to determine if ALDF could use them to argue that the producers were required to add labeling to indicate that the calves were fed an iron deficient diet and raised in conditions that violated the anti-cruelty law.²⁰⁷ They spent many hours trying to determine who would have standing to sue.²⁰⁸ They subscribed to “Vealer USA” magazine.²⁰⁹ Since all of them had full-time jobs, the work proceeded slowly, but this work was food for the soul. They could viscerally feel the suffering of the calves, and it was energizing to care deeply about the outcome of the case. If they could establish precedent that this practice was illegal, they would accomplish something important: a major blow to an abusive practice that could have ripple effects in other states. Finally, they had drafted pleadings for a highly innovative case, secured the approval of the national ALDF, and were ready to file their lawsuit. Recognizing the educational opportunity, their preparation included alerting local activists, who organized

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. Interview with Wise, *supra* note 149.

209. Interview with Luick, *supra* note 177.

demonstrations and protests at restaurants that served milk-fed veal. Sarah Luick recalls “that we organized the local press to cover our filing of the case and got amazingly great publicity”²¹⁰ The Massachusetts SPCA allowed them to take their photo with a veal calf: “[T]ouching that calf was really emotional for me,” Sarah says. “This experience was the conclusion of any more meat or poultry eating for me and fish was given up for good shortly after that.”²¹¹

In their complaint, they sought injunctive relief to bar Provimi Corporation, the originator of milk- (or special-) fed veal, from selling the meat of special-fed veal calves, because, they alleged, the total confinement of calves violated the anti-cruelty laws of Massachusetts, and the meat lacked iron and was therefore tainted and unhealthy.²¹² Second, they sought an injunction requiring any seller of special-fed veal in Massachusetts to display on the package a truthful explanation of how the calves were raised, so that consumers would know what they were buying.²¹³ After all of their efforts, the result was disappointing. The trial judge held that the state law was preempted by a comprehensive federal and state scheme regulating labeling, packaging and marketing of meat.²¹⁴ While the court acknowledged that “the ALDF does not, in the strict sense, try to enforce Massachusetts’ criminal anti-cruelty statutes,”²¹⁵ it implied that we were trying to do an end run around the cruelty laws and that our effort was “misdirected.”²¹⁶ It suggested that if ALDF had indeed, uncovered cruelty, it should urge the appropriate public officials to take action.²¹⁷ The court of appeals upheld the decision.²¹⁸ Of course, the “Catch-22” was that, had public officials been willing to prosecute for cruelty, ALDF would not have been put in the position of resorting to filing this lawsuit. The lawsuit was a direct response to the failure by public officials to enforce the anti-cruelty laws to protect farmed animals. It has been credited as having been “at the forefront of a series of campaigns attacking the treatment of veal calves raised to produce ‘milk-fed veal.’”²¹⁹ The approach of using consumer protection laws to challenge practices that harm animals was a sound one; it has been refined in subsequent litigation and has met with varying degrees of success.²²⁰

210. *Id.*

211. *Id.*

212. *Provimi Veal*, 626 F. Supp. at 278-79.

213. *Id.*

214. *Id.* at 281.

215. *Id.* at 280.

216. *Id.* at 281.

217. *Id.* at 281.

218. *Animal Legal Defense Fund Boston, Inc. v. Provimi Veal Corp.*, 802 F.2d 440 (1st Cir. 1986).

219. WAISMAN, FRASCH, & WAGMAN, *supra* note 4, at 19.

220. See Carter Dillard, *False Advertising, Animals, and Ethical Consumption*, 10 ANIMAL L. 25 (2004); Donna Mo, Note, *Unhappy Cows and Unfair Competition: Using Unfair Competition Laws to Fight Farm Animal Abuse*, 52 UCLA L. REV. 1313, 1348-50 (2005).

The *Provimi* case took its toll on the Boston chapter; the members were exhausted by the demands of the litigation process.²²¹

The experience of doing that important *Provimi* case showed us that really this was not work to do on the sidelines I think we all realized that doing such work was not something you could too easily fit into your regular jobs. We disbanded in terms of meetings soon after the *Provimi* case We had folks who'd come to our well advertised meetings. But, in the long run, none seemed to want to stay with the work. No clear paths to legal victories, learning about and seeing the hard realities of industrially used animals, etc., and lots of hands on work proved too much for those at least interested in the concept of animal law and the plight of animals.²²²

By this time, both Steven Wise and Sarah Luick had joined the national board of directors of ALDF, and while some chapters were active and others were forming,²²³ the focus of the leaders turned from building the chapters to building the national organization and its ability to pursue litigation.²²⁴

XVIII. Challenging the Leghold Trap

Directly attacking a form of animal abuse or exploitation in the hope of putting a halt to the practice has been an ongoing theme in animal law. It was attempted in another early lawsuit, *Animal Legal Defense Fund v. Department of Environmental Conservation of the State of New York (ALDF v. DEC)*.²²⁵ The architect of that lawsuit was Jolene Marion, a New York attorney who was passionate about many things, including her hatred of the steel-jawed leghold trap and her disdain for the New York Department of Environmental Conservation.²²⁶ In 1971, I had met Jolene at the City University of New York, where we both attended college and ran an on-campus shelter for abandoned cats. After Jolene graduated in 1972 and began law school, we lost touch. By 1980, Jolene had

221. Interview with Luick, *supra* note 177.

222. *Id.*

223. See, e.g., Minutes of Annual Board Meeting, Att'ys for Animal Rights (Apr. 10, 1983) (on file with author); Minutes of the Annual Membership Meeting, Animal Legal Defense Fund (Oct. 21, 1984) (on file with author) ("The Animal Legal Defense Fund now has 140 members and two new chapters, in Minneapolis/St. Paul and Chicago."). In 1987, another chapter formed in Seattle, Washington. Letter from Steve Ann Chambers to author (January 5, 1987) (on file with author).

