UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	)	
Plaintiffs,	)	**Case No.: 03-2006 (EGS/JMF)**
v.	)	
FELD ENTERTAINMENT, INC.,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR ENTITLEMENT TO ATTORNEYS' FEES

EXHIBIT 4

1 of 4 DOCUMENTS

Animal Law

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SYMPOSIUM: CONFRONTING BARRIERS TO THE COURTROOM FOR ANIMAL ADVOCATES: INTRODUCTION: CONFRONTING BARRIERS TO THE COURTROOM FOR ANIMAL ADVOCATES

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BIO: *© Delcianna J. Winders 2006. Delcianna J. Winders is a Law Clerk to the Honorable Martha Craig Daughtrey of the United States Court of Appeals for the Sixth Circuit. She earned her J.D. from New York University (NYU) School of Law in 2006, and her B.A. from the University of California, Santa Cruz in 2001. The author's deepest appreciation goes to the pioneering panelists and moderators of this symposium, who are a source of inspiration. She also has enormous gratitude for the members of the NYU Student Animal Legal Defense Fund for their commitment and support, and to the NYU School of Law administration for sponsoring this symposium. She is particularly grateful to Professor Katrina Wyman, as the faculty sponsor of this event, and Jennie Dorn, who possesses an unbelievable ability to accomplish seemingly endless tasks efficiently and professionally. The author also thanks the amazing (and patient) staff of Animal Law, especially Sara Hart and Kim McCoy, as well as the National Center for Animal Law and the Animal Legal Defense Fund for their invaluable assistance. Finally, the author thanks her family and Christopher Murell for helping sustain her passion and commitment.

LEXISNEXIS SUMMARY:
... I. A BRIEF HISTORY OF ANIMAL LAW: MAINSTREAMING A NOVEL FIELD OF LAW ... As New York University's (NYU) Vice Dean, Clayton Gillette, noted in introducing the symposium, "This dramatic increase in a brand new field [is] something that doesn't happen very frequently... The fact that there is a new field that has arisen is ... a remarkable event ... ." The field of animal law has begun to crystallize and garner mainstream acceptance, as evidenced by the developments detailed above and by the multitude of conferences occurring at law schools across the country, including this well-attended symposium at NYU. ... The goal of this symposium was to bring leading scholars and practitioners in the field of animal law together to exchange ideas about the barriers animal advocates face and, most importantly, to strategize about overcoming them. ... The second panel, "Legal Standing for Animals & Advocates," analyzed standing jurisprudence, one of many sites of the current cultural transformation. ... " Veteran animal advocate Tischler echoed this experience, reflecting, "We didn't set out to make standing law. ... In essence, Professor David Cassuto, who teaches and writes on animal law, observed that standing, particularly the injury-in-fact prong of standing analysis, poses a normative question. ...

TEXT:
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I. A BRIEF HISTORY OF ANIMAL LAW: MAINSTREAMING A NOVEL FIELD OF LAW

Animal law has received much press recently, garnering accolades as a novel and cutting edge field. But the fact of the matter is that animal law is not entirely new. Pioneering animal law practitioners have been trailblazing for decades, and are only now beginning to gain recognition for their efforts. As Joyce Tischler, co-founder of the Animal Legal Defense Fund (ALDF) and animal law practitioner for over a quarter of a century, noted in her opening remarks, in the early

days, animal law practitioners were isolated and frequently mocked. n1 But in time, these advocates sought each other out and started to build intellectual communities; they began dialoguing, exchanging ideas, building organizations, formulating plans, and making things happen. As Tischler explained, "In the process of bringing all these lawsuits, something funny happened on the way. An area of the law formed while we weren't looking." n2

Little by little, animal law began to establish itself within more mainstream legal discourses. This introduction was slow, Tischler observed, "because our legal system abhors change." n3 But the determined, committed, and passionate early advocates refused to let resistance deter them, and their perseverance has paid off. Animal law courses are now taught at law schools across the nation, n4 and student and professional organizations abound, n5 including a national Animal Law Committee within the Tort Trial and Insurance Practice Section of the American Bar Association. n6 Animal law scholarship also flourishes, with four journals dedicated exclusively to animal law and animal law articles increasingly published in generalist journals. n7

[*3] All of these developments have occurred in an incredibly short period of time. As New York University's (NYU) Vice Dean, Clayton Gillette, noted in introducing the symposium, "This dramatic increase in a brand new field [is] something that doesn't happen very frequently... The fact that there is a new field that has arisen is ... a remarkable event ... ." n8 The field of animal law has begun to crystallize and garner mainstream acceptance, as evidenced by the developments detailed above and by the multitude of conferences occurring at law schools across the country, including this well-attended symposium at NYU. n9 It is in this sense that animal law is a new field.

Despite these apparent successes, the fact remains that most animals today are no better off than they were ten years ago; the lives of many have actually deteriorated with the escalation of practices that place profits above all else, particularly the intensive confinement of animals raised for food. n10 David Wolfson, who has managed to balance a fulltime career as a partner at a major law firm with regular animal law teaching, writing, lecturing, and practice, n11 aptly captured and personalized this dynamic when he explained, "Sometimes I ... feel [*4] like I'm running after a train that I know I have to catch. I know that I'm running quicker than I used to. The problem seems to be that the train is also going a little faster than it used to be too." n12

II. TRANSCENDING BARRIERS: BUILDING A BRIDGE TO THE FUTURE OF ANIMAL ADVOCACY

What do these dubious successes mean for the animal advocacy movement? How do advocates reconcile the tremendous advances the movement has made in terms of mobilization with the tremendous amount of work that still needs doing? How can the movement put this critical mass and growing mainstream awareness to optimum use? Answering these questions necessitates grappling with the recurring obstacles that those seeking to litigate on behalf of nonhuman animals have faced. The goal of this symposium was to bring leading scholars and practitioners in the field of animal law together to exchange ideas about the barriers animal advocates face and, most importantly, to strategize about overcoming them. The symposium was accordingly organized around some of the major barriers that have interposed themselves between animal advocates and their goals: deeply entrenched cultural myths that hinder legal developments, standing doctrine that delays and sometimes entirely thwarts consideration of the merits in cases concerning nonhuman animals, and the paucity of causes of action that easily lend themselves to animal protection litigation.

III. TAKING STOCK: A CLOSER LOOK AT THE BARRIERS

A. Cultural Barriers: Myths, Transparency, and Transformation

The first panel, "Linking Cultural & Legal Transitions," explored the cultural myths that enable humans to distance ourselves from the routine, institutionalized violence inherent in contemporary human uses of other animals. The panelists, Una Chaudhuri, a Professor of English and Drama at NYU working in the field of Critical Animal Studies; n13 Taimie Bryant, Professor of Law at the University of California, Los Angeles (UCLA), whose novel work on animal issues integrates law and social science; n14 and Dale Jamieson, Professor of [*5] Environmental Studies and Philosophy and affiliated Professor of Law at NYU, who has studied cultural transformations in the way humans relate to other animals and the environment, n15 brought a wealth of expertise and experience to the table. The panel also addressed the related importance of increasing transparency - of rendering visible practices that are currently hidden from view - and the moral transformation that ensues. n16 As Bryant incisively observed, "With transparency comes transformation and accountability." n17 Indeed, this transformation is presently occurring on an international scale. n18 Jamieson remarked:

In the broadest sense we've won the arguments ... . That more than anything is why we're all here and why this conference is introduced by the dean of a law school ... . The transformation of what animal rights meant before these arguments were on the table and what it means now is almost unfathomable. n19

The panel itself represented a cultural transition in progress. We are in an era of heated and deeply polarized discussions about the appropriate treatment of nonhuman animals. We live, in Jamieson's words, "in a time in which our moral relationships with animals are [*6] being radically transformed." n20 The only uncertainty now is precisely what shape this transformation will take.

B. Standing As a Barrier: Injuries-in-Fact and Normativeness

The second panel, "Legal Standing for Animals & Advocates," analyzed standing jurisprudence, one of many sites of the current cultural transformation. Standing is fundamentally important to litigators of any stripe, because it is an element of the very justiciability of an issue. Katherine Meyer, who has argued some of the most important animal standing cases to date, n21 aptly described the importance of standing, explaining that a lack of standing is "a complete barrier to the courtroom. If you don't have standing, you don't get through the door. You may have a cause of action, there may be a door there, but if you don't [have] standing, you can't get through it." n22

While advocates for humans often take standing for granted, standing has posed a frequent and formidable obstacle for animal advocates. Meyer, who has litigated animal protection cases for nearly fifteen years, commented that standing challenges have been "inevitably the first round of the litigation in all of these cases." n23 Veteran animal advocate Tischler echoed this experience, reflecting, "We didn't set out to make standing law. We didn't want to become standing experts. Dealing with the issue of standing ... has been a practical necessity, because we are challenged in every case we file." n24

These standing challenges can be defeated, as exemplified by Meyer's victory in Ringling Bros., in which the court held that a former elephant handler had standing to challenge the abusive treatment of the elephants with whom he had worked. n25 Nevertheless, these challenges remain an impediment to litigating the merits of an animal advocacy claim because of the incredible amount of time they take to resolve. For example, Meyer points out that in Ringling Bros., three years of attention to the merits were lost to litigating standing, while the elephants remained in the conditions challenged as abusive. n26

[*7] While animal advocates have consistently faced standing challenges and heightened scrutiny, Jonathan Lovvorn, Vice President of Animal Protection Litigation for the Humane Society of the United States, commented that courts will readily assume with little analysis that anyone financially impacted by an action has standing to challenge it. n27 In essence, Professor David Cassuto, who teaches and writes on animal law, observed that standing, particularly the injury-in-fact prong of standing analysis, poses a normative question. n28 Lovvorn elaborated on this notion, asserting that underlying the heightened scrutiny of standing in animal protection cases "is the idea that the courts don't really think that the injury that we're talking about is a real injury." n29

The task before the animal advocacy movement, then, is to communicate these injuries in a manner comprehensible to a wider audience. This task comprises two elements. First, Lovvorn argued, advocates must learn to present the injuries at issue in terms that are intelligible to those accustomed to conceptualizing injuries as arising from automobile accidents and commercial disputes. n30 Second, he added, advocates must attend to the public perception of these issues, addressing the inevitable, if under-acknowledged, interaction between cultural and legal norms. n31 Both of these tasks require cultural transformation and call for the same transparency discussed by the first panel, as well as mindful attention to the big picture and the relationship between incremental immediate steps and long-term goals.

C. Causes of Action: Doors into the Courtroom

The third panel, "Animal Advocacy & Causes of Action," considered existing and potential avenues into the courtroom for animal advocates. Panelists included Carter Dillard, n32 David Favre, n33 Eric [*8] Glitzenstein, n34 Mariann Sullivan, n35 and Sonia Waisman. n36 The discussion was wide-ranging and tackled a multitude of issues, including claims for recovery beyond "replacement value" when companion animals are intentionally or negligently injured or killed, n37 private enforcement of animal cruelty statutes, n38 claims challenging false representations made by manufacturers about their treatment of animals, n39 [*9] existing and proposed citizen suit provisions, n40 challenges to

unlawful or capricious government actions, n41 open government claims to increase transparency and expose practices, n42 and even potential constitutional claims. n43

[*10] Despite the expansive list of topics covered and the exploratory nature of the discussion, some overarching and unanimously agreed upon themes emerged. Perhaps most important was a compelling reminder that advocates must not lose sight of the forest for the trees. As moderator Len Egert, one of the founding partners of Egert & Trakinski, an animal law practice based in New York City, thoughtfully urged:

As a movement, as animal advocates[,] we have to constantly be thinking about the types of cases we bring and whether or not we're going to move forward and take a step forward in a direction that we want to go in ... . We need to think about what our goals are all the time and be very careful that we're not doing more harm than good, because we are really at the beginning stages and we have to make sure we get to the place we want to be. n44

IV. PLANNING AHEAD: DEVELOPING A VISIONARY PRAGMATIC STRATEGY FOR THE FUTURE OF ANIMAL LAW

Egert's call for strategy, visionary pragmatism, and perspective was, in fact, voiced throughout the daylong symposium. In her opening overview of the past, present, and future of animal law, Tischler emphasized, "We are going to have to focus on [the] creation ... of breakthrough cases." n45 Likewise, Meyer noted the importance of a thoughtful incrementalism undergirded by a long-range vision and plan, explaining, "It's like Brown vs. Board of Education. n46 That wasn't the first case they brought. They brought all these other incremental cases leading up to Brown ... to establish that principle." n47 Egert carefully considered a step-by-step strategy, insisting:

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It's very important to see the big picture and look at what potentially is down the line so that we can do the hard work of figuring out incrementally... what cases, what steps are going to lead to that, or lead at least to an ability to make those arguments and really have them heard in court. n48

Fleshing out such goals, however, can be difficult. As Wolfson reminded animal advocates, "At the end of it we're just trying to change the world. That's all we're trying to do here. We're just trying to basically change something from top to bottom." n49 When the transformation called for is so fundamental that it goes to the core of many of our daily consumption practices and implicates the lives of literally billions, it can be frustrating and seemingly impossible to establish a clear vision, let alone develop a strategy to realize that vision.

But a pragmatic visionary strategy is not impossible. For example, Sullivan suggested developing a vision of "where we would ... like to go in a realistic sense legally in the next 20 or 30 years ... ." n50 In doing so, there is much to learn from the hard earned experiences of prior social movements that have used the law as a tool for social change. Despite the obvious differences between advocacy on behalf of humans and advocacy on behalf of nonhuman animals, there are also similarities and strategic lessons to be learned if we look and listen.

Animal issues are on the table in a way they have never been before. As Jamieson and Wolfson both emphasized:

In many ways we have already won most of the arguments. The key issues that we argue on behalf of have already been proven. That animal issues [are] a serious ethical concern. That animals are treated in ways that are very hard to justify and the majority of times very unnecessary. That there is a great deal of need for change. And that people should care about those issues. n51

[*12] Animal advocates have succeeded in creating a mainstream discourse. Transformation is already underway. Now, the question is what role advocates will play in this transformation and what will ultimately result. These decisions are ours to make.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCriminal Law & ProcedureSentencingAlternativesShock Incarceration GovernmentsAgriculture & FoodAnimal Protection

FOOTNOTES:

n1. Joyce Tischler, Symposium, Confronting Barriers to the Court Room for Animal Advocates 2-9 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with Animal L.) [hereinafter Confronting Barriers].

n2. Id. at 5.

n3. Id. at 4.

n4. ALDF, Programs: Animal Law Courses, http://www.aldf.org/content/index.php?pid=83 (accessed Nov. 30, 2006) (list of law schools offering animal law courses).

n5. ALDF, Programs: SALDF Chapters, http://www.aldf.org/content/index.php?pid=51 (accessed Nov. 30, 2006) (list of animal law student groups); ALDF, Resources: Bar Association Animal Law Sections and Committees, http://www.aldf.org/resources/details.php?id=101 (Jan. 1, 2006) (list of national, state, and regional bar association animal law committees and sections).

n6. ABA, Animal Law Committee, http://www.abanet.org/tips/animal/home.html (last modified Oct. 30, 2006).

n7. See Animal L.; J. Animal L.; J. Animal L. & Ethics; J. Intl. Wildlife L. & Policy (journals dedicated exclusively to animal law). See e.g. Cass R. Sunstein, Centennial Tribute Essay: The Rights of Animals, *70 U. Chi. L. Rev. 387 (2003);* Donna Mo, Student Author, Unhappy Cows and Unfair Competition: Using Unfair Competition Laws to Fight Farm Animal Abuse, *52 UCLA L. Rev. 1313 (2005);* Student Author, Challenging Concentration of Control in the American Meat Industry, *117 Harv. L. Rev. 2643 (2004)* (examples of recently published animal-related articles in generalist law reviews).

n8. Clayton Gillette, Symposium, Confronting Barriers 1 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with Animal L.).

n9. See e.g. Student Animal Legal Defense Fund, Annual Animal Law Conference, http://www.lclark.edu/org/saldf/conference.html (accessed Nov. 12, 2006) (longest running national animal law conference, which will host its fifteenth annual event in 2007); Duke L., Duke Law Events, http://www.law.duke.edu/webcast/index.html; select Duke University Animal Law Conference (part 1), (part 2), (part 3), or (part 4) (accessed Nov. 12, 2006) (webcast of animal law symposium held by Duke Law School's Law & Contemporary Problems); Yale Bull. & Calendar, 'Future of Animal Law' to Be Explored, http://www.yale.edu/opa/v33.n10/story2.html (Nov. 5, 2004) (described by Yale Law School Dean Harold Koh as an "opportunity to discuss cutting-edge legal issues with the foremost experts in the this field"); ALDF, Animal Law Events: The Future of Animal Law, http://www.aldf.org/events/details.php?id=20 (accessed Dec. 1, 2006) (publicizing "The Future of Animal Law" conference scheduled for Mar. 30-Apr. 1, 2007 at Harvard Law School).

n10. See Student Author, supra n. 7, at 2646-52 (discussing confinement conditions of farmed animals, vertical and horizontal integration of the meat processing industry, and the relationship between the two); Mo, supra n. 7, at 1319-20 nn. 39-41 (describing confinement conditions experienced by the vast majority of farmed animals in the United States); Warren A. Braunig, Student Author, Reflexive Law Solutions for Factory Farm Pollution, *80 N.Y.U. L. Rev. 1505, 1508 n. 14 (2005)* (detailing a significant increase over the last thirty years in the number of animals farmed in the United States, and a contemporaneous dramatic decline in the total number of livestock and poultry facilities).

n11. Milbank, Tweed, Hadley & McCloy LLP, Attorneys: David J. Wolfson, http://www.milbank.com/en/Attorneys/v-z/Wolfson David.htm (accessed Nov. 12, 2006); David J. Wolfson & Mariann Sullivan, Foxes in the Hen House: Animals, Agribusiness and the Law: A Modern American Fable, in Animal Rights: Current Debates and New Directions 205-33 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004); David J. Wolfson, Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production, *2 Animal L. 123 (1996).* Wolfson teaches animal law seminars at the Benjamin N. Cardozo School of Law, Columbia University Law School, and New York University School of Law. He has previously taught at Harvard Law School and led an animal law study group at Yale Law School.

n12. David J. Wolfson, Symposium, Confronting Barriers 75 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with Animal L.).

n13. See Animality and Peformance, TDR: The Journal of Performance Studies (Una Chaudhuri, guest ed.) (forthcoming 2007); Una Chaudhuri, (De)Facing the Animals: Zooesis and Performance, TDR: The Journal of Performance Studies (forthcoming 2007); Una Chaudhuri, Zoo Stories: "Boundary-Work" in Theatre History, in Redefining Theatre History (W.B. Worthen & Peter Holland eds., Palgrave MacMillan 2003); Una Chaudhuri, Animal Geographies: Zooesis and the Space of Modern Drama, 46 Modern Drama 646, 646-62 (Winter 2003).

n14. Taimie L. Bryant, Trauma, Law, and Advocacy for Animals, *1 J. Animal L. & Ethics 63 (2006);* Taimie L. Bryant, Similarity or Difference As a Basis for Justice: Must Animals Be Like Humans to Be Legally Protected from Humans? 70 L. & Contemp. Probs. (forthcoming 2006) (draft available at http://www.law.ucla.edu/docs/
bryant - similarity - july 14.pdf); Taimie L. Bryant, Mythic Non-Violence, 2 J. Animal L. 1 (2006) (available at http://www.animallaw.info/journals/
jo pdf/Journal%20of%20Animal%20Law%20Vol%202.pdf).

n15. See e.g. Dale Jamieson, Morality's Progress: Essays on Humans, Other Animals, and the Rest of Nature (Clarendon Press 2002) (compiling some of Jamieson's work on these topics); Readings in Animal Cognition (Marc Bekoff & Dale Jamieson eds., MIT Press 1996).

n16. Taimie Bryant, Dale Jamieson & Una Chaudhuri, Symposium, Confronting Barriers 23-25 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with Animal L.).

n17. Id. at 25.

n18. Discourses about human-animal interactions are by no means limited to the United States; indeed, many other countries appear to be much further along in terms of material improvements in the lives of nonhuman animals. Wolfson & Sullivan, supra n. 11, at 221-24 (comparing recent animal protection advances in the European Union with the relative lack thereof in the United States); Christina G. Skibinsky, Changes in Store for the Livestock Industry? Canada's Recurring Proposed Animal Cruelty Amendments, *68 Sask. L. Rev. 173 (2005)* (analyzing increasing attention to animal welfare issues in Canada, general public support for updated animal cruelty legislation, and industry backlash); Jessica Braunschweig-Norris, Student Author, The U.S. Egg Industry - Not All It's Cracked up to Be for the Welfare of the Laying Hen: A Comparative Look at United States and

European Union Welfare Laws, *10 Drake J. Agric. L. 511 (2005)* (describing the disparity between welfare regulation of the egg industry in the European Union and the United States); Kate M. Nattrass, "... Und Die Tiere": Constitutional Protection for Germany's Animals, *10 Animal L. 283 (2004)* (tracing the legal and social developments leading to Germany's constitutional amendment providing protection to animals); Delcianna J. Winders, Student Author, Combining False Advertising and Reflexive Law to Standardize "Cruelty-Free" Labeling of Cosmetics, *81 N.Y.U. L. Rev. 454, 455 (2006)* (comparing the European Union's ban of testing cosmetics on animals and of marketing products so tested with the United States' failure to even ensure the veracity of "cruelty-free" claims).

n19. Dale Jamieson, Symposium, Confronting Barriers 23 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with Animal L.).

n20. Id. at 14.

n21. *Am. Socy. Prevention Cruelty Animals v. Ringling Bros. & Barnum & Bailey, 317 F.3d 334, 338 (D.C. Cir. 2003)* (holding that a former elephant handler had standing to challenge the treatment of elephants with whom he had worked); *ALDF v. Glickman, 154 F.3d 426, 445 (D.C. Cir. 1998)* (en banc) (holding that a regular visitor to animal exhibitions had standing to challenge the treatment of primates that he had visited).

n22. Katherine Meyer, Symposium, Confronting Barriers 34 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with Animal L.).

n23. Id.

n24. Tischler, supra n. 1, at 7.

n25. *317 F.3d at 434.* The American Society for the Prevention of Cruelty to Animals, other animal welfare groups, and a former elephant handler sued Ringling Bros. under the Endangered Species Act (Endangered Species Act of 1973, *16 U.S.C. §1540*(g) (2002)). The district court dismissed the complaint for lack of standing, but the D.C. Circuit reversed, holding that the former handler had demonstrated a present or imminent injury and established redressability. *Ringling Bros., 317 F.3d at 434.*

n26. Meyer, supra n. 22, at 40.

n27. Jonathan Lovvorn, Symposium, Confronting Barriers 41 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with Animal L.); see e.g. *Fund for Animals, Inc. v. Norton, 322 F.3d 728, 733-34 (D.C. Cir. 2003)* (finding standing to be "self-evident" and declining to require that the intervenor provide more than allegations to establish standing where the type of injury alleged was the "threatened loss of tourist dollars" and harm to property).

n28. David Cassuto, Symposium, Confronting Barriers 32 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with Animal L.); see also David Cassuto, The Law of Words: Standing, Environment, and Other Contested Terms, *28 Harv. Envtl. L. Rev. 79, 95-100 (2004)* (critiquing injury-in-fact jurisprudence as normative and contingent, and arguing that definitions of injury should instead be derived exclusively from statutes).

n29. Lovvorn, supra n. 27, at 41.

n30. Id.

n31. Id. at 46.

n32. Carter Dillard is the Director of Farm Animal Litigation for the Humane Society of the United States. He wrote the seminal work on how animal advocates can use false advertising law. Infra n. 39.

n33. David Favre is a professor at Michigan State University College of Law. He teaches animal law and wildlife law and has authored a variety of scholarly articles and books on animal law, including a casebook and a recently published article. David Favre, Animals: Welfare, Interests, and Rights (Mich. St. U., Det. College L. 2003); David S. Favre, Judicial Recognition of the Interests of Animals-A New Tort, *2005 Mich. St. L. Rev. 333* [hereinafter A New Tort].

n34. Eric Glitzenstein is a founding partner of Meyer Glitzenstein & Crystal. He has litigated a plethora of citizen suit actions and has written on the importance of citizen suit enforcement and judicial oversight to environmental law.

n35. Mariann Sullivan is the Deputy Chief Attorney for the New York State Appellate Division, First Department. She serves on various animal law committees and writes on animal law.

n36. Sonia Waisman teaches animal law at California Western School of Law and co-authored the first animal law casebook. Pamela D. Frasch, Sonia S. Waisman, Bruce A. Wagman & Scott Beckstead, Animal Law (1st ed., Carolina Academic Press 2000) (casebook currently in third edition). She has also written on the recovery of noneconomic damages for the wrongful killing or injury of companion animals. Infra, n. 37.

n37. Because companion animals are legally private property, plaintiffs have historically been able to recover only the "replacement value" of an animal that is killed or injured. See Sonia S. Waisman & Barbara R. Newell, Recovery of 'Non-Economic' Damages for Wrongful Killing or Injury of Companion Animals, *7 Animal L. 45, 70 (2001)* (arguing that damages for noneconomic harms are justified and explaining the Tennessee "T-Bo Act" which allows for recovery of damages for loss of companionship of particular pets) (*Tenn. Code Ann. §44-17-403* (West 2004)); A New Tort, supra n. 33, at 340-43 (noting "replacement value" as indication of impoverished nature of body of law dealing with protection of animal interests). For additional analyses of the valuation of nonhuman animals, see Geordie Duckler, The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation, *8 Animal L. 199, 203-04 (2002)* (arguing that animals have particular values in addition to their property value); Christopher Green, Student Author, The Future of Veterinary Malpractice Liability in the Care of Companion Animals, *10 Animal L. 163, 179 (2004)* (providing comprehensive factual analysis of valuation of companion animals and its implications for veterinary malpractice liability).

n38. Animal cruelty laws are generally criminal provisions that can only be enforced by a prosecutor who has complete prosecutorial discretion. See Jennifer H. Rackstraw, Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes, *9 Animal L. 243, 244 (2003)* (arguing that prosecutorial discretion is the "lynchpin of our legal system," as "[a] prosecutor's power to decide whether or not to charge an individual with the commission of a crime is virtually unchecked"). Animal cruelty violations, moreover, appear to be seriously under prosecuted. *Id. at 245-47.* Mechanisms that enable private citizens to bring cruelty claims have garnered increasing attention as a means of ensuring more vigorous enforcement of these laws. *Id. at 264-66* (proposing a model self-help statute empowering private citizens to enforce cruelty laws). See also William A. Reppy, Jr., Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience, *11 Animal L. 39, 41-45 (2005)* (drawing on experience of North Carolina civil remedy provision to propose a model anti-cruelty civil remedies statute).

n39. As consumers increasingly integrate animal concerns into their purchasing habits, manufacturers have begun to respond with a plethora of labeling claims about the treatment of animals. See Carter Dillard, False

Advertising, Animals, and Ethical Consumption, *10 Animal L. 25, 26 (2004)* (noting the success of "animal advocacy groups ... in convincing consumers to make ethical choices when buying"). See also Winders, supra n. 18, at 458-59 nn. 13-14 (noting that statistics indicate that "cruelty-free" labels affect consumer purchasing habits). Unfortunately, all too often these claims are false or misleading, which is problematic from both an animal protection and a consumers' rights perspective. See Dillard, supra n. 39, at 26 (stating that "because consumers will often pay more for humanely produced goods, and because those goods often cost more to produce, there is an incentive to convince buyers at the point of purchase that goods are created under more animal-friendly conditions than they in fact are"). See also Winders, supra n. 18, at 459-60 (noting that the lack of a standardized definition of "cruelty-free" means consumers are at risk of being mislead or deceived). False advertising law is increasingly used to hold manufacturers accountable for misleading claims about their treatment of animals. See Mariann Sullivan, To Tell the Truth: The Role of Consumer Protection Litigation in Resolving Disputes between Animal Protection Agencies and Industry, Animal L. Comm. Newsltr. 26-29 (Fall 2005) (detailing recent false advertising activity initiated by animal advocacy movement) (on file with Animal L.). See generally Dillard, supra n. 39 (detailing the various avenues available for advocates to bring false advertising claims).

n40. See e.g. Student Author, 2002 Legislative Review, *9 Animal L. 331, 345-56* (Emilie Keturakis ed., 2003) (proposing citizen suit as a means of addressing the government's failure to enforce the Animal Welfare Act (AWA)).

n41. See Administrative Procedure Act (APA), *5 U.S.C. §§702-706* (2000) (providing judicial review of the actions of federal agencies and requiring reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed" and to "hold unlawful and set aside agency action, findings, and conclusions" that are, inter alia, arbitrary or capricious). Because the AWA lacks a citizen suit provision, challenges to its enforcement, or lack thereof, must be brought under the APA. See Animal Welfare Act, *7 U.S.C. §§2131-2159* (2000 & Supps. II 2002, III 2003, IV 2004) (regulating treatment of animals). Analogous state administrative procedure acts similarly provide review of state administrative actions. For a database of state administrative procedure resources, see Fla. St. U. College L., ABA Administrative Procedure Database: State Resources, http://www.law.fsu.edu/library/admin/state resources.html (accessed Nov. 12, 2006).

n42. See Freedom of Information Act (FOIA), *5 U.S.C. §552* (2000) (requiring federal agencies to publicly disclose certain documents). FOIA can assist animal advocates by enabling them to access information, such as information about federally regulated animal industries. The Ninth Circuit's decision in U.S. v. Catholic Healthcare W. represents a recent use of FOIA by animal advocates. *445 F.3d 1147, 1156 (9th Cir. 2006)* (allowing an action against a researcher for his experimentation on beagles to proceed, where the plaintiffs alleged, based on information obtained through FOIA, that the researcher had fraudulently obtained seven hundred thousand dollars in grant money from the government).

n43. The panelists specifically discussed a remark made by Laurence Tribe about the possibility of interpreting the Thirteenth Amendment to extend protection to nonhuman animals. See 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, 4 (2001)* ("The Thirteenth Amendment, which prohibits slavery throughout the United States[,] ... is not limited to government violations but extends to private conduct as well[, indicating that] ... our constitutional apparatus and tradition includes devices for protecting values even without taking the step of conferring rights on new entities - -by identifying certain things that are simply wrong.").

n44. Len Egert, Symposium, Confronting Barriers 50 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with Animal L.).

n45. Tischler, supra n. 1, at 7.

n46. *347 U.S. 483, 495 (1954)* (holding that "in the field of public education the doctrine of 'separate but equal' has no place" and that "such segregation is a denial of the equal protection of the laws").

n47. Meyer, supra n. 22, at 45-46; see also Leland B. Ware, Setting the Stage for Brown: The Development and Implementation of the NAACP's School Desegregation Campaign, 1930-1950, *52 Mercer L. Rev. 631, 632 (2001)* (describing the "long-range, carefully coordinated litigation campaign" preceding the decision in Brown); Jack Greenberg, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution 152-211 (Basic Bks. 1994) (discussing the evolution of Brown). Panelist Lovvorn has suggested elsewhere, however, that animal advocates exercise caution with the Brown analogy as "far too many ... have fallen under the intoxicating thrall of the fantasy of creating something like Brown v. Board of Education for animals" when, in fact, there will be no "court-imposed silver-bullet for animals." Jonathan R. Lovvorn, Introduction: 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, 139, 147 (2006)* (footnote omitted). Even in the civil rights context, Brown has proven to be no "silver-bullet," yet another reason for animal advocates to avoid romanticizing it. See Charles J. Ogletree, With All Deliberate Speed: Reflections on the First Half Century of Brown v. Board of Education (W.W. Norton & Co. 2004) (analyzing ramifications of Brown decision and arguing that its mandate was flawed from the beginning); Derrick Bell, Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform (Oxford U. Press 2004) (arguing that Brown undermined rather than advanced the education needs of black children). As Lovvorn himself argues, animal advocates can still learn from cultural and legal strategic efforts preceding Brown, even while recognizing there will be no "silver-bullet."

n48. Egert, supra n. 44, at 60.

n49. Wolfson, supra n. 12, at 76-77; see also Lovvorn, supra n. 47, at 134 (discussing animal advocates' "overriding duty to ... put things into perspective and to think long and hard about the consequences of [their] actions"). A part of this "big picture" view is, of course, combining a sense of realism and pragmatism. See id. (urging animal advocates to "soberly assess [their] tactics for victory").

n50. Mariann Sullivan, Symposium, Confronting Barriers 65 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with Animal L.). See also Lovvorn, supra n. 47, at 142 (suggesting that animal advocates focus on "the space in between current practices and where current polling data tells us society is ready to go in terms of reform").

n51. Wolfson, supra n. 12, at 75-76 (paraphrasing Jamieson).

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SYMPOSIUM: CONFRONTING BARRIERS TO THE COURTROOM FOR ANIMAL ADVOCATES: LEGAL STANDING FOR ANIMALS AND ADVOCATES

NAME: Panelists: David Cassuto, Jonathan Lovvorn, and Katherine Meyer*

Moderator: Joyce Tischler +

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LEXISNEXIS SUMMARY:

... In order to litigate on behalf of an animal's interests in federal court, the advocate must first establish standing by meeting three requirements: (1) the plaintiff must have suffered an injury in fact, (2) the injury must be causally connected to the act about which the plaintiff is complaining, and (3) the court must be able to redress the injury. ... Some state animal cruelty codes allow humane agents to bring those lawsuits on behalf of the animals. ... These judges are devotees of judicial restraint out of one side of their mouths, but out of the other side of their mouths, they are taking the words "case or controversy" and creating all kinds of rules that are not found in the Constitution, precisely to keep these kinds of lawsuits out of court. ... Lovvorn: I do not want to make David Cassuto 's argument for him, but I find the informational injury issue to be fascinating. ... Regarding the situation with Section 10 in the ESA, obviously, if you have a right to the permit and information but are denied access, that should constitute an informational injury, and that is the basis for the endangered species canned hunting suit HSUS has filed, and which Kathy Meyer discussed earlier. ... Tischler: In the Glickman case, Kathy Meyer , the court held that standing was based on an injury to an aesthetic interest. ... That plaintiff had standing to challenge the United States Department of Agriculture (USDA) for its failure to carry out the congressional mandate in the 1985 AWA amendments, requiring that the USDA promulgate standards for the psychological well being of primates. ... The trick for Rider was, how do you show a continuing injury or a future injury, when the circus is going to argue that the plaintiff only has past injuries, and therefore, those injuries are not cognizable for Article III purposes? ... The idea that private litigants are somehow going to more fully pursue their rights than public interest organizations or advocates is totally false. ... With these farming issues - it is very important what HSUS is doing, as are other groups - we are talking about billions of animals.

HIGHLIGHT:

For animal advocates, one of the most significant barriers to the courtroom is standing. In order to litigate on behalf of an animal's interests in federal court, the advocate must first establish standing by meeting three requirements: (1) the plaintiff must have suffered an injury in fact, (2) the injury must be causally connected to the act about which the plaintiff is complaining, and (3) the court must be able to redress the injury. When it comes to non-human animals, how does an advocate demonstrate an injury to establish standing? In this panel, experts in animal litigation discuss the concept of establishing legal standing for animals and animal advocates; the panelists' own experiences, including specific cases and creative methods used; and the future of legal standing for animals.

TEXT:
[*61]

Sandeep Kandhari: So that brings us to our next panel. This panel is going to be about standing, at both the state and federal level. Standing is one of those vital issues, one of those big barriers to actually helping and furthering this cause. Today, we will discuss why it has been an issue, as well as possible solutions or strategies for overcoming standing. To moderate this panel, I would like to reintroduce Joyce Tischler, who will take it away from here.

Tischler: Good afternoon. This panel is on legal standing for non-human animals and their human advocates. When I was in law school, I can remember my contracts professor summarized standing with a surprisingly simple conclusion. "Either you have it, or you don't."

Our panelists are three people who know of what they speak. David Cassuto, to my right, is a professor at Pace Law School, where [*62] he began teaching in July 2003. n1 He teaches in the areas of property, professional responsibility, animal law, water law, and legal and environmental theory. n2 Prior to that, he was with Coblentz, Patch, Duffy & Bass in San Francisco, where he practiced complex civil litigation. n3 His published work includes The Law of Words: Standing, Environment, and Other Contested Terms and Bred Meat - A Look at the "Nature" of Factory Farms, which is coming out in the Duke journal, Law & Contemporary Problems, in Winter 2007. n4

Katherine Meyer is a founding partner of the public interest firm of Meyer, Glitzenstein & Crystal in Washington, D.C. n5 Ms. Meyer has litigated numerous cases involving standing and animal advocates, including the American Society for the Prevention of Cruelty to Animals v. Ringling Bros. n6 She is one of the most experienced attorneys in the United States when it comes to the issue of standing for animal advocates.

Jonathan Lovvorn directs the Animal Protection Litigation program at The Humane Society of the United States (HSUS), where he is focused on developing novel legal theories. n7 He also runs the animal law clinic at George Washington University Law School, n8 is a lecturer on animal law at George Washington University Law School, n9 and is an adjunct professor of animal law at Lewis & Clark Law School. n10

I will ask you, Kathy [Meyer], to start off by telling us more than my law school professor did. What is standing and how does it relate to animal protection and animal rights cases?

Meyer: Actually, I thought what you said was good. "You either have it, or you don't," and you know it when you see it. I will start with one of Justice Douglas' quotes from Assn. of Data Processing Service Organizations in 1970, when he said "generalizations about standing [*63] to sue are ... worthless." n11 That about sums it up. It is hard to put it all into a nice little package. Basically, in the federal context, it is a constitutional requirement that the person who is actually bringing the lawsuit is the proper person to be complaining about the illegal act that is being complained about. n12 It stems from those three little words in Article III of the Constitution which give federal courts jurisdiction over "cases or controversies." n13 Believe it or not, those words, "case or controversy," have been construed over the years by such strict constructionists as Justice Scalia to create a whole slew of barriers to getting into court. n14

There are three basic requirements for standing. The first is that the plaintiff has to have an "injury in fact": some kind of an injury that is caused by the illegal act that is being complained about. n15 The second is the "causation" requirement: the injury that is being complained about must be fairly traceable to the illegal act that is being complained about. n16 The third requirement is that the court can redress that injury in some fashion: what you are asking the court to do is likely to give you some "redressability" of your injury. n17 Those are the three basic requirements for standing. In addition, there is the prudential requirement when you are suing under a statute that your claim also be within the zone of interests that Congress intended the statute to protect. n18 That is not a constitutional requirement, but one that courts can apply at their discretion if they want to kick you out of court, even though you have shown that you meet all of the constitutional requirements. n19 Basically, you have to be the proper person. The idea is to make sure that the

court is resolving an actual concrete controversy: something that will be presented in an adversarial way by the parties, something that is capable of judicial resolution, not some hypothetical situation.

Tischler: David [Cassuto], can you talk about injury in fact? You have called the requirement of injury in fact a sham. Would you explain that critique and start by telling us what injury in fact is?

Cassuto: Well, interestingly, if I could tell you what injury in fact was, I would not be quite so harsh about it. The problem with injury in [*64] fact, and the reason I think it is a sham, is because it means whatever the judge on that particular day says it means. Essentially, in order to be a case or controversy, the Supreme Court has opined that an adverse party, the person bringing the suit, has to be injured in some way or another. n20 That is what the Court means by injury in fact, but I wish it were that simple.

Let me just step back for a second, because the case or controversy requirement in the Constitution is not defined. Over time, the Supreme Court has said plaintiffs have to be injured in order for there to be a case or controversy, in order for the litigants to be truly adverse. n21 We can say, "Well, of course it makes sense that the litigant should be injured. That's why she is suing." But that is not what injury in fact means. First of all, what is "in fact"? I do not know. You might say, "I see somebody tormenting their dog, and I find that profoundly disturbing, and I lose sleep about it. I have become clinically depressed. I cannot function. I cannot work." This is a very real scenario.

Can you sue that person? No, you cannot, because you are somehow not within the zone of interests of that statute. Have you been injured? Heck yeah, you have been injured. You cannot sleep. You are losing your hair. You are tormented and clinically depressed. If someone says they are injured, unless they are lying, they have been injured. When the court says you have to really be injured in order to bring a suit, what is it saying? It is saying something tautological (i.e., that you have to be injured to be injured), or it is saying something else and not telling us what that is.

If I see a dog being tormented and I cannot sue, it is not because I am not injured. It is because the court has decided that my injury is not a kind it feels is judicially cognizable. So that is an entirely different question. That is a normative question. If it is a normative question, that goes to the merits. It has nothing to do with whether somebody is injured or not. That is why I think it is a sham.

Tischler: What would you replace it with?

Cassuto: Let me restrict my answer to what I would replace it with in the environmental or animal related context. It seems to me if a statute has a citizen suit provision, that is to say, if there are private Attorneys General capable of enforcing a particular law, that means Congress has decreed that if the law is violated, there is injury. Congress has created injury by stating that if the law is violated, someone can sue to enforce it. To me, that ends the discussion about whether injury exists. There is legal injury, because the legislature has created it. The court's prudential standing requirements and their rather [*65] lengthy and obfuscatory expositions on whether or not there is injury only serve to muddy the waters rather than to clarify. The result is that people with perfectly viable causes of action cannot sue.

Meyer: It is pretty clear that Congress can create an injury that would suffice for purposes of Article III standing. If I were going to leave with one statement for this crowd, I would say that the work really has to be done in the legislature. We have to get these statutes passed. We have to get these private rights of action, as David [Cassuto] said. We have to get Congress to create legal rights and legal injuries by law and then go one step further and designate who the proper person is to bring those lawsuits. Some state animal cruelty codes allow humane agents to bring those lawsuits on behalf of the animals. n22 There is no reason why Congress could not do that in the federal arena as well. That is where the work really needs to be done in order to expand standing law for animals. It is a matter of getting the legislature to start creating these injuries and designating the proper entities to bring those lawsuits.

Tischler: Is that not easier said than done?

Meyer: Ah, that is why we leave it to the lobbyists.

Tischler: Do you agree?

Cassuto: I do agree, but if it were up to me, and if we could go back and retrofit some of these laws, I would like to take a look at standing in general. As a concept, it is quite problematic. It is based on these court created notions of what amounts to a case or controversy. I would like us to go back - actually I have got stuff to do - I would like the Court to go back and reexamine what it means by a case or controversy, because it got off on the wrong track.

Meyer: It was a way for the conservative judges to keep people like us out of court. That is exactly why they did it. That is why Justice Scalia wrote the Lujan decision. You get conservative judges in the courts creating these rules that apply, and at the same time, they are claiming they do not legislate. These judges are devotees of judicial restraint out of one side of their mouths, but out of the other side of their mouths, they are taking the words "case or controversy" and creating all kinds of rules that are not found in the Constitution, precisely to keep these kinds of lawsuits out of court.

Tischler: Kenneth Davis, in his administrative law treatise, implied that standing is one of the most complex areas of the law. n23 Not because it needs to be, not that it is inherently complex, but because it is so political, and - this goes well beyond animal law cases - the decisions are woefully inconsistent. Is that basically what you are saying?

Meyer: Definitely.

[*66] Tischler: In a sense, standing decisions are a reflection of judges' social values and political views.

Meyer: It is a complete barrier to the courtroom. If you do not have standing, you do not get through the door. You may have a cause of action and a door may exist, but if you do not have standing, you cannot get through it. So that is the end of the ballgame. In a lot of the cases we handle, the first round is a motion to dismiss on standing - that is if you are lucky. Otherwise, it is a motion for summary judgment, and then you have to actually prove each of those three standing requirements. n24 For a motion to dismiss, you just have to allege those three requirements in your complaint. n25 That is inevitably the first round of litigation in all of these cases. It takes a long time to get those issues resolved. You may lose that first round in the district court and then have to appeal to the court of appeals. Five years may go by before you get down to the merits of your claim, assuming you prevail on standing. It is a huge problem and a formidable barrier to having your merits litigated.

Lovvorn: Since we are in the phase of offering a critical analysis of standing, because I do think we are stuck with it and do not expect the legislature or the courts to radically change it any time soon, it is important to point out that the reason given for these standing requirements - the need for a gatekeeping function - does not hold up under scrutiny. n26 The theory is that federal courts cannot be flooded with cases by wild-eyed radicals trying to change the system, therefore we need a strict standing requirement, et cetera. But no one seems to stop to consider the amount of time that is spent litigating these issues, both at the trial court and appellate level, versus just having an open system. It would be interesting for someone to add up the amount of attorney hours and judge hours spent fighting over these arbitrary little standards.

We need to remember how unique the federal system is in this respect. Many states have taxpayer standing, which essentially means that anyone who pays taxes in that state and can challenge an unlawful expenditure by a government entity and can bring suit. n27 Humane societies and humane agents are also authorized to bring litigation to protect animals without a standing requirement in many states. n28

[*67] For these jurisdictions, the absence of Article III standing has not flooded the courts with a situation that cannot be handled. So I think that we are stuck with standing at the federal level. I do not see the legislature changing it, and I do not see the Supreme Court reversing itself, although I agree that once Congress says, "Here is your citizen suit provision," that should be sufficient. n29 In short, there is a real problem with the justification for the federal standing test, and if the Supreme Court wanted to, there is nothing that would stop it from watering the test down significantly.

Cassuto: That is entirely right. Since the courts made it up, they can make up its replacement.

Meyer: Not with the way the federal judiciary is going.

Cassuto: On one hand, there is certainly a lot of danger to going back and retrofitting. On the other hand, Jonathan [Lovvorn] is absolutely right. Look at the number of states that have taxpayer standing or far more relaxed standing requirements, and then look at this canard the federal judiciary has created where it is simply too great a burden. If the doors to the courtroom were thrown open, it would be a potentially entropic experience, and there is no way the system could handle it. I sympathize with the fact that the judiciary is significantly understaffed, but there is the little matter of it being their job to hear these cases. If there are not enough people to do the job, then the solution is hiring more people to help them. It does not mean that members of the judiciary should not have to do their jobs.

I teach a course that compares the environmental laws of the United States with those of Brazil. One of the things that continually leaves my students' mouths agape is the number of cases the Brazilian Supreme Court decides every year - something in the neighborhood of sixty to one hundred thousand. n30 If you do the math, it means the Brazilian Supreme Court spends just minutes per case. n31 I am not exactly sure how this works, to be honest with you. It does

present an alternative, in that clearly, for them, it is more an issue of openness and access than it is about case management. I am not saying that the [*68] Brazilian way is the answer, but I am saying that the American way is not.

Tischler: Back to another basic. Kathy [Meyer], would you describe what informational standing is and how that relates to some of the cases you have dealt with over the years?

Meyer: Informational standing is one of those creations of Congress. It is an example of what I was talking about. Congress can, by statute, create a legal right to which someone is entitled, and if the person is denied that legal right, she has an injury in fact and Article III standing. n32 The classic example for informational injury is the Freedom of Information Act (FOIA). n33 Congress passed a statute that said every citizen has a right to request information from the federal government, and the federal government must disclose that information unless it is exempt from disclosure under one of nine exemptions. n34 If you submit a FOIA request and the government says, "See you later, we are not responding," you can go to court. n35 There is no question about standing. You have Article III standing simply by virtue of the fact that you requested the information, and the request was denied. n36 The Supreme Court made that clear in the Public Citizen v. Department of Justice case, which was actually a case under the Federal Advisory Committee Act. n37 In the course of explaining why informational [*69] injury existed under that statute, the court used FOIA as an example. n38

Animal law attorneys have been trying to use informational injury to establish injury in fact and get into court in a number of other instances. There was another very important Supreme Court case a few years ago called Federal Election Commission v. Akins. n39 In that case, some voters were complaining about the fact that a particular entity was not deemed a "political committee" within the meaning of the Federal Election Campaign Act. n40 The Federal Election Commission (FEC) decided that this entity was not a political committee, and therefore, it did not have to file all the reports that are required of political committees n41 or limit its campaign contributions. n42 The court found the plaintiffs had standing by virtue of the informational injury they suffered as a result of the FEC not deeming this entity a political committee. n43 The voters - the plaintiffs in the case - were denied information that, by statute, would have to be submitted by the entity if in fact it were a political committee. n44 That was enough for Article III standing.

Meyer & Gliztenstein has a case pending for HSUS, Defenders of Wildlife, and some other groups that is really tricky. n45 It involves three species of African antelopes the Fish and Wildlife Service (FWS) recently listed as endangered under the Endangered Species Act (ESA). n46 If an animal is listed as an endangered species under the ESA, it is entitled to all the protections of that statute. n47 When the FWS listed the three wild populations of the antelope species as endangered, it simultaneously issued a special rule exempting any captive-bred animals of those species that are born and bred in the United States. n48 The reason it issued this special rule was to exempt the [*70] antelopes that are used on canned hunting ranches, basically in Texas, from all the requirements of the ESA. It was basically a gift to the Texas canned hunting operations, which pull in a lot of money and draw people from around the world.

Canned hunting operations are enclosed ranches; n49 people visit because they want to acquire the head of one of these exotic species as a "trophy." These are beautiful antelope species. They have beautiful horns and are just gorgeous. People pay thousands of dollars for the privilege of riding around in a truck, shooting one of these animals, and then taking it home as a "trophy" and putting it on their wall. n50 This is the first time in the history of the FWS' implementation of the ESA that it has ever crafted an exemption like this for an otherwise endangered species, n51 so HSUS, Defenders of Wildlife, and other organizations wanted to bring a lawsuit. It was very difficult to establish that anyone had Article III standing. We had some theories, and we had a plaintiff, for example, who studies these antelope species in the wild in Africa. We alleged that this whole scheme is going to increase poaching and the illegal black market in the wild species, and that this will injure our plaintiff for purposes of Article III standing. n52

We also made an informational injury argument. Normally, the only way to get an exemption from the otherwise strict requirements of the ESA is by going through the permitting process under Section 10 of the statute. n53 Section 10 states that anyone who wants an exemption from the ESA has to apply for the exemption and make certain showings. n54 All of that information has to be made available by the FWS to the public at every phase of the proceeding, and the public is entitled to comment on the information. n55 If the FWS grants the exemption, it has to issue certain findings; these are also published in the Federal Register. n56

Our argument - as in the FOIA context and the Akins case - is that our clients, HSUS and Defenders of Wildlife, who regularly follow these kinds of regulatory actions, regularly comment on them, and disseminate that kind of information to their members, are being deprived of the information that they normally would obtain pursuant to [*71] the statute. Instead of going through the case-by-case permitting process required by the statute, the FWS has created this broad exemption. n57 That is an example of a creative way of trying to use informational injury. The case is pending

right now on a motion to dismiss on standing grounds in the Northern District of California. We will see what happens. n58

Lovvorn: I do not want to make David [Cassuto]'s argument for him, but I find the informational injury issue to be fascinating. Courts are very hostile to this approach, because it represents a potential shift in the separation of powers. If informational standing is given its broadest interpretation, it means things really shift to Congress to determine who is going to be able to get into court under Article III, rather than the court deciding itself. In some cases, the courts have been somewhat hostile to the information injury approach. n59 However, as Kathy [Meyer] points out, under the FOIA, n60 courts have said that if you are denied information to which Congress says you have a right, informational injury may exist. n61 Regarding the situation with Section 10 in the ESA, obviously, if you have a right to the permit and information but are denied access, that should constitute an informational injury, and that is the basis for the endangered species canned hunting suit HSUS has filed, and which Kathy [Meyer] discussed earlier. n62 The Akins case and the political committee is probably the biggest stretch of this theory. n63 And remember, just because Congress says you have a right to the administrative record and to challenge an agency decision in court under the Administrative Procedure Act, n64 that does not mean you have an informational injury.

But to return to the idea of Congress changing the laws to fix standing, every time I talk to our lobbying staff about trying to do something to change these statutes at the federal level, they laugh me out of the room. They say, "We can't even ban cock fighting at the national level." n65 Since the judiciary is getting more and more hostile to [*72] our positions in general, we also probably should not be looking there for a major expansion. What is going to carry the day, if anything, is looking at creative theories on competitive injury or trying to expand informational injury, among other things. That is where the activity has to be, at least for the short term, because we are unlikely to find relief in these other venues.

The reality of high fences and closed doors is also problematic, such as the canned hunting facilities that nobody sees, because nobody is there; animal research labs - no access; factory farms - no access. Those challenges are very difficult for purposes of Article III, because animal advocates do not see it, and therefore cannot claim a traditional Article III injury. The only way we are going to get there is by using creative theories or by reaching out to people who do see it. For example, we have a case right now on the federal Humane Slaughter Act (HMSA). n66 We have added, as plaintiffs, workers in poultry facilities who have come forward, believe it or not, risking their jobs and potential physical violence, to try to do something about the fact that the HMSA has not been applied to poultry. n67 As animal protection organizations, our ability to overcome these hurdles is going to depend on our ability to reach out beyond our community to other social movements and organizations in order to find people who can provide the Article III standing we need.

Meyer: Jonathan [Lovvorn] is saying, "If you cannot see it, you cannot be injured by what is happening." That is the dilemma to which he is referring. Under the law, you cannot be injured if you cannot show that you had some sensory impact as a result of what you saw. n68 Just knowing about it or reading about it in the newspaper and knowing it is happening is not enough for Article III. n69

Tischler: What about shifting the focus to state courts? Are the standing requirements less onerous there?

Lovvorn: Certainly, that is something people are looking into. The state court system, at least in some states, does not have the same Article III standards as the federal system. Although those courts see us coming and want to raise the standing bar as high as they can. We have a taxpayer standing case in the Pennsylvania Supreme Court right now challenging canned hunting. n70 We also have a taxpayer [*73] standing case in a California superior court challenging a state subsidy for the confinement of hens in battery cages. n71 There may be a lot of action in the state court system in the future, but then again, there are limitations. Federal court is more difficult to get into, but presumably, once you get there, things are better - although I put a big emphasis on presumably.

Meyer: That is how we were able to end the Hegins Pigeon Shoot - through a state court action. n72 Pennsylvania's animal cruelty code, unlike most animal cruelty codes, actually has a civil action provision that can be invoked by a humane agent, such as a humane society. n73 On behalf of The Fund for Animals and the Pennsylvania Society for the Prevention of Cruelty to Animals, we were able to put together that lawsuit and bring a case to enjoin future pigeon shoots. n74 But those are rare situations. I do not even know how many state laws have those kinds of provisions; not very many.

Lovvorn: That is what I mean about the need to branch out. There is a tremendous residual amount of law enforcement authority residing with humane agents and humane societies at the state level that really needs to be activated,

because the draconian federal standing requirements do not exist. n75 Certainly at the federal level, there is nothing that would necessarily - if you want to talk about really radical changes - prevent the appointment of national humane societies to enforce animal protection laws the way they do at the state level. It will not happen for a long time, but it should.

Meyer: The Animal Welfare Act (AWA) - that is where we need a private right of action. We need designated people to bring those cases; otherwise, that statute is not worth the piece of paper it is written on, unfortunately.

Tischler: In the Glickman case, Kathy [Meyer], the court held that standing was based on an injury to an aesthetic interest. n76 What about Ringling Bros.?

Meyer: The American Society for the Prevention of Cruelty to Animals v. Ringling Bros. case is actually pending right now in federal court. n77 We are representing another coalition of groups - the American Society for the Prevention of Cruelty to Animals, the Animal Welfare Institute, The Fund for Animals, the Animal Protection Institute, [*74] and a former circus employee, Tom Rider. n78 That case was also tricky, because in Animal Legal Defense Fund v. Glickman, the D.C. Circuit Court held that an individual who went to the zoo repeatedly to see particular animals was injured aesthetically by seeing primates in solitary confinement without any enrichment. n79 That plaintiff had standing to challenge the United States Department of Agriculture (USDA) for its failure to carry out the congressional mandate in the 1985 AWA amendments, requiring that the USDA promulgate standards for the psychological well being of primates. n80 Another requirement of "injury in fact" is that it cannot be a past injury. n81 It has to be either a continuing injury or a threatened injury - an injury that is on the horizon, about to happen. n82

Past injuries will not suffice. In the Glickman case, we were able to establish standing because Mark Jurnove, who had gone to the zoo repeatedly to see these particular animals, alleged in his affidavit that he kept going back and was going to continue to go back, because he had bonded with these particular primates. n83 He could not abandon them, he felt compelled to go back and continue to fight for them and see them, and therefore he had continuing aesthetic injuries. n84

In the Ringling Bros. case, our main argument for Article III standing was that Tom Rider had been a barn man for the elephants and had seen the mistreatment of the Asian elephants. n85 This case challenges the treatment of Asian elephants under the ESA, because Asian elephants are an endangered species. n86 Rider had left the circus, because he could not bear to see the mistreatment of the Asian elephants anymore. n87 The trick for Rider was, how do you show a continuing injury or a future injury, when the circus is going to argue that the plaintiff only has past injuries, and therefore, those injuries are not cognizable for Article III purposes?

Luckily for us, right before we brought that case, the Laidlaw decision was issued by the Supreme Court. n88 Laidlaw held that individuals who used to canoe in a river forty years ago - and would like to canoe in the river again, but who feared that the river was polluted, [*75] and therefore had to avoid using the river that they otherwise would have liked to use - had Article III standing n89 - their apprehension about using the river in a recreational way was valid. Even though the district court had found that the river was not in fact polluted in that case, the majority, led by Ruth Ginsberg, held that this did not matter. n90 The plaintiffs had Article III standing because they had to make the choice to avoid using the river that they otherwise would have liked to use. n91

When that decision was issued, we saw an opening for Rider to have standing. What we alleged in that case, and will have no problem proving, is that Rider fell in love with the Asian elephants with whom he worked. He really did bond with them. He knows them all by name and spent a lot of time with them. He could not bear seeing them mistreated. He left the circus, because he could not take it anymore. He would like to go back and visit them and see them again, but he is in this position of having to make the choice to avoid going back to see them, because that is the only way he can avoid subjecting himself to more aesthetic injury. These are the kinds of hoops through which we must jump; this is what you have to do to come up with these standing theories.

So we used Glickman plus Laidlaw, a 2000 Supreme Court decision under the Clean Water Act, n92 and came up with the novel argument that Rider was suffering Article III injury because he had to avoid going back to see his "girls," as he calls them, whom he loved so much. n93 We lost on this theory on a motion to dismiss in the district court, on the grounds that Rider would never suffer that kind of injury again, because he is not allowed to come back and see the elephants. n94 We said, "Well, all he has to do is buy a ticket to the circus," and we prevailed on appeal. n95 We had to go up to the D.C. Circuit to get the trial court reversed. n96 Now we are back down on the merits of that case. We lost three years on the standing issue, but that is how we established standing.

Cassuto: There are a couple of really interesting threads to this whole actual or imminent injury thing. According to the courts, if you do not know you are injured, then how can you be injured? There is a certain rhetorical attractiveness

to that idea. But on the other hand, if you extrapolate: if you put a child in a dark room and never let light [*76] into the room, the child will never know anything about sunlight or what it is like to live outside of the dark. Will that child be injured? The child will never know that there is a light-filled world out there, but will that child be injured? I would argue that, of course, that child will be injured. This idea that if you do not know exactly what is happening - if you are not privy to it, if you are not allowed to see it - that somehow protects you from injury, is specious. It gets back to the idea of actual or imminent injury, which this is. Sorry to ride this particular hobby horse, but since it is made of wood, I guess that is okay.

If we are talking about actual injury, we get back to "What is an injury?" Is it actual? Yes, it is actual. Then you get to imminent. This gets into an area of the law that, again, leads to a lot of problems: not just in animal law, not just in standing, but elsewhere. What is an imminent injury? Exactly how soon does something have to occur before it is imminent? The Supreme Court has said you have to have a plane ticket to go and see the problem before it is imminent. n97 How did it come up with that? How do judges get away with making this stuff up?

Extrapolate this to a criminal law context. Assume we have a battered spouse who has been continually beaten over a period of years by her abusive, psychotic husband. He is drunk, and he says to her right before he passes out, "When I wake up, I'm going to kill you." Then he goes to sleep. He is not going to kill her any time soon. He may be passed out for hours. Can she act in self-defense right then? Can she take some kind of preemptive action? Or does she have to wait until he wakes up and goes and gets himself the weapon which he is going to use to kill her? Is the injury imminent right before he passes out, or during that time he is passed out? I suggest it is. The court apparently would disagree with me, because she has not yet seen him come toward her with the loaded weapon. What sense does this make in a practical context? What sense does it make in a human to human interactive context? And what sense does it make in a civil litigation context when what we are trying to do is protect? If we are dealing with an animal protection statute and trying to protect animals, why must we have these silly arguments about imminence?

Tischler: I have one problem with that analogy: a battered woman has a third option - to get out, to leave - and the animals do not have this option.

Cassuto: Yes, I think that is a valid point. But again, what if we are talking about somebody who, for whatever reason - because of psychological or physical injury; because there is a child in the house; or because there is a pet in the house, which is a recurring theme with respect to battered spouses - cannot leave? What are the alternatives?

Lovvorn: Part of what is lurking here that we have not really hit head on is the double standard that exists with regard to animal protection versus environmental, commercial, or any other type of litigation [*77] in which the plaintiff may have to deal with Article III. We have known for years that the bar is set higher for animal protection advocates. Injury in fact, causation, and redressability are going to be scrutinized a lot more. The problem is that the courts do not really think the injury about which we are talking is a real injury. It is just an emotional subjective preference. It is not the same as somebody losing money. It is not the same as someone seeing a mountaintop sheared off where they have hiked for twenty years, although obviously it is.

This is interesting, because we finally, after all these years of knowing this, got a ruling from the D.C. Circuit a few years ago essentially holding that it is okay to just assume that people who are financially affected have standing. n98 For those people, the courts do not have to look at the details, but for everyone else, they do. In my opinion, the court finally just came out and said it was going to do this on a double standard.

As advocates, it is our role to try to figure out these secret rules. We talk about standing being a big game; it certainly is. We have to figure out how to make whatever injuries we are talking about, be they informational, aesthetic, emotional, or otherwise, sound plausible to a judge trained in looking at commercial litigation. The question of standing comes down to this: Does the injury you are articulating make sense in the context of an auto accident or commercial dispute? One of the reasons why courts will not accept, for Article III purposes, merely knowing or hearing about animals being treated inhumanely without being there and witnessing it is because it sounds a whole lot like negligent infliction of emotional distress. n99 Thus, a lot of the standards that you see applied in Article III are just a rough game of, "Does whatever you are putting forward sound similar enough to the common law causes of action that I was taught in law school?" All the other factors for Article III tend to fall into place after that. You can look at the injury someone is arguing and determine whether or not it is going to pass the test, based on how much it sounds like a common law theory. I agree that the Article III standing test is largely a sham in most cases, but it also shows that there is a method by which you can play and win this particular game. And cases like Laidlaw certainly help in that regard. n100

Tischler: There is dicta that the purpose of standing is to ensure that plaintiffs will pursue the litigation to its conclusion. A presumption exists that if the plaintiffs have a financial interest, they are likely [*78] to follow through, because their own financial well being is at stake. n101 However, if animal advocates allege that they are harmed because animals owned by some third party are suffering, the presumption is that these advocates will somehow not follow through. As we all know, animal advocacy organizations, whose mission and goals are to protect animals, are highly likely to follow through on litigation. What can these plaintiffs do to convince judges that they will go the distance?

Lovvorn: You hear it a lot, this idea that public interest advocates will not follow through in the same way as people who are concerned about financial loss. But go down to the superior court in whatever town you live one morning when it is hearing law in motion, and just listen to what is going on there. A good portion of it involves people who have not pursued their cause of action for more than two years after filing it. The judge is often on the bench saying, "Is anyone here today for this case? Is anyone going to show up and actually argue it? Okay, we're going to finally dismiss it." The idea that private litigants are somehow going to more fully pursue their rights than public interest organizations or advocates is totally false. I have never heard of a public interest group not bothering to send counsel to court when it has a hearing. If you watch the civil docket, you will see major corporations that do not bother to send a lawyer. That whole idea that public interest advocates will not follow through is something that we really need to attack.

Cassuto: There is a certain moral schizophrenia, and what we have here is a sort of legal schizophrenia. One of the reasons that mediation has come to the forefront as a method of alternative dispute resolution is because people have finally started to recognize as a sociological phenomenon what we, as lawyers, see all the time: the fact that people say, "I don't care about the money. I just want the bastard to apologize." That is so often true. Mediation allows a dispassionate, disinterested professional to say, "You know, I think we can make this go away if you will just acknowledge that you did something wrong and/or stop doing this thing that's wrong. It is not about the money. You can get away without a very onerous civil judgment if you will just discuss the root causes for the plaintiff's upset." The idea that money has to be involved is a smokescreen. More often, litigation involves things about which people care deeply. Most people do not care deeply about money. They want it; they like it; they would like more of it, but it is not the thing that drives them on a visceral level.

Tischler: In 1972, Professor Christopher Stone published an essay titled: Should Trees Have Standing? n102 I recall the first time I [*79] read that essay; it was wonderful and inspiring. I called it "legal poetry." But, has it influenced either the literature or the courts?

Lovvorn: The interesting thing about Stone's piece is that it was very influential in the environmental movement and was actually cited in Justice Douglas' famous dissent in the Sierra Club case. n103 But that was thirty years ago when Sierra Club attorneys managed to get at least one Supreme Court Justice to say, more or less, "Why don't we just forget about all this and acknowledge that trees and rocks and beautiful places should have Article III standing in their own right." n104 As a practical matter, after thirty years of significant work on environmental protection, the fact is that this theory has really gone nowhere in terms of working for the environmentalists. The lesson is that this kind of change in the test for access to federal courts is probably somewhat impractical at this phase. It is a wonderful piece. For anyone who loses a standing case, probably one of the most therapeutic things to do is go and read Justice Douglas's dissent afterwards.

Maybe Stone's theory will be the future of animal law, but in terms of environmental protection, it has not been the case. Maybe it influenced the Laidlaw decision. Maybe judges who decide they are not going to apply these Article III standards too strictly have Christopher Stone in their back pocket.

Tischler: Let us take some questions from the audience.

Question: Kim Stallwood, Animals & Society Institute. Is there not a cliche that the definition of insanity is someone who keeps repeating something and expecting a different outcome? Why am I thinking of that when I hear what you are saying about standing? If it is such an impediment, why have we, as the animal movement, not actually tried to do something about it? It seems to me, how can we expect to get existing laws enforced for animals, how can we get better laws passed for animals, if we cannot sue on their behalf?

Meyer: I totally agree with you. As I said in the beginning, it is a legislative problem. A lot of this can be cured by legislative fixes. The problem is that the current legislature is apparently packed with anti-animal representatives. Thinking about Douglas's dissent in Sierra Club v. Morton, one of the things he said, which I think is very telling, was that there should be legitimate spokespersons for the trees, otters, and biodiversity, and that Congress can, in theory, designate those legitimate spokespeople. n105

Congress can say that it is against the law to pollute the environment, it is against the law to torture an animal, and it is against the law to neglect an animal. Congress can decide that certain individuals may go to court and assert the interests of those injured entities, in the same way as *Rule 17 of the Federal Rules of Civil Procedure* allows the [*80] designation of a next friend for incapacitated individuals. n106 That is a congressional designation of a particular person to represent the interests of the injured. The same thing can happen here. We need some kind of a concerted plan, and we can start one statute at a time. My priority is the AWA. We need to get that statute amended, figure out a way to do it so that when the statute is violated, people can go in and sue. It may not happen with this Congress or the next Congress, but we have to start working to ensure that it happens eventually. Otherwise, we are counting on the USDA to enforce that statute, which it rarely does. n107 People are very limited in what we can do, in terms of bringing lawsuits. We can sue the governing agency if it issues a decision we do not like, but we cannot sue the actual violators. n108 That is the problem. I totally agree with you, it is something we need to focus on and start strategizing about. I know people are already doing so. I am not suggesting this is a novel idea. People have been grappling with this for years.

Cassuto: Let me just add one caveat, even though I endorse what both of you have been saying. There is something that nags at me when I think about why we are not enacting laws about this stuff. Part of it comes back to, if you will, the chicken or the egg phenomenon with respect to whether laws codify norms, or vice versa. If we are making laws in order to create norms, then what we are doing is sort of anticipating that people will agree with us, rather than assuming that these laws will arise organically from a sense of outrage about a status quo.

My favorite example: you go to a restaurant - every restaurant you have ever been in - you go to the bathroom, and there is a sign in the bathroom that says, "Employees must wash their hands with warm water and soap before returning to work." Well, I do not know about you, but I want to live in a world where people already know that, where you do not have to legislate that kind of behavior. It is just one of those things that you do, because you know it is right; it is normative phenomenon before it is codified into law.

Here, we have the mistreatment of animals, which is, as yet, not recognized as normatively outrageous. I fear that enacting a law about it prior to the creation of that outrage will be counterproductive. That is my fear.

Question: I am going to play the devil's advocate, having tried these civil cases and tried to prosecute cases in rural areas. We are talking a lot about human standing. There is always a way to find human standing, the public health issue being one great way. But we are not talking about what I see as the longer-term problem of standing for animals. What I think it is - and I am wondering how you feel [*81] about this - is confusion over the definition of property. What are we doing as a large movement to be a force and say, "Look, we need to reclassify this as guardianship, not property." I do not see a big change happening until we get the standard of chattel and property changed over to guardianship. Someone like a guardian ad litem could say, "Look, this animal cannot speak English, but I'm going to speak for it."

What can we offer to the farming community, to the meat packing industry, to the animal breeders; the dog breeders who make a livelihood out of this, to say, "Yeah, we know you make a livelihood out of this, and we're going to take your property away, because we don't like how it looks." We have art galleries with chicken heads, and it looks distasteful to us. But is it not true that the fundamental problem we are having as a movement is that we want to take away people's property, and that is how it is seen? Until we do that, we can find individual human standing in every place in the world, but the animals are never going to have it the way we are going about it. I was just wondering if anybody had thoughts on this. Am I totally out of touch with things? I feel frustrated going through individual case to individual case and having judges make their decisions before I even walk in and say hello. As long as there are farmers and people with livelihoods and a lot of money saying, "this is my property, damn it," I don't see a very large change taking place. What are we doing for that larger view of what animals are, as property versus our friends over whom we have stewardship?

Meyer: Everything everybody is doing is helpful to that cause. This is a movement. We would all like it to go faster. There is a lot to do, but Steve Wise's books, and the works of other people who are writing about these issues, are very important. n109

All of the cases that Jonathan [Lovvorn] is handling, cases we are handling for groups, all of it adds up to what David [Cassuto] was saying: we need to make these actions politically incorrect, we have to generate that public outrage. We have to make it politically incorrect to do these things, such as considering animals as property. Until we change the way people think, we are not going to reach that point. You have got to admit - I know it is slow going and people are frustrated - but there has been a lot of change. Joyce [Tischler] has been at the forefront of it. There has been tremendous change. It is becoming gradually more and more politically incorrect to do some of these things.

With these farming issues - it is very important what HSUS is doing, n110 as are other groups - we are talking about billions of animals. [*82] You have to do it incrementally. This is not going to divulge any great secret, but a lot of us here in this room are looking for the right sets of facts to bring those first guardian ad litem cases. That is where we are going. The way you get there is by bringing other cases first. It is like Brown v. Board of Education in the civil rights context, n111 which was not the first case brought to establish that principle; there were other incremental cases leading up to Brown. n112 Everything that everybody is doing - writing about it, talking about it, having conferences, bringing cases - all of that adds collectively to the movement. I agree that it is frustrating and there is a lot more to do, but we are going in the right direction.

Cassuto: I would add that the point you raise about the property status of animals is, of course, very disturbing and very urgent. It is part of a larger issue within the notion of property status and private property in general that it is okay to allow a taking of private property to give to another private entity in order for there to be urban renewal. n113 Now, whether or not one agrees with that concept, whether or not one thinks that is a good idea, the fact is that, in the Kelo decision, the Supreme Court stated something that has been the case for over one hundred years. n114 It did not make any new law. Pretty much no urban redevelopment could take place without that law. But what happened? Congress, virtually every state legislature, and property rights advocates all over this nation became hysterical, and now there is a backlash against this idea of the state exercising its right of eminent domain. n115

When we talk about whether or not we have to change the property status of animals - yes, of course, we have to change the property status of animals. But the whole notion of private property is so problematic and so visceral that if Congress passed a law tomorrow saying animals are not property, the only thing that would happen is you would have the kind of backlash that would set this movement back [*83] probably 150 years. We have to be cognizant of that backlash as we agitate for the kind of important changes you are noting.

Lovvorn: Certainly, the situation with regard to the property status of animals, the courts, Article III, and our ability to get what we want is very frustrating. The problem is, right now, no member of Congress would even introduce a resolution saying that animals are not property. No member of Congress would suggest - well, maybe one or two somewhere might - a citizen suit provision for the AWA. It is not viable. The key is to look at that political climate and remember that the courts are people, and they are political. They are not the objective institutions people think they are. If we cannot succeed with the limited changes we are attempting right now, we need to work on changing the public perception and doing other things. Thus, with respect to the question about simply giving up on trying to make standing work and just focusing on eliminating the property status of animals, I do not agree with the theory that if we are not succeeding with what we are doing now, the solution is to attempt something more radical, because we are unlikely to prevail on such endeavors.

Question: Would you comment on the whole concept of guardianship ad litem, where it is not your human standing at issue, but the animal's standing?

Tischler: In 1980, I filed a lawsuit against a veterinarian who allegedly committed malpractice on a standard poodle. n116 The first listed plaintiff was the poodle, whose name was Sterling Berg. n117 I moved for an order appointing Sterling's owner to serve as his guardian ad litem. n118 I was lucky I did not get involuntarily committed. It is something that I would think long and hard about before attempting again. The timing, the judge, and the facts would have to be just right.

Question: What about the substitution of a chimpanzee, instead of a dog or cat?

Tischler: I understand where you are heading, but my experience has been that when I speak to a general audience about dogs and cats, people seem to understand and embrace my points more readily than when I talk about chimpanzees. That is because dogs and cats are members of our families, and more people relate to them as emotional beings. Most people are emotionally more distant from chimpanzees, because they are not raised with chimpanzees. We may see chimpanzees on a National Geographic television special, but most people, including judges, have never actually met or spent time with them. For that reason, chimpanzees do not necessarily make a more compelling plaintiff.

Meyer: It is a great idea though. The problem is you have to do it at the right time with the right judge. We spend a lot of time figuring [*84] out which case to bring, where to bring it, and how to allege standing. What we are worried about is going backwards. With every case we bring, we run the risk that not only might we lose that case, but the judge might issue a decision that takes the entire movement two steps backwards. People in this room have been thinking about this a lot. It is a question of when, under what circumstances, and exactly how to get there.

Lovvorn: We not only have to think about steps backwards, but also steps forward. The theory that drives people to say "it should be a chimpanzee rather than a bull" is the same tactical, strategic thinking that makes us think long and hard about the net result of our actions. No matter what we convince a lower federal court of, anywhere in America, whatever novel theory, we have the United States Supreme Court as currently constituted waiting for us. Even if we got everything in our wildest dreams in a federal court case, the last place we would stop is the United States Supreme Court. We need to think about who is there waiting for us.

Meyer: The state of the judiciary is so important. That is the answer to all of these questions. Unfortunately, it never becomes a political issue. The only issue the public talks about is abortion, when we are discussing who should be on the Supreme Court. There are many other federal courts that are making laws out there. We never talk about these other very important issues, that these judges - young judges, appointed for life - are deciding as the laws of this country. They are making these decisions. As Jonathan [Lovvorn] says, you can win the greatest case as guardian ad litem on behalf of a chimpanzee, but then you are eventually going to have to deal with judges like Justices Scalia and Roberts, and it can become a lost cause. Obviously, animal rights might not be the best issue to discuss for the judiciary debate, but environmental laws might be. In recent debates, we did not hear much discussion like, "Well, if Judge Alito is appointed to the Supreme Court, what is he going to do to the environment? If it's Judge Roberts, what about that decision under the Endangered Species Act?" n119 Much of the debate was about abortion. n120 That myopic focus is a crime, frankly. People need to focus on other issues, and we need to focus on judicial selection as part of the presidential election: Who is this person going to put on the courts? Who is going to be making the laws that will govern our lives? Those are very important issues.

[*85] Question: When we talk about the private right of enforcement, the argument has been bandied about that instead of putting the onus with law enforcement or the government and saying that we must hold them accountable to pursue these cases, we are saying, "Clearly you're not going to do it, so we're going to have to do it." I want to know your perspective on that argument.

Meyer: The only way to hold government officials accountable is to vote out the President who appointed them. There is no way to hold them accountable - in the federal context, there is no way - there is nothing I can do about the fact that the USDA does not enforce the AWA, other than go out and vote for somebody next time for President who is going to put different people in charge of that agency. Citizens cannot bring a lawsuit against the USDA for not enforcing a statute. n121 The Supreme Court has made that clear in Heckler v. Chaney. n122 I do not think a lot of people understand that we cannot bring a lawsuit against a federal agency for failing to enforce the statute it is obligated to enforce. n123 There is no way to hold these agencies accountable, other than to complain loudly and write editorials. Our clients have written reports about how the USDA is not enforcing the AWA. n124 There is nothing you can do about it. That is why having a private right of action is so important.

Of course that is not the reason we give when we are lobbying or advocating for a private right of action. We say that we should take these government officials at their word that they are overworked, that they do not have enough resources. We say that we want to help them by having private Attorneys General appointed to bring these lawsuits, to supplement the agencies' enforcement authority. It is not that the agencies are completely sympathetic to the industries they are regulating - which is often really what is going on - it is that they are overworked and need help. We are volunteering to help them.

Lovvorn: There is also something very practical lurking in your question. Look at the Woodley case that the Animal Legal Defense Fund brought in North Carolina under that state's private enforcement statute. n125 It was one of the biggest successes that the movement has seen in the last decade. What you do not see, however, is twenty-five similar actions being filed, because no animal protection organization has the resources necessary to take on those animals. It is very expensive to care for and house hundreds of animals for years while a case winds its way through the courts, not to mention that animal [*86] groups do not enjoy any immunity from civil suits the way public prosecutors do. Thus, the point about making sure that prosecutors and others actually do their government appointed jobs is very important. We cannot just privatize enforcement and hope that it is going to get done. It would certainly help to have those private rights of actions, if they were politically feasible, but they are not a silver bullet. The people who are charged with doing these enforcement jobs need to do them, because no one else can.

Cassuto: I offer a flip side to that. With respect to whether or not it is crying uncle, I would cry uncle, I would cry aunt, I would sing Waltzing Matilda if it would just get some of these laws strengthened and enforced. I do not really care who is doing it. I want there to be a reasonable and expected method of enforcement, such that it would create a deterrent and make it less likely that these abuses would occur. I am cautiously optimistic that if there were more private

rights of action, there would also be more state enforcement. There would be both the shame phenomenon - states would not want private citizens always doing the work of the government - and there would also be an understanding that this is an important issue to the voters and taxpayers of this state or nation. That combined set of pressures stemming from the private right of action would, one hopes, create an enforcement priority within the state.

Tischler: I would like to thank this group of lively, passionate, and experienced lawyers for sharing their insights.

Kandhari: Thank you Jonathan Lovvorn, Katherine Meyer, David Cassuto, and Joyce Tischler.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityCase or Controversy RequirementsGeneral OverviewCivil ProcedureJusticiabilityStandingInjury in FactGovernmentsAgriculture & FoodAnimal Protection

FOOTNOTES:

n1. Pace L. Sch., The Faculty: David N. Cassuto, http://www.law.pace.edu/facbios/cassuto.html (accessed Nov. 11, 2006).

n2. Id.

n3. Id.

n4. David N. Cassuto, The Law of Words: Standing, Environment, and Other Contested Terms, 28 Harv. Envtl. 79, 79-128 (2004); David N. Cassuto, Bred Meat - A Look at the "Nature" of Factory Farms, 70 L. & Contemp. Probs. (forthcoming 2007) (copy on file with Animal L.).

n5. Meyer Glitzenstein & Crystal, About Us, http://www.meyerglitz.com/aboutus.html (accessed Nov. 11, 2006).

n6. *317 F.3d 334, 335 (D.C. Cir. 2003).*

n7. HSUS, Animal Protection Litigation Section, http://www.hsus.org/in the courts (accessed Nov. 11, 2006); HSUS, The HSUS Launches Litigation Section, http://www.hsus.org/press and publications/press releases/the-hsus-launches-litigation-section.html (Dec. 1, 2004).

n8. George Washington U. L. Sch., Academics: Clinical Programs: Animal Law Litigation Project, http://www.law.gwu.edu/Academics/Clinical+Programs/Animal+Law+Litigation+Project.html (accessed Nov. 11, 2006).

n9. George Washington U. L. Sch., GW Law Profiles: Jonathan R. Lovvorn, http://www.law.gwu.edu/Faculty/profile.aspx?id=3935 (accessed Nov.11, 2006).

n10. Lewis & Clark L. Sch., Summer School: Professor Jonathan Lovvorn, http://www.lclark.edu/dept/summer/prof lovvorn.html (accessed Nov. 11, 2006).

n11. *Assn. Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 151 (1970).*

n12. See e.g. *Allen v. Wright, 468 U.S. 737, 755 (1984)* (stating that respondents lacked standing to litigate their claim based on injury of racial discrimination).

n13. U.S. Const. art. III, §2, cl. 1.

n14. See *Lujan v. Defenders Wildlife, 504 U.S. 555, 564 (1992)* (stating that "'some day' intentions ... do not support a finding of the 'actual or imminent' injury that our cases require") [hereinafter Lujan II]; *Friends Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 199 (2000)* (Scalia, J., dissenting) (quoting *L.A. v. Lyons, 461 U.S. 95, 107, n. 8 (1983)* (stating that "ongoing 'concerns' about the environment are not enough, for: 'it is the reality of the threat of repeated injury that is relevant to the standing inquiry'")).

n15. *Laidlaw, 528 U.S. at 180.*

n16. Id.

n17. *Id. at 181.*

n18. *Allen, 468 U.S. at 751.*

n19. Id.

n20. *Lujan II, 504 U.S. at 560.*

n21. *Orr v. Orr, 440 U.S. 268, 290-91 (1979)* (Rhenquist, J., dissenting). "The architects of our constitutional form of government ... consciously limited the Judicial Branch's 'right of expounding the Constitution' to ... actual 'cases' and 'controversies' between genuinely adverse parties... . To demonstrate the 'personal stake' in litigation necessary to satisfy Art. III, the party must suffer 'a distinct and palpable injury' ... ." (citations omitted).

n22. See generally *18 Pa. Consol. Stat. Ann. §5511(i)* (2004) (stating that "an agent of any society or association for the prevention of cruelty to animals, incorporated under the laws of this Commonwealth, shall have standing to request any court of competent jurisdiction to enjoin any violation of this section").

n23. Kenneth Culp Davis, Handbook on Administrative Law 676 §199 (West 1951).

n24. Standing has three requirements: "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Laidlaw, 528 U.S. at 180-81.* For summary judgment requirements, see *Fed. R. Civ. P. 56(c).*

n25. *Fed. R. Civ. P. 12(b)(6).*

n26. See e.g. *Utah v. Babbitt, 137 F.3d 1193, 1201 (10th Cir. 1998)* (discussing the gatekeeping function of Article III standing).

n27. See e.g. *Citizens Preservation Buehler Park v. City of Rolla, 187 S.W.3d 359, 362-63 (Mo. App. S. Dist. 2006);* Shamsian v. Dept. Conserv., *39 Cal. Rptr. 3d 62, 73 (Cal. App. 2d Dist. 2006), Ex parte Chem. Waste Mgt., 929 So. 2d 1007, 1010 (Ala. 2005).*

n28. See generally *18 Pa. Consol. Stat. Ann. §5511(i).*

n29. *Lujan II, 504 U.S. at 571-72* (holding that Congress's authorization that "any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency ... who is alleged to be in violation of any provision of this chapter" in section 1540(g) of the Endangered Species Act did not relieve plaintiffs of the need to prove an independent basis for Article III standing).

n30. See Brazil Travel: Brazil - Supreme Court, http://www.v-brazil.com/government/judiciary-branch/supreme-court.html (accessed Nov. 11, 2006) ("The Brazilian Supreme Court is one of the busiest in the world. In 2004, the Court received 62,273 cases, down from 109,965 in 2003.").

n31. See Supremo Tribunal Federal, Calendario de Julgamentos, http://www.stf .gov.br/processos/calendario/calendariojulgamento.asp (accessed Oct. 10, 2006) (This website, the official site of Brazil's Federal Tribunal Calendar Page, is written in Portuguese and was translated by Micheline D'Angelis. The Brazilian Supreme Court hears cases on sixty-eight days per year. With over sixty thousand cases in a year, the court would have to hear a case approximately every two minutes.).

n32. See *Assn. Data Processing Serv. Orgs., Inc., 397 U.S. at 151-52* ("The question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to 'cases' and 'controversies.'... The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."); see also *Lujan v. Defenders of Wildlife, 497 U.S. 871, 883 (1990)* ("The party seeking review ... must show that he has 'suffered legal wrong' because of the challenged agency action, or is 'adversely affected or aggrieved' by that action 'within the meaning of a relevant statute.'... the plaintiff must establish that the injury he complains of ... falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.") [hereinafter Lujan I].

n33. *5 U.S.C. §552* (2002 & Supp. 2004).

n34. See *5 U.S.C. §§552*(a)(3)(A)-(B) ("(A) ... each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person. (B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section."); see also *5 U.S.C. §552*(b)(1)-(9) (regarding types of information and matters to which FOIA disclosure requirements do not apply).

n35. See *Natl. Lab. Rel. Bd. v. Robbins Tire & Rubber Co., 437 U.S. 214, 238 (1978)* ("An agency's denial of a FOIA request is immediately reviewable in the district court.").

n36. See *5 U.S.C. §702* ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); *Pub. Citizen v. Dept. Just., 491 U.S. 440, 449 (1989).*

n37. *491 U.S. at 443.*

n38. Id. The Court noted: "As when an agency denies requests for information under the Freedom of Information Act, refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue. Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records."

n39. *524 U.S. 11 (1998).*

n40. *Id. at 13.*, Federal Election Campaign Act of 1971, *2 U.S.C. §431*(4) (2000).

n41. *Akins, 524 U.S. at 13.*

n42. *Id. at 14.*

n43. *Id. at 20-21.*

n44. Id.

n45. Pl.'s Compl. at 1-2, Cary v. Hall, No. 05 CV 04363 (N.D. Cal. filed Oct. 26, 2005).

n46. Id. at 3.

n47. See Endangered Species Act of 1973, *16 U.S.C. §1531*(c)(1) (2006) ("It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.").

n48. HSUS, Wildlife Protection Coalition Files Suit to Protect Endangered African Antelope from "Canned" Hunts, http://www.hsus.org/press and publications/
press releases/wildlife protection coalition Files Suit To Protect Endangered
African Antelope From Canned Hunts.html (Oct. 26, 2005); *70 Fed. Reg. 5117* (Feb. 1, 2005) (proposed regulation providing for the hunting of captive-bred populations of the scimitar-horned oryx, addax, and dama gazelle in the United States).

n49. HSUS, Facts about Canned Hunts, http://www.hsus.org/wildlife/
stop canned hunts/facts about canned hunts.html (accessed Nov. 11, 2006).

n50. HSUS, Sample Prices for Canned Hunts, http://www.hsus.org/wildlife/
stop canned hunts/sample prices for canned hunts.html (accessed Nov. 11, 2006).

n51. HSUS, Trophy Hunting Group Asks Federal Court to Endorse "Canned" Hunting of Endangered Animals Trapped Behind Fences, http://www.hsus.org/
press and publications/press releases/trophy hunting group asks.html (Dec. 29, 2005).

n52. Pl.'s Compl. at 19-20, Cary, No. 05 CV 04363.

n53. *16 U.S.C. §1539.*

n54. Id. at §1539(a)(2)(A)-(B).

n55. Id. at §1539(c).

n56. Id. at §1539(d).

n57. Id. at §1539 (providing for case-by-case permitting); see generally *70 Fed. Reg. 52310* (Sept. 2, 2005) (exceptions granted from the Endangered Species Act for certain captive populations of specific antelope species).

n58. On September 30, 2006, the District Court for the Northern District of California upheld the plaintiffs' informational injury theory for purposes of standing. *Cary v. Hall, 2006 U.S. Dist. LEXIS 78573 at 28, 40* (N.D. Cal. Sept. 30, 2006).

n59. *ALDF v. Espy, 23 F.3d 496, 501-02 (D.C. Cir. 1994)* (rejecting Article III standing based on informational injury under the AWA).

n60. *5 U.S.C. §552.*

n61. *Pub. Citizen, 491 U.S. at 449.*

n62. Supra nn. 45-48

n63. *Akins, 524 U.S. at 20-21.*

n64. *5 U.S.C. §706* (2000).

n65. See Animal Fighting Prohibition Enforcement Act Sen. 382, 109th Cong. (May 2, 2005); H.R. 817, 109th Cong. (Feb. 15, 2005); see also Daniel W. Reilly, Face-off over Green's bill: Sensenbrenner blamed for holdup, Milw. J. & Sent. (Sept. 27, 2006) (available at http://www.jsonline.com/story/index.aspx?id=503696) (describing how a bill to toughen penalties for cockfighting and dogfighting sponsored by Rep. Mark Green is being held up in the House Judiciary Committee by Chairman Jim Sensenbrenner).

n66. See Pl.'s Compl. at 3, Levine v. Johanns, No. C 05 4764 (N.D. Cal. Nov. 21, 2005) (challenging the exclusion of poultry from the definition of "livestock") (available at http://www.hsus.org/web-files/PDF/HMSA complaint.pdf).

n67. Compare *70 Fed. Reg. 56624, 56624-25* (Sept. 28, 2005) (informing slaughterhouses and the public that the HMSA does not require "humane methods" for "handling and slaughter of poultry") with the Humane Methods of Slaughter Act, *7 U.S.C. §1902* (directing that all "cattle, calves, horses, mules, sheep, swine, and other livestock" be "rendered insensible to pain" before being processed for slaughter).

n68. *Sierra Club v. Morton, 405 U.S. 727, 734 (1972).*

n69. *Id. at 734-35.*

n70. HSUS, Current Docket: The Fund for Animals v. Pennsylvania Game Commission, http://www.hsus.org/in the courts/docket/tioga canned hunting.html (accessed Nov. 11, 2006).

n71. HSUS, The HSUS et al. v. California State Board of Equalization (battery cage tax breaks), http://www.hsus.org/in the courts/docket/ca battery cages.html (accessed Nov. 11, 2006).

n72. *Hulsizer v. Lab. Day Comm., Inc., 734 A.2d 848, 848 (Pa. 1999).*

n73. *18 Pa. Consol. Stat. Ann. §5511(i).*

n74. *Hulsizer, 734 A.2d at 848.*

n75. More than a dozen states provide a method for humane societies, humane agents, or citizen eyewitnesses to initiate enforcement actions for violations of the cruelty code without any type of injury in fact requirement. See Jennifer H. Rackstraw, Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes, *9 Animal L. 243 (2003).*

n76. *ALDF v. Glickman, 154 F.3d 426, 431 (D.C. Cir. 1998).*

n77. *317 F.3d 334, 334 (D.C. Cir. 2003).*

n78. *Id. at 335.*

n79. *Glickman, 154 F.3d at 438.*

n80. *Id. at 428.*

n81. See *Steel Co. v. Citizens Better Env., 523 U.S. 83, 109 (1998)* (quoting *O'Shea v. Littleton, 414 U.S. 488, 495-96)* ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.").

n82. See *Lujan II, 504 U.S. at 560* (stating that to qualify as a constitutionally sufficient injury in fact, the asserted injury must be "concrete and particularized," as well as "actual or imminent, not 'conjectural' or 'hypothetical.'").

n83. *Glickman, 154 F.3d at 431.*

n84. *Id. at 430.*

n85. *Ringling Bros., 317 F.3d at 336.*

n86. *Id. at 335.*

n87. Id.

n88. *Laidlaw, 528 U.S. at 167.*

n89. *Id. at 183-84.*

n90. *Id. at 183-85.*

n91. *Id. at 181-82.*

n92. *Glickman, 154 F.3d at 431* (plaintiff claimed injury from seeing animals at a zoo treated inhumanely); *Laidlaw, 528 U.S. at 181* (actual injury to the plaintiff is enough to establish standing for Art. III); *33 U.S.C. §1365*(a), (g) (2000) (granting authorization for citizen suits).

n93. *Ringling Bros., 317 F.3d at 335.*

n94. *Id. at 336.*

n95. Id.

n96. *Id. at 339.*

n97. *Lujan II, 504 U.S. at 592* (Blackmun, J., dissenting).

n98. *Fund for Animals, Inc., v. Norton, 322 F.3d 728, 733 (D.C. Cir. 2003).*

n99. See e.g. *Restatement (Second) of Torts §313* (1965) (for the definition of negligent infliction of emotional distress); see also *Averbach v. Vnescheconombank, 280 F. Supp. 2d 945, 960 (N.D. Cal. 2003)* (discussing how California courts do not recognize the tort).

n100. *Laidlaw, 528 U.S. at 183* (holding that environmental plaintiffs have injury in fact based on their concerns that the river they use might be polluted).

n101. For a list of federal circuit cases that have recognized economic interests in standing, see General Principles Governing Standing to Maintain Action, *61 A.L.R. Fed. 87, 99-101 (1983).*

n102. Christopher D. Stone, Should Trees Have Standing? Toward Legal Rights for Natural Objects, *45 S. Cal. L. Rev. 450, 450-501 (1972).*

n103. *Sierra Club, 405 U.S. at 742* (Douglas, J., dissenting).

n104. *Id. at 742-43* (Douglas, J., dissenting).

n105. *405 U.S. at 745.*

n106. *Fed. R. Civ. P. 17(c).*

n107. Animal Welfare Act, *7 U.S.C. §§2132,* 2133, 2142 (2006) (stating that Secretary of Agriculture is authorized to promulgate humane standards under the Act).

n108. Id. at §2146; *16 U.S.C. §1540*(g) (compare the enforcement provisions of the Animal Welfare Act, which does not allow for citizen suit, with the Endangered Species Act, which does contain a citizen suit provision).

n109. See e.g. Steven M. Wise, Rattling the Cage: Toward Legal Rights for Animals (Perseus Bks. 2000) (discussing fundamental legal rights for animals); Animal Rights: Current Debates and New Directions (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004) (exploring the legal and political issues of animal rights).

n110. HSUS, Litigation for Farm Animals, http://www.hsus.org/farm/camp/lit-leg/litigation.html (accessed Nov. 3, 2006); see also HSUS, News: USDA Reverses Decades-Old Policy on Farm Animal Transport, http://www.hsus.org/farm/news/ournews/usda reverses 28 hour policy.html (Sept. 28, 2006) (announcing the USDA decision that the Twenty-Eight Hour Law covers the long-distance transportation of animals on trucks).

n111. *347 U.S. 483, 483 (1954).*

n112. See *Mo. ex rel. Gaines v. Can., 305 U.S. 337, 349 (1938)* (stating the " basic consideration is not as to what sort of opportunities other States provide ... but as to what opportunities Missouri itself furnishes to white students and denies to negroes"); *Sweatt v. Painter, 339 U.S. 629, 636 (1950)* (holding that a university must admit a black student); *McLaurin v. Okla. St. Regents, 339 U.S. 637, 642 (1950)* (holding that the university could not segregate students once they had been admitted).

n113. *Kelo v. City New London, Conn., 545 U.S. 469, 2005 U.S. LEXIS 5011* (June 23, 2005).

n114. Id.

n115. See generally Richard Stradling, David Bracken & Janell Ross, Property Ruling Fuels Concern, Raleigh NC News & Observer B1 (Oct. 24, 2005) (commenting that the "recent U.S. Supreme Court decision ... has some ... residents worried the same thing could happen to them"); Kevin Collison & Warren Erdman, Eminent Domain and TIF Reforms Needed Some Say, Others Advise Caution, Kan. City Star D16 (Jan. 24, 2006) (commenting that "opponents of eminent domain ... have begun lobbying lawmakers to introduce bills that would ban the use of condemnation for economic development").

n116. Berg v. Gunn, No. 258590, slip op. at 3 (Cal. Super. Ct. San Mateo Cty. Oct. 27, 1981).

n117. Id. at 1.

n118. Id. at 1.

n119. See *Rancho Viejo, LLC v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003)* (Roberts, J. dissenting) (stating that the "panel's approach in this case leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating 'Commerce ... among the several States'").

n120. See generally Robin Toner, Court in Transition: Abortion, N.Y.Times A22 (July 21, 2005) ("Cold paper trail leads some to scrutinize nominee's past words on abortion."); Nancy Benac, Abortion Focus of Nominations, Again, Centre Daily Times A3 (Nov. 13, 2005) (stating "Abortion was the first question out of the box at the Supreme Court confirmation hearing").

n121. *Heckler v. Chaney, 470 U.S. 821, 831-33 (1985).*

n122. Id.

n123. Id.

n124. See Am. Socy. Prevention Cruelty Animals, Fund Animals & Animal Welfare Inst., Government Sanctioned Abuse: How the United States Department of Agriculture Allows Ringling Brothers Circus to Systematically Mistreat Elephants, http://www .animalwelfare.com/wildlife/elephants/fullrpt.pdf (Sept. 2003).

n125. ALDF v. Woodley, No. 04 CVD 1248, slip op. at 7-8 (N.C. Super. 11th Dist. Apr. 12, 2005); N.C. Gen. Stat. §19A (2003).

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Animal Law

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SYMPOSIUM: CONFRONTING BARRIERS TO THE COURTROOM FOR ANIMAL ADVOCATES: ANIMAL ADVOCACY AND CAUSES OF ACTION

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

*Moderator: Leonard Egert +

BIO: *© Carter Dillard 2006. Carter Dillard is the Director of Farm Animal Litigation for the Humane Society of the United States. He earned his J.D. from Emory University School of Law in 1999.

© David Favre 2006. David Favre is a professor at Michigan State University Law College. He earned his J.D. from the College of William and Mary in 1973.

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© Mariann Sullivan 2006. Mariann Sullivan is the Deputy Chief Attorney for the New York State Appellate Division, First Department. She earned her J.D. from Fordham University School of Law in 1980. The views expressed herein are solely her own. © Sonia Waisman 2006. Sonia Waisman is a partner of Morrison & Foerster. She earned her J.D. from California Western School of Law in 1991.

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LEXISNEXIS SUMMARY:
... Panelists talk about traditional forms of standing, make suggestions for innovation using existing laws, and discuss visions of how they would like to see the law develop as it pertains to standing for animals. ... The second panel, on standing issues, was fascinating and dealt with barriers and ideas about getting into courtrooms. ... Dillard: I would say that in every factory farm in the United States today, there is probably a violation of that state's cruelty code going on, whether or not there is a common practice exemption. ... In North Carolina, "any person" - this is the actual phrase used - can enforce the cruelty law of the state. ... In particular, and I am talking mainly in the wildlife context - it is more of a problem in the captive animal context - the statute, on its face, allows any person to bring a lawsuit. ... It concluded that although Congress could, in principle, confer standing on animals under Article III that could be brought by some kind of a next friend or someone on behalf of the animals, the Cetacean Community was not a person within the meaning of the ESA's citizen suit provision. ... What about the idea of trying to tie together noneconomic damages and cruelty prosecutions, whereby if somebody is convicted of cruelty to a companion animal, part of that person's sentence would include reimbursing the human victim for their emotional damages? ...

HIGHLIGHT: In the third panel of the NYU Symposium, distinguished animal law professionals discuss various causes of action which may be used on behalf of animals in the courtroom. Panelists talk about traditional forms of

standing, make suggestions for innovation using existing laws, and discuss visions of how they would like to see the law develop as it pertains to standing for animals.

TEXT:
[*87]

Tara West: Welcome back. It is now my pleasure to introduce Len Egert. Len is going to be moderating the causes of action panel. He will be exploring different avenues that animal advocates might use to get into court. Len wanted me to keep this very short, because he has a lot of material he wants to cover. So I will just say briefly that he is a partner in the firm of Egert and Trakinski, and they do primarily animal law, which they have been doing for eight years here in New York City. n1 Now I will hand it over to Len.

Egert: Thank you very much. I have the distinct honor and pleasure of introducing this fantastic panel and all the speakers. Let me [*88] just say before I introduce this group, for those of you who are lawyers and have to suffer through Continuing Legal Education, I guarantee you will not hear a more interesting discussion of standing in your legal career. That was just amazing.

I am not going to read the panelists' biographies, because you have them in your books. But I do want to just briefly run down the line here so you will know who is talking. I will start with Mariann Sullivan, who is a Deputy Chief Attorney for the New York State Appellate Division, First Department. n2 Mariann is a former Chair of the New York City Bar Association's Legal Issues Pertaining to Animals Committee, n3 which is a mouthful. Did we change it to the Animal Law Committee yet?

Sullivan: I do not think so.

Egert: She is a member of the American Bar Association's Animal Law Committee. n4 She has written extensively, commented on bills and pending legislation, and done a lot of fantastic work. n5

Next is Eric Glitzenstein, who is a founding partner of Meyer Glitzenstein & Crystal, one of the preeminent public interest law firms in the country. n6 The program does not say that, but it is true.

Then we have Professor David Favre, who has been a pioneer in this field. For over twenty years, he has published books and articles dealing with animal issues and has some very unique ideas and perspectives in this area. n7 So we are happy to have him participating.

Sonia Waisman is next. Sonia is a partner at Morrison & Foerster. n8 She coauthored the first animal law casebook n9 and teaches animal law at Loyola Law School. n10 She has also written articles in this field. n11

[*89] Last but not least is Carter Dillard, who is now the Director of Farm Animal Litigation for the Humane Society of the United States. n12 He has been very creative in determining causes of action on behalf of nonhuman animals.

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

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

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

there is some potential there in litigating on behalf of animals. Then, just as important, we will explore the procedural issues.

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

We will start with the companion animal issues, particularly torts and damages. Increasingly, we see claims for emotional distress or something more than replacement value for dogs, cats, and other companion [*90] animals. I would like to ask Sonia [Waisman] to address what types of claims could be brought, and what the trend has been in terms of expanding the notion of damages.

Waisman: Thanks Len [Egert]. As you said, these cases are not new, but there have been a growing number of cases brought in recent years pressing for the recovery of noneconomic or emotional distress damages. The first barrier is that, in a number of jurisdictions, case precedent limits recovery in cases of negligence - negligent harm to property - precluding the recovery of noneconomic damages, such as emotional distress damages. n13 So how do you get around that?

There are exceptions. There are jurisdictions like Hawaii, which, from 1970 until 1986 explicitly allowed the recovery of emotional distress damages for harm to property. n14 The seminal case involved damage to a house; it was not even an animal case. n15 About fifteen years later, in a quarantine case involving harm to an animal, the defendant made the slippery slope argument, which we will get back to later, but which is a big issue with the courts and one of the biggest hurdles we face. n16 The defendant argued that if the court allowed a case for harm to one animal, there would be an onslaught of similar cases, which would be uncontrollable. n17 However, the Hawaii Supreme Court pointed out that, in Hawaii, a law allowing recovery for such emotional distress had been in effect for more than ten years, and the court had not seen any change at all in the number of related cases on its docket. n18

We could be making that same argument to courts in all jurisdictions. The first step in confronting and surmounting the barrier, I think, is to get the court to recognize and acknowledge that the bond between people and animals does exist, that companion animals are more than mere property. Courts are doing that. For example, in 2001, the Wisconsin Supreme Court addressed this issue. n19 At the beginning of its opinion, the court stated, "We are uncomfortable with the law's cold characterization of a dog, such as [the one at issue] as mere 'property.'" n20 The court then said that it was calling the dog property, because that is how the law currently defined dogs. n21 The court did not rule in favor of the plaintiff in that case. n22 It looked to Wisconsin precedent and construed it to bar recovery for emotional distress damages in cases of negligence. n23 The court did not foreclose the recovery of [*91] emotional distress damages in cases of intentional harm, but found that the facts in that case did not present such a situation. n24 The fact that the court was uncomfortable with the characterization of animals as property is an important step.

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

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

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

Waisman: There are really mixed views on that. Yes, the animals' value is established vis-a-vis the human plaintiff. There is no question about that. Whether that helps animals in the long run, I would argue that it can. The fact that you are getting recognition of a bond - that many people do consider their companion animals to be part of the family - is

significant. Not that courts in the past have never said or recognized that, but we are seeing it more and more in these cases. I think that, in the long run, this has to help the animals. Even if it does not change the property status per se, I think it is a stepping stone on that river, on David Favre's river, a stepping stone towards advancement. n25

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

[*92] Favre: There is another important issue that Sonia [Waisman] did not raise regarding public policy. We have much trouble in our society in trying to decide whether, if you are emotionally harmed by harm to another human being, you will be able to recover. If you see a human get hit by a bus, can you recover for that? The answer is typically no, not unless they are a blood relationship. n26 If your best friend gets smashed in front of you, and you are traumatized for life, you have no cause of action. So the judges are likely pondering, particularly Supreme Court judges, why we would give a better status to an animal than we can to another human friend, and how we would measure that. Is a jury allowed to just go berserk and give a million dollars? How much is that pain and suffering worth?

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

Waisman: I would like to follow up on that. I think a lot of courts do defer to the legislature, and not only in animal cases, but in any case where the plaintiff is seeking to extend the right of recovery. Whether it is in the best interest of the animals to go the legislative route is a tough question. The first statute to do so was in Tennessee, originally known as the T-Bo Act, but now known as the General Patton Act of 2003. n27 It came about because the Shih Tzu of a state senator, Steve Cohen, was attacked by another dog and died, causing the senator to realize that the law did not provide for noneconomic damages in this circumstance. n28 The problem with the T-Bo Act - its restrictions - is significant. The Act was originally limited to a four thousand dollar recovery, n29 which has now been increased to five thousand dollars, n30 but many would argue that this is far from what it [*93] should be. The statute implicitly, and then later explicitly, excludes and exempts veterinary malpractice cases, n31 which is huge. It also defines the animals covered very narrowly, defining a pet to be a dog or a cat, period. n32

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

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

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

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

Favre: One of the advantages of being a law professor, and there are many, is that I am paid to ponder and think about the future. I have been in this movement since 1981 and have pondered the future [*94] quite a bit. Intellectually, what do I want to be before I die? Now that I am approaching sixty, it is not inconceivable that I might die. I would like the animal rights movement to reach the point where animals are plaintiffs. That is all I can want in my lifetime, that animals are allowed to be plaintiffs and to assert their individual interests against somebody who is seeking to harm those interests.

However, there exists a big barrier that is talked about within the animal rights movement all the time, and that is the property status. Many books have been written about this. n33 I keep pondering it. I pondered it for a decade. I said to myself, "It is not going to go away. I do not care what you say philosophically, the actual legal property status for animals in my lifetime is not going to go away. So we have got to do something else. We need another route to the rights that I want." Then I reflect back and think, is the property status in fact an absolute barrier to animals being plaintiffs? My answer is no, it is not. That exists in our heads. These are all our ideas - human ