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**A Brief History of Animal Law, Part II (1985 - 2011)**

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*This article traces the growth of the field of animal law from 1985 to the present. It tracks the effort by attorneys and law students in the United States and abroad to institutionalize animal law classes, scholarly conferences, animal law sections in state, local, and regional bar associations, as well as the American Bar Association. It provides a review of efforts to spearhead lawsuits, legislative enactments, initiatives, and other means to gain greater protections for animals. Section II of the article describes the development of an institutional structure in various sectors of the legal community. Section III presents a review of landmark lawsuits and legislation. The article concludes with a summary of the major lessons that have been learned.*

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## I. Introduction

The goal of this article is to provide insights and understanding of how the field of animal law has grown and developed. In the 1970s and long before anyone used the term “animal law,” a handful of lawyers began an experiment, consciously trying to use the American legal system to increase protections for animals. By the mid-to-late 1980s, the earliest practitioners were joined by a new crop of attorneys and law students interested in protecting animals. Approximately ten years ago, I noticed that this small community had evolved into something more. In addition to our litigation and other projects, we had institutionalized formal structures and systems, including the establishment of bar committees and sections, animal law classes and student groups, conferences, and outreach to legal professionals throughout and beyond the borders of the United States. Without fully acknowledging it, we had created a new field of the law -- animal law.

In a prior article,<sup>1</sup> I chronicled the beginnings of the animal law movement. In this article, I focus on the second wave of animal law advocacy, tracking progress, examples of innovation, and trends.<sup>2</sup> This second wave has been characterized not only by the lawsuits filed, but by the building of an infrastructure within the legal profession, so one can say with some certainty that animal law will be around long after its founders have been laid to rest. No one person can build a social movement. Animal law is the product of the unique and varied talents of many committed individuals and this article is dedicated to each of them.<sup>3</sup>

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\* Joyce Tischler is the Co-Founder and General Counsel of The Animal Legal Defense Fund. The Author wishes to thank Carter Dillard, Matthew Liebman, Jaclyn Leeds, and Katie Stephens for reviewing this article in draft and offering many helpful comments. Thank you, moreover, to all of my colleagues who allowed me to interview them; your stories and perspectives are what bring this article to life.

<sup>1</sup> See generally Joyce Tischler, *The History of Animal Law, Part I (1972-1987)*, 1 STAN. J. ANIMAL L. & POL'Y 1 (2008), which tracked the beginnings of animal law as a conscious effort by lawyers to bring cases that would protect animals from harm, how these lawyers met and were influenced by the surrounding animal rights movement, how they developed working relationships, and how they shaped their varied approaches to animal rights and protection litigation. The current article takes up where the first article left off.

<sup>2</sup> The use of the word “history” is not meant to mislead, but even at this early stage, a complete history of animal law would require a book. This article is not intended to be comprehensive or chronological. Rather, I offer anecdotes and vignettes, in the hope that the reader will experience the flavor of this new and expanding movement.

<sup>3</sup> I regret that there is not space to list each and every one of the attorneys, law students, law professors, lobbyists, prosecutors, judges, lawmakers, law enforcers, and others who contribute to what we now call the field of animal law. I can only provide a thumbnail sketch of this movement. So, I begin with an apology to anyone who is not named in this article and offer a “thank you” to each of you for your contributions.

## II. The Development of an Infrastructure for the Animal Law Movement

*“Mark these words . . . You will never out-perform your inner circle. If you want to achieve more, the first thing you should do is improve your inner circle.”*

Coach John Wooden

When the Animal Legal Defense Fund (ALDF)<sup>4</sup> was founded in 1979, approximately half a dozen attorneys and law students met monthly in San Francisco, to explore common ground and teach themselves about the state and federal laws intended to protect animals. As ALDF attracted additional legal professionals, chapters formed in a few cities.<sup>5</sup> It bears repeating that there were almost no animal law classes,<sup>6</sup> no casebooks, no law reviews, and no conferences, except for the annual ALDF conference that started in 1981. Thus, these chapters provided several vital cornerstones to the movement: the only organized source of education on animal law that was available; support and social networking opportunities to the individuals who joined them; and volunteer staff for some of the earliest programs and lawsuits filed on behalf of animals. By the late-1980s, as the leaders of the chapters turned their energies to building a national movement and handling an increasing load of lawsuits, the chapters lost momentum and were replaced by state and local bar association sections and committees.

### A. Bar Association Committees

The first such bar group was the Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York (Committee or N.Y.C. Bar Committee), founded in 1990.<sup>7</sup> It took a few years for the Committee to gain the trust of the Bar Association and attract a corps of members. By focusing on two functions,

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<sup>4</sup> Animal Legal Defense Fund was called Attorneys for Animal Rights from 1979 – 1984.

<sup>5</sup> The first “chapter” was formed by Marcelle Philpott-Bryant, an attorney in private practice in Los Angeles. Philpott-Bryant served on the first Board of Directors and as the President of Animal Legal Defense Fund (Attorneys for Animal Rights). Once a national board of directors was in place, the San Francisco group became a chapter. In the Minutes of Regular Meeting of the Board of Directors of the ALDF, dated October 12, 1985, references were made to chapters in Boston, Washington, D.C., New York City, and a chapter forming in Chicago.

<sup>6</sup> See Tischler, *supra* note 1, at 10 n.57. The first animal law course was taught only one time, in 1977, at Seton Hall Law School. A second course was introduced at Dickinson Law School in 1983, but it evolved over time to include other subject matter. A third course was started at Pace Law School by Jolene Marion in 1985.

<sup>7</sup> Telephone Interview with Jane Hoffman, President, Mayor’s Alliance for New York City Animals (Nov. 22, 2010) [hereinafter Interview with Hoffman]. Jane Hoffman was an associate at Simpson Thacher in Manhattan when she received a “cold call” from Jolene Marion, an animal protection attorney and former employee of ALDF. Marion “said ‘we need to start a committee at the New York City Bar and I want you to do it. It will be a lot easier if a lawyer from a major law firm does it.’ Once Jolene suggested it, it made perfect sense to get it started.” The founders included Jolene Marion, Jane Hoffman, Elinor Molbegott, Darryl Vernon, and Frances Carlisle. Carlisle had been a member of the original ALDF/AFAR group in San Francisco while she was a law student at UC Davis Law School.

building educational programs and commenting on proposed legislation, the Committee's accomplishments have been impressive. The Committee holds frequent conferences; but the fifth conference, held on September 25, 1999, created "a seminal moment for animal law."<sup>8</sup> Titled "The Legal Status of Nonhuman Animals," this conference brought together for the first time Professors Taimie Bryant, Anthony D'Amato, Helena Silverstein, Steven Wise, Nicholas Robinson, Thomas Kelch, Michael Radford, Clark Freshman, Jennifer Friesen, Robert Garner, David Favre, Peter Singer, Gary Francione, and William Reppy.<sup>9</sup> The panelists discussed the current legal structure governing the treatment of nonhuman animals, differing approaches taken in the United States and the United Kingdom, the panelists' views on to what extent the current legal system provides protections to animals, whether animals can be adequately protected as property, and the potential for change through legislation and litigation.<sup>10</sup>

The conference was held at the prestigious "House" of the New York City Bar Association, in a beautiful old room that fits a maximum of 250 people. Mariann Sullivan, one of the organizers of the event, described the atmosphere at the conference as "electric."<sup>11</sup> "The room was filled to capacity . . . people were sitting in the aisles, on the floor. You could hear a pin drop the entire day. People were riveted; they were thirsty for these ideas. It was moving."<sup>12</sup> The panel format, with Jane Hoffman and David Wolfson posing questions, allowed for a less formal style of presentation, with good-natured give and take among the panelists. For example, in panel three, Wolfson posed a hypothetical of a chimpanzee in a laboratory about to be vivisected and asked the panelists if there was a legally viable claim that the chimpanzee should not be treated in this manner. Professor Steven Wise stated, "I wouldn't bring such a claim today. I don't think that common law judges are ready to allow it. Common law judges need to understand there are cogent and powerful arguments that can be brought under the common law that would lead to a chimpanzee having a common law right to

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<sup>8</sup> Interview with Hoffman, *supra* note 7. The conference was planned by David Wolfson, Mariann Sullivan, Gilda Mariani, and Jane Hoffman.

<sup>9</sup> Taimie Bryant, Professor of Law, UCLA; Anthony D'Amato, Leighton Professor of Law, Northwestern University School of Law; Helena Silverstein, Professor and Department Head of Government & Law, Lafayette College; Steven Wise, adjunct professor, Founder and President, Center for the Expansion of Fundamental Rights, former President, ALDF; Nicholas Robinson, Gilbert & Sarah Kerlin Distinguished Professor of Environmental Law, Pace University School of Law; Thomas Kelch, Professor of Law, Whittier Law School; Michael Radford, Reader in Animal Welfare Law, University of Aberdeen (UK); Clark Freshman, Professor of Law, UC Hastings College of Law; Jennifer Friesen, Professor Emeritus of Law (retired), Loyola Law School (L.A.); Robert Garner, Professor of Politics, University of Leicester (UK); David Favre, Professor of Law, Michigan State University School of Law, Founder, Animal Legal and Historical Web Center; Peter Singer, Ira W. Decamp Professor of Bioethics in the University Center for Human Values, Princeton University; Gary Francione, Distinguished Professor of Law and Nicholas deB. Katzenbach Scholar of Law & Philosophy, Rutgers University School of Law-Newark; and William A. Reppy, Jr., Charles L. B. Lowndes Professor of Law, Emeritus, Duke Law School.

<sup>10</sup> Symposium, *The Legal Status of Nonhuman Animals*, 8 ANIMAL L. 1 (2002) [hereinafter Symposium].

<sup>11</sup> Telephone Interview with Mariann Sullivan, Co-Founder and Program Director, Our Hen House (Nov. 19, 2010) [hereinafter Interview with Sullivan].

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

bodily integrity. Those arguments are being developed as we sit, and the intellectual foundation for that case is being developed.”<sup>13</sup> He suggested several ways to cultivate those arguments: holding conferences like the present one, teaching animal law classes, and publishing in animal law journals. “These lay the intellectual foundation that will allow us to bring these kinds of cases.”<sup>14</sup>

Later in the same panel, Professors D’Amato and Francione had a spirited exchange: Professor Francione repeated a point he had made earlier in the day, to wit, that we will not be able to use the legal system to achieve justice for nonhuman animals until there is a broader social movement advocating for change. “I am perplexed, I have to tell you, to think that we’re really seriously thinking that the legal system is going to take the lead here and that it’s going to play any significant role before we convince more people and we turn this into a real social movement.”<sup>15</sup> Professor D’Amato responded, “You have an either/or view of the universe. You say unless the lawyers in this room go out and act like everybody else—forget the legal talents you have, forget whatever ability you have to convince anybody—that unless you go out and get your legislators to do something, you’re wasting your time. I think that is the counsel of despair. I think what you should really say to these people is: you can make a difference. Go into some court and make the argument . . . .”<sup>16</sup>

During the fourth panel, Wolfson asked for suggestions for worthwhile legislation and Professor Jennifer Friesen responded with two innovative ideas. First, she stated that she “would create a state agency that has the powers to enforce expanded anti-cruelty statutes.”<sup>17</sup> Second, she suggested using the initiative process to pass strict regulations to limit factory farming. Professor Helena Silverstein added that legislation should be thought of not merely as an end in itself, but as an opportunity to raise consciousness.

Professor Michael Radford offered several examples of successful welfare legislation for farmed animals in the United Kingdom, including “schedules of objective requirements delineating space requirements, prohibiting things like slippery floors and protrusions that may cause damage or injury, giving revisions [sic] about periods of light, provisions about ventilation, the way they are fed, the sort of diet, provisions about how often they have to be inspected.”<sup>18</sup> Radford pointed to ways in which demands coming from the public in the United Kingdom were influencing public officials and causing significant improvements in the treatment of animals. Cosmetic testing was effectively banned in the United Kingdom, not by operation of law, but by the Home Secretary, who responded to public opinion by announcing that he would no longer issue licenses for cosmetic testing on animals.<sup>19</sup> Supermarket chains were no longer stocking eggs from hens kept in battery cages, in response to public pressure that

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<sup>13</sup> Symposium, *supra* note 10, at 47.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 51.

<sup>16</sup> *Id.* at 51.

<sup>17</sup> *Id.* at 65.

<sup>18</sup> *Id.* at 69.

<sup>19</sup> *Id.* at 72.

was supported by professional lobbying efforts, even though legislative changes had not yet gone into effect.<sup>20</sup>

The Treaty of Rome, the founding document of the European Union, had been amended to classify animals as “sentient beings” and, as Professor Radford noted earlier in the day, “within the U.K. and also within European Union law, there is, it seems to me, a significant change of language, moving away from unnecessary suffering towards words and phrases like welfare, proper care and well-being, meeting behavioral and physiological needs, maintaining in good health, and promoting a positive state of well-being.”<sup>21</sup> These examples of progress in the United Kingdom and Europe were eye-opening to this American audience, accustomed to a public that was ignorant and complacent and laws (if any) that effectuated the will of the agribusiness industry. Such legal protections for farmed animals as Radford described seemed fantastical.

Hoffman recalled, “There was a level of thoughtfulness that allowed for this kind of conversation.”<sup>22</sup> Wolfson expressed the sense that this conference marked a turning point, when animal law began “to become a part of mainstream law,” “sanctioned,” and “reputable.”<sup>23</sup> The proceedings of this momentous day were later published and provide a wealth of information and ideas for anyone in the field of animal law.<sup>24</sup>

It was foreseeable that, as more attorneys became actively involved in animal law, they would seek professional relationships with like-minded attorneys at the local level. As a result, today, there are twenty-three state and sixteen regional or local bar association animal law committees or sections.<sup>25</sup> The growth of bar committees is attributable to several factors: the legal community is not innately biased for or against the concepts of animal welfare or animal rights; the existing bar association structure is ready-made to house newly forming interest groups and provide a venue for animal lawyers to congregate and network; animal lawyers have adopted a conservative, collegial, and scholarly approach to building animal law committees; and the subject of animal law is intellectually stimulating, which attracts bright, thoughtful attorneys to join. Thus, we can expect to see continuing growth in the number and activities of bar association animal law committees, each creating its own history, holding conferences, assisting local attorneys to network, and providing continuing education in animal law.

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<sup>20</sup> *Id.* at 72.

<sup>21</sup> *Id.* at 18.

<sup>22</sup> Interview with Hoffman, *supra* note 7.

<sup>23</sup> Telephone Interview with David Wolfson, Partner, Global Corporate Group at Milbank, Tweed, Hadley & McCloy LLP (Nov. 16, 2010) [hereinafter Interview with Wolfson].

<sup>24</sup> Symposium, *supra* note 10.

<sup>25</sup> ALDF.org, Bar Association Animal Law Sections and Committees, <http://www.aldf.org/article.php?id=277> (last visited Jan. 20, 2012).

## B. The ABA and Animal Law

With 400,000 members,<sup>26</sup> the American Bar Association (ABA) is a major icon of the legal establishment in the U.S. Bringing animal law to the ABA was a natural step for those seeking to mainstream the new and growing field. The first such effort came in 1983. Elinor Molbegott<sup>27</sup> had been working as a staff attorney for the ASPCA for about five years when Dr. John Kullberg,<sup>28</sup> then the ASPCA's President, suggested that they work together to form an Animal Law Committee of the ABA. The ABA agreed to form the Committee as part of the Young Lawyers Division (Young Lawyers Committee).<sup>29</sup> The Committee soon began to attract members and to publish a newsletter called the Animal Law Report, which contained articles about cases and statutory law related to animals. Within a few years, the Young Lawyers Committee members developed a resolution stating that if companion animals were injured or harmed, a court should not use the traditional notion of fair market value as the valuation of the animals. They presented their resolution to the ABA leadership and were met with the sounds of barking and mooing. "It was taken as a complete joke; it was mortifying."<sup>30</sup> The resolution went no further.

When Theresa Macellaro became the Chair of the Young Lawyers Committee in 1989, animal law was still only on the fringes of the ABA. Macellaro wanted to educate the more mainstream ABA members about the subject.<sup>31</sup> Because she had networked with attorneys from other sections of the ABA, she was able to convince the ABA leadership to include a session on animal law at its 1992 annual meeting to be held in San Francisco. Macellaro hoped to present a celebrity and a "big name" lawyer to draw people into the room. Once there, they would also hear from Lucy Kaplan, then of PETA, and me, as the experts on animal rights and animal law. Nationally known civil rights attorney William Kunstler<sup>32</sup> agreed to be one of the four panelists, as did

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<sup>26</sup> ABANow, About the American Bar Association, <http://www.abanow.org/reporter-resources/about-the-american-bar-association/> (last visited Feb. 12, 2012).

<sup>27</sup> Telephone Interview with Elinor Molbegott, Attorney, Law Offices of Elinor Molbegott, PLLC (Nov. 23, 2010) [hereinafter Interview with Molbegott]. Molbegott was one of the earlier attorneys to hold a staff position with an animal protection agency. Before she graduated law school in 1977, Molbegott convinced the ASPCA that they would benefit from having a lawyer on staff to assist their Law Enforcement Department with issues such as search and seizure and how to handle cruelty investigations and prepare for prosecutions. She also helped to develop the ASPCA's legislative department and served as General Counsel until she left the agency in 1992.

<sup>28</sup> NYTimes.com, Obituaries, <http://www.nytimes.com/2003/04/27/nyregion/john-f-kullberg-64-headed-asPCA.html> (last visited Feb. 12, 2012). Prior to joining the ASPCA, Kullberg had served as the director of admissions and assistant dean at Columbia Law School.

<sup>29</sup> Interview with Molbegott, *supra* note 27.

<sup>30</sup> *Id.*

<sup>31</sup> Telephone Interview with Theresa Macellaro, Attorney and Member of the Board of Directors, In Defense of Animals (Nov. 19, 2010) [hereinafter Interview with Macellaro].

<sup>32</sup> David Stout, *William Kunstler, 76, Dies; Lawyer for Social Outcasts*, N.Y. Times, Sept. 5, 1995, available at <http://query.nytimes.com/gst/fullpage.html?res=990CE1D8123AF936A3575AC0A963958260>.

Jefferson Starship former lead singer Grace Slick.<sup>33</sup> Kunstler had not previously spoken about animal rights, so Macellaro sent him materials and offered to write his talk. He insisted on drafting his own speech, which included some poignant thoughts.<sup>34</sup> Slick, already a committed animal rights advocate, was clever and entertaining as the moderator. Kaplan and I focused on delivering the core messages about the plight of animals and the failure of the American legal system to offer realistic protections. Macellaro's plan worked well: every seat in the room was filled, with most of the audience hearing about animal law for the first time. One of those attorneys was Bruce Wagman, who jumped into animal law with both feet and has become a bright star in the field.<sup>35</sup> Oddly however, the Young Lawyers Committee faded out of existence not long after that successful panel.<sup>36</sup>

The next effort to bring animal law to the ABA did not come until 2004, when Barbara Gislason, a Minneapolis attorney, approached the ABA section chairs expressing her interest in establishing an animal law committee. When that approach proved ineffective, she attended an ABA Fellows dinner and sought advice from Bob Stein, then Executive Director of the ABA and former University of Minnesota Law School Dean. He listened carefully to her ideas about the valuation of companion animals and suggested that she attempt to form a committee as part of the Tort Trial and Insurance Practice Section (TIPS), a relatively conservative section. Wanting the committee to represent "a broad spectrum of ideas,"<sup>37</sup> Gislason assembled a

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<sup>33</sup> JeffersonAirplane.com, Grace Slick, <http://www.jeffersonairplane.com/the-band/grace-slick/> (last visited Feb. 12, 2012)

<sup>34</sup> Interview with Macellaro, *supra* note 31. She served as the Chair from 1989 - 1991. In an essay for the Animal Protection Committee's newsletter, Kunstler wrote, "We exist on this darkling plain along with all other living creatures. We have conquered the seas, the air, and even the outer reaches of space by dint of what is packed under our crania and the marvelous miracle of our extraordinary flexible fingers. We are part and parcel of the eternal cycle of life and death to which humans and non-humans alike are similarly subject. We owe it to ourselves and the animal world as well to create, not merely a body of rules and regulations to govern our conduct, but a level of sensibility that makes us care, deeply and constructively, about the entire planet and all of its varied inhabitants . . ." William M. Kunstler, *Animal Rights – The Issue of the '90s*, 5 ANIMAL L. REPORT NO. 1 at 3 (Feb. 1992), published by the Animal Protection Comm., Young Lawyers Div., American Bar Ass'n. (on file with ALDF).

<sup>35</sup> Bruce Wagman, *Growing Up with Animal Law: From Courtrooms to Casebooks*, 60 J. LEGAL EDUC. 193 (2010) (discussing the development and growth of animal law in conjunction with Wagman's own experiences in the field). Wagman is one of the authors of the first ANIMAL LAW casebook. *See, infra* 171. A partner with the firm of Schiff Hardin LLP, Wagman has served as chief outside litigation counsel for ALDF, represents numerous other animal protection groups and individuals, teaches animal law at several Bay Area law schools, and is a frequent speaker in the U.S. and abroad.

<sup>36</sup> None of the interviewees could say for sure why the Committee ceased its existence. The ABA Young Lawyers Division is limited to ABA members who are under 36 years of age or in practice for fewer than five years. Macellaro left the Young Lawyers Division soon after the 1992 event. Elinor Molbegott suggested that if there was no strong leader to replace her, it is "not surprising it disappeared. The ABA tolerated the committee but that was about all." E-mail from Elinor Molbegott, Attorney, Law Offices of Elinor Molbegott, PLLC, to Joyce Tischler, Co-Founder and General Counsel, ALDF (May 2, 2011, 16:01 PST) (on file with author).

<sup>37</sup> Barbara J. Gislason, Attorney, Barbara J. Gislason Law Firm, Making It in the ABA: A Personal and Institutional Journey, speech delivered at ALDF Future of Animal Law Conference (Mar. 30 - Apr. 1, 2007).



membership list of lawyers from around the United States who had shown leadership in animal law; simultaneously, she included lawyers with contrary opinions. Her proposal to the ABA was unanimously accepted and the ABA-TIPS Animal Law Committee (TIPS Committee) was formed on October 9, 2004.<sup>38</sup> “Credibility and respect came with the ABA’s recognition. And, bringing Animal Law into a highly respected section of the ABA was huge – symbolic,” stated Gislason.<sup>39</sup>

In its short history, the TIPS Committee has built an impressive list of accomplishments. In addition to continuing legal education programs, podcasts, a newsletter, and the ABA’s publication of animal law books by Committee members, the TIPS Committee has successfully passed several resolutions through the ABA House of Delegates, giving them the status of ABA policy. In 2005, in response to Hurricane Katrina and the resulting tragedy in New Orleans, the Committee drafted a proposal recommending that Congress pass H.R. 3858, the Pets Evacuation and Transportation Standards Act (PETS Act).<sup>40</sup> The proposal was approved by the House of Delegates and sent to the U.S. Congress. The PETS Act, enacted into law in 2006, requires state and local emergency preparedness authorities to include provisions for pets and service animals in their evacuation plans in order to qualify for grants from the Federal Emergency Management Agency.<sup>41</sup> In 2010, the TIPS Committee developed a “Model Act Governing the Care and Disposition of Disaster Animals,” which urges states to adopt a law to establish guidelines for a mandatory minimum holding period by shelters for pets who are separated from their families due to natural disasters. The ABA House of Delegates approved the Committee’s Recommendation and urged its adoption by state legislatures. And, in 2011, the House of Delegates approved the TIPS Committee’s recommendations for handling animals seized in governmental raids on animal fighting rings, puppy mills, and similar activities.<sup>42</sup>

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<sup>38</sup> The ABA web site contains the following description of the TIPS Animal Law Committee, along with a list of current programs and events being conducted by the Committee: The Animal Law Committee “address[es] all issues concerning the intersection of animals and the law to create a paradigm shift resulting in a just world for all. The status of animals in our legal system, and in our society at large, is in flux, and attorneys are discovering innovative ways to use the rule of law in many different arenas to create a just world for all. These arenas involve a vast array of human/animal interactions, including estate planning for companion animals, due process protections in dangerous dog/reckless owner laws, appropriate compensation when an animal is killed or injured, protections against breed discrimination, standards of care and accountability for animals used in industry and agriculture, expanding notions of what constitutes ‘cruelty to animals,’ and the competing interests of wild animals and humans in dwindling resources.” <http://apps.americanbar.org/dch/committee.cfm?com=IL201050> (last visited Feb. 12, 2012). The Committee maintains its own Facebook page entitled “Animal Law Committee of the ABA Tort Trial and Insurance Practice Section.” See also, MaddiesFund.org, Making a Case for Animal Law, [http://www.maddiesfund.org/Resource\\_Library/Making\\_a\\_Case\\_for\\_Animal\\_Law.html](http://www.maddiesfund.org/Resource_Library/Making_a_Case_for_Animal_Law.html) (last visited Feb. 12, 2012) (describing Gislason’s inspiration to create the Animal Law Committee).

<sup>39</sup> Gislason, *supra* note 37.

<sup>40</sup> 42 U.S.C. §§ 5170b(a)(3)(J), 5196(e)(4), 5196(j)(2), 5196b(g) (2006).

<sup>41</sup> *Id.*; see also, E-mail from Mariann Sullivan, Co-Founder and Program Director, Our Hen House, to Joyce Tischler, Co-Founder and General Counsel, ALDF (May 5, 2011, 16:24 PST) (on file with author).

<sup>42</sup> *Id.*

The TIPS Animal Law Committee is now an accepted and valued part of the ABA, winning multiple awards for its achievements.<sup>43</sup> The success of the TIPS Committee can be attributed to several things: while the Young Lawyers Committee relied largely on the efforts of one person who served as the Chair, the TIPS Committee has a broad membership base, strong leadership, and a focus on preparing its members to assume future leadership roles. Also, the TIPS Committee leaders have learned the lesson that it is easier to work from the inside than from the outside. They are actively involved with other sections and cultivate friendships throughout the ABA, giving the TIPS Committee a level of respect that the earlier Young Lawyers Committee lacked. Finally, the field of animal law has gained stature within the legal profession, making it less subject to the cackles and barks of the earlier years.

### C. Animal Law Goes To School

#### 1. Animal Law Classes

Between 1977 and 2000, there was no organized effort to institutionalize the teaching of animal law at American law schools.<sup>44</sup> It was offered at a handful of schools, usually taught by adjunct professors who were local attorneys with an interest in animal law and a desire to mentor students.<sup>45</sup> An even smaller number of tenured professors taught the subject.<sup>46</sup> None of the national animal protection or rights groups had a specific program or focus on this area, but students increasingly contacted ALDF, asking for advice, assistance, and funding to support student animal law groups and introduce an animal law class in their schools. In 2000, ALDF formally committed its resources to the introduction of animal law classes and support of student chapters at law schools. Full-time employees began to contact law school administrators on a regular basis and provide services and materials to law students. ALDF's efforts were significantly enhanced by the publication, in 2000, of *Animal Law*, the first casebook covering animal law cases, legislation, and issues.<sup>47</sup>

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<sup>43</sup> Awards include the "Most Innovative Committee" in 2005 and 2006, the "Women Involvement Award" in 2007, the "Exceptional Achievement in Promoting and Achieving Greater Participation and Involvement by Committee Members in the Activities of the Committee and Section" in 2008, and the "Overall Excellence" award in 2009. *History of Animal Law Committee*, American Bar Association, available at <http://apps.americanbar.org/tips/animal/history/history31N.html> (last visited Feb. 12, 2012).

<sup>44</sup> Tischler, *supra* note 1, at 9-10. As of 1985, there was one law course specifically dedicated to animal law, the course taught by Jolene Marion at Pace Law School.

<sup>45</sup> Joyce Tischler, *Building Our Future*, 15 ANIMAL L. 7, 7-8 (2008).

<sup>46</sup> David Favre at Michigan State University Law School, Taimie Bryant at UCLA, Thomas Kelch of Whittier Law School, David Cassuto joined the faculty of Pace in 2003, and Gary Francione at Rutgers.

<sup>47</sup> See *infra* note 170. For example, sometime in or around 2005, I met with an assistant dean at the University of San Diego School of Law. Joining me were San Diego attorney Kristina Hancock and a law student who had petitioned the school to introduce an animal law class. Included in our arsenal was the *Animal Law* casebook, materials and resources offered by ALDF, copies of *Animal Law* (journal),

The number of animal law classes jumped from nine in 2000 to 141 as of this writing.<sup>48</sup> Adding to this momentum, an animal law section was formed within the American Association of Law Schools (AALS),<sup>49</sup> providing animal law professors with increased opportunities to network with one another, share ideas, and enhance the quality of the classes offered.<sup>50</sup> The growth of animal law classes is attributable to several factors: ALDF's programmatic effort,<sup>51</sup> increasing student demand, increasing media attention focused on animal law, the availability of casebooks, the highly publicized gifts made to establish animal law courses in top tier law schools by television celebrity Bob Barker, and the willingness of local attorneys to serve as adjunct professors to teach the newly introduced courses and foster the development of a scholarly approach to the subject. It is also due to the nature of American legal education. As attorney and scholar Paul Waldau has noted, the methodologies used by American law schools include a generous support of academic freedom, openness to diversity of opinion, a commitment to critical thinking, open discussion, and creative debate. Students are expected to ask questions and express themselves freely, and it is common to discuss ethics, values, and social policy in the context of a typical law school class. All of this supports, and to some extent, explains the rapid growth of animal law courses.<sup>52</sup>

## 2. Law Student Chapters and Groups

The first law student group can be traced to an ambitious effort by Nancy Perry and a small group of law students at Lewis & Clark Law School in Portland, Oregon.<sup>53</sup> Lewis & Clark was recognized as a leading environmental law school, but Perry envisioned a setting where animal law would also flourish. In 1993, Perry and the other

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and scholarly articles on the subject. Serendipitously, visiting professor Jane Henning had asked to teach an animal law class and our combined efforts were successful in getting it established.

<sup>48</sup> This number is a moving target, as more classes are introduced on a regular basis and not all classes are taught annually. For the most up-to-date online list of animal law classes, *see* Animal Law Courses, [http://aldf.org/userdata\\_display.php?modin=51](http://aldf.org/userdata_display.php?modin=51) (last visited Feb. 12, 2012).

<sup>49</sup> *See, e.g.,* Rebecca Huss, *Letter from the Chair*, NEWSLETTER (Am. Ass'n of Law Schools, Section on Animal Law), November 2010, at 1, *available at* <http://www.aals.org/documents/sections/animal/November2010Newsletter.pdf>.

<sup>50</sup> *See also* Animal Legal Defense Fund, Animal Law Instructor Website, <http://www.aldf.org/article.php?id=1309> (last visited Feb. 12, 2012).

<sup>51</sup> *See* Animal Legal Defense Fund, Law Students & SALDF Chapters, <http://www.aldf.org/article.php?list=type&type=100> (last visited Feb. 12, 2012).

<sup>52</sup> Paul Waldau, *Law & Other Animals*, in *TEACHING THE ANIMAL*, 218 (Margo DeMello ed., 2010).

<sup>53</sup> Nancy V. Perry, *Ten Years of Animal Law at Lewis & Clark Law School*, 9 *ANIMAL L.* ix (2003). Perry worked closely with fellow students Benjamin Allen and Matt Howard. After graduating from law school, Perry spent sixteen years at the Humane Society of the United States (HSUS), where she served as Vice President of Government Affairs. Perry was responsible for HSUS's legislative efforts and helped lead over twenty successful state ballot initiative campaigns. She is now the Senior Vice President of Government Relations at the American Society for the Prevention of Cruelty to Animals.

students founded the first Student Animal Legal Defense Fund chapter<sup>54</sup> and initiated a student-run Animal Law Conference that continues to draw attendees from all parts of the United States. This conference has become an important way to meet and network with other animal law students, as well as to hear many of the leading animal law scholars and practitioners, helping to build the animal law movement as a whole.<sup>55</sup>

Other student chapters have joined in the effort to hold educational conferences.<sup>56</sup> In 2006, the Student Animal Legal Defense Fund of New York University School of Law hosted a one-day symposium to explore common courtroom barriers faced by those handling animal-related litigation.<sup>57</sup> The symposium provided another much needed opportunity for sharing and reflection about the progress made by the animal law movement, despite often daunting challenges. It opened with an exploration of how our cultural myths enable us to distance ourselves from the institutionalized exploitation of animals. The panelists, including Professors Taimie Bryant, Dale Jamieson,<sup>58</sup> and Una Chaudhuri,<sup>59</sup> stressed the need for increased transparency, to wit, exposing the practices that bring harm and suffering to animals. As Professor Bryant noted, this approach has been used successfully in other social movements. She shared her hope “that with transparency comes transformation and accountability.”<sup>60</sup>

A second panel, composed of Jonathan Lovvorn, Kathy Meyer, and Professor David Cassuto,<sup>61</sup> scrutinized the vexing legal issue of how standing to sue has been used as a barrier to litigation that would protect animals. The panelists then explored efforts that they and others have made to overcome the hurdle. The final panel of the symposium dug into a range of issues and potential causes of action. Sonia Waisman<sup>62</sup> probed the potential to pressure the legal system to increase the value of an animal’s life

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *See, e.g.,* Animal Legal Defense Fund, Events, [www.aldf.org/article.php?list=type&type=103](http://www.aldf.org/article.php?list=type&type=103) (list of events and conferences is updated regularly); *see also*, [www.nabranimallaw.org/Law\\_Schools/Overview/](http://www.nabranimallaw.org/Law_Schools/Overview/).

<sup>57</sup> Symposium, *Confronting Barriers to the Courtroom for Animal Advocates*, 13 ANIMAL L. 1 (2006-2007). We have NYU Law School graduate Delcianna Winders to thank, for both organizing the symposium and reducing it to published form. Winders enjoys a successful career in the field of animal law and currently works as an attorney for PETA.

<sup>58</sup> Dale Jamieson serves as the Director of Environmental Studies at New York University, where he is also Professor of Environmental Studies and Philosophy and Affiliated Professor of Law. *Id.*

<sup>59</sup> Una Chaudhuri is a Professor of English, Drama, and Environmental Studies at New York University. Chaudhuri has researched and published in the area of “zooësis,” the representation of animals in performance, media, and culture. *Id.*

<sup>60</sup> Symposium, *supra* note 57, at 5.

<sup>61</sup> Jonathan Lovvorn, Senior Vice President for Animal Protection Litigation & Investigations, Humane Society of the United States; Katherine Meyer, founding partner, Meyer, Glitzenstein & Crystal, Washington, D.C. (Meyer’s areas of expertise include environmental and animal law, public health, and the Freedom of Information Act); David Cassuto, Professor of Law and Director, Brazil-American Institute for Law & Environment at Pace University School of Law, Board of Directors, ALDF, co-founder and editor, Animal Blawg, <http://animalblawg.wordpress.com/david-n-cassuto/>.

<sup>62</sup> Sonia Waisman, partner in the Los Angeles firm, McCloskey, Waring & Waisman, is co-author of ANIMAL LAW casebook and ANIMAL LAW IN A NUTSHELL (West 2011). She provides annual legal services to the National Animal Law Appellate Moot Court Competition, and has taught animal law at Loyola Law School (L.A.), California Western Law School, and Vermont Law School.

by allowing for the recovery of noneconomic damages.<sup>63</sup> Professor David Favre introduced the audience to his concept of animals as “living property” and how that status could be used to create new legal obligations to those animals.<sup>64</sup> Carter Dillard<sup>65</sup> examined the use of state anti-cruelty laws to challenge the suffering that results from factory farming practices.<sup>66</sup> Moving from the “very practical” to the more “abstract,” Eric Glitzenstein<sup>67</sup> speculated about the concept of attempting to use the Eighth, Thirteenth, and even the Fifth Amendments to the U.S. Constitution “to create not only evolutionary, but revolutionary, change in the way that animals are treated under federal law.”<sup>68</sup> This symposium was another reminder of the long-term value of such events, showcasing the most active animal lawyers and scholars and presenting ideas that we can turn to for a better understanding of what has been attempted, as well as what could be tried in future litigation. These panel discussions were recorded and published.<sup>69</sup>

As of this writing, there are 167 law student chapters or groups operating in the United States, seven in Canada, one in New Zealand,<sup>70</sup> and a variety of resources and opportunities are available to these students.<sup>71</sup> The chapters are engaged in a broad array of activities; they often create the demand for animal law classes, and by networking with students from other law schools, support the growth of additional chapters.

### 3. Law Journals

In 1995, Nancy Perry and colleagues launched *Animal Law*, a law journal devoted exclusively to the publication of scholarly articles “concerning animal issues.”<sup>72</sup> Initially, the journal received little support from the school; the faculty questioned whether it would survive over the long haul and the school refused to provide funding.<sup>73</sup> The student staff consisted entirely of volunteers and, wanting to encourage

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<sup>63</sup> Symposium, *supra* note 57, at 8.

<sup>64</sup> Symposium, *supra* note 57, at 93-95.

<sup>65</sup> Carter Dillard, Director of the Litigation Program at Animal Legal Defense Fund. Before joining ALDF, Dillard was appointed to the faculty of Loyola University New Orleans, College of Law, as a Westerfield Fellow. He previously served as General Counsel to Compassion Over Killing and Director of Farm Animal Litigation at the Humane Society of the United States.

<sup>66</sup> *Id.* at 98.

<sup>67</sup> Eric Glitzenstein, founding partner, Meyer, Glitzenstein & Crystal. Glitzenstein specializes in environmental, animal protection, natural resource, and open government law and he serves on the Board of Directors of Defenders of Wildlife.

<sup>68</sup> *Id.* at 101-103.

<sup>69</sup> *Id.*

<sup>70</sup> For a current listing of student chapters and groups, see Animal Legal Defense Fund, Student Animal Legal Defense Fund Chapters, <http://aldf.org/article.php?id=446> (last visited Feb. 12, 2012).

<sup>71</sup> See, e.g., Animal Legal Defense Fund, How to Start a SALDF Chapter at Your School, <http://www.aldf.org/article.php?id=439> (last visited Feb. 12, 2012).

<sup>72</sup> 17 ANIMAL L. (2010), front inside cover.

<sup>73</sup> Michael C. Blumm, *The Origins of Animal Law*, 10 ANIMAL L. 5, 5-6 (2004). Indeed, “there was enough ambiguity in the faculty’s approval that for the first six issues of the journal, the masthead

the effort, as then-CEO of Animal Legal Defense Fund, I agreed to provide them with grants for the first several years, to cover the costs of printing and mailing the journals.<sup>74</sup> In those early years of publication, finding authors was a major challenge for the editors. From this precarious start, *Animal Law* has grown and continued to produce a consistently high-quality law review, which is now a recognized part of the establishment at Lewis & Clark.<sup>75</sup> There are now four additional law schools where students are publishing scholarly journals focused on animal law: the *Stanford Journal of Animal Law and Policy*, the *Journal of Animal Law* (Michigan State), the *Journal of Animal Law and Ethics* (University of Pennsylvania), and the *Journal of Animal & Environmental Law* (University of Louisville).<sup>76</sup> In 1995, it seemed like a leap of faith to believe that there would be enough scholarly material to fill one annual animal law review; but in hindsight, that concern was unwarranted. A quick review of the contents of these publications shows an extraordinary range of topics and perspectives.

#### 4. The Next Step in Animal Law Education

In 2001, Lewis & Clark Law School graduate Laura Ireland-Moore founded the National Center for Animal Law,<sup>77</sup> further solidifying the animal law program at Lewis & Clark and introducing such innovative events as the annual moot court competition held at Harvard Law School.

In 2008, Lewis & Clark Law School entered into a collaborative agreement with ALDF to host “the nation’s premier animal law program,” the Center for Animal Law Studies (CALs).<sup>78</sup> Guided by Pamela Frascch,<sup>79</sup> the first Assistant Dean of an animal law program, Katherine Hessler,<sup>80</sup> Professor and Director of the Animal Law Clinic, and

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read, ‘Students of Lewis & Clark Law School,’ rather than ‘Lewis & Clark Law School.’ I am happy to say those days are past.” *Id.* at 6. See also, Laura Cadiz, *Fifteen Volumes of Animal Law*, 15 ANIMAL L. 1, 2 (2008).

<sup>74</sup> Blumm, *supra* note 73, at 5-6; Perry, *supra* note 53, fn. 3; Cadiz, *supra* note 73, at 1. The student editors made some other good friends: Arizona attorney and then ALDF Board member Richard Katz served as national advisor to the journal and Professor Michael Blumm of Lewis & Clark Law School became its faculty advisor.

<sup>75</sup> Cadiz, *supra* note 73, at 2. I cautioned the editors that, in order to survive over the long term, the journal would have to be embraced and financially supported by the Law School. Due to their hard work and perseverance, they eventually won over the faculty and the Dean of the Law School. According to Cadiz, the editors now receive academic credit, and the Law Review now has a larger office space and publishes bi-annual issues.

<sup>76</sup> See Animal Legal Defense Fund, Animal Law Books and Periodicals, <http://www.aldf.org/article.php?id=271> (last visited Feb. 12, 2012).

<sup>77</sup> Perry, *supra* note 53, fn. 4. Ireland-Moore served in that position until she announced her departure in 2008.

<sup>78</sup> Lewis & Clark Law School, Center for Animal Law Studies at Lewis & Clark, [http://www.lclark.edu/law/centers/animal\\_law\\_studies/](http://www.lclark.edu/law/centers/animal_law_studies/) (last visited Feb. 12, 2012).

<sup>79</sup> Pamela D. Frascch, Assistant Dean of the Animal Law Program & Executive Director of the Center for Animal Law Studies, co-author, ANIMAL LAW casebook and ANIMAL LAW IN A NUTSHELL. Prior to joining the staff at CALs, Frascch founded the Criminal Justice Program at ALDF and served in various capacities in that agency.

<sup>80</sup> Katherine Hessler, Clinical Professor & Animal Law Clinic Director, Center for Animal Law Studies, co-author, ANIMAL LAW IN A NUTSHELL. Prior to joining CALs, Hessler taught and served as

assistant director Laura Handzel,<sup>81</sup> CALS is breaking new ground on a regular basis. It offers numerous animal law opportunities: specialized courses taught by visiting professors in areas such as international wildlife law, farmed animal law, and animal rights law;<sup>82</sup> a legal clinic;<sup>83</sup> a clinical internship in animal protection legislation; an annual conference; and other services to students who wish to pursue animal law. Most recently, CALS established the first Master of Laws (LL.M.) program in Animal Law.<sup>84</sup> Other law schools also continue to expand their animal law offerings. For example, George Washington Law School now offers two animal law seminars, an animal welfare project, and other resources that cater to students interested in animal law.<sup>85</sup> Animal law education is an obvious area in which we can expect and should plan for growth.

#### D. The Quest to Make Animal Law a Career

When I left private practice in 1981 to work full time for ALDF, it was a risky and not altogether rational career choice; the agency had a tiny budget, no office or support staff, and no one with expertise in fundraising. The only other animal-protection lawyers I was aware of in paid positions were Elinor Molbegott, then General Counsel of the ASPCA, and Murdaugh Madden, then General Counsel of HSUS. Both of those agencies were well-established and had stable sources of funding; they could afford staff attorneys. No one in private practice or elsewhere self-identified as an animal lawyer.

Animal law has not grown in the way the environmental law movement grew: while federal environmental laws provide standing to sue and attorneys' fees, animal protection laws provide neither. Thus, in the animal law sector, there has not been rapid job growth. Yet, as more and more students take animal law courses and more bar

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Associate Director of the Center for Interdisciplinary Study of Conflict and Dispute Resolution at Case Western Reserve University School of Law.

<sup>81</sup> Laura Handzel, Esq., Assistant Director. Prior to joining CALS, Handzel worked in private practice in Arizona, while volunteering for local animal welfare and humane education activities.

<sup>82</sup> Center for Animal Law Studies at Lewis & Clark, Animal Law Curriculum, [http://www.lclark.edu/law/centers/animal\\_law\\_studies/curriculum/](http://www.lclark.edu/law/centers/animal_law_studies/curriculum/) (last visited Feb. 12, 2012). CALS has a summer intensive program which is open to students from all law schools.

<sup>83</sup> Center for Animal Law Studies at Lewis & Clark, Animal Law Clinic, [http://www.lclark.edu/law/centers/animal\\_law\\_studies/animal\\_law\\_clinic/](http://www.lclark.edu/law/centers/animal_law_studies/animal_law_clinic/) (last visited Feb. 12, 2012).

<sup>84</sup> Center for Animal Law Studies at Lewis & Clark, Animal Law LL.M., [http://law.lclark.edu/centers/animal\\_law\\_studies/curriculum/LLM/](http://law.lclark.edu/centers/animal_law_studies/curriculum/LLM/) (last visited Feb. 12, 2012).

<sup>85</sup> George Washington University Law School, Animal Law Overview, <http://www.law.gwu.edu/Academics/Publicinterest/AnimalLaw/Pages/AnimalLaw.aspx> (last visited Feb. 12, 2012). For example, under the guidance of Professor Joan Schaffner, the George Washington University Law School offers students opportunities to research and strengthen animal welfare laws in Washington, D.C.

groups form, legal professionals want to develop a career in which they can devote their energies to protecting animals.<sup>86</sup>

A distinct group of animal law attorneys has begun to hang out its shingle in private practice, dealing mainly with cases involving companion animals.<sup>87</sup> These lawyers are pioneers, building a foundation for animal law as a career in the private sector. A few private practices and practitioners, such as the Washington, D.C. firm of Meyer, Glitzenstein & Crystal and Bruce Wagman of Schiff Hardin represent large nonprofit animal protection agencies. Other attorneys, like David Wolfson, work for large firms, with an agreement that their pro bono time will be spent on animal protection cases. A growing subset of animal lawyers is teaching animal law classes and seminars and running animal law or legislative clinics.

Non-profit animal protection agencies have begun to see the value of hiring staff attorneys. In 2005, HSUS hired three staff attorneys. Their goal was to do groundbreaking legal work and support the agency's legislative campaigns. Their litigation staff has grown faster and larger than they initially anticipated, to some extent fueled by the resources furnished by the merger of HSUS and the Fund for Animals. HSUS is now the single largest employer of animal lawyers in the nonprofit sector.<sup>88</sup> Other animal protection groups also have staff attorneys, including ALDF, People for the Ethical Treatment of Animals, Compassion Over Killing, the ASPCA, Physicians Committee for Responsible Medicine, Friends of Animals, Farm Sanctuary, and Best Friends. Each agency approaches litigation somewhat differently. For example, PCRM's litigation program, headed by Dan Kinburn,<sup>89</sup> "challenges industry and government efforts to promote the consumption of animal products and other unhealthy foods, and uses litigation to promote vegetarian diets as well as alternatives to the use of animals in medical research and education."<sup>90</sup> HSUS's Litigation Unit, under the direction of Jon Lovvorn, works to support the agency's campaigns and legislative efforts, with a key focus on farmed animals and wildlife cases. ALDF's docket includes, as per its mission statement, an ongoing push for legal rights in addition to greater protections. ALDF is

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<sup>86</sup> Yolanda Eisenstein, *CAREERS IN ANIMAL LAW* (1st ed. 2011); Joyce Tischler, *Making Animal Law Your Career*, ABA Trial Tort and Insurance Practice Section, Animal Law Committee Newsletter 20 Winter 2007); Alexandra Friedberg, *Animal Law Continues Growth in American Law Schools*, *Id.* at 18; Animal Legal Defense Fund, *Opportunities In Animal Law*, <http://aldf.org/downloads/CareerServicesPacketOpportunitiesinAnimalLaw.pdf> (last visited Feb. 12, 2012).

<sup>87</sup> There are numerous examples of private practitioners who handle companion animal cases, including Adam Karp, a Washington State attorney who specializes in personal injury and custody cases involving animals; Calley Gerber, Gerber Animal Law Center of Raleigh, NC; Amy Trakinski, who focuses primarily on animal rights law in NY and NJ; Robert Newman of Santa Ana, CA, who specializes in all aspects of veterinary service; Yolanda Eisenstein, Animal Law Office, Dallas, TX; Randall Turner, Turner & McKenzie, P.C., Fort Worth & Dallas, TX; and Donald D. Feare of Arlington, TX, whose practice is focused on a broad array of animal-related issues and clients. For a list of practitioners, visit [http://www.animal-lawyer.com/html/referrals\\_.html](http://www.animal-lawyer.com/html/referrals_.html) (last accessed Feb. 12, 2012).

<sup>88</sup> Humane Society of the United States, *Throwing the Book at Animal Abusers*, <http://hsus.typepad.com/wayne/2007/09/litigation.html> (last visited Feb. 12, 2012).

<sup>89</sup> Dan Kinburn, General Counsel, Physicians Committee for Responsible Medicine

<sup>90</sup> Physicians Committee for Responsible Medicine, <http://www.pcrm.org/media/experts/bios/dan-kinburn-esq> (last visited Feb. 12, 2012).



continuing its cruelty and companion animal work and, with Carter Dillard at the helm, branching into a more pointed focus on farmed animal cases.

Some animal lawyers have opted to work for federal, state, or local agencies, bringing their animal law training and sensibilities with them. Take the example of Wisconsin attorney Leslie Hamilton, who works for a county Corporation Counsel. By offering to carry out certain tasks as part of her duties, she has opened up opportunities to engage in animal law activities. When the humane society under contract with the county seizes animals in cruelty cases, Hamilton files petitions for transfer of ownership to the humane society. She also serves as counsel to the Board of Health in dangerous dog administrative hearings and engages in a variety of other animal-related legal matters.<sup>91</sup>

The professional connections that are made through working within the bar associations have led to some fascinating opportunities to work for animals. Two examples of this occurred within the N.Y.C. Bar Committee. Because of contacts she made as an active member of the Committee, attorney Meena Alagappan now serves as the Executive Director of Humane Education Advocates Reaching Teachers (HEART). Similarly, as a result of a Committee project to improve the administration of animal control in New York City, Jane Hoffman left private practice and now heads the Mayor's Alliance for New York City's Animals, which has the goal of making New York a no-kill city by 2015.<sup>92</sup>

As of this writing, the quest for a career in animal law is still challenging and risky, with more attorneys available than jobs being offered. Just as "animal" lawyers work to develop new theories to use in litigation, emerging legal advocates must think innovatively to generate jobs that will enable them to fill the growing needs of the field.

### E. Becoming an International Movement

Dr. Shirley McGreal, the founder and Chairwoman of the International Primate Protection League (IPPL), has long been active in the international animal welfare community and as she became familiar with ALDF, she saw a place for attorneys to assist on an international level. In 1984, she invited Professor David Favre to accompany her to a meeting of the International Union for Conservation of Nature

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<sup>91</sup> Tischler, *supra* note 86, at 21.

<sup>92</sup> See, e.g., Interview by ALDF with Meena Alagappan, Executive Director, HEART (Feb. 4, 2009) available at <http://www.aldf.org/article.php?id=1578>; HEART works "to foster compassion & respect for all living beings & the environment by educating youth & teachers in humane education." See HEART, <http://teachhumane.org/heart/> (last visited Feb. 12, 2012). See, also, Interview with Hoffman, *supra* note 7; Interview with Sullivan, *supra* note 11: In 2001, Mariann Sullivan drafted a memo that went from the Committee to the administration of then-incoming Mayor Michael Bloomberg. It discussed, among other things, the embattled Center for Animal Care and Control and made policy recommendations. The Mayor's office was receptive and a series of meetings occurred between City officials and Hoffman, Sullivan, and Wolfson, culminating in a Memorandum of Understanding and the creation of a new nonprofit, The Mayor's Alliance for New York City's Animals. Jane Hoffman serves as its Executive Director. The Mayor's Alliance has brought together the key stakeholders in New York City; it has become a model for other cities dealing with animal control, having already improved cooperation among the agencies and animal protection groups and reducing the euthanasia rate significantly.

(IUCN), a global environmental organization.<sup>93</sup> He recalls being fascinated when he learned that within the context of IUCN, decision-makers have “no concern for the welfare of individual animals; they only think of animals in ‘species’ terms and geographic terms. [They are] trying to maintain populations that are sustainable.”<sup>94</sup> At his first IUCN meeting, Favre met a kindred spirit, wildlife expert, Bill Clark,<sup>95</sup> and they agreed that an international treaty setting minimum standards for animal welfare was needed.<sup>96</sup> Between 1986 and 1988, the two drafted an International Convention for the Protection of Animals<sup>97</sup> and contacted representatives of various countries, explaining the concept and asking for their support and participation. This proved to be a daunting task. Favre and Clark were able to enlist the support of Maneka Gandhi, an animal rights advocate and Member of the Indian Parliament, but they were ultimately unable to establish broad support for the Convention and to date, no such treaty exists.<sup>98</sup>

Favre turned his attention to an existing treaty, the Convention on International Trade in Endangered Species of Flora and Fauna (CITES).<sup>99</sup> The purpose of CITES is to protect species from extinction by regulating international trade. Favre agreed with McGreal that attorneys could prove beneficial to the international efforts to protect animals and in 1987, he attended his first biennial meeting of CITES on behalf of ALDF. Once again, he discovered that there was no opportunity to present concepts of animal rights,<sup>100</sup> but by understanding how CITES operated, he could help to protect animals on a species level. CITES meetings were structured so that nongovernmental agencies (NGOs) such as IPPL, HSUS, and ALDF could lobby governmental representatives, who had the power to vote about the levels of protection to be afforded to a given species. CITES was also attended by commercial industry representatives seeking to exploit species for financial gain and who, of course, lobbied the governmental representatives for lower protections.

Favre began to learn how to effectively impact decisions made regarding species protection; the key was attending the conference and networking as much as possible

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<sup>93</sup> See IUCN.org, <http://www.iucn.org/> (last visited Feb. 12, 2012).

<sup>94</sup> Telephone interview with David Favre, Professor of Law, Michigan State University (Nov. 4, 2010 and Nov. 8, 2010) [hereinafter Interview with Favre].

<sup>95</sup> Dr. Bill Clark is employed by INTERPOL and works on Project WISDOM, a program designed to enhance wildlife law enforcement efforts in Africa, with particular attention to halting the illegal trade in elephant ivory and rhinoceros horns. He also serves as an honorary warden and U.S. liaison for the Kenya Wildlife Service. Prior to working for INTERPOL, Dr. Clark was the CITES Coordinator for the Israel Nature and Parks Authority for over thirty years. He has authored close to 100 articles and several books on wildlife and law enforcement issues.

<sup>96</sup> Animal Legal & Historical Ctr., Statement of Need for the Convention for the Protection of Animals, <http://www.animallaw.info/articles/qvitfavreconvanimalwelfare.htm> (last visited Feb. 12, 2012).

<sup>97</sup> Animal Legal & Historical Ctr., International Convention for the Protection of Animals, <http://www.animallaw.info/treaties/itconfprotanimal.htm> (last visited Feb. 12, 2012).

<sup>98</sup> Georgetown Law Library, International & Foreign Animal Law Research Guide, (Sep. 23, 2011) <http://www.ll.georgetown.edu/guides/internationalanimallaw.cfm>.

<sup>99</sup> Animal Legal & Historical Ctr., Quick Summary of CITES, <http://www.animallaw.info/topics/tabbed%20topic%20page/spuscites.htm> (last visited Feb. 12, 2012).

<sup>100</sup> Interview with Favre, *supra* note 94. Favre bemoaned the fact that, “[t]he idea of animal rights is a nonstarter for developing countries. The best we could hope for is animal welfare.”

with the governmental representatives. A lot of the most important contacts were made at the cocktail parties.<sup>101</sup> According to Favre, “It was still [in the 1980s] a modest sized group and people knew each other personally.”<sup>102</sup> There was no Internet and a poor mail system, so Favre helped to organize the animal protection NGOs by establishing a central organization called the Species Survival Network.<sup>103</sup>

Looking back, he commented, “It is clearly better to have it [CITES] than not, but there are a lot of problems, not so much with CITES, but rather with how the world implements or fails to implement the treaty.” While CITES contained some powerful language, there was a lack of implementing legislation in the countries from which endangered species were being exported. Over the next few years, Favre travelled to Malta and Ghana to help draft domestic laws to implement CITES. In July, 1991, he conducted training sessions for the Department of Wildlife in Malawi and he could see, firsthand, how the best intentions of CITES were thwarted at the local level. According to Favre, “The level of education was low and the individuals were not capable of dealing with international trade issues effectively . . . .”<sup>104</sup> He witnessed how something as simple as having access to a reliable computer could impact the lives of endangered species within a developing country. He noted that “a functional computer at the desk of a customs agent—that’s the critical point where the illegal shipments could be stopped.”<sup>105</sup> Favre also noticed that, even though CITES had existed since 1973, there was no codified explanation of the treaty or the resolutions that had been passed to enforce it, so he filled that gap with the publication of the first and only book about CITES at that time.<sup>106</sup>

In the ensuing years, Favre has watched with interest as the structure of CITES meetings has changed; today, it is far more complex and a lot more of the lobbying is done before and after the two week biennial gathering. “It’s no longer easy to impact the product. It’s also harder for the U.S. to impact what other countries are doing.”<sup>107</sup> The counterpoint is that the SSN has grown into a mature NGO that “helps to develop grassroots organizations in other countries and those groups do the work...” i.e., outreach to their governmental representatives.<sup>108</sup> HSUS, Born Free, and others now have full-time employees dedicated to lobbying at CITES.

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Species Survival Network, <http://www.ssn.org/> (last visited Feb. 12, 2012).

<sup>104</sup> “As I started the workshop, it became clear that most of the legal issues I discussed in law school would be inappropriate for the group; had to keep it to basics. It was also clear that 8 of the 10 people had no idea what the treaty (CITES) was about, and that all five of the customs agents had no idea about international wildlife trade. My discussion was strongly supported by the two videotapes that the U.S. Fish and Wildlife Service had loaned me . . . .” Memo from Prof. David Favre to ALDF Board of Directors, July 16, 1991 at 2.

<sup>105</sup> Interview with Favre, *supra* note 94.

<sup>106</sup> DAVID FAVRE, INTERNATIONAL TRADE IN ENDANGERED SPECIES: A GUIDE (Springer Publishing 1989).

<sup>107</sup> Interview with Favre, *supra* note 94.

<sup>108</sup> *Id.*

In 2003, San Diego attorney Kristina Hancock<sup>109</sup> approached Favre with the opportunity to plan and host a conference on animal law at the international level. The contacts Favre had made through his CITES work and his web site<sup>110</sup> were essential to locating speakers from other parts of the globe.<sup>111</sup> Hancock and Favre found speakers who could provide a cultural context for the laws and treatment of animals in their respective countries. They realized that most of the audience would be Americans and wanted that audience to leave the conference with a much deeper understanding of the issues that animals face in other countries and regions.

The result was “Animals and the Global Community: Integrating Animal Welfare into the Legal Systems of the World,” held at California Western School of Law in April, 2004, a first-of-its-kind gathering and an impressive achievement.<sup>112</sup> Speakers included attorney Raj Panjwani,<sup>113</sup> who described the legal framework used to protect animals in India, Tom Garrett<sup>114</sup> and Dr. Agnes Van Volkenburgh,<sup>115</sup> who addressed confinement hog farming in Poland, Shadrack Arhin,<sup>116</sup> who described Ghana’s approach to dealing with stray and feral animals in urban areas, Elena Maroueva<sup>117</sup> from Russia, who spoke about the stray animal issue and the challenge of obtaining new animal protection laws in her country, and Jill Robinson,<sup>118</sup> who gave a moving presentation on Chinese farmers’ intensive confinement of Asiatic black bears who are crudely “milked” for their bile. Professor Michael Radford<sup>119</sup> and Peter Stevenson<sup>120</sup> of

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<sup>109</sup> Kristina A. Hancock, Senior Counsel, McKenna Long & Aldridge LLP, adjunct professor in animal law, California Western School of Law, Vice Chair, ABA TIPS Animal Law Committee.

<sup>110</sup> See Interview with Favre, *supra* note 94. His web site is: Animal Legal and Historical Web Center, <http://www.animallaw.info/> (last visited Feb. 12, 2012).

<sup>111</sup> Interview with Favre, *supra* note 94.

<sup>112</sup> See *A Global Perspective on Animals in the Legal System*, International Animal Welfare Conference at California Western School of Law (Apr. 2004) available at <http://www.animallaw.info/policy/pobowelfareconf2004.htm> (last visited Feb. 12, 2012).

<sup>113</sup> Raj Panjwani, founder, Animal and Environment Legal Defense Fund, New Dehli, India, has provided legal advice and assistance to, among other groups, the Animal Welfare Board of India, the Committee for Prevention of Cruelty and Supervision of Experiments on Animals, World Wildlife Fund-India, World Society for Protection of Animals, Wildlife Trust of India, People for Animals, and Greenpeace. He serves on the ABA TIPS Animal Law Committee.

<sup>114</sup> Tom Garrett, writer, Animal Welfare Institute, has written extensively about the introduction of factory farming methods into Eastern Europe.

<sup>115</sup> Agnes Van Volkenburgh, DVM, was raised in Poland and practices veterinary medicine in Southern California.

<sup>116</sup> Shadrack Arhin, attorney for Corporate Legal Concepts in Accra, Ghana, specializes in property, corporate, environmental, and wildlife law. In 1995, Arhin worked with David Favre to redraft Ghana’s wildlife laws. Arhin has also been active with the ABA TIPS Animal Law Committee.

<sup>117</sup> Elena Maroueva, Director of VITA Animal Rights Center, an animal-rights activist organization based in Moscow, Russia.

<sup>118</sup> Jill Robinson, founder and CEO of Animals Asia Foundation, works to negotiate for the release of bears from bile farms, established sanctuaries in China and Vietnam for rescued bears, and also rescues stray dogs in Asia.

<sup>119</sup> *Supra* note 9.

<sup>120</sup> Peter Stevenson, attorney and Chief Policy Advisor, Compassion in World Farming is considered one of the leading advocates for farmed animals in the United Kingdom and Europe. He is

the United Kingdom explained how the European Union functions and how it has been able to pass animal protection legislation that is far more advanced than American law; Fernando Araujo<sup>121</sup> discussed recent animal law developments in Portugal; Katrina Sharman<sup>122</sup> focused on animals used in research in Australia; and Peter Sankoff<sup>123</sup> provided a critique of New Zealand's Animal Welfare Act of 1999 and current treatment of farmed animals. Even more important than the topics covered were the relationships that were born at this conference; friendships formed that have paved the way for partnerships at the international level.<sup>124</sup>

That same year, Brian and Ondine Sherman, a father and daughter from Australia, founded Voiceless, the Animal Protection Institute, with a special emphasis on introducing and fostering the growth of animal law in their country.<sup>125</sup> Due to their efforts, animal law is currently taught at nine law schools in Australia and animal law bar sections are forming in various parts of that country. As Favre correctly predicted, the Internet is enabling animal lawyers around the globe to learn of each others' legal systems, provide information and opinions, maintain regular contact, and work together programmatically, giving animal law a more robust international presence.<sup>126</sup>

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credited with helping to establish the European Union bans on sow stalls, veal crates, and battery cages, along with the acknowledgement (Treaty of Rome) that animals are "sentient beings."

<sup>121</sup> Fernando Araujo, Ph.D, Professor of Law, University of Lisbon Faculty of Law and author of the first Portuguese book on animal rights.

<sup>122</sup> Katrina Sharman, Board Member and former Corporate Counsel, Voiceless, The Animal Protection Institute, an Australian nonprofit organization dedicated to protecting animals in that country; contributor to ANIMAL LAW IN AUSTRALIA AND NEW ZEALAND (Thomson Reuters 2010).

<sup>123</sup> See Peter Sankoff & Steven White, ANIMAL LAW IN AUSTRALASIA (The Federation Press 2009). Peter Sankoff is an Associate Professor at the University of Western Ontario, Faculty of Law who specializes in animal law, criminal law, and the law of evidence. He taught animal law at the University of Auckland from 2006-2010, and has taught Comparative Concepts in Animal Protection Law at Lewis & Clark Law School.

<sup>124</sup> Interview with Favre, *supra* note 94. "I published the proceedings, but the human connections were paramount. The Internet was now able to allow us to communicate in an ongoing manner. Katrina [Sharman] and [animal law in] Australia were exploding onto the scene . . ." *Id.* Copies of the published proceedings are available for purchase at Animal Legal and Historical Center, <http://www.animallaw.info/policy/pobooks.htm> (last visited Feb. 12, 2012).

<sup>125</sup> Voiceless, The Animal Protection Institute, <http://www.voiceless.org.au/who-we-are> (last visited Feb. 12, 2012). "Voiceless is an independent non-profit think tank dedicated to alleviating the suffering of animals in Australia. Established in 2004 by father and daughter team, Brian Sherman AM and Ondine Sherman, Voiceless: Creates and fosters networks of leading lawyers, politicians and academics to influence law and public policy; Conducts high quality research and analysis of animal industries, exposing legalized cruelty and promoting informed debate; Creates a groundswell for social change by building and fortifying the Australian animal protection movement with select Grants and Prizes; and Informs consumers and empowers them to make animal-friendly choices." *Id.*

<sup>126</sup> See Animal Legal & Historical Ctr., World Materials, (Sept. 23, 2011) <http://www.animallaw.info/nonus/index.htm> (last visited Feb. 12, 2012). See also, Professor David Cassuto, Posting to ANIMAL BLAWG, <http://animalblawg.wordpress.com/2010/04/12/second-world-conference-on-bioethics-and-animal-rights-salvador-brazil-august-2010/> (April 12, 2010) (last accessed Feb. 12, 2012). Cassuto's Blawg regularly features postings on international animal issues, as well as a "blogroll" of blogs from various countries. See ANIMAL BLAWG, <http://animalblawg.wordpress.com/> (last visited Feb. 12, 2012). *Voiceless* now has an annual Animal Law Lecture Series in which speakers spend two weeks touring Australia and delivering presentations at law schools, law firms and other

## F. A Split Approach to the Practice of Animal Law: Rights Versus Welfare Reform

### 1. The Development of the Rights Approach

From its outset, the animal law movement has struggled with the distinction between rights and welfare and the resulting choice of which concept to spend one's time promoting. Proponents on each side argue their positions vehemently, each believing that the approach he supports will provide the most likely, if not the only, path to meaningful change in the status of and protections received by animals. This split has been played out in articles, books, publications, conferences, debates, and programmatic choices about which lawsuits to bring and legislation to promote.

While most of the practitioners of animal law have been knee-deep in animal protection cases, two lawyers have been the leaders in the effort to understand and chart how philosophical rights theories can be applied within the context of the American legal system. David Favre began thinking about legal rights for animals soon after he became a law professor in 1977 and his initial inklings were codified in an article on wildlife rights.<sup>127</sup> That same year, Steven Wise began a general law practice in Boston, Massachusetts.<sup>128</sup>

Favre and Wise met in 1980, at the first conference of animal-rights lawyers sponsored by Henry Mark Holzer and the Society for Animal Rights,<sup>129</sup> and both thereafter joined the board of directors of the nascent Attorneys for Animal Rights.<sup>130</sup> In 1982, in preparing for his talk at the first Attorneys for Animal Rights conference, Favre researched slavery in America and the use of *habeas corpus*.<sup>131</sup> At the same time, Wise was becoming increasingly dissatisfied with representing human clients and began to develop a practice exclusively devoted to animal law.<sup>132</sup> His attitude toward the kinds of animal law cases he wished to handle also began to transition, as he realized, "I could take all these animal cases and it would be only a slight drop in the bucket of animal abuse. I would spend an entire career nibbling at the edges. The only way I could make

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venues. To date, Lecture Series speakers have included Steven Wise, Raj Panjwani, Bruce Wagman, Joyce Tischler, and Peter Stevenson, giving Australian legal audiences access to non-Australian perspectives and giving each of the guest lecturers a wonderful opportunity to learn about Australian animal law issues. The Voiceless web site hosts Law Talk, an international forum for attorneys and law students. See Voiceless, *supra* note 125. In Canada, the animal law movement is being developed by a group of law professors including Professor Vaughan Black of Schulich School of Law, Dalhousie University and Professor Martine Lachance, Faculty of Law of the University of Quebec in Montreal (UQAM). Professor Lachance is also the Director of the International Research Group in Animal Law.

<sup>127</sup> Interview with Favre, *supra* note 94.

<sup>128</sup> Telephone interview with Steven Wise, Founder and President, Center for the Expansion of Fundamental Rights (Dec. 6, 2010) [hereinafter Interview with Wise].

<sup>129</sup> Tischler, *supra* note 1, at 21-23. Henry Mark Holzer, Professor of Law Emeritus, Brooklyn Law School, Chairman, International Society for Animal Rights.

<sup>130</sup> See, *supra* note 4.

<sup>131</sup> Interview with Favre, *supra* note 94.

<sup>132</sup> Interview with Wise, *supra* note 128.

a substantial impact was to focus on making systemic change.”<sup>133</sup> Favre was thinking along the same lines--in 1988, he and Wise began a series of discussions aimed at writing a law-review article about rights for chimpanzees.<sup>134</sup> Their discussions included whether rights would occur through litigation or legislation.<sup>135</sup> The resulting article was submitted to the Vermont Law Journal, but the student editors were unwilling to publish it.<sup>136</sup>

Soon after, Favre and Wise were contacted by Peter Singer and Paola Cavalieri, who were editing a book, *The Great Ape Project*,<sup>137</sup> an ethical manifesto to bring great apes into the moral community of equals. The editors asked Favre and Wise to draft a chapter on legal rights and they agreed. They were eager to take what had been a purely philosophical concept and apply it within the overarching framework of the law. But, the editors were suggesting changes to their chapter that would make no sense to a lawyer or judge.<sup>138</sup> For example, Singer and Cavalieri proposed that rights for apes could be achieved by adding apes to all laws protecting humans.<sup>139</sup> Favre and Wise countered that was not possible in the current legal system and Singer responded that the goal of the book was not to address practical realities,<sup>140</sup> but rather, “to take a different road” in order “to arouse public support for a radical re-thinking of the position of the apes.”<sup>141</sup> He expressed concern that there were “serious philosophical differences”<sup>142</sup> in their approaches and that this book was not the venue to deal with practical attempts to apply rights theory within the existing legal system.<sup>143</sup> Favre and

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<sup>133</sup> *Id.*

<sup>134</sup> Interview with Favre, *supra* note 94.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* This unpublished article is on file with its authors.

<sup>137</sup> THE GREAT APE PROJECT: EQUALITY BEYOND HUMANITY (Paola Cavalieri & Peter Singer, eds., 1993) (a collection of essays that advocate for the extension of legal rights to great apes).

<sup>138</sup> Interview with Wise, *supra* note 128.

<sup>139</sup> Facsimile from Peter Singer, Professor of Bioethics, Princeton University, to David Favre, Professor of Law, Michigan State University, and Steven Wise, Founder and President, Center for the Expansion of Fundamental Rights (Feb. 24, 1992) (on file with David Favre) [hereinafter Singer Fax to Favre & Wise, February].

<sup>140</sup> Facsimile from Peter Singer, Professor of Bioethics, Princeton University, to Steven Wise, Founder and President, Center for the Expansion of Fundamental Rights (March 3, 1992) (on file with David Favre) [hereinafter Singer Fax to Wise, March]. “We would rather strengthen and clarify the ethical basis of our position before we get into the details of seeing what we can get out of the existing legal situation.” *Id.*

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

<sup>142</sup> Singer Fax to Wise, March, *supra* note 140; Singer Fax to Favre & Wise, February, *supra* note 139. David Favre responded, “There is no difference in philosophy between ourselves that I can discern. We support the same ethical position . . . . You state that there is a difference in tactics. I guess that we do not understand what your tactic is, beyond the publication of the Declaration itself. What is to come next? At some point you have to talk with the lawyers.” Letter from David Favre, Professor of Law, Michigan State University, to Peter Singer, Professor of Bioethics, Princeton University (Feb. 28, 1992) (on file with David Favre) [hereinafter Favre Letter to Singer, February].

<sup>143</sup> Singer Fax to Favre & Wise, February, *supra* note 139, at page 2. Singer wrote, “In this book, we are making a claim for a small group of animals, but for this group we are serious about demanding real equality, and we don’t want to compromise our claim on their behalf. We can well understand that, as lawyers, you might think this unrealistic, and might think that a more moderate

Wise argued vehemently with Singer's conclusion:<sup>144</sup> "We cannot seem, by correspondence, to make you understand that our efforts are in *harmony*, that we have *no* deep philosophical differences, and that our projects are *not* distinct. In fact, David and I are taking the initial practical steps to implement our mutual goals. We are *not* compromising. We are *initiating*."<sup>145</sup>

Singer and Cavalieri refused to publish the chapter as part of their book, a rejection that had a deep impact on Favre and Wise. They began to see the limitations of approaching animal rights from a purely philosophical perspective, a "mile high" view of the concepts. The lawyers' job, as they saw it, was to apply these concepts on the ground. "Judges didn't care about Singer, Regan or even philosophy; what they care about is jurisprudence and law. If I wanted to persuade judges, it wasn't going to happen by citing philosophy. The way to move forward was to make arguments similar to philosophy, but cast them in jurisprudential language."<sup>146</sup>

Favre had recently accepted the position of interim dean at his law school and was required to focus on that. Wise, however, turned his attention to writing scholarly law review articles in order to flesh out his ideas.<sup>147</sup> Between 1995 and 1999, Wise found his writer's voice and, in the process, transformed the debate about animal rights from a philosophical to a legal one. He published an astonishing series of articles in which he

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strategy would have a better chance of achieving something concrete, and in the long run, bringing about a major change for the better. If that is you[r] view, I would give you all possible encouragement in pursuing that strategy, and hope for its success. But we are pursuing a different strategy, and we don't want to risk confusing the issue in our book." *Id.*

In drafting this article, I (Tischler) contacted Peter Singer and asked him to review that 1992 facsimile-discussion with Favre and Wise. Singer explained that, in writing the book, he and Cavalieri were adamant that they wanted to be purist in their approach. Throughout the editing process, they asked themselves, "How purist are we going to be? We are asking for everything for apes... What is it that we want to get in front of people **now**?" When I asked Singer if he thought there were "deep philosophical differences" between his approach and Favre and Wise's, he replied, "It's quite possible that we were all trying to reach the same goal. We (Singer and Cavalieri) were thinking more revolutionary than incremental." Video Skype Interview with Peter Singer, March 23, 2011, 15:30 PST (transcript on file with ALDF).

<sup>144</sup> Singer Fax to Wise, March, *supra* note 140. "Paola and I know that the legal world is full of compromises, and for that reason have nothing but respect for your efforts to achieve something for apes through this process. It is just that our book is an attempt to take a different road - we hope our efforts will complement each other, but they are distinct and ours can only succeed if we keep the distinction clearcut . . . . To deal with 'the reality and complexity of legal rights' would in effect mean: how can we get something for apes within the present legal system that is fixated on the unique status of human beings. Those are presuppositions that we don't want to accept." *Id.* Steve Wise responded, "You say that you respect our efforts to achieve something for apes through the legal process, but that you seek to take a different road. *There is no other road.* Only the legal process exists to implement legal rights." Facsimile from Steven Wise, Founder and President, Center for the Expansion of Fundamental Rights, to Peter Singer, Professor of Bioethics, Princeton University (March 10, 1992) (on file with David Favre) [hereinafter Wise Fax to Singer, March]; Favre Letter to Singer, February, *supra* note 142.

<sup>145</sup> Wise Fax to Singer, March *supra* note 144.

<sup>146</sup> Interview with Wise, *supra* note 128.

<sup>147</sup> *Id.* ("I woke up on December 19, 1993, my forty-fourth birthday and felt mortal...I dissolved my law firm, set my course to be a writer, left ALDF. I had to break all the molds of my life, so that I could accomplish what I wanted to do. Everything else was taking up too much of my time and I needed to focus single-mindedly on rights.").



began to chart a course for the establishment of legal rights for great apes.<sup>148</sup> Yet, he was not satisfied, “I began to realize that nobody reads these things [law reviews], so I didn’t see how it would make an impact. I had an idea to put it into a trade book. Virtually every idea is laid out in the Vermont Law Review article. . . . It needed to get out to the world and law reviews were not the way to do it.”<sup>149</sup> He found an editor sometime in 1996 and began to work on *Rattling the Cage*,<sup>150</sup> which laid out the legal theories about rights for chimpanzees in a style that was geared more to the general public.<sup>151</sup> The publication of *Rattling the Cage* marked a turning point in the field of animal law, enabling Wise and the movement to reach a significantly larger audience.<sup>152</sup> Several books and articles and countless debates and presentations later, Wise has remained laser-focused on the goal of the recognition of animals as legal persons,<sup>153</sup> and, as of this writing, he is working with dozens of bright, energetic people to develop the first set of lawsuits to address that issue.<sup>154</sup>

Favre has approached the establishment of legal rights for animals in his own fashion, arguing that within the existing property paradigm, significant advances are possible. While more incremental, Favre’s ideas are equally inventive. In one article, Favre advanced the idea that property in an animal can be divided between legal and equitable title and the equitable title can be transferred to the animal. He has also urged the creation of a new tort to protect some interests of certain animals, and pioneered the

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<sup>148</sup> See generally Steven M. Wise, *How Nonhuman Animals Were Trapped in a Nonexistent Universe*, 1 ANIMAL L. 15 (1995) (discussing why legal rights need not be restricted to humans, and why fundamental interests of nonhuman animals such as chimpanzees and bonobos should be protected); Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471 (Spring 1996) (discussing how the legal inferiority of nonhuman animals arose from ancient hierarchical cosmologies and how those ancient cosmologies continue to perpetuate the legal status of nonhuman animals); Steven M. Wise, *Legal Rights for Nonhuman Animals: The Case for Chimpanzees and Bonobos*, 2 ANIMAL L. 179 (1996) (arguing that chimpanzees and bonobos should be entitled to the fundamental legal rights of bodily integrity and bodily liberty); Steven M. Wise, *Hardly a Revolution - The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VT. L. REV. 793 (1998) (arguing that the denial of “dignity rights” to nonhuman animals conflicts with traditional principles and values of Western law); Steven M. Wise, *Animal Thing to Animal Person - Thoughts on Time, Place, and Theories*, 5 ANIMAL L. 61 (1999) (discussing strategic considerations for challenging the “animals as property” rule); Dr. Jane Goodall & Steven M. Wise, *Are Chimpanzees Entitled to Fundamental Legal Rights?*, 3 ANIMAL L. 61 (1997) (arguing that chimpanzees should be entitled to fundamental legal rights).

<sup>149</sup> Interview with Wise, *supra* note 128.

<sup>150</sup> STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* (Perseus Books 1999).

<sup>151</sup> Interview with Wise, *supra* note 129.

<sup>152</sup> See *infra* Part II.G.

<sup>153</sup> STEVEN M. WISE, *DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS* (Perseus Books 2002). Steven M. Wise, *The Entitlement of Chimpanzees to the Common Law Writs of Habeas Corpus and De Homine Replegiando*, 37 GOLDEN GATE U. L. REV. 219 (2007); Steven M. Wise, *Rattling the Cage Defended*, 43 B.C. L. REV. 623 (May 2002); Symposium, *The Legal Status of Nonhuman Animals*, 8 ANIMAL L. 1 (2002); Steven M. Wise, *Arguments in Favour of Basic Legal Rights for Nonhumans*, REFORM, issue 91 (Australian Law Reform Commission March, 2008).

<sup>154</sup> Steven M. Wise, *Legal Personhood and the Nonhuman Rights Project*, 17 ANIMAL L. 1 (2010); Nonhuman Rights Project, <http://www.nonhumanrights.org/> (last visited Feb. 12, 2012).

notion that animals can be granted some legal rights if they are viewed as constituting a fourth category of property, “living property.”<sup>155</sup>

## 2. The Argument for Welfare Reform

Not every animal lawyer has greeted Favre and Wise’s ideas with enthusiasm. In 2006, Jonathan Lovvorn<sup>156</sup> published an eloquent plea to students and practitioners of animal law to step away from the focus on animal rights and instead work for progressive welfare reforms.<sup>157</sup> He reasoned that (a) many of those advocating for rights have a basic misunderstanding of the history of the civil rights movement and its application to animal rights;<sup>158</sup> (b) while we focus our energies on rights, billions of animals continue to suffer horribly, while there are, in fact, positive reforms that are attainable right now;<sup>159</sup> and (c) a better model than the civil rights movement is the environmental law movement, which has made impressive progress by focusing on reform through legislation and litigation.<sup>160</sup> Lovvorn’s plea has gained a good deal of traction with animal law practitioners who are either more attuned to welfare concepts or are pragmatically viewing incremental reform as the only truly viable option. The distinction between welfare and rights, spawned in the inaugural years of animal law, lives on today as some animal lawyers continue to debate which approach is best to secure meaningful legal protection for animals. We cannot know at this early juncture which path will create greater gains for animals, whether one will dilute the other or support and enhance the speed of progress. Fifty years from now, other authors will have the benefit of hindsight to tell that story.

## G. Animal Law Takes Center Stage

Several actions and events converged to change the landscape for animal law. The publication of Steven Wise’s first book, *Rattling the Cage*, created a “trigger event” in the field.<sup>161</sup> It drew national attention to the issue of animal rights and engaged some

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<sup>155</sup> David Favre, *A New Property Status for Animals: Equitable Self-Ownership*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 234, 238-45 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004); David Favre, *Equitable Self-ownership for Animals*, 50 DUKE L.J. 473 (2000); David S. Favre, *Judicial Recognition of the Interests of Animals: A New Tort*, 2005 MICH. ST. L. REV. 333 (2005); David Favre, *Living Property: A New Status for Animals within the Legal System*, 93 MARQ. L. REV. 1021 (2010). In his most recent article, Favre argues that once animals are distinguished from other forms of property, it will encourage a new area of jurisprudence, which will establish certain legal rights for a limited class of animals. For a complete list of Favre’s articles on other aspects of animal law, see, <http://www.animallaw.info/articles/>.

<sup>156</sup> *Supra* note 61.

<sup>157</sup> Jonathan R. Lovvorn, *Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform*, 12 ANIMAL L. 133 (2006).

<sup>158</sup> *Id.* at 139-41.

<sup>159</sup> *Id.* at 141-46.

<sup>160</sup> *Id.* at 142, fn. 69.

<sup>161</sup> BILL MOYER, *DOING DEMOCRACY: THE MAP MODEL FOR ORGANIZING SOCIAL MOVEMENTS* (1st ed. 2001). Moyer defined a “trigger event” in a social justice movement as “an incident that

of the nation's leading legal scholars. Wise's ideas were enthusiastically embraced by Professors Laurence Tribe,<sup>162</sup> Cass Sunstein,<sup>163</sup> and Alan Dershowitz,<sup>164</sup> while Professor Richard Epstein<sup>165</sup> and Judge Richard Posner<sup>166</sup> vigorously criticized the ideas. Wise welcomed the opportunity to debate and hone his theories; finally, his ideas were being heard by a large audience and they were being viewed as serious and innovative. Also in 1999, The New York Times prominently critiqued animal law with a full-length article,<sup>167</sup> claiming that, "influenced by developing scientific and ethical scholarship showing animals to have far higher levels of cognition and social development than previously believed," lawyers were "filing novel lawsuits and producing new legal scholarship to try to chip away at a fundamental principle of American law that animals are property and have no rights."<sup>168</sup>

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dramatically reveals a critical social problem to the general public in a vivid way." *Id.* at 54. An example is the arrest of civil rights activist Rosa Parks for her refusal to give up her seat and move to the back of the bus. I apply this to Wise's publication of *Rattling the Cage* and the extraordinary reaction it received from scholars, jurists and the American public. It catapulted Wise and animal rights law into the mainstream of American society.

<sup>162</sup> Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1341 (1974) (arguing that standing could be extended to animals); Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1 (2001). Laurence H. Tribe is currently the Carl M. Loeb University Professor of Law at Harvard Law School.

<sup>163</sup> ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum, eds., 2004); Cass R. Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000); Cass R. Sunstein, *Enforcing Existing Rights*, 8 ANIMAL L. 1 (2002); Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387 (2003); Cass R. Sunstein, *Animal Rights Without Controversy*, 70 LAW & CONTEMP. PROBS. 117 (2007). Cass R. Sunstein is the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget (since Jan. 2009). Prior to that, he was Felix Frankfurter Professor of Law, Harvard Law School (since 2008); Professor of Law, University of Chicago Law School (1981 to 2008). He is the author of numerous books and articles.

<sup>164</sup> Alan M. Dershowitz, *SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE*, ch. 9 (1st ed. 2002); Alan M. Dershowitz, *The Evolving Legal Status of Chimpanzees*, 9 ANIMAL L. 1 (2003) (symposium). Alan M. Dershowitz is currently the Felix Frankfurter Professor of Law at Harvard Law School.

<sup>165</sup> Richard A. Epstein, *The Next Rights Revolution?*, 51 NAT'L REV. 44 (Nov. 8, 1999); Richard A. Epstein and the Honorable Richard A. Posner, *Debate at Northwestern Law School*, Apr. 4, 2000; Richard A. Epstein, *Animals as Objects, or Subjects, of Rights*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). Richard A. Epstein is currently the James Parker Hall Distinguished Service Professor Emeritus of Law and Senior Lecturer at the University of Chicago Law School.

<sup>166</sup> Richard A. Posner, *Animal Rights*, 110 YALE L.J. 527 (2000); Richard A. Posner, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). Richard A. Posner is currently a Judge on the United States Seventh Circuit Court of Appeals and a Senior Lecturer at the University of Chicago Law School.

<sup>167</sup> William Glaberson, *Legal Pioneers Seek to Raise Lowly Status of Animals*, N.Y. TIMES, Aug. 18, 1999, at A1, available at <http://www.nytimes.com/1999/08/18/us/legal-pioneers-seek-to-raise-lowly-status-of-animals.html>.

<sup>168</sup> *Id.*

In 2000, Wise was invited to teach an animal law course at Harvard Law School.<sup>169</sup> He had been teaching animal law at Vermont Law School for ten years, but the invitation from Harvard was a symbolic entry into the upper echelon of legal education.

That same year, the first casebook for teaching animal law was published.<sup>170</sup> Prior to that, instructors had to assemble their own material, which was burdensome and bulky; plus there was no consistency in the approach to these courses. Wise recalls the “cumbersome process” of manually collecting all of his course materials, which included over 1,000 pages of cases, statutes, essays, and law review articles.<sup>171</sup> The impact of a scholarly casebook cannot be understated: it “gave a tremendous boost to the developing academic field,”<sup>172</sup> brought a higher level of continuity to animal law courses, and enhanced the legitimacy of animal law as a subject of study. Also in 2000, David Favre, looking for new technological tools to support animal law, came up with another big picture idea that has broadened the reach of the subject: he created and built the Animal Legal and Historical Center,<sup>173</sup> a web center devoted solely to cases, statutes, articles, historical information, and other resources about animal law. The Center has grown enormously in a short period of time and now serves an international audience as a primary resource for information about animal law.

Animal Law received an additional boost from a surprising source: in 2001, *The Price is Right* host Bob Barker, a longtime animal activist with no prior involvement in animal law, began to give large and highly publicized endowment gifts to leading law schools in order to encourage them, and other schools, to offer animal law courses.<sup>174</sup> These donations have enhanced students’ opportunities to learn about animal rights, conduct research on animal law topics, participate in clinics and moot courts, and obtain hands-on experience through externships with animal protection groups.<sup>175</sup>

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<sup>169</sup> Interview with Wise, *supra* note 128; Adam Kolber, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163, 164 (Oct. 2001).

<sup>170</sup> PAMELA D. FRASCH, SONIA S. WAISMAN, BRUCE A. WAGMAN, & SCOTT BECKSTEAD, ANIMAL LAW (1st ed. 2000) [hereinafter ANIMAL LAW casebook].

<sup>171</sup> Tischler, *supra* note 45, at 8.

<sup>172</sup> Taimie L. Bryant, *The Bob Barker Gifts to Support Animal Rights Law*, 60 J. LEGAL EDUC. 237, 247 (Nov. 2010).

<sup>173</sup> Animal Legal & Historical Ctr., *supra* note 110.

<sup>174</sup> “. . . Barker’s stated goal was only to ensure the opportunity for students to take animal rights law courses, with the hope that many would carry forward into their professional careers a willingness to pursue legal change to benefit animals.” Bryant, *supra* note 172 at 249; *see also* Wagman, *supra* note 35, at 204.

<sup>175</sup> Bryant, *supra* note 172, at 244-245.

### III. Landmark Lawsuits and Legislation

*"The loftier the building, the deeper must the foundation be laid."*

Thomas a` Kempis

Animal law practitioners have always had to answer the question: where do I focus my time and energy? With so much suffering and exploitation to address, a core debate still raging over rights versus welfare, and the practical realities of few paying jobs in the field of animal law,<sup>176</sup> the answers have been as varied as the personalities of the practitioners. As noted by Jon Lovvorn,<sup>177</sup> there have been numerous lawsuits that have pushed the peanut forward.<sup>178</sup> It is not my goal to rehash all of the cases that have been brought, but rather, to put into perspective those cases and legislation which are creating broad based change or mark a turning point in the evolution of animal law.<sup>179</sup>

#### A. Companion Animals

Since the inception of animal law, the overwhelming majority of civil lawsuits have dealt with the unique set of problems experienced by companion animals, i.e., those species who have the closest physical proximity to and emotional relationships with human beings. The range of legal issues that arise is huge: the measure of damages recoverable when an animal is injured or killed,<sup>180</sup> new applications of existing theories

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<sup>176</sup> Eisenstein, *supra* note 86. Most attorneys handle animal law cases on a pro bono basis. There are only a handful of paid positions, including working for a nonprofit animal protection organization, teaching animal law, working for a county, state or federal agency and handling animal law matters, or opening an animal law private practice.

<sup>177</sup> Lovvorn, *supra* note 157, at 144-46. Lovvorn points to: successful litigation challenges to the Hegins pigeons shoot case, the Makah whale hunt, indiscriminate killing of migratory birds, the slaughter of white-tailed deer, in addition to the seizure of hundreds of abused dogs, the rescue of the Suarez polar bears from a traveling circus, and the removal of the "Animal Care Certified" logo on certain egg products.

<sup>178</sup> Barnaby J. Feder, *Pressuring Perdue*, N.Y. TIMES, Nov. 26, 1989, available at <http://query.nytimes.com/gst/fullpage.html?res=950DE1DD123EF935A15752C1A96F948260&pagewanted=1>. In a 1989 interview with *The New York Times*, animal rights advocate Henry Spira was asked what his epitaph should be and he responded, "He pushed the peanut forward." I often quote this; it is a fitting description of the work that we do and the painfully slow pace at which progress is made.

<sup>179</sup> There are currently two casebooks in the U.S. (Frasch and Favre) and various other books in the U.S. and abroad covering a wide variety of animal law cases and even those sources cannot cover all of the cases that have been filed. PAMELA D. FRASCH, KATHERINE M. HESSLER, SARAH M. KUTIL & SONIA S. WAISMAN, *ANIMAL LAW IN A NUTSHELL* (West 2011) [hereinafter *NUTSHELL*]; DEBORAH CAO, *ANIMAL LAW IN AUSTRALIA AND NEW ZEALAND* (Lawbook Co. 2010); PETER SANKOFF & STEVEN WHITE, *ANIMAL LAW IN AUSTRALASIA* (Federation Press 2009); JOAN SCHAFFER & JULIE FERSHTMAN, *LITIGATING ANIMAL LAW DISPUTES: A COMPLETE GUIDE FOR LAWYERS* (ABA 2009); DAVID FAVRE, *ANIMAL LAW: WELFARE, INTERESTS, AND RIGHTS* (Aspen 2008); TAIMIE L. BRYANT, REBECCA J. HUSS & DAVID N. CASSUTO, *ANIMAL LAW AND THE COURTS: A READER* (Thomson West 2008); *ANIMAL LAW casebook*, *supra* note 170.

<sup>180</sup> See, e.g., *Womack v. Von Rardon*, 135 P.3d 542 (Wash. Ct. App. 2006) (emotional distress); *Petco v. Schuster*, 144 S.W.3d 554 (Tex. App. 2004) (sentimental value); *Burgess v. Taylor*, 44 S.W.3d 806 (Ky. Ct. App. 2001) (punitive damages); *Elliot v. Hurst*, 817 S.W.2d 877 (Ark. 1991) (fair market value);

of liability,<sup>181</sup> due process and the burden of proof in nuisance and “dangerous dog” cases,<sup>182</sup> breed specific legislation,<sup>183</sup> landlord tenant disputes,<sup>184</sup> search and seizure,<sup>185</sup> contractual disputes,<sup>186</sup> wills, trusts and probate issues, and the duty to care for animals during natural disasters.<sup>187</sup>

Some of the more interesting legal developments have come in unexpected areas, such as uniform laws that have corrected the long-standing problem of honorary trusts by creating valid trusts for the benefit of animals.<sup>188</sup> Cases in which the parties are fighting over the custody and possession of a dog or cat reveal that some courts are considering the emotional attachments that the humans have to the animal involved, the concept of visitation rights and, in some cases, a consideration of the interests of the animal who is the subject of the custody battle.<sup>189</sup> Human beings have been appointed as guardians *ad litem* and special masters, most notably, the appointment of Professor Rebecca Huss to represent the interests of the animal victims in the Michael Vick/Bad

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Jankoski v. Preiser Animal Hosp., 510 N.E.2d 1084 (Ill. App. Ct. 1987) (loss of companionship); Brousseau v. Rosenthal, 443 N.Y.S.2d 285 (N.Y. City Civ. Ct. 1980) (actual value).

<sup>181</sup> See, e.g., Burgess v. Taylor, *supra* note 180 (intentional infliction of emotional distress); Rabideau v. City of Racine, 627 N.W.2d 795 (Wis. 2001) (negligent and/or intentional infliction of emotional distress);

<sup>182</sup> See, e.g., State v. Murphy, 860 N.E. 2d 1068 (Ohio Ct. App. 2006) (definition of “vicious”); County of Pasco v. Riehl, 636 So. 2d 17 (Fla. 1994) (due process); Phillips v. San Luis Obispo County Dept. of Animal Reg., 228 Cal. Rptr. 101 (Cal. Ct. App. 1986) (discretionary hearing violates due process) .

<sup>183</sup> See, e.g., Dias v. City and County of Denver, 567 F.3d 1169 (10th Cir. 2009) (upholding pit bull ban); Michigan Wolfdog Ass’n v. St. Clair Cnty., 122 F. Supp. 2d 794 (E.D. Mich. 2000) (upholding Michigan Wolf-Dog Cross Act); American Dog Owners Ass’n v. City of Yakima, 777 P.2d 1046 (Wash. 1989) (upholding pit bull ban); American Dog Owners Ass’n v. City of Lynn, 533 N.E.2d 642 (Mass. 1989) (discussing “vagueness” of ordinance regulating pit bulls); Colorado Dog Fanciers v. City and Cnty. of Denver, 820 P.2d 644 (Colo. 1991).

<sup>184</sup> See, e.g., Crossroads Apartments Assocs. v. Leboo, 578 N.Y.S.2d 1004 (N.Y. City Ct. 1991); Nahrstedt v. Lakeside Village Condominium Ass’n, 878 P.2d 1275 (Cal. 1994) (condominium restriction).

<sup>185</sup> See, e.g., Baxter v. State, 891 N.E.2d 110 (Ind. Ct. App. 2008) (seizure justified when animals are in dire condition); San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962 (9th Cir. 2005) (killing dog constitutes seizure under Fourth Amendment); State v. King, 809 N.E.2d 71 (Ohio Ct. App. 2004) (probable cause for issuance of a warrant); Brown v. Muhlenberg Twp., 269 F.3d 205 (3rd Cir. 2001) (seizure under Fourth Amendment).

<sup>186</sup> See, e.g., Aegis Security Ins. Co. v. Pennsylvania Ins. Dept., 798 A.2d 330 (Pa. Commw. Ct. 2002) (insurance contracts and policy exclusions); Sease v. Taylor’s Pets, Inc. 700 P.2d 1054 (Or. Ct. App. 1985) (is an animal a “product”/ strict products liability); Connor v. Bogrett, 596 P.2d 683 (Wyo. 1979) (sale of labrador retriever).

<sup>187</sup> See, *supra* note 40.

<sup>188</sup> UNIF. TRUST CODE § 408 (2003) (making trusts for animals valid and enforceable). The Uniform Probate Code also provides for both honorary and formal trusts for animals. See UNIF. PROBATE CODE § 2-907 (amended 2008). See, NUTSHELL, *supra* note 179, Chapter 8, Wills and Trusts.

<sup>189</sup> See, e.g., Houseman v. Dare, 405 N.J. Super. 538 (App. Div. 2009); Zovko v. Gregory, Case No. CH 97-544 (Va. Cir. Ct., Arlington Cty. Oct. 17, 1997) (discussing best interests of a cat); Bennett v. Bennett, 655 So.2d 109 (Fla. Dist. Ct. App. 1995) (discussing custody and visitation of animals); Arrington v. Arrington, 613 S.W.2d 565 (Tex. App. 1981).

Newz Kennels prosecution.<sup>190</sup> Activists are passing legislation to ban harmful practices that were heretofore not challenged, for example, the surgical declawing of cats.<sup>191</sup>

Additionally, advocates are finding new ways to use existing state laws that enhance their ability to protect animals. Professor Bill Reppy told a small group of people, including me, about a highly unusual, but little-used law, Chapter 19A of the North Carolina General Statutes, which enables citizens to civilly enjoin cruelty.<sup>192</sup> Thereafter, ALDF, represented by Bruce Wagman, successfully used Chapter 19A to rescue hundreds of dogs suffering at the hands of animals hoarders, to wit, ALDF sued to enjoin the cruelty being committed by Barbara and Robert Woodley against the dogs in their possession.<sup>193</sup> We were able to breathe life into a statute that grants meaningful protections to animals, allowing a court to inquire into the physical suffering experienced by the dogs and to force their owner to relinquish the dogs to another caregiver.<sup>194</sup> Of additional significance is that the attorneys in the Woodley case educated the court about the issue of animal hoarding as a psychological condition,<sup>195</sup> arguing that none of the dogs should be returned to their abusive owners. Moreover, the internal decision made by ALDF and Wagman that all of the rescued dogs would be brought back to health, socialized, and placed into new homes helped to raise the bar for rehabilitating the animal victims of hoarding from the prior widespread practice of killing most animals seized from hoarders. The North Carolina Court of Appeals confirmed a citizen's right to use Chapter 19A<sup>196</sup> and citizens have successfully used it multiple times since then.

## B. Cruelty Laws and Prosecutions

State anti-cruelty statutes are the cornerstone of American animal protection laws. Most of these laws were passed in the second half of the 19<sup>th</sup> Century and were a

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<sup>190</sup> Rebecca J. Huss, *Lessons Learned: Acting as Guardian/Special Master in the Bad Newz Kennels Case*, 15 ANIMAL L. 69 (2008); Alexis C. Fox, *Using Special Masters to Advance the Goals of Animal Protection Laws*, 15 ANIMAL L. 87 (2008); in Tennessee, a probate court appointed a guardian *ad litem* for Alex, a golden retriever, 5/8/07 Com. Appeal (Mem. TN) B1 2007 WLNR 8714930.

<sup>191</sup> California Veterinary Medical Ass'n v. City of West Hollywood, 152 Cal. App. 4th 536, 541-43 (Cal. App. 2d Dist. 2007).

<sup>192</sup> Professor Reppy later wrote about the valuable tool offered by the North Carolina law. See William A. Reppy, Jr., *Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience*, 11 ANIMAL L. 39 (2005).

<sup>193</sup> Perm. Inj. in Animal Legal Def. Fund v. Woodley, No. 04 CVD 1248 (N.C. Gen. Ct. Just. Ct. Div., Lee County, N.C. Apr. 12, 2005) (copy on file with ALDF); see also Barry Yeoman, *Special Report: Operation Rescue*, O, THE OPRAH MAGAZINE, June 2009, available at <http://www.oprah.com/relationships/Animal-Rescue-The-Fight-to-Save-300-Dogs/1> (last visited Feb. 12, 2012).

<sup>194</sup> *Id.*

<sup>195</sup> Animal hoarders cause, and are unable to perceive, the long term suffering experienced by the animals in their possession. For a better understanding of hoarding, see The Hoarding of Animals Research Consortium, <http://www.tufts.edu/vet/hoarding/> (last visited Feb. 12, 2012).

<sup>196</sup> Animal Legal Def. Fund v. Woodley, 640 S.E.2d 777 (N.C. Ct. App. 2007).

reflection of American society's growing concern for the suffering of animals.<sup>197</sup> In the 1970s and 80s, animal law practitioners paid scarce attention to these state laws, considering them to be under the aegis of the criminal justice system, local animal control agencies, and humane societies. However, in the past twenty years, activists and groups working in most states have passed legislation to strengthen and improve their anti-cruelty laws by adding provisions for cost of care bonds, seizure and forfeiture of animals, psychiatric evaluations and treatment of offenders, restitution, and cross reporting of crimes.<sup>198</sup> HSUS has a long-term campaign to criminalize cockfighting in every state and allow the crime to be charged as a felony.<sup>199</sup> Crush videos have been banned by federal law.<sup>200</sup> Through the work of Randall Lockwood, Frank Ascione, Phil Arkow, and others, a body of literature now exists to document "the link," i.e., the close connection between abuse of animals, abuse of children, and domestic violence.<sup>201</sup> These findings are regularly used to educate prosecutors and law enforcement about the interconnectedness of violence and the importance of prosecuting animal cruelty cases.

The heavily publicized prosecution and conviction of football player Michael Vick and three of his associates on federal and state charges related to illegal dog fighting brought the issue of dog fighting into focus for many Americans<sup>202</sup> and helped

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<sup>197</sup> David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800s*, 1993 DET. C.L. REV. 1 (1993). "The nineteenth century saw a significant transformation of society's attitude toward animals, which was reflected in the legal system . . . . During the first half of the century, lawmakers began to recognize that an animal's potential for pain and suffering was real and deserving of protection against its unnecessary infliction. The last half of the nineteenth century saw the adoption of anti-cruelty laws which became the solid foundation upon which today's laws still stand." *Id.* at 1-2.

<sup>198</sup> See Pamela D. Frasch, Stephan K. Otto, Kristen, M. Olsen, & Paul A. Ernest, *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69 (1999). For a free downloadable compendium of current animal protection laws in the U.S. and Canada, see Animal Legal Defense Fund, Animal Protection Laws of the United States and Canada, <http://www.aldf.org/article.php?id=259> (last accessed Feb. 12, 2012).

<sup>199</sup> HSUS, Cockfighting, <http://www.humanesociety.org/issues/cockfighting/> (last visited Feb. 12, 2012).

<sup>200</sup> Crush videos cater to the sexual fetish of certain individuals. These videos, which sold via the Internet, depict small animals being crushed to death by the foot or shoe of a woman. The U.S. Supreme Court overturned the first federal statute that prohibited the commercial sale of depictions of animal cruelty on the ground that it was overly broad and violated the First Amendment. *United States v. Stevens*, 130 S. Ct. 1577 (2010). Congress quickly passed legislation that is limited to banning crush videos, H.R. 5566, 111th Cong. (2010).

<sup>201</sup> See, e.g., FRANK R. ASCIONE & PHIL ARKOW, CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE: LINKING THE CIRCLES OF COMPASSION FOR PREVENTION AND INTERVENTION (Purdue Univ. Press 1999) [hereinafter Ascione and Arkow]; FRANK ASCIONE & RANDALL LOCKWOOD, CRUELTY TO ANIMALS AND INTERPERSONAL VIOLENCE: READINGS IN RESEARCH AND APPLICATION (1st ed. 1998); Carter Luke et. al., *Cruelty to Animals and Other Crimes: A Study by the MSPCA and Northeastern University* (1997), available at <http://www.mspca.org/programs/cruelty-prevention/animal-cruelty-information/animal-cruelty-study.html> (last accessed Feb. 12, 2012). See also, ANIMAL LAW casebook, *supra* note 170, at 180-189.

<sup>202</sup> See, e.g., coverage by CNN, Vick surrenders early to begin dogfighting sentence, [http://articles.cnn.com/2007-11-19/us/vick.surrenders\\_1\\_vick-surrenders-judge-henry-e-hudson-dogfighting-operation?\\_s=PM:US](http://articles.cnn.com/2007-11-19/us/vick.surrenders_1_vick-surrenders-judge-henry-e-hudson-dogfighting-operation?_s=PM:US) (last visited Feb. 12, 2012); ESPN, Apologetic Vick gets 23-month sentence on dogfighting charges, <http://sports.espn.go.com/nfl/news/story?id=3148549> (last visited Feb. 12, 2012); USA TODAY, Vick case sheds light on dark world of dog fighting,



in the effort to encourage prosecutors to be more aggressive in initiating and handling prosecutions of dog fighting activities.<sup>203</sup> An innovative approach to strengthening the enforcement of state anti-cruelty laws was developed by ALDF in the mid-1990s, when it began a program to offer free legal assistance to prosecutors of cruelty cases.<sup>204</sup> The program, now headed by Scott Heiser,<sup>205</sup> a former prosecutor, offers a variety of resources, including free legal research and advice, a database of cruelty cases, location of expert witnesses, and grants to pay for DNA analysis and expert testimony.

Supporting the enforcement of state anti-cruelty laws has enabled animal law practitioners to work in a collegial manner with prosecutors, judges, and law enforcement, and has helped in the move to mainstream animal law in the legal community. Violations of state anti-cruelty laws have become higher profile and media-worthy and the above approaches have led to greater willingness on the part of prosecutors to handle cruelty cases. Additionally, animal law practitioners have experimented with efforts to civilly enforce cruelty laws and assist with private prosecutions in states where such approaches are allowed.<sup>206</sup>

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[http://www.usatoday.com/sports/football/nfl/falcons/2007-07-18-vick-cover\\_N.htm](http://www.usatoday.com/sports/football/nfl/falcons/2007-07-18-vick-cover_N.htm) (last visited Feb. 12, 2012); Fox News, Michael Vick Sentenced to 23 Months in Jail for Role in Dogfighting Conspiracy, <http://www.foxnews.com/story/0,2933,316319,00.html> (last visited Feb. 12, 2012); NPR, After Michael Vick, The Battle To Stop Dogfighting, <http://www.npr.org/templates/story/story.php?storyId=113158123> (last visited Feb. 12, 2012); LOS ANGELES TIMES, Dog owner can't forgive Michael Vick, <http://articles.latimes.com/2010/nov/16/sports/la-sp-plaschke-20101117> (last visited Feb. 12, 2012). A full review of the case and its aftermath can be viewed at <http://www.aldf.org/article.php?id=928> (last visited Feb. 12, 2012).

<sup>203</sup> See, *supra* note 190.

<sup>204</sup> Joyce Tischler, *Zero Tolerance for Cruelty: An Approach to Enhancing Enforcement of State Anticruelty Laws*, in Ascione and Arkow, *supra* note 202, at 297.

<sup>205</sup> Scott Heiser, Director, Criminal Justice Program, ALDF; former District Attorney, Benton County, Oregon.

<sup>206</sup> See, e.g., *Int'l Primate Protection League v. Adm'rs of Tulane Educational Fund*, 500 U.S. 72 (1991) (maintaining that animal rights groups had standing to seek injunctive relief to bar defendants from killing monkeys formerly used in research as violative of Louisiana's animal cruelty statute); *ALDF v. Woodley*, *supra* note 195 (allowing animal protection group to sue for injunctive relief for alleged violation of an animal cruelty statute); *Humane Soc'y of Rochester and Monroe Cnty. for Prevention of Cruelty to Animals, Inc. v. Lyng*, 633 F. Supp. 480 (W.D.N.Y. 1986) (holding that the Humane Society and dairy farmers were entitled to an injunction against USDA officials, prohibiting hot iron facial branding); *Animal Legal Def. Fund v. Clougherty Packing Co.*, No. SCV-240050 (Cal. Sup. Ct. 2007); *Animal Legal Def. Fund v. Mendes*, 160 Cal. App. 4th 136, 72 Cal. Rptr. 3d 553 (Cal. Ct. App. 5 Dist. 2008).

### C. Animals Used in Research and Testing

*"The greatest injustice is using the law to keep justice at bay."*<sup>207</sup>

Scott Adams

In 1966, the U.S. Congress passed the federal *Animal Welfare Act* (AWA).<sup>208</sup> One of the AWA's primary purposes is "to insure that animals intended for use in research facilities . . . are provided humane care and treatment . . ." <sup>209</sup> The AWA sets out basic protections for animals used in research, including requirements "for animal care, treatment, and practices in experimental procedures to ensure that animal pain and distress are minimized, including adequate veterinary care with the appropriate use of anesthetic, analgesic, tranquilizing drugs, or euthanasia . . ." <sup>210</sup> It is a "before and after" law, regulating housing, feeding, and other aspects of animal care, but barring the U.S. Department of Agriculture (USDA), the agency charged with its enforcement, from regulating the design or performance of actual research or testing.

Civil litigation under the AWA began approximately twenty years after the law was passed. The first generation of animal law practitioners believed that the USDA's enforcement of the AWA fell far short of the mandate of Congress to protect animals used in research. Through a series of civil lawsuits, they sought to strengthen enforcement of the AWA.

#### 1. Are Rats, Mice, and Birds "Animals"?

As originally enacted, the AWA only covered certain species of animals.<sup>211</sup> Congress amended the definition of "animal" in 1970, expanding it to include "or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes . . ." <sup>212</sup> However, one year later, the USDA promulgated a regulation that specifically excluded all rats, mice, and birds from this definition.<sup>213</sup> Critics argued that the USDA's regulation contravened the plain language of the AWA and frustrated the intent of Congress in passing the legislation.<sup>214</sup> The exclusion of these species from the protections of the AWA meant that the requirements for veterinary care, anesthesia, analgesics, and other basics did not apply to approximately ninety-five percent of all

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<sup>207</sup> Paraphrased from a comment made in his April 11, 2010 Dilbert comic strip, *available at* <http://www.dilbert.com/strips/comic/2010-04-11/> (last visited Feb. 12, 2012).

<sup>208</sup> 7 U.S.C. §§ 2131-2159 (2006).

<sup>209</sup> 7 U.S.C. § 2131(1) (2006).

<sup>210</sup> 7 U.S.C. § 2143(a)(3)(A) (2006).

<sup>211</sup> At the time of its enactment, the AWA defined "animal" as "live dogs, cats, monkeys (nonhuman primate mammals) guinea pigs, hamsters, and rabbits." H.R. 13881, 89th Cong. § 2(h) (1966).

<sup>212</sup> 7 U.S.C. § 2132(g) (2006).

<sup>213</sup> 9 C.F.R. § 1.1 (2000).

<sup>214</sup> See Henry Cohen, *The Legality of the Agriculture Department's Exclusion of Rats and Mice from Coverage under the Animal Welfare Act*, 31 ST. LOUIS U. L.J. 543 (1987).

animals used in research and testing.<sup>215</sup> Yet, this regulation went unchallenged for years.

In 1989, ALDF's then staff attorney Valerie Stanley, along with Dr. Martin Stephens<sup>216</sup> then with HSUS, petitioned the USDA, asking the agency to promulgate a regulation to specify that birds, rats, and mice used in research be defined as "animals," so that those species would receive the protections of the AWA.<sup>217</sup> When the USDA denied their petition,<sup>218</sup> ALDF and HSUS filed suit in U.S. District Court claiming that the exclusion of rats, mice, and birds and the refusal to amend the earlier regulation were arbitrary and capricious and an abuse of discretion. The USDA's chief argument was that it had discretion to choose which species would be covered by the AWA, an argument that Judge Charles Richey of the District Court found to be "strained and unlikely."<sup>219</sup> He held for the plaintiffs, reasoning that if the stated purpose of the AWA was to ensure that animals used in research are provided humane care, including rats, mice, and birds would help to serve that purpose, whereas exclusion would not.<sup>220</sup> On appeal, the D.C. Circuit vacated the judgment, holding that none of the plaintiffs had standing.<sup>221</sup> Unlike environmental statutes, the AWA has no explicit citizen suit provision and it was unclear who, if anyone, possessed standing. This was a frustrating

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<sup>215</sup> National Association for Biomedical Research, Species in Research, [http://www.nabr.org/Biomedical\\_Research/Laboratory\\_Animals/Species\\_in\\_Research.aspx](http://www.nabr.org/Biomedical_Research/Laboratory_Animals/Species_in_Research.aspx) (last visited Feb. 12, 2012). It has been estimated that rats and mice constitute ninety-five percent of all animals used in research. Defenders of this exclusion argue that rats and mice are adequately protected because they are covered by the National Institutes of Health's Guide for the Care and Use of Laboratory Animals, see National Institutes of Health's Guide for the Care and Use of Laboratory Animals, available at <http://oacu.od.nih.gov/regs/guide/guide.pdf> (last accessed Feb. 12, 2012), which researchers must agree to abide by in order to receive funding from the NIH. The Guide does not have the force of law.

<sup>216</sup> Martin Stephens, Ph.D., Senior Research Associate, Johns Hopkins Center for Alternatives to Animal Testing; former Vice President, Animal Research Issues, The Humane Society of the U.S.

<sup>217</sup> Before the U.S. Department of Agriculture Petition for Rulemaking and Collateral Relief, submitted by Humane Society of the United States and Animal Legal Defense Fund (on file with ALDF). Petition for Rulemaking to Redefine "animal" in the AWA, HSUS and ALDF (Nov. 15, 1989) (on file with author).

<sup>218</sup> Letter from James W. Glosser, Admin., USDA, Animal and Plant Health Inspection Service, to Dr. Martin Stephens and Valerie Stanley (June 8, 1990) (on file with ALDF).

<sup>219</sup> Animal Legal Def. Fund v. Madigan, 781 F. Supp. 797, 801 (D.D.C. 1992).

<sup>220</sup> *Id.* at 800-01.

<sup>221</sup> Animal Legal Def. Fund v. Espy, 23 F.3d 496 (D.C. Cir. 1994). The plaintiffs included Patricia Knowles, a psychobiologist who worked with rats and mice from 1972 until 1988 in AWA covered facilities. She was not engaged in research at the time of the suit, although she stated by affidavit that she would return to it. The Court of Appeals held that Knowles failed to meet the requirement that her "injury be presently suffered or imminently threatened" as established by *Lujan v. Defenders of Wildlife*. 23 F.3d at 500. Plaintiff William Strauss was a member of a research facility's oversight committee, as mandated by the AWA. He alleged that he was chosen to represent the community's interest in the care and treatment of animals and claimed that he had no relevant guidance to evaluate the treatment of rats and mice, given that the USDA had failed to promulgate standards for their humane treatment. The Court held that, as a private citizen, Strauss had no right to enforce federal law and no cognizable claim of injury in fact. 23 F.3d at 501.

reminder of how standing can be used as a bar to certain plaintiffs,<sup>222</sup> because on the merits, the case was quite winnable.

Several years later, a college psychology student who worked with rats was determined to have standing to challenge the 1971 AWA regulations and the case settled, with the USDA agreeing to promulgate regulations to cover rats, mice, and birds.<sup>223</sup> It was a short-lived victory. Working with an industry group that promotes the use of animals in research, Senator Jesse Helms attached a rider to a Farm Bill, amending the AWA to specifically exclude rats, mice, and birds from the definition of animal.<sup>224</sup> Thus, ninety-five percent of all animals used in research and testing are intentionally excluded from the protections of the AWA.

## 2. Primates

The debate about performing research on primates has been especially heated.<sup>225</sup> In 1985, Congress amended the AWA and directed the USDA to promulgate standards, including “minimum requirements . . . for a physical environment adequate to promote the psychological well-being of primates.”<sup>226</sup> The legislative history shows that legislators were moved by the plight of primates kept in isolation in tiny cages. Congress simultaneously created Institutional Animal Care and Use Committees (IACUCs), an internal mechanism to review all research protocols, and mandated that at least one member of the public serve on those committees to represent the public’s interest in the welfare of animals.<sup>227</sup>

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<sup>222</sup> See, e.g., KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES: SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE at 523 (1976); KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 24:35, at 342 (2d Ed. 1978).

<sup>223</sup> Alternatives Research & Dev. Found. v. Glickman, 101 F. Supp.2d 7 (D.C. Cir. 2000).

<sup>224</sup> Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002). The National Association for Biomedical Research proudly proclaims that it spearheaded this legislative effort to remove rats, mice and birds from the protections afforded by the AWA, in NABR, A Voice in Government, 25 Years of Sound Public Policy, at 15, available at [http://www.nabr.org/About\\_NABR/Government.aspx](http://www.nabr.org/About_NABR/Government.aspx) (last accessed Feb. 12, 2012).

<sup>225</sup> See, e.g., DEBORAH BLUM, THE MONKEY WARS (Oxford U. Press 1995); Collette L. Adkins Giese, *Twenty Years Wasted: Inadequate USDA Regulations Fails to Protect Primate Psychological Well-Being*, 1 J. ANIMAL L. & ETHICS 221, 224 n.31 (2006) (“Tapes from the Head Injury Clinic at the University of Pennsylvania were stolen by an animal rights group and subsequently shown to millions of television viewers . . . . The tapes displayed a primate coming out of anesthesia and writhing in pain as doctors cut into its skull. Another scene involved researchers laughing and smoking while inflicting head injuries on conscious baboons struggling against restraints.”).

<sup>226</sup> 7 U.S.C. § 2143(a)(2)(B) (2006). The law was amended in 1985, not 2006.

<sup>227</sup> 7 U.S.C. § 2143(b)(1)(B). Anecdotally, I have been told that the “public member” requirement is side-stepped by many facilities, but there has been no study or lawsuit that documents this failure. A “public member” who speaks out too loudly risks being removed from the IACUC. See Katherine M. Swanson, *Carte Blanch for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. MICH. J.L. REFORM 937, 959 (2002). Swanson provides an example of Dr. Jan Moor-Jankowski, then a member of the New York University Medical Center IACUC who unsuccessfully attempted to question wrongdoing by a fellow researcher. *Id.* at 960-61.

Many in the American animal protection movement were heartened by these amendments, which were intended to improve conditions for animals in labs.<sup>228</sup> In 1986, the USDA published a notice of its intent to issue regulations.<sup>229</sup> But, two years passed and no regulations had been proposed, so ALDF, represented by Valerie Stanley, decided to sue the USDA for its unreasonable delay.<sup>230</sup> At the court's first status call, the USDA announced that it would issue the proposed regulations.<sup>231</sup> In March of 1989, the proposed regulations were published in the Federal Register and comments were sought.<sup>232</sup> Relying on scientific evidence that social deprivation is psychologically debilitating to primates, the USDA's proposed regulations mandated that primates be housed with other compatible primates in pairs, family groups, or other social groupings.<sup>233</sup> Minimum cage sizes for primates were substantially increased. Many in the animal protection movement were hopeful that finally, meaningful improvements in the care and treatment given to these animals would be made. But, the biomedical research industry heatedly opposed the proposed regulations<sup>234</sup> and in response, the USDA issued a second set of proposed rules in August, 1990.<sup>235</sup> The revised regulations were substantially different: instead of the USDA setting standards for meeting the psychological well-being of primates, it delegated that responsibility to the regulated facilities, mandating that they develop plans which would be kept at the facility, rather than being submitted to the USDA. The significance of this change is that (a) the regulated research facilities, rather than the agency charged with enforcing the AWA, would develop the standards for the treatment of primates, a classic fox guarding the hen house scenario and (b) the public, including animal protection groups, would no longer have access to the plans through the Freedom of Information Act. Additionally, most of the specific standards of the earlier version of the proposed rules were removed and timetables were expanded. The biggest blow, however, was that the requirement for group housing for primates was eliminated entirely, leaving thousands of primates to continue to live in isolation.

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<sup>228</sup> Indeed, the title of the bill was "The Improved Standards for Laboratory Animals Act of 1985," Pub. L. No. 99-198, 99 Stat. 1645 (1985).

<sup>229</sup> 51 Fed. Reg. 7950 (March 7, 1986).

<sup>230</sup> Animal Legal Def. Fund v. Yeutter, 760 F. Supp. 923 (D.D.C. 1988).

<sup>231</sup> Telephone Interview with Valerie Stanley, Adjunct Professor, Georgetown University Law Center & University of Maryland School of Law (Nov. 4, 2010 and Nov. 9, 2010), former Senior Staff Attorney, Animal Legal Defense Fund [hereinafter Interview with Stanley] ("Judge Richey [of the District Court] was assigned to this case and every one after it. We had a status call with Judge Richey in March, 1989 and USDA announced that they were proposing a new rule that day.").

<sup>232</sup> 54 Fed. Reg. 10897 (Mar. 15, 1989).

<sup>233</sup> *Id.* at 10917.

<sup>234</sup> Interview with Stanley, *supra* note 234, "NABR's complaints with USDA's proposed regulations were that since they were the experts with regard to primate well-being, USDA should leave the setting of standards up to their research facility members by allowing them to develop their own 'plans for the psychological well-being of primates.' USDA adopted this approach and re-proposed the regulations."

<sup>235</sup> 55 Fed. Reg. 33448, 33525 (Aug. 15, 1990).

Stanley and ALDF returned to court, this time accompanied by Christine Stevens<sup>236</sup> and the Society for Animal Protective Legislation,<sup>237</sup> which had worked hard to pass the 1985 amendments. Judge Richey of the District Court ruled for the plaintiffs, chastising the USDA for “wide open regulations” and delegating its rulemaking authority to the regulated entities.<sup>238</sup> He wondered why the USDA had removed the requirement of group housing for primates when its own experts had determined that social isolation is damaging to them. Yet, once again, on appeal, the D.C. Circuit vacated the District Court’s judgment, relying in part on *ALDF v. Espy*, the rats and mice decision. It found that no plaintiff had standing.<sup>239</sup> Nine years after Congress had passed the Improved Standards for Laboratory Animals Act, there was no improvement in the care and treatment given to those animals. I felt completely discouraged and ready to give up, but Stanley was made of stronger metal.<sup>240</sup>

She decided to go to the PETA office and look through their files of complaints about zoos. That is where she learned of Marc Jurnove and two other individuals who regularly visited roadside zoos and found the primates there to be in isolation, having no contact with other primates.<sup>241</sup> Stanley realized that here were potential plaintiffs

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<sup>236</sup> Christine Stevens, founder and President, Animal Welfare Institute, founder, Society for Animal Protective Legislation, <http://www.nytimes.com/2002/10/15/us/christine-stevens-84-a-friend-to-the-animals.html> (last visited Feb. 12, 2012).

<sup>237</sup> Largely credited with the passage of the AWA and its amendments, Stevens worked tirelessly to improve treatment afforded to animals in research. Stevens was accustomed to working *with* the USDA and had never before been a plaintiff in a lawsuit against the agency; however, she was livid about the sham regulations and felt the agency was allowing itself to be dictated to by the research industry.

<sup>238</sup> *Animal Legal Def. Fund, Inc. v. Sec’y of Agric.*, 813 F. Supp. 882, 887 (D.D.C. 1993)

<sup>239</sup> *Animal Legal Def. Fund, Inc. v. Sec’y of Agric.*, 29 F.3d 720 (D.C. Cir 1994). The plaintiffs included Bernard Migler, a businessman who claimed injury from an inability to sell a group “pole” housing system for primates to the regulated facilities, because the final regulations failed to require group housing. The Court of Appeals held that he fell outside the zone of interests of the AWA. Another plaintiff, Dr. Roger Fouts, a primatologist who conducted language studies with chimpanzees, claimed that the vagueness of the final regulations prevented him from establishing a plan and housing facility that would not violate the AWA. The Court held that individual researchers, as opposed to research facilities, are not subject to the regulations and therefore he did not have a direct personal injury. “Courts don’t let their emotions get involved with their opinions. They can be aware of the most amazing cruelty and not let it get in their judicial way. That is a really hard lesson to learn. I see it over and over again.” Interview with Stanley, *supra* note 233.

<sup>240</sup> Stanley “knew that somehow, we would crack this nut; we were so close.” Interview with Stanley, *supra* note 233.

<sup>241</sup> See, e.g., Affidavit of Dr. Roger S. Fouts, *Animal Legal Def. Fund, Inc. v. Glickman*, 943 F. Supp. 44, (D.D.C. 1996). Dr. Fouts described his visit to the Long Island Game Farm on April 27, 1996, where he witnessed a chimpanzee named Barney living in isolation in an outdoor cage. “Social enrichment is critical for any primate . . . . The famous father of primatology in this country, Robert Yerkes once said that ‘One chimpanzee is no chimpanzee.’ This is where Barney is lacking the most, by not being housed with a fellow chimpanzee he is suffering deprivation through social isolation. It is well established in the psychological literature that social deprivation can have devastating effects on social animals. Our own species manifests this awareness in that some of our most severe punishment is social isolation. I have found and continue to find that seeing an isolated chimpanzee, away from his kind, is a very disturbing experience to human observers. The contrast between the active social animals most of us

who would have standing under the AWA. With these individual plaintiffs, ALDF returned to court to challenge the USDA's primate regulations. Once again, Judge Richey held that the plaintiffs had standing and that the USDA's regulations were illegal.<sup>242</sup> The case went to the Court of Appeals and two weeks after our briefs were due, we were informed that the panel we were assigned to would include two judges who had ruled that our plaintiffs in the previous AWA lawsuits lacked standing.<sup>243</sup> In a two to one decision, the Court of Appeals overruled Judge Richey on standing.<sup>244</sup> Judge Wald dissented, finding Jurnove's allegations to be well within existing precedent for standing.<sup>245</sup>

At this point, we had nothing left to lose, so Stanley asked for a rehearing by the panel, which was denied, and a rehearing by the full court, all eleven judges, which, to our amazement, was granted. The Court of Appeals, clearly grappling with the issue, found that Marc Jurnove, an activist who frequently visited the Long Island Game Farm to view the primates in isolation there, had aesthetic standing under the AWA to challenge the primate regulations.<sup>246</sup> Finally, fifteen years after the passage of the 1985 amendments, at least one person in the U.S. had standing to attempt to breathe life into the AWA. While many consider this standing decision to be a major achievement, it felt like a Pyrrhic victory given that, on appeal, the court ruled against the plaintiffs on the merits, holding that the USDA's final regulations were sufficient under the AWA.<sup>247</sup> Yet, just a few years later, the USDA itself admitted that its AWA regulations were inadequate to provide guidance to its own inspectors.<sup>248</sup>

Any reasonable person looking at the intent of Congress in the passage of the 1985 amendments would have expected a significant improvement in how the targeted

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have seen on Jane Goodall televisions specials of the wild chimpanzee is a stark and disturbing contrast to [sic] chimpanzee lying alone in his cage."

<sup>242</sup> Animal Legal Def. Fund, Inc. v. Glickman, 943 F. Supp. 44, 54 (D.D.C. 1996). "At the outset the court shall state... this case involves animals, a subject that should be of great concern to all humankind. It also involves the failures of our system of government, another subject of great concern." *Id.* at 50.

<sup>243</sup> See Valerie Stanley, *The Animal Welfare Act and USDA: Time for an Overhaul*, 16 PACE ENV'T. L. REV. 103, 112 (1998) (citing Animal Legal Defense Fund, Inc. v. Glickman, 130 F.3d 464, 466 (D.C. Cir. 1997)).

<sup>244</sup> Glickman, 130 F.3d at 466. Judge Sentelle, writing for the majority stated, "This appeal is but the latest chapter in the ongoing saga of Animal Legal Defense Fund, Inc.'s ("ALDF") effort to enlist the courts in its campaign to influence USDA's administration of the Animal Welfare Act . . ." *Id.*

<sup>245</sup> *Id.* at 476.

<sup>246</sup> Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 429 (D.C. Cir. 1998).

<sup>247</sup> Animal Legal Def. Fund, Inc. v. Glickman, 204 F.3d 229, 230 (D.D.C. 2000). See Swanson, *supra* note 229, at 947-948; Collette L. Adkins Giese, *Twenty Years Wasted: Inadequate USDA Regulations Fail to Protect Primate Psychological Well-Being*, 1 J. ANIMAL L. & ETHICS 221, 228-29 (2006).

<sup>248</sup> As early as December, 1996, the USDA was aware that there were significant problems with the vague "standards" established by its final regulation, 9 C.F.R. § 3.81 (1991). Facility inspectors were unable to determine whether the facilities were providing adequate enrichment to the primates, or whether the plans were actually being implemented. USDA Employee Opinions on the Effectiveness of Performance-Based Standards for Animal Care Facilities (APHIS 1996). Over the next few years, a team of USDA employees evaluated the situation, leading to a proposed policy, issued by USDA at 64 Fed. Reg. 38,145 (1999) to assist the facilities in developing environmental enhancement plans and assist the inspectors in how to judge whether a facility was meeting the requirements of 9 C.F.R. § 3.81.

animals are housed and treated. But, our society has not reached the tipping point at which it will allow open analysis of the use or even the treatment of animals in research. Thus, animal protectionists and animal lawyers achieved a good decision on standing, but the courts allowed the USDA and industry to circumvent the will of Congress, leaving the AWA as a paper tiger. Primates remain in isolation, ninety-five percent of animals used in research have no protection under the AWA, and animal protectionists in the United States are excluded from laboratories and only rarely invited to serve on the Institutional Animal Care and Use Committees at research facilities and universities. This is unlike the relationship between animal protectionists and researchers in Europe, who work together more closely and respectfully, with the result that animals used in research in Europe have received broader protections.<sup>249</sup> The plight of animals used in research and testing in the United States is disturbing; the opportunity for progress remains in the distance and the American animal law movement will need to approach this area with creative new strategies in order to break through the current stalemate.<sup>250</sup>

### 3. Patenting of Animals

In the late 1980s, the U.S. Patent and Trademark Office (PTO) dealt an additional blow to animals. Federal patent law states that "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore."<sup>251</sup> Since the inception of the patent system in the United States, the Patent Office had considered higher life forms, to wit, animals, to be non-patentable. In *Diamond v. Chakrabarty*, the Supreme Court interpreted this language as allowing the patenting of a human-made, genetically engineered bacteria, a microorganism designed to break down components of crude oil.<sup>252</sup> Relying on *Chakrabarty*, the PTO published a notice that it would now accept patent applications for nonhuman animals,<sup>253</sup> a decision that shook many of us to the core. This decision marked a significant change in public policy, yet it was the choice,

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<sup>249</sup> Directive 2010/63/EU of the European Parliament and of the Council of 22 Sept. 2010 on the Protection of Animals Used for Scientific Purposes, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:276:0033:0079:EN:PDF> (last accessed Feb. 12, 2012); see also Thomas Hartung, Comparative Analysis of the Revised Directive 2010/63/EU for the Protection of laboratory Animals with its Predecessor 86/609/EEC - a t4 Report, ALTEX 27, 4/10 (2010), available at [http://altweb.jhsph.edu/bin/k/c/ALTEX\\_4\\_10\\_Hartung2.pdf](http://altweb.jhsph.edu/bin/k/c/ALTEX_4_10_Hartung2.pdf) (last accessed Feb. 12, 2012).

<sup>250</sup> Some unexpected and good news arrived in December 2011, when The National Academy of Sciences' Institute of Medicine (IOM) released a study commissioned by the National Institutes of Health, in which IOM concluded, "While the chimpanzee has been a valuable animal model in past research, most current use of chimpanzees for biomedical research is unnecessary..." The NIH has announced that it will halt funding new research using chimpanzees and will evaluate existing research projects using a criteria developed by the IOM committee. NIH Research Involving Chimpanzees, <http://grants.nih.gov/grants/guide/notice-files/NOT-OD-12-025.html> (last visited Feb. 12, 2012). While this does not ban biomedical research on chimpanzees, it is a hopeful sign of changing attitudes in the research industry.

<sup>251</sup> 35 U.S.C. § 101 (2006).

<sup>252</sup> 447 U.S. 303 (1980).

<sup>253</sup> Patent and Trademark Office Notice: Animals - Patentability, 1077 OFFICIAL GAZETTE U.S. PAT. & TRADEMARK OFFICE 8. (Apr. 21, 1987).



neither of Congress nor the judiciary, but of a bureaucratic agency, with no input from the public. On a practical level, the PTO's new policy would foster experimentation that would cause pain and suffering to a whole new class of animals, and on an ethical level, it implied that nonhuman animals, complex and sentient living beings, are legally no different from microorganisms and inanimate objects.

Less than a year later, the PTO issued the first animal patent to Harvard University for a mouse who was genetically engineered to readily develop cancer. No one directly challenged the issuance of the patent, but we felt strongly that the patenting of animals should be challenged and filed suit on behalf of several animal protection groups, farmed animal protection groups, and individual farmers who would be impacted by patenting of animals. In *ALDF v. Quigg*, we argued that the Patent Commissioner had exceeded his authority in determining that animals were patentable subject matter.<sup>254</sup> Of all the cases we had worked on, this afforded us the most opportunity to argue something akin to rights philosophy, as we tried, in vain, to convince the court of the illogic of defining animals as "machines" or "manufactures." Lamentably, the Federal Circuit chose to sidestep the legal, as well as moral and ethical issues, dismissing the action.<sup>255</sup>

It was not until 2002 that a court grappled with the complex public policy issues involved in the patentability of animals, but it was not an American court. When Harvard attempted to patent the genetically altered mouse in Canada, its application was denied and the Canadian Supreme Court held that the words "manufacture" and "composition of matter" are not sufficiently broad to include higher life forms.<sup>256</sup> Animal lawyers had made all the right arguments; we were simply in the wrong country with the wrong plaintiffs. Today, animals are patentable in the United States, United Kingdom, and Australia, as well as in the European Union. Brazil, Canada, China, Russia, and several other countries have prohibited animal patents.<sup>257</sup> However, the American Anti-Vivisection Society and other groups have successfully challenged specific patents of animals by initiating *inter partes* reexamination proceedings to declare the invalidity of animal patents, a tactic that should be noted.<sup>258</sup>

#### D. Wildlife and Captive Wildlife

The introduction of this article refers to "the second wave" of animal law. A clear example of the second wave is in the approach taken by the Washington, D.C. law firm

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<sup>254</sup> Animal Legal Def. Fund, Inc. v. Donald J. Quigg, 710 F. Supp. 728, No. 88-2938-FMS (N.D. Cal. 1989). The Complaint for Declaratory and Injunctive Relief was filed on July 28, 1998. I served as lead counsel in this litigation, working with Steven Wise and Kenneth Ross.

<sup>255</sup> The U.S. District Court dismissed the lawsuit for failure to state a claim. In re Quigg, 710 F. Supp. 728 (N.D. Cal. 1989). During the appeal to the U.S. Court of Appeals, Federal Circuit, the Court dismissed the case for lack of standing, 932 F.2d 920 (Fed. Cir. 1991).

<sup>256</sup> Harvard Coll. v. Canada, [2002] 4 S.C.R. 45, 2002 SCC 76 (Can.).

<sup>257</sup> See American Anti-Vivisection Society, Stop Animal Patents, <http://www.stopanimalpatents.org/faq.html> (last visited Feb. 12, 2012).

<sup>258</sup> See American Anti-Vivisection Society, Stop Animal Patents, [http://www.stopanimalpatents.org/overview\\_rabbit.html](http://www.stopanimalpatents.org/overview_rabbit.html) (last visited Feb. 12, 2012).

Meyer, Glitzenstein & Crystal, formed in 1993. Kathy Meyer and Eric Glitzenstein cut their teeth at the Public Citizen Litigation Group, Ralph Nader's litigation arm, where they learned consumer protection, federal administrative law, statutory interpretation, Freedom of Information Act, basic federal practice, and what had worked well in those contexts. In the late 1980s, they met Jasper Carlton of the Biodiversity Legal Foundation, who asked them if they could do anything about the huge backlog of species that were not being added to the endangered or threatened species lists pursuant to the mandate of the Endangered Species Act.<sup>259</sup> Meyer and Glitzenstein thought they could, but they needed plaintiffs. While environmental groups didn't take to the idea, Wayne Pacelle,<sup>260</sup> then at the Fund for Animals (Fund), liked it. Once the Fund was on board, Defenders of Wildlife also agreed to join a lawsuit filed against the Department of Interior. After many months, Meyer and Glitzenstein were able to negotiate a settlement in which four hundred species were listed.<sup>261</sup> This was the first in a long line of wildlife cases that Meyer and Glitzenstein brought on behalf of the Fund. Applying what they had learned at Public Citizen within the context of animal law was working; they were using existing environmental laws to protect wildlife and winning cases.<sup>262</sup> In Pennsylvania, they were able to use the state anti-cruelty law to stop a hunting activity, the annual pigeon shoot in Hegins.<sup>263</sup>

Recently, Meyer Glitzenstein & Crystal, representing several animal protection groups and a former elephant handler, brought suit against Ringing Brothers and Barnum & Bailey Circus. The suit alleged that the defendants' practices of beating Asian elephants with bull hooks and chaining them constitute a "take" in violation of the federal Endangered Species Act. The trial court held that the plaintiffs lacked Article III standing, a decision that was upheld on appeal.<sup>264</sup> This case marks one of the first attempts by animal lawyers to use the Endangered Species Act to protect captive wildlife and as such, is a portent of possible future litigation.<sup>265</sup> While the firm handles

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<sup>259</sup> Telephone Interview with Katherine Meyer, partner Meyer, Glitzenstein & Crystal, October 27, 2010 [hereinafter Interview with Meyer].

<sup>260</sup> Wayne Pacelle, President and Chief Executive Officer, The Humane Society of the U.S.

<sup>261</sup> Fund for Animals v. Lujan, 962 F.2d 1391 (D.D.C. 1992).

<sup>262</sup> Interview with Meyer, *supra* note 262. "We weren't steeped in animal law, but we had learned of tools in other contexts and thought those tools could be applied to animal law... We didn't know what had been tried, what had failed. But we knew consumer protection, administrative law, statutory interpretation, basic federal practice and principles and what worked in those contexts. We tried applying them in this new (animal) context and it worked really well- we won cases."

<sup>263</sup> *Hulsizer v. Labor Day Comm., Inc.*, 734 A.2d 848 (Pa. 1999). An agent of the local society for the prevention of cruelty to animals was held to have standing to enjoin a pigeon shoot. Fourteen years earlier, in New York State, Jolene Marion had tried unsuccessfully to convince a court to declare that trapping violates the state anti-cruelty statute. *Animal Legal Def. Fund v. Dep't of Envtl. Conservation*, EC No., 6670/85 (N.Y. Sup. Ct. Dec. 6, filed Oct. 8, 1985).

<sup>264</sup> *ASPCA v. Feld Entm't Inc.*, 659 F.3d 13 (D.C. Cir. 2011).

<sup>265</sup> *ASPCA v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334 (D.C. Cir. 2003), *judgment for defendants sub nom. Feld Entm't*, 677 F. Supp. 2d 55 (D.D.C. 2009). Bruce Wagman and ALDF also alleged a "take" violation of the ESA against an animal trainer who allegedly beat chimpanzees in his possession. That case settled and the chimpanzees were sent to sanctuaries. *ALDF v. Yost*, Civ. No. 05-1066 (C.D. Cal, filed Nov. 18, 2005). As per the settlement, I include the following statement: "*The Animal Legal Defense Fund (ALDF), the Chimpanzee Collaboratory and three other plaintiffs have reached a settlement*

other types of animal law cases, as well as environmental and open government cases, their wildlife docket remains a full one.<sup>266</sup> And today, the six-year-old litigation unit at HSUS, headed by former Meyer & Glitzenstein partner Jonathan Lovvorn, also maintains a solid docket of wildlife cases.<sup>267</sup> The benefit of bringing wildlife cases is that the foundation has been laid by the environmental movement and can be built upon. The major federal laws are in place, standing is established, and animal protection lawyers can bring cases successfully, building a body of law in which wildlife protection is acknowledged by the courts. A goal for the distant future will be legislation and lawsuits that recognize and respect the rightful place of wild animals, not as resources for human exploitation, but as co-equals on the planet.

### E. Ruffling Big Ag's Feathers

*"Opportunity dances with those already on the dance floor."*

H. Jackson Brown, Jr.

Any review of the legal status of animals raised for food must start with the acknowledgment that, in the United States, farmed animals have very little protection under either federal or state law.<sup>268</sup> Most state anti-cruelty laws exempt customary farming practices from their coverage.<sup>269</sup> No federal law offers this class of animals protection during the time they are being raised. One federal law offers meager protection during transport to slaughter,<sup>270</sup> and another offers even less protection during the slaughter process.<sup>271</sup> That is the landscape faced by those who seek to protect animals raised for food.

Growing up in England, where factory farming had long been an issue in the public eye, David Wolfson felt that it was the single most important animal protection issue to be addressed.<sup>272</sup> His interest in farmed animals led him to join a chapter of the Students for the Ethical Treatment of Animals in college and while a student at

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*with Hollywood animal trainer Sidney Yost in the Federal action filed on November 18, 2005. The settlement will include the retirement of three chimpanzees, Cody, Angel and Sable, to a chimpanzee sanctuary pursuant to the recommendations of noted primatologist Roger Fouts and the appointment of Dr. Fouts as the chimpanzees' guardian. This settlement was the result of a compromise of both sides in an effort to put aside differences and do what is best for the chimpanzees and neither the plaintiffs nor Yost admit liability in this matter."*

<sup>266</sup> See Meyer, Glitzenstein & Crystal, *Our Practice, Wildlife & Animal Protection*, available at <http://www.we-blog-meyerglitz.blogspot.com/> (last visited Feb. 12, 2012).

<sup>267</sup> Humane Society, *About Us, Litigation*, <http://www.humanesociety.org/about/departments/litigation/docket.html> (last visited Feb. 12, 2012). When the Fund for Animals, long known for its commitment to wildlife, merged with HSUS, it solidified the HSUS/Fund wildlife focus.

<sup>268</sup> ANIMAL LAW casebook, *supra* note 170, at 420; NUTSHELL, *supra* note 179, at 287.

<sup>269</sup> See, *infra* note 279.

<sup>270</sup> Twenty-Eight Hour Law, 49 U.S.C. § 80502.

<sup>271</sup> Humane Methods of Livestock Slaughter Act, 7 U.S.C. §1901 et seq.

<sup>272</sup> Interview with Wolfson, *supra* note 23.

Columbia Law School, he volunteered at the ASPCA, where he met Gene Baur of Farm Sanctuary.

Wolfson recalls sitting in the law library at Columbia and, feeling bored, he began to read a state anti-cruelty statute and noticed that farmed animals were exempted from the protections of the law.<sup>273</sup> He thought that was strange, so he checked another state, and then another and discovered that farmed animals were exempted in each state. He sat on the library floor, surrounded by every state's anti-cruelty statute, and wrote a list of common farming practices, noting which states exempted farmed animals from the protections of the anti-cruelty laws. He observed that most of the exemptions were recently enacted amendments. Based on this research, Wolfson wrote a paper, that he eventually sent to Henry Spira.

Henry Spira is regarded as one of the animal movement's most brilliant tacticians.<sup>274</sup> In his early years, Spira focused on abuses of animals used in research, but later in his life, he became convinced that the American animal rights movement was missing the most important area on which to focus: farmed animals.<sup>275</sup> Wolfson had met Spira while he was still in law school and from 1992 until Spira's death in 1998, Wolfson spent a great deal of time with him, talking about farmed animal issues, learning more generally about animal rights, and providing Spira with advice about such things as how to negotiate with McDonalds.<sup>276</sup>

Wolfson showed Spira his paper on farmed animals and Spira asked him to polish it up for publication. At first, Wolfson balked, but he eventually rewrote the paper and Spira edited and published it.<sup>277</sup> That paper, titled "Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production,"<sup>278</sup> provides a harrowing description of the failure of the American legal

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<sup>273</sup> *Id.*

<sup>274</sup> PETER SINGER, *ETHICS INTO ACTION: HENRY SPIRA AND THE ANIMAL RIGHTS* (Rowman & Littlefield Publishers, Inc. 1999); *see also* Barnaby J. Feder, *Pressuring Perdue*, N.Y. TIMES, Nov. 26, 1989, *available at* <http://query.nytimes.com/gst/fullpage.html?res=950DE1DD123EF935A15752C1A96F948260&pagewanted=all> (last visited Feb. 12, 2012).

<sup>275</sup> I (Tischler) recall being at an annual meeting of the leadership of the animal movement and watching Henry Spira stand and address all of us about the movement's failure to pay attention to the most important issue: the plight of farmed animals. I paid little attention; after all, everyone in the room thought his or her issue was the most important one. A year later, Spira made the same speech and once again, I ignored his plea. The third time Spira chastised us for failing to focus on farmed animals, something clicked. "He's absolutely right," I thought. At that time in the U.S., only a few small organizations were working on this issue and tackling it seemed like an overwhelming task.

<sup>276</sup> Interview with Wolfson, *supra* note 24: "Henry was my initial and strongest mentor. We saw a lot of things the same way . . . Henry didn't trust a lot of people and it was very difficult, but he trusted me."

<sup>277</sup> The first edition of Wolfson's paper was published by Spira through the Archimedian Press/Coalition for Non-Violent Food in 1996. It was thereafter reprinted in 2 ANIMAL L. 123 (1996). Farm Sanctuary published it in book form in 1999. This article is available at Animal Legal & Historical Ctr., <http://www.animallaw.info/articles/arus2animall123.htm> (last visited Feb. 12, 2012).

<sup>278</sup> *Id.*; *see also*, David J. Wolfson and Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004);

system to offer even minimal protections to farmed animals. As Wolfson pointed out, the core problem in the United States is that the agricultural industry has firm control of the conditions in which farmed animals are kept. The majority of state anti-cruelty laws exempt common and standard farming practices, and trying to change those laws through state legislatures would fail, given that the legislative agricultural committees are joined at the hip with the industry.<sup>279</sup>

When Wolfson graduated from law school, he went to work for a large firm and devoted his pro bono hours to working for Farm Sanctuary.<sup>280</sup> By the late 1990s, Wolfson felt the time had come to develop a coalition approach to working on farmed animal issues in the U.S. Sometime in 1999, he invited key individuals and organizations to meet at his firm's office in New York City and discuss the possibility of such a coalition.<sup>281</sup> Some of our colleagues came from Great Britain to attend the meeting. In particular, Peter Stevenson and Richard Ryder<sup>282</sup> had expressed concern that because the care and treatment of farmed animals in the United States lagged so far behind the standards set in European countries, the low American standards might actually hold back continued improvements in Europe. Stevenson tried to encourage the group at Wolfson's office to focus on the conditions of intensive confinement for sows and he was impressed to learn about the ballot initiative system in the United States. The meeting, however, was a resounding disappointment. It ended with no agreement on how to proceed or which species to focus on and no plan to move forward as a coalition.

Wolfson came away from that meeting with a sense that he was talking to the wrong people. He decided to approach the person who had access to the money and

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<sup>279</sup> I (Tischler) was involved in various conversations with leaders of the animal rights/protection movement in the 1980s, in which we bemoaned the plight of farmed animals and felt helpless to effectively create change through the normal legislative process, either at the federal or state level. The reigning wisdom was that the agribusiness industry was too powerful and would defeat all proposed legislation at the committee level.

<sup>280</sup> Interview with Wolfson, *supra* note 23. "Farm Sanctuary works to protect farm animals from cruelty, inspire change in the way society views and treats farm animals and promote compassionate vegan living." Farm Sanctuary, [www.farmsanctuary.org](http://www.farmsanctuary.org) (last visited Feb. 12, 2012).

<sup>281</sup> *Id.*; Interview with Sullivan, *supra* note 11. There is no written record of this meeting. I have tried to reconstruct it through interviews with David Wolfson, Mariann Sullivan, Peter Stevenson, and my own memories of the session. To the best of our combined recollections, the people in attendance at this meeting included Kim Stallwood, then of Animals' Agenda, Andrew Rowan of HSUS, Peter Stevenson of Compassion in World Farming, Richard Ryder, Mary Beth Sweetland of PETA, Joyce Tischler of ALDF, David Wolfson, Mariann Sullivan, Karen Davis of United Poultry Concerns, and Gene Baur of Farm Sanctuary. Peter Stevenson enabled me to nail down the year of the meeting: "I remember David Wolfson organised the meeting and asked me to give a presentation about progress in the EU on legislation on the welfare of farm animals. We then discussed possible approaches and I argued that seeking a ban on sow gestation crates may be a good starting point – the UK ban on these stalls had come into force on 1 January 1999. I think the meeting was in 1999 – the EU enacted the ban on barren battery cages in summer 1999 and it was this that caused the interest in EU developments." E-mail from Peter Stevenson, Chief Policy Advisor, Compassion in World Farming, to Joyce Tischler, Co-Founder and General Counsel, ALDF (Mar. 12, 2011, 11:15 CST) (on file with ALDF).

<sup>282</sup> Richard Ryder, Ph.D., British psychologist, author and longtime animal activist who coined the term "speciesism" in 1970.

power to act: Wayne Pacelle. By 1994, Pacelle, who had worked on wildlife issues with The Fund for Animals, had moved to HSUS, the largest and wealthiest animal protection organization in the United States. He was HSUS's chief lobbyist and in that role, he had spearheaded the use of state initiatives that were changing the landscape of animal protection law.<sup>283</sup> Until 1998, HSUS had focused solely on wildlife initiatives and Wolfson aimed to change that. He cornered Pacelle, pressured him, and continued the conversation until he sensed that Pacelle was buying in.

A much smaller coalition was formed: HSUS had successfully waged state initiative campaigns and knew how to proceed from a practical perspective. Farm Sanctuary contributed its expertise on the conditions in which farmed animals were kept. ALDF, Wolfson, Sullivan, and Peter Stevenson assisted with the drafting of the initiative language. The coalition chose to proceed with a sow gestation crate initiative in Florida.<sup>284</sup> Several factors led to this choice: surveys showed sufficient support for eliminating intensive confinement of sows; Florida had a relatively small pig industry, which was less likely to be able to fight back effectively; funding was available for that state; and it appeared to be a state in which the potential for success was high enough to take the risk. The coalition worked with groups and activists in Florida to undertake the back-breaking task of signature gathering.<sup>285</sup> Another innovation was a carefully planned advertising campaign, which was essential to winning over the voters.

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<sup>283</sup> Pacelle joined HSUS in 1994 and served as its chief lobbyist until 2004, when he became the agency's President and CEO. For a complete list of the initiatives sponsored by HSUS, see HSUS, Initiative and Referendum History, *available at* [http://www.humanesociety.org/assets/pdfs/legislation/ballot\\_initiatives\\_chart.pdf](http://www.humanesociety.org/assets/pdfs/legislation/ballot_initiatives_chart.pdf) (last visited Feb. 12, 2012). This initiative is also known as the HSUS Ballot Initiative. According to the HSUS web site, these initiative campaigns were planned by: "carefully identifying issues in demographically favorable states, organizing volunteer petitioners, conducting public attitude surveys, raising money, and persuading voters primarily by airing emotionally compelling advertising showing direct harm to animals." The Ballot Initiative chart includes a chart of all ballot measures introduced by HSUS since 1990, the results and the percentage by which the voters approved or rejected each initiative.

<sup>284</sup> *Cruel and Inhumane Confinement of Sows Act*, *available at* Animal Legal & Historical Ctr., <http://www.animallaw.com/Gestationcrates.htm> (last visited Feb. 12, 2012). "Breeding sows spend the majority of their reproductive lives, typically three to five years, in intensive confinement where stretching out, turning around, and sometimes standing up is impossible. The stalls are purposely designed so that movement is severely limited, typically sized at 2 x 7 feet, and just barely larger than the animal housed in the crate. The compact design was intended to increase efficiency in pork production, requiring less labor and feed than other housing arrangements. While the goal of the crates is economic efficiency, the outcome also includes a wide array of physical and psychological disorders in the confined sows.

"Scientific evidence points to many physical and psychological disorders caused by intensive confinement. Among the physical disorders are joint damage, leg weakness, impaired mobility, urinary tract infections, and other painful disorders that prevent pigs from engaging in normal exercise and socialization. Scientific evidence also suggests that pigs need environmental stimulation and social relationships with other pigs. If deprived of this, pigs may develop chronic stress, depression, frustration, aggression, and abnormal neurotic behaviors. Intensive confinement not only deprives pigs of a healthy social life, but it inflicts physical and mental pain so severe that pigs often get sick and cannot function." *Id.*

<sup>285</sup> *Florida's Hogs Hit the Campaign Trail*, The Animal's Advocate: The Quarterly Newsletter of the Animal Legal Defense Fund (ALDF), Summer/Fall 2002, at 1, *available at*

The risk paid off: in 2002, Florida voters passed the initiative by a vote of 55% to 45% and this victory was “the game changer,”<sup>286</sup> opening the door for similar initiative campaigns in other states. The Florida gestation crate campaign “exposed the plight of farmed animals . . .” and the victory “said to everyone that Americans think intensive confinement is not right . . .”<sup>287</sup> In 2006, Arizona voters passed a ban on gestation crates and veal calf crates; Maple Leaf, the largest Canadian pork producer, announced that it would phase out the use of gestation crates. In 2007, Oregon’s legislature became the first to legislatively ban gestation crates; Maine and Colorado passed similar laws. In 2009, Michigan legislated a phase-out of veal crates for calves, gestation crates for sows, and battery cages for laying hens. Under threat of an initiative in 2010, the Ohio Farm Bureau and other agricultural groups reached agreement with animal protection groups to phase out veal and gestation crates, ban the transport of downer cows, and provide for other improvements for farmed animals in that state.<sup>288</sup>

The initiative campaign in California in 2008 brought the most intensive agribusiness effort to fight against improvements for farmed animals. HSUS, bolstered by its in-house staff of attorneys, led a highly organized and effective campaign.<sup>289</sup> As a result, California’s Prevention of Farm Animal Cruelty Act, making it a crime to confine hens in cages, calves in veal crates, and pigs in gestation crates, passed by an overwhelming 63.5% vote.<sup>290</sup>

These are examples of the recent protections achieved for farmed animals through the innovative use of the initiative process in the United States. These achievements seemed out of reach as recently as the late-1990s. It is still early in the process and the agribusiness industry is counterattacking, but the passage of initiatives and legislation are key strategic tools that have been used in the effort to win greater protections for farmed animals.<sup>291</sup>

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[http://www.aldf.org/downloads/97\\_animalsadvocatesummer02.pdf](http://www.aldf.org/downloads/97_animalsadvocatesummer02.pdf) (last accessed Feb. 12, 2012). The activists needed 488,000 signatures to get the initiative on the Florida ballot; they gathered 650,000.

<sup>286</sup> Interview with Wolfson, *supra* note 24: “If you read *The Art of War*, the most important thing you have to establish is momentum... Florida changed everything. Florida led to Arizona, to Smithfield, to Maine, Washington, which led to Prop 2, which led to Colorado, then Michigan, then Ohio. That energy elevated the debate.” See also Lauren Etter, *Smithfield to Phase Out Crates- Big Pork Producer Yields to Activists, Customers on Animal-Welfare Issue*, WALL ST. J., Jan. 25, 2007, available at <http://online.wsj.com/article/SB116969807556687337.html> (last accessed Feb. 12, 2012).

<sup>287</sup> Interview with Wolfson, *supra* note 23.

<sup>288</sup> HSUS, *Landmark Ohio Animal Welfare Agreement Reached Among HSUS, Ohioans for Humane Farms, Gov. Strickland, and Leading Livestock Organizations* Press Release, (June 30, 2010), [http://www.humanesociety.org/news/press\\_releases/2010/06/landmark\\_ohio\\_agreement\\_063010.html](http://www.humanesociety.org/news/press_releases/2010/06/landmark_ohio_agreement_063010.html) (last visited Feb. 12, 2012).

<sup>289</sup> Jonathan R. Lovvorn & Nancy V. Perry, *California Proposition 2: A Watershed Moment in Animal Law*, 15 ANIMAL L. 149 (2009). Of particular note is how the HSUS litigation team provided essential strategic support to the legislative effort, by filing multiple complaints to the California Fair Political Practices Commission, as well as a lawsuit exposing a federal agency’s plan to misappropriate \$3 million to oppose Prop 2. *Id.* at 163.

<sup>290</sup> HSUS Ballot Initiative Chart, *supra* note 284.

<sup>291</sup> In July 2011, HSUS announced that it had reached agreement with United Egg Producers to jointly introduce federal legislation that would set standards for the housing of all hens in egg production. HSUS, *Egg Industry Agree to Promote Federal Standards for Hens*,

In the past decade, American animal advocates have also stepped up their efforts to challenge various aspects of factory farming through lawsuits, some of which have been successful. Based on his own efforts, Carter Dillard has recommended using false advertising laws to shine a light on the terrible treatment received by most farmed animals.<sup>292</sup> Knowing that they have to please consumers in order to sell their products, unethical marketers sometimes try to persuade consumers that farmed animals are raised in conditions that are not at all reflective of the reality of intensive farming practices.<sup>293</sup> A PETA lawsuit claiming that the California Milk Advisory Board's "Happy Cows" campaign constituted false and deceptive advertising was dismissed by the court.<sup>294</sup> Compassion Over Killing, however, was successful in its 2003 effort to force the United Egg Producers, an industry trade association, to cease using the "Animal Care Certified" claim and logo on egg cartons. That same year, Farm Sanctuary successfully used the federal Administrative Procedure Act to challenge the USDA's denial of a petition to ban the use of downed livestock for food, part of an ongoing effort to protect animals too sick to be sent through the normal slaughter process.<sup>295</sup> On the other hand, the United States Supreme Court reminded us that local efforts to criminalize ritual animal slaughter as cruelty will be overturned when they violate the First Amendment's free exercise of religion clause.<sup>296</sup> Horse slaughter, a practice that most Americans find objectionable, has come under attack and the Seventh Circuit upheld an Illinois law that bans the processing, sale, or transfer of horse meat for consumption by humans.<sup>297</sup> In another breakthrough decision, the New Jersey Supreme Court struck down regulations promulgated by its state Agriculture Department, for failure to ensure the humane treatment of livestock, as mandated by state legislation.<sup>298</sup>

And, while this did not happen in the United States, one of the most well-known and interesting farmed animal cases to date is what is referred to as the "McLibel" lawsuit brought by the McDonald's Corporation in a British court against individuals

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[http://www.humanesociety.org/news/press\\_releases/2011/07/egg\\_agreement.html](http://www.humanesociety.org/news/press_releases/2011/07/egg_agreement.html) (last visited Feb. 12, 2012). A federal bill (H.R. 3798) was introduced in January 2012 and as of this writing, that bill has engendered considerable debate and controversy. HSUS, *Federal Bill Introduced to Improve Housing for Egg-laying Hens and Provide Stable Future for Egg Farmers*, [http://www.humanesociety.org/news/press\\_releases/2012/01/federal\\_bill\\_introduced\\_01232012.html](http://www.humanesociety.org/news/press_releases/2012/01/federal_bill_introduced_01232012.html) (last visited Feb. 12, 2012).

<sup>292</sup> Carter Dillard, *False Advertising, Animals and Ethical Consumption*, 10 ANIMAL L. 25, 26-27 (2004).

<sup>293</sup> *Id.*

<sup>294</sup> *People for the Ethical Treatment of Animals v. Cal. Milk Producers Advisory Bd.*, 22 Cal. Rptr. 3d 900 (Cal. Ct. App. 2005).

<sup>295</sup> *Baur v. Veneman*, 352 F.3d 625 (2d Cir. 2003). A "downed" animal is too sick or disabled to be able to walk from the transport vehicle into the slaughterhouse. *Id.* at 628.

<sup>296</sup> *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). It is unfortunate that this case was fought all the way to the Supreme Court. A city council passed a law against ritual sacrifice of animals where the facts showed that the law was directed at a local Santeria church. Had the ordinance been content neutral and generally applicable, the result could have been different. See NUTSHELL, *supra* note 179, at 61.

<sup>297</sup> *Cavel Int'l v. Madigan*, 500 F.3d 551 (7th Cir. 2007).

<sup>298</sup> *New Jersey Soc'y for Prevention of Cruelty to Animals v. Dept. of Agric.*, 955 A.2d 886 (N.J. 2008).



who distributed leaflets criticizing the corporation for its indifference to the mistreatment of animals who thereafter became its food products. A British court found for the plaintiffs in some respects, but McDonald's lost far more than it gained, as the decision goes into great detail about the allegations and evidence of cruelty to farmed animals.<sup>299</sup>

The current success of the animal protection movement and animal law in challenging factory farming has been due, in part, to the strategy of bringing the horrible conditions of intensive confinement, transport, and slaughter directly to consumers and forcing the massive agricultural industry into a defensive position. This tactic, which had faltered in the context of animals used in research, has worked to prod the agricultural industry to face the challenge of creating more humane environments for farmed animals. In the coming years, we will witness more legislative efforts, as well as new lawsuits challenging factory farming on a variety of bases. The agricultural industry has indicated some willingness to improve conditions for farmed animals, but we are also seeing coordinated efforts to maintain the status quo, through legislation and litigation intended to silence and/or defeat those who expose and criticize the abuse of farmed animals.

#### IV. Conclusion

Animal law is still a fledgling movement and its proponents are creating a substructure for progress in the future. We have seen significant success in the institutionalization of animal law classes, bar sections, and committees, in part because the legal profession is open to new ideas, discussion, and debate. Animal lawyers are working within the legal establishment, opting for a collegial approach and understanding that they can be more effective if they build a base by working from the inside out, rather than if they attempt to gain access to an established legal institution as an outsider.

The far more difficult challenge faced by the animal law movement is in the hands-on effort to apply animal protection or rights theories within the context of the existing legal system, which is, after all, the only system we have to work with. In the early 1980s, most of the active animal rights attorneys, including me, were young and inexperienced as litigators. Enamored of the success of other social movements, particularly civil rights,<sup>300</sup> we focused solely on using litigation as a tool to create a sea change in the legal system's attitude toward and treatment of animals. Convinced that being right was enough, we filed cases that were, in some instances, asking for too much, too soon and doomed to fail.

We are starting to witness specialization within the field, a natural and positive development. For example, Washington State private practitioner Adam Karp focuses on companion animal cases, with a particular emphasis on tort claims, and California

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<sup>299</sup> McDonald's Corp. v. Steel, (1997) EWHC QB 366; see also David J. Wolfson, *McLibel*, 5 ANIMAL L. 21 (1999).

<sup>300</sup> See, e.g., MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (UNC Press 1987).

companion animal lawyer, Robert Newman, has developed expertise in veterinary malpractice, custody, and tort claims, as well as serving as a consultant to veterinarians on how to limit their liability through better practices. HSUS is intentionally training some of its staff attorneys to specialize. With specialization comes a level of mastery of the subject, both substantively and procedurally, something that is necessary if we are to level the playing field in the courtroom.

Animal lawyers are discovering the value of forging alliances with environmental groups, wildlife protection groups, small family farmers, and farm workers, veterinarians, economists, scientists, public health specialists, and others. The cross-pollination that will occur will strengthen our efforts to aid animals. On the other hand, I note, with some disappointment, that much of the leadership of the animal law movement has not matured in a significant way – it lacks a realistic sense of community. In contrast, a close look at the leadership of the environmental movement shows a very tight-knit community that meets regularly, agrees on collective goals, shares resources, and fosters a high level of interpersonal trust. This has proven to be a major strength of that movement. The animal law movement remains tribal and competitive; there is too little trust or sharing of ideas, which makes it difficult to learn from one another, build common knowledge, and work as a stronger, broader team for the good of the animals. In order to make and defend significant progress, animal lawyers, like the larger animal protection movement, will have to move beyond this stage and embrace its own colleagues for the benefit of all.

The education of animal lawyers will become more sophisticated in the coming years. Introductory animal law classes are offered at the majority of ABA accredited law schools and within a decade, all ABA accredited law schools will have an animal law course as a regular part of their curriculum. The Center for Animal Law Studies at Lewis & Clark Law School is the model for a very robust animal law program at a law school, offering classes focused on a broad range of animal law topics, as well as clinical opportunities in litigation and legislative drafting, and most recently, the establishment of a Master of Laws (LL.M.) program in Animal Law. On a nationwide basis, we will benefit from more fellowships, more clinical and clerking opportunities, and a greater number of tenured faculty teaching the ongoing animal law offerings.

Animal law may have started as an American phenomenon, but it has spread to other parts of the globe. We can anticipate that lawyers will reach across national borders and work together to draft international treaties, as well as animal protection legislation in countries that currently lack such laws. They will also lobby in international forums that control or influence the protections given or denied to animals.

In the thirty plus years since animal law began, we have learned many valuable and some painful lessons. For one, the legal system doesn't change society; there is an intricate interplay between progress made in the court of public opinion and progress made in the courts of law. As lawyers, we must be sensitive to how far we can push and how fast. Animal lawyers should study the history of social movements in the U.S. carefully, in order to discern what applies to our movement and what does not.<sup>301</sup> If our

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<sup>301</sup> See, e.g., Moyer, *supra* note 161.

society is not ready for a change, it will not occur, no matter how much our clients and we think it should. The rate at which progress occurs is slow, far slower than any animal advocate would like it to be.

Second, breakthrough decisions establishing greater protections for animals, as well as the acknowledgement of their interests and rights, are sorely needed. In order to accomplish that important goal, animal lawyers must select their cases carefully, weighing a number of factors. It is not enough to try to right a wrong that has occurred. Of necessity, some of the legal theories currently being tried are experimental, but the case should be winnable, because losses do not create precedent to build upon. Establishing good precedent and a certain measure of predictability is key, given that in this early period of animal law we are assembling the foundation that future animal lawyers will build on.

Additionally, we now know that we must communicate with judges in a language that they are familiar and comfortable with. Judges are members of society and, as such, they generally embody the values and prejudices of the mainstream. Citing them to the philosophical writings of Regan or Singer may have an impact with some judges, but we are more likely to convince them to find in our clients' favor if we utilize mainstream legal theories and terms such as "cruelty," "suffering," and "interests."

Finally, litigation of the future should not occur in a vacuum. Successful litigation is one part of an overall campaign to protect animals. It should work in tandem with education of citizens, a strong media component, and a legislative focus. Generally speaking, no one tactic works by itself; rather, they build on each other. A successful campaign is one that is multi-pronged, with each of the above elements integrated in order to support and bolster the efforts of the others. Sometimes, litigation that fails can be used to prove that legislation is needed to solve the problem. Or, as happened with the Alternatives Research and Development Foundation case (rats, mice, and birds), when litigation is successful, the opposition may overturn the victory through quick legislative action. We have learned that litigators must watch their backs, by coordinating with lobbyists to assure that a victory in court is not ambushed in the legislature.

Three decades is not a long time in the development of a social movement. We are only beginning to explore the legal theories that may be argued to provide greater protections for animals and I know that our most exciting achievements are yet to come.

I close this article by offering a vision that has guided me for the past thirty-two years: those of us at the heart of the animal law movement envision a world in which the lives and interests of all sentient beings are respected within the legal system, a world in which animals are not exploited, terrorized, tortured, or controlled to serve human whims or purposes. We look to a new generation of animal lawyers to write the next chapter of this story, to share our vision and walk down the road with us toward a far more just and compassionate society.