224. The San Francisco chapter of ALDF experienced a similar fate, as my attention turned increasingly to working at the national level.

225. No. 6670/85 (N.Y. Sup. Ct. Dec. 6, 1985).

226. See Jolene R. Marion, *Whose Wildlife Is It Anyway? How New York's Fish and Game Statutes, Regulations, and Policies Endanger the Environment and Have Disenfranchised the Majority of the Electorate*, 4 PACE ENV'T L. REV. 401 (1987).

structured her private practice so that she was handling mainly cases related to animals,²²⁷ and she had founded the Lawyers Committee for the Enforcement of Animal Protection Laws, based in New York City.²²⁸ Our mutual interest in animal rights law brought us back into contact.²²⁹ Within the next few years, Jolene had joined the national AFAR Board, and the Lawyers Committee became AFAR's New York chapter. At the start of 1985, she became AFAR's second staff attorney.²³⁰

That same year, assisted by members of the Lawyers Committee for the Enforcement of Animal Protection Laws, Jolene filed *ALDF v. DEC*,²³¹ launching a direct attack upon the use of the leghold traps. She amassed thirty-eight plaintiffs, including ALDF, PETA, the American Society for the Prevention of Cruelty to Animals (ASPCA), Humane Society of the United States, New York State Humane Association, environmental organizations, including Rockland Audubon Society and West Branch Conservation Association, the Suffern Historic Hikers, who didn't want to view trapped animals or risk being trapped themselves, fifteen veterinarians who had treated dogs and cats caught in leghold traps, and six individuals whose dogs or cats had been caught in traps, some set illegally on the owners' land.²³² She filed affidavits from twenty-three veterinarians, who testified that the leghold trap is a cruel device.²³³ Her lead affiant was Dr. George Whitney, a veterinarian and former trapper, who described in vivid detail what happens to an animal from the moment the trap jaws shut until the moment of death.²³⁴ She asked the court to declare that the leghold trap violates New York's anti-cruelty law²³⁵ and to declare that the use of leghold traps is a public nuisance, and she sought an injunction stopping the Department of Environmental Conservation from permitting the use of the leghold trap in New York State.²³⁶ A coalition of fur and trapping groups, including the American Fur Industry, the National Trappers Association, Woodstream Corporation, and The Wildlife Legislative Fund of America, intervened to support the defendants and defend the use of the trap.²³⁷ Jolene treated the case as a forum in which to expose the underlying cruelty inflicted

227. Letter from author to Joan Cunningham (Nov. 17, 1980) (on file with author).

228. Personal recollection of author.

229. Letters from Jolene Marion to author (Sept. 24, 1978 & Oct. 27, 1978) (on file with author).

230. Minutes of Regular Board Meeting at 1, Animal Legal Defense Fund (Oct. 12, 1985) (on file with author).

231. Complaint, *ALDF v. DEC*, No. 6670/85 (N.Y. Sup. Ct. filed Oct. 8, 1985).

232. *Id.*

233. Affidavits, *ALDF v. DEC*, No. 6670/85 (N.Y. Sup. Ct. filed Oct. 8, 1985).

234. *Id.*

235. N.Y. AGRIC. & MKTS. LAW § 353.

236. Complaint at 21-22, *ALDF v. DEC*, No. 6670/85.

237. *Trapping Forces United to Combat NY Lawsuit*, FUR-FISH-GAME, Jan. 1986, at 52.

upon wildlife by leghold traps.²³⁸ It was an ambitious endeavor with a discouraging outcome.

In deciding against the plaintiffs, the court narrowly construed New York's law, but the trial judge was gracious: "If this court could substitute its own personal feelings and emotions in place of the law and legal precedent, we could end this opinion here with a decision favoring the protection of the animals."²³⁹ But, he noted that New York's Environmental Conservation Law allows trapping of wildlife with certain specified restrictions.²⁴⁰ Therefore, he concluded, the state legislature had intended to authorize the use of leghold traps, except as specifically prohibited.²⁴¹ The legislature, by failing to limit or deny the use of traps, had acknowledged that their use did not violate cruelty laws.²⁴² "[C]ourts must follow legal precedent and leave to other branches of government the decision as to which of the competing interests will prevail. The issues here are important ones but the plaintiffs if they are to prevail must convince the legislative and executive branches of government of the rightness of the cause."²⁴³ As in the *Provimi* case, the court was telling us to go elsewhere. The decision was affirmed on appeal,²⁴⁴ and Jolene was sorely disappointed.

These early cases show our passion, as well as our naivety about how the legal system works to protect the status quo. It took the repeated sound of doors slamming in our faces to learn the sad fact that one lawsuit rarely ever changes a long-term abuse that permeates our society. However, as we also learned, that lawsuit could be used as part of an ongoing campaign to challenge such a particular form of animal abuse. The continuing legislative and litigation effort to ban the use of leghold traps in the United States has met with uneven success in the years since this effort.²⁴⁵

XIX. Stopping Hot Iron Face Branding of Dairy Cows

Each of the cases taken by the early attorneys was something of an experiment. We had failed to convince a court to allow civil litigants to gain

238. See, e.g., Jolene Marion, William J. Thomashower, & Laura M. Mattera, Letter to the Editor, *Most Animals Trapped for Fur Coats Die in Pain*, N.Y. TIMES, Nov. 13, 1985, at A26; handwritten note from Jolene Marion to author (on file with author) ("They cut 1/2 the letter, but got the best part. Neat, huh?").

239. *ALDF v. DEC*, No. 6670/85, slip op. at 3.

240. *Id.* at 3-5.

241. *Id.* at 5.

242. *Id.*

243. *Id.* at 3.

244. *ALDF v. DEC*, 506 N.Y.S.2d 425 (App. Div. 1986).

245. See Dena M. Jones & Sheila Hughes Rodriguez, *Restricting the Use of Animal Traps in the United States: An Overview of Laws and Strategies*, 9 ANIMAL L. 135 (2003); see also Emilie Clermont, *2003 Legislative Review*, 10 ANIMAL L. 363, 364 (2004).

declaratory relief under criminal anti-cruelty law in *Provimi* and *DEC*, but continued to believe that, with the right set of facts, it could be done. That set of facts presented itself in *Humane Society of Rochester & Monroe County v. Lyng*, a 1986 case in which the plaintiffs were able to halt the hot iron face branding of dairy cows.²⁴⁶ It also marked an unusual legal collaboration involving ALDF Board and staff scattered throughout the United States working together on an emergency basis.²⁴⁷

Although the U.S. Department of Agriculture had previously announced a bail-out program for the dairy industry, it later mandated that the cows be branded on their faces²⁴⁸ in order to ensure that dairy farmers didn't "recycle" their cows back into production.²⁴⁹ Dairy farmers were not accustomed to branding cows and were distressed at the obvious pain that this would cause.²⁵⁰ We had heard about the hot iron branding, but were unsure whether we could take effective action and how we would get standing. Peter Lovenheim recalls discussing the issue with ALDF colleagues and seeing, upon his return to Rochester, a letter to the editor in the local newspaper from a farmer who hated the fact that the federal government was making him do the hot iron face branding to his cows.²⁵¹ Peter thought this farmer might have standing. He called the local humane society and asked to speak to their general counsel. Their counsel, Henry Dutcher, was a partner in a small, local firm. Peter explained his idea, and Dutcher, a colorful older fellow, sensed the potential. He called in Joe Gordon, an associate, and told him to pursue the case if interested. "Joe was doing run of the mill legal work, and this case recharged his batteries. We got started immediately, and for the next two weeks, we practically lived together in that office."²⁵² Peter and Joe began looking for farmers who would serve as plaintiffs. The farmer who had written the letter to the editor didn't want to be a plaintiff, but they found another farmer, almost at the Pennsylvania border, who was willing to get involved. "I remember driving to his farm, on very little sleep, to get an affidavit signed, and driving back to Rochester around midnight."²⁵³

The rest of us joined the search; Jolene and I dropped everything and combed the Northeast and Mid-West dairy communities. Roger Galvin and Valerie Stanley drafted a complaint to file in the D.C. area, as Peter and Joe drafted a complaint to file in Rochester. Peter and Joe got to court first and were

246. *Humane Soc'y of Rochester & Monroe County v. Lyng*, 633 F. Supp. 480 (W.D.N.Y. 1986).

247. *Straight from the Horse's Mouth: The Cow Branding Case*, ANIMAL LEGAL DEFENSE FUND NEWSL. (ALDF, San Francisco, Cal.), Summer 1986, at 1, 2, 7 [hereinafter *Cow Branding*].

248. *Id.*

249. Keith Schneider, *U.S. Cows to Be Slaughtered to Cut Surplus Milk Output*, N.Y. TIMES, Mar. 29, 1986, at A15.

250. *Cow Branding*, *supra* note 247, at 1.

251. Telephone Interview with Peter Lovenheim, Attorney and Former ALDF Board Member (Nov. 2, 2007) [hereinafter Interview with Lovenheim].

252. *Id.*

253. *Id.*

granted a temporary restraining order.²⁵⁴ Everyone's focus shifted to the Rochester lawsuit, and we all worked non-stop for the next several weeks, assisting Peter and Joe to prepare for the preliminary injunction hearing. John Kullberg, then President of the ASPCA, testified.²⁵⁵ Two animal agriculture professors, Dr. Short of Cornell and Dr. Ted Friend of Texas A&M, testified about how painful hot iron face branding would be for the cows.²⁵⁶ The pace of the preparation was mind-numbing, and we had no idea how it would turn out. "The USDA had Justice Department attorneys handling the defense for them, so we felt like David and Goliath."²⁵⁷ Peter and Joe did a lot of the legwork, such as organizing witnesses and working on the brief. Henry Dutcher handled the oral argument.²⁵⁸ Peter Lovenheim remembered:

The day after the hearing had ended, we got called to the court. We were told that the judge had made his decision, and copies of the decision would be available shortly. The judge looked at us and said, "Some school children had sent me a birthday cake with a cow face on it. I hope you guys are right because I've lost a lot of sleep over this." . . . It was a great opinion. I used the historical argument that I used in *Iroquois Brands* to demonstrate that cruelty to animals is a significant ethical issue in our culture. I was pleased to see the judge state that the government had failed to consider more humane alternatives; I felt he was saying that the government had an obligation to consider humaneness."²⁵⁹

In *Rochester Humane*, the court was willing to declare that a federal governmental agency, the U.S. Department of Agriculture, was forcing local farmers to risk violating state anti-cruelty laws.²⁶⁰ As a result of this victory, the cows would not be face branded. We were elated. The case received significant press coverage, including coverage in Time Magazine, a piece done on National Public Radio, and coverage by Peter Jennings on the evening television news.²⁶¹

XX. Shareholders Stand Up for Animals

A few years earlier, Peter Lovenheim had developed a completely different and highly innovative approach that turned out to be another

254. *Id.*; see also *Cow Branding*, *supra* note 247, at 1-2.

255. *Cow Branding*, *supra* note 247, at 7.

256. *Id.*

257. Interview with Lovenheim, *supra* note 251.

258. *Id.*

259. *Id.*

260. *Humane Soc'y of Rochester & Monroe County v. Lyng*, 633 F. Supp. 480 (W.D.N.Y. 1986).

261. Peter Lovenheim recalled that the hot iron face branding case was the second story of the evening, following the bombing of Libya. Interview with Lovenheim, *supra* note 251.

success.²⁶² As a hobby, Peter, who then served as Government Relations Counsel for the Humane Society of the United States (HSUS), enjoyed investing in stock and decided to buy shares of Iroquois Brands, Ltd., a company that carried health and natural foods and vitamins.²⁶³ A few months after purchasing the stock, Peter received the company's annual report and learned that Iroquois Brands also marketed pâté de foie gras (goose liver pâté) imported from France.²⁶⁴ From his work on farmed animal issues at HSUS, he was aware that goose liver pâté was a highly controversial food product, produced by painfully force feeding geese so that their livers enlarged.²⁶⁵ He also remembered sitting in his Corporations class at Cornell Law School, reading *Medical Committee for Human Rights v. SEC*, a case about shareholders bringing a resolution to Dow Chemical asking the company to cease selling napalm unless it received reasonable assurance that the napalm would not be used against humans.²⁶⁶ That decision upheld the plaintiffs' right to bring a shareholder resolution on an important moral issue.²⁶⁷ He wanted to test the waters and apply the shareholder resolution idea to the exploitation of animals.

Peter sent a letter to the president of Iroquois Brands, stating his concerns about the humaneness of force-feeding geese and asking the company to discontinue marketing the product or, in the alternative, to form a committee to study the issue.²⁶⁸ He received a polite response, advising him that Iroquois Brands was not interested in the issue.²⁶⁹ So, he researched how to draft a shareholder proposal that would be included in the Iroquois proxy statement. In his proposal,²⁷⁰ and later in a signed affidavit, he described the force-feeding process, which, according to French agribusiness journals, begins when the geese are four months old.²⁷¹ The mechanized approach places the goose in a metal brace, so that her body and wings are immobilized and her neck stretched; a

262. See Thomas A. Decapo, Note, *Challenging Objectionable Animal Treatment with the Shareholder Proxy Proposal Rule*, 1988 U. ILL. L. REV. 119 (1988).

263. Interview with Lovenheim, *supra* note 251; Affidavit of Peter Lovenheim at 1-2, *Lovenheim v. Iroquois Brands, Ltd.*, 618 F. Supp. 554 (D.D.C. 1985) (No. 85-0734) [hereinafter *Lovenheim Affidavit*].

264. *Lovenheim Affidavit*, *supra* note 263, at 2.

265. *Id.* at 2-3.

266. *Med. Comm. for Human Rts. v. S.E.C.*, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 560 (1972).

267. *Id.*

268. Interview with Lovenheim, *supra* note 251.

269. *Id.*

270. *Lovenheim Affidavit*, *supra* note 263, at 4; Shareholder Proposal Submitted to Iroquois Brands, Ltd., by Peter C. Lovenheim, Esq. (Dec. 1982) (on file with author) [hereinafter *Shareholder Proposal*].

271. *Lovenheim Affidavit*, *supra* note 263, at 3; Shareholder Proposal, *supra* note 270, at 2. See also U.N. FOOD & AGRIC. ORG., FAO ANIMAL PRODUCTION AND HEALTH PAPER 154: GOOSE PRODUCTION 59-62 (Roger Buckland & Gerard Guy eds., 2002), available at <http://www.fao.org/docrep/005/Y4359E/y4359e00.htm> [hereinafter *GOOSE PRODUCTION*].

funnel is inserted 10-12 inches into her throat; and 400 grams of mash are pumped into her stomach.²⁷² An elastic band placed around the goose's neck prevents the animal from regurgitating the mash.²⁷³ The manual approach involves a handler who inserts the funnel and uses a stick to force the mash into the goose's stomach.²⁷⁴ This force-feeding is done two to four times daily for twenty-eight days, and then the goose is slaughtered and her liver made into pâté.²⁷⁵ This process causes her liver to enlarge from about 150 to about 900 grams.²⁷⁶

In researching shareholder proposals, Peter learned that he could not ask Iroquois Brands to discontinue marketing a product. However, he could and did ask the company to include in its proxy statement, sent to all shareholders prior to the shareholder meeting, his proposal to "form a committee to study the methods by which its French supplier produces pâté de foie gras, and report to the shareholders its findings and opinions, based on expert consultation, on whether this production method causes undue distress, pain or suffering to the animals involved and, if so, whether further distribution of this product should be discontinued until a more humane production method is developed."²⁷⁷ For two years in a row, Peter submitted his shareholder proposal to Iroquois Brands, pursuant to SEC Rule 14a-8.²⁷⁸ Both times, Iroquois refused to include the proposal in its proxy statement. It relied on an exemption to Rule 14a-8, to wit, Peter's "proposal relate[d] to operations which account for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and [was] not otherwise significantly related to the issuer's business."²⁷⁹ Peter sent the SEC a twenty page memorandum explaining why force-feeding of geese is "significantly related to Iroquois' business, including that 'it concerns the significant ethical issue of cruelty to animals which is directly raised by Iroquois' importing and marketing a food product that experts say results from cruelty to animals and which if done in this country would violate American humane laws.'"²⁸⁰ After the second refusal and no SEC action, Peter filed suit for declaratory and injunctive relief in the U.S. District Court, asking the court to bar Iroquois Brands from excluding the proposal from the proxy materials.²⁸¹ He had found an attorney who specialized in Securities and Exchange Commission matters, Jonathan Eisenberg, who agreed to handle the case pro bono, with Peter

272. GOOSE PRODUCTION, *supra* note 271.
273. *Id.*
274. *Id.*
275. Shareholder Proposal, *supra* note 270, at 2.
276. *Id.*
277. *Id.* at 1.
278. 17 C.F.R. § 240.14a-8
279. Complaint at 6, *Lovenheim v. Iroquois Brands, Ltd.*, No. 85-0734 (D.C.D.C. filed Mar. 1, 1985).
280. *Id.* at 7.
281. *Id.* at 10.

assisting on the brief writing.²⁸² In a four page segment of the memorandum in support of their motion for preliminary injunction, Peter argued the responsibility of Iroquois Brands to address the ethical and social issues related to cruelty to animals,²⁸³ citing the Seven Laws of Noah in the Bible,²⁸⁴ the earliest animal protection law in the U.S.,²⁸⁵ and the long history of federal and state laws designed to protect animals from suffering.²⁸⁶

At the oral argument on the plaintiff's motion for a preliminary injunction, Eisenberg postured himself like a goose waiting to be force-fed.²⁸⁷ After the hearing, he told Peter: "I can't believe I did that."²⁸⁸ In March 1985, Eisenberg called Peter to tell him that he had just received a call from the district court clerk asking for some authority that a goose is an animal; Eisenberg thought that was a good sign.²⁸⁹ A few hours later, he called back to say: "We won." The district court held that "in light of the ethical and social significance of plaintiff's proposal"²⁹⁰ Peter Lovenheim was likely to prevail on the merits.²⁹¹ It was a strongly worded decision, and it referenced²⁹² Peter's argument that "humane treatment of animals as an ethical principle is among the moral foundations of Western culture."²⁹³

Following the victory, Peter went to the Iroquois Brands shareholder meeting, which was held a few weeks later, and presented the proposal, and, of course, it was roundly defeated.²⁹⁴ But, the point had been made, and the case was covered by mainstream press, including *The Washington Post* and *Wall Street Journal*.²⁹⁵ The media talked about the case, and equally important, described the force-feeding method in detail.²⁹⁶ What could have been treated as a light issue

282. Interview with Lovenheim, *supra* note 251.

283. Memorandum in Support of Plaintiff's Motion for Preliminary Injunction at 24-27, No. 85-0734 (D.C. filed Mar. 1, 1985) [hereinafter Iroquois Brands Memo].

284. *Id.* at 24 ("In the Bible, an injunction for mankind to treat animals humanely is found among the ancient Seven Laws of Noah, which predate even the Ten Commandments (Gen. 9:4).").

285. *Id.* ("Among the first laws passed by the Massachusetts Bay Colony in 1641 was one for the protection 'of brutes.'" (citing EMILY STEWART LEAVITT, ANIMALS AND THEIR LEGAL RIGHTS 11 (1978))).

286. *Id.* at 25-26.

287. Interview with Lovenheim, *supra* note 251.

288. *Id.*

289. *Id.*

290. Lovenheim v. Iroquois Brands, Ltd., 618 F. Supp. 554, 561 (D.C.D.C. 1985).

291. *Id.*

292. *Id.* at 559 n.8.

293. Iroquois Brands Memo, *supra* note 282, at 24.

294. Interview with Lovenheim, *supra* note 251.

295. Jerry Knight, *Force-Feeding Moral Issues onto Corporate Agendas*, WASH. POST, Mar. 11, 1985, at Washington Business 1; *Iroquois Brands May Leave Goose-Liver Pate Business*, WALL ST. J., May 15, 1985.

296. *Id.*

was viewed seriously in the context of a shareholder proposal.²⁹⁷ Peter Lovenheim was elated: "I knew if I could get this on the proxy to Iroquois Brands' shareholders, I would be reaching a large group of people who are not the usual constituents of animal protection and there would be an opportunity to do a lot of educating. I felt my case was strong because of that Dow Chemical case. Also, I wanted it to be established that animal protection was an important social, ethical and moral issue and I felt that I could establish that. And, nobody had done this before."²⁹⁸

Peter Lovenheim realized that he had created a vehicle that could become an ongoing campaign. First, he approached Ingrid Newkirk of PETA to suggest the development of an ongoing program to bring animal protection issues to corporations through shareholder proposals.²⁹⁹ It was a new approach for PETA, and Newkirk was very interested.³⁰⁰ Peter worked with PETA for several years, drafting resolutions, dealing with the corporations and the SEC. PETA has since filed shareholder proposals with dozens of pharmaceutical and cosmetic companies, and it is a campaign that PETA actively conducts as of this writing.³⁰¹ Second, Peter brought the idea to Henry Spira, whom he had met when he worked on farmed animal issues at HSUS, and to John Kullberg of the American Society for the Prevention of Cruelty to Animals. Spira wanted to try the shareholder proposal technique with the fast food industry. He had been trying to engage them in negotiation and wanted to add pressure. Together, they devised a proposal to McDonald's to ask them to "form a committee to assess the effect of 'factory farming' on the animals whose meat and eggs McDonald's sells by investigating the prevailing methods by which these animals are raised, and report back to the shareholders its findings and recommendations as to how, if necessary, the company can encourage development of more humane ways of raising these animals."³⁰² Peter remembers,

Once we got the SEC to order the company to include our proposal in their proxy, then Henry would negotiate with the company; he would offer to withdraw the proposal if they would agree to issue humane standards. The result was that, for the first time, McDonald's formed a committee and issued humane standards for the raising of the animals they sold as meat.³⁰³

In 1993, Peter assisted Spira and Nannette Coco with a shareholder proposal that set out three principles to help assure humane treatment of farmed

297. Interview with Lovenheim, *supra* note 251.

298. *Id.*

299. *Id.*

300. *Id.*

301. See PETA, Give the Animals Five: Shareholder Campaign, <http://www.stopanimaltests.com/feat/gta/shareholder.asp> (lasted visited June 16, 2008).

302. Letter from Peter Lovenheim, Att'y for the ASPCA, to Cecilia D. Blye, Office of Chief Counsel, Div. of Corp. Fin., SEC (Jan. 24, 1989) (on file with author).

303. Interview with Lovenheim, *supra* note 251.

animals: “animals should be housed, fed, and transported in a practical manner least restrictive of their physical and behavioral needs;” “animals should be afforded individual veterinary care when needed;” and “methods used [for slaughter] should be designed to produce a quick and humane death.”³⁰⁴ They asked the McDonald’s Board of Directors to “endorse these principles and encourage the company’s suppliers” to comply with the principles.³⁰⁵ While often the activists provided the direction for a campaign to us, in this instance it was a creative lawyer who provided a new type of campaign for the activists.

XXI. Twelve Monkeys and One Rat Were Arrested

The 1980s were the heyday of animal rights protests and demonstrations, most commonly focused on the use of animals in research, hunting, trapping, and fur. In the larger cities, hundreds and, at times, thousands of animal activists would demonstrate. Frequently, activists would engage in civil disobedience and risk getting arrested. They looked to the attorneys working in the animal law field to provide them with free legal representation. Howard Lichtig, an experienced California criminal defense attorney,³⁰⁶ enjoyed representing animal rights demonstrators, who were very different from the average defendant he represented.³⁰⁷ He understood that these clients were highly principled and committed to using the legal system in order to publicize the plight of animals.³⁰⁸ “They’re there for you to do something for the animals.”³⁰⁹ He also liked having the opportunity to engage in creative uses of jury nullification and the defense of necessity, both of which were almost always unsuccessful.³¹⁰ Howard led a small group of us in handling numerous animal rights demonstration cases in

304. Shareholder Proposal submitted to McDonald’s Corporation by Henry Spira and Nannette E. Coco (Dec. 13, 1993) (on file with author).

305. *Id.*; Interview with Peter Lovenheim, *supra* note 251.

306. Lichtig, who also served on the ALDF Board of Directors, later moved to Port Orford, Oregon, where he continued his criminal law practice, as well as his representation of animal rights activists, until his untimely death.

307. Howard Lichtig, Attorney, Remarks at Annual Animal Law Conference, Lewis & Clark Law School (Oct. 26, 2003) [hereinafter Lichtig Remarks]. Lichtig noted that in most criminal prosecutions, he would not want to put his client on the witness stand to testify. Not so with animal activist defendants, who generally did not have criminal records (other than for civil disobedience activities), were highly articulate, and made good witnesses for their defense.

308. *Id.*

309. *Id.*

310. *Id.* In essence, the defense of necessity argument is that the defendant had to commit a crime in order to avoid a greater evil. *See, e.g.,* Defendants’ Trial Brief in Support of Their Right to Assert the Defense of Necessity at 4, *State v. Winsted*, No. B8653918 (Santa Clara County, Cal., Mun. Ct. Nov. 3, 1986) (“Defendants herein believe that their conduct was necessary to prevent the massive destruction of hundreds of thousands of animals by Stanford University in expensive, meaningless and unnecessarily painful experiments.”).

Northern California.³¹¹ In one of the more unusual cases, seven activists protesting the building of a laboratory that would conduct research on animals occupied a 160-foot-high crane being used for the construction of the lab at the University of California, Berkeley. The activists stayed up on the crane for a week, and our initial meetings with them were held while they were perched 160 feet above the ground. Our only means of communicating with these clients was to climb out onto the roof of a nearby building and speak to them via walkie-talkies.³¹² Howard and I assumed that our conversations were being listened to by University police and authorities, which necessitated careful and limited discussions.³¹³ It was a nerve-wracking week, and all parties were concerned for the safety of the activists. Additionally, the University was concerned about the potential for liability if any of the activists were injured, given that the activists were young, poor, and judgment-proof.³¹⁴ The crane occupation drew media attention to the issue of the use of animals in invasive and painful research,³¹⁵ cost the University an estimated \$200,000 in construction delays,³¹⁶ and resulted in the activists being charged with criminal trespass, unlawful lodging in a public place, and property damage, all misdemeanors. They faced a maximum sentence of sixteen months in jail and a \$5,000 fine. The activists pled no contest and were sentenced to perform ten days of community service.³¹⁷ They were placed on probation for two years, during which time they could not engage in illegal activities, especially climbing up cranes, on the Berkeley campus.³¹⁸

We represented another group of protesters who occupied the fifth floor of Jordan Hall at Stanford University in order to protest the use of animals in research going on at that site. While most of the activists who were arrested pled out, a small group, all middle-aged women, decided to face trial. The prosecutors “made the mistake of charging a trespass with intent to disrupt.”³¹⁹ The resulting trial lasted three weeks and “we were able to put the clients on the stand to talk

311. See, e.g., Declaration of Howard S. Lichtig, *State v. Langston*, No. B8649198 (Santa Clara County, Cal., Mun. Ct. Oct. 22, 1986); Defendants’ Trial Brief, *State v. Winsted*, No. B8653918; Proposed Exception Order, *Regents of the Univ. of Cal. v. Coalition Against Militarism, Animal Abuse and Environmental Hazards*, No. 648283-7 (Cal. Super. Ct. May 18, 1989); Notice of and Motion to Modify Probation, *State v. Dessaux*, No. 123980 (Alameda County, Cal., Mun. Ct. Jan. 23, 1990).

312. See Conditional Settlement Agreement and General Release, *Regents of the Univ. of Cal. v. Coalition Against Militarism, Animal Abuse and Environmental Hazards*, No. 648283-7 (Cal. Super. Ct. 1989). Cell phones were not yet in use.

313. See *id.*

314. Lichtig Remarks, *supra* note 307.

315. Bruce Hilton, *Bioethics: How a Crane Makes Us Think About Animals*, S.F. CHRON., Feb. 25, 1989, at D2.

316. Marie Spark, *Protesters Hit with Community Service*, DAILY CALIFORNIAN (U.C. Berkeley, Cal.), Sept. 26, 1989, at 2.

317. *Id.*

318. *Id.*; see also Lichtig Remarks, *supra* note 307.

319. Lichtig Remarks, *supra* note 307.

about their intent, and how they formed the intent and their belief in animals. So they got to talk about where they got their education about animal issues and why they were opposed to experimentation.”³²⁰ Some of the defendants testified about their anger over the use of federal funds to addict animals to drugs in experiments, while social services for human drug addicts, including their family members and friends, were being cut.³²¹ In some instances, their testimony moved the jurors, the judge, and the attorneys to tears.³²²

Roger Galvin and Valerie Stanley regularly represented large groups of activists arrested in the Washington, D.C. area.³²³ One of the most dramatic demonstrations occurred in 1985: a four day sit-in at an administrative office at the National Institutes of Health, intended as a protest of the continued funding of the University of Pennsylvania’s Head Injury Laboratory.³²⁴ PETA had obtained video footage showing extreme abuse of the baboons used at that facility, inept and unsterile surgical procedures, and failure to provide adequate anesthesia, among other serious deficiencies. The sit-in achieved its goals: federal funding of the laboratory was suspended pending an NIH investigation.³²⁵ Representation of activists engaging in civil disobedience became a standard part of our docket, as per the report included in ALDF’s Summer 1986 newsletter:

On August 5, PETA organized a protest of the continued imprisonment of the Silver Spring Monkeys and their transfer to the Delta Regional Primate Facility. Fifteen people dressed themselves as monkeys to represent each of the primates still held, and various other protesters dressed as rats and mice. Thirteen protesters (twelve monkeys and one rat) were arrested, and booked, in uniform. Roger Galvin and Valerie Stanley negotiated the release of the protesters and settlement of the matter, utilizing a forfeiture of the collateral of \$50. No further criminal proceedings will be brought against the protesters.³²⁶

While the criminal defense cases supported the efforts of activists working to educate the public about animal abuse, there were drawbacks. The activists

320. *Id.*

321. Personal observation by the author during the trial.

322. Lichtig Remarks, *supra* note 307.

323. In this article, I touch on only a few of the many cases in which activists were arrested and animal rights lawyers provided representation. Another line of cases involved activists sued for libel, slander, or defamation as a result of engaging in activities to protect animals. See GEORGE PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* (1996).

324. Roger Galvin, Holly Hazard, Valerie Stanley, Gary Francione, and Esther Dukes represented the activists, presenting their demands and negotiating for food and blankets, use of bathrooms, and other necessities. The attorneys negotiated a settlement whereby none of the activists was prosecuted. *University of Pennsylvania Head Injury Lab: The Lawyer Connection*, ALDF NEWSL. (San Francisco, Cal.) Nov. 2, 1985, at 2-3.

325. *Id.*

326. *Legal Representation of Civil Disobedients*, ALDF NEWSL. (San Francisco, Cal.), Summer 1986, at 6.

were unfamiliar with our vision of creating a body of civil law that would offer protections and rights to animals, and the criminal work consumed resources—both time and money—that would otherwise have been focused on the civil litigation. Moreover, while as individual attorneys we could freely represent criminal defendants, we were increasingly uncomfortable with ALDF, as a legal organization, being perceived as aligning with acts of civil disobedience, to wit, breaking the law. We were particularly concerned about actions that threatened physical harm or property destruction. As the 1980s closed, we began to disassociate ALDF from criminal defense work, and seasoned criminal defense specialists, such as Howard Lichtig, Roger Galvin, Larry Weiss, and Phil Hirschkop, became the main sources to whom the activists turned.

XXII. Growing Pains

The late 1980s were a time of transition, as the animal law movement began to expand and mature. In 1987, we drafted our first “White Paper,” in order to encourage our own “big picture” thought process, provide general recommendations to staff about the direction that the agency would take, and “provide specific recommendations . . . with regard to each major category of animal problems”³²⁷ The final document was created by the Board for internal use only, but it marked a significant change in how the group was thinking about its work. The White Paper provided us with a blueprint of agreed-upon long- and short-term goals for farm animals, companion animals, wildlife, animals in laboratories, zoos, and circuses, and several other areas of focus. Several of the burning questions with which we had wrestled in the early years were resolving themselves. ALDF was moving toward the selection of cases in which it proactively developed the legal theory and sought out appropriate fact patterns, and moving away from the reactive stance of taking cases brought to it by animal rights activists. We were consciously selecting cases in which we could have a greater impact for a larger number of animals; in Holzer’s parlance: “focusing on wholesale instead of retail.”³²⁸ This was not without its cost. Jolene Marion ultimately left ALDF, citing her dissatisfaction with the shift away from dealing with the problems of individual companion animal guardians,³²⁹ who clearly needed legal representation and had no one else to turn to.

Some other earlier Board members, such as Laurence Kessenick, Marcelle Philpott-Bryant, and Nancy Jane Shestack, had left the ALDF Board and were no longer active in the governance of ALDF. Other attorneys—Steve Ann Chambers,

327. Summary of Executive Committee Meeting (June 6 & 13, 1987) (on file with author).

328. Interview with Holzer (2006), *supra* note 6.

329. Notes on Exec. Comm. Mtg. 1-2 (May 24, 1988) (on file with author).

Stephanie Nichols-Young, Katie Brophy, Richard Katz, and Ken Ross—joined the Board, bringing enormous energy and adding greatly to the effort. Roger Galvin, Valerie Stanley, and Holly Hazard had formed a private law firm to specialize in animal law, and ALDF began to use their legal services.³³⁰ When Jolene left ALDF, the New York office was closed and we entered into a retainer agreement with Galvin, Stanley & Hazard.³³¹ This also marked a shift into what we called “major impact litigation” with more of a focus on federal administrative agency work. The D.C. firm of Meyer & Glitzenstein, with attorneys experienced in environmental law and the Federal Advisory Committee Act, was now offering its services to the animal rights movement and provided another excellent resource for the various animal advocacy groups and animal activists.³³²

XXIII. Looking Back; Looking Forward

When asked to share the highlights of his early involvement with ALDF and animal law, David Favre replied:

[I]t seems like a slow dance of evolution from a group of activist attorneys distributed around the U.S. with equally diverse ideas about what was important to do for animals, into a professional staff and national Board with a shared vision of helping develop the jurisprudential concepts for animal rights. Some of the painful lessons we have learned along the way include:

- A. Passion for animals is not a substitute for quality legal work.
- B. We could not become a law firm for other animal rights groups for they did not and do not have a vision about how the legal system works or should work.
- C. The long term development of animal jurisprudence requires that you not take up every issue that comes to your door.
- D. That the general public is reluctant to help a legal organization by writing checks. The message of compassion and emotion is what triggers check writing, not jurisprudential development.
- E. A million dollars per year does not go as far as it seems like it ought to.
- F. Persistence and resources are required.³³³

330. Minutes of Regular Board Meeting 2, Animal Legal Defense Fund (Aug. 21, 1988) (on file with author).

331. Notes on Exec. Comm. Mtg., *supra* note 328.

332. Meyer, Glitzenstein & Crystal: About Us, <http://www.meyerglitz.com/aboutus> (last visited June 16, 2008).

333. Voiceless Law Talk, June 2005: David Favre, http://www.voiceless.org.au/Law/Special_Guest_Lawyers /June_2005%3A_David_Favre.html (last visited March 20, 2008).

Some years ago, I was speaking informally with Bill Curtiss, an attorney for EarthJustice, and he mentioned that he was grateful for how much they had learned, but wished they could have learned it sooner. Indeed. Those of us lucky enough to practice animal law understand, as few other lawyers do, what it feels like to throw your heart and soul into a lawsuit, in addition to your experience and intellect. When you win a case, you know that you have saved precious sentient beings from suffering or death. When you lose, you are painfully aware that the suffering will continue or that deaths will occur.

I have sometimes thought that, with the notable exception of Hank Holzer, we didn't consciously set out to create a new area of the law; we simply wanted to use our legal skills to help animals. It seemed like the *right* thing to do. And, in that first highly experimental decade, in which we were writing the rules and creating the processes, it was rather lonely. But, with time and experience, we began to develop a vision of what *could* be, both with regard to more successful litigation and in building a base of legal professionals who share our values and vision. As the 1980s came to a close, the field of animal law entered a new phase, with growth in animal law classes and student chapters of ALDF, an explosion of scholarly writing, and, most importantly, an influx of new blood: gifted and committed attorneys and law students to add to the ranks of the previously tiny core of practitioners. That, and the cases that defined and redefined animal law during this next period, will be the focus of Part II of this article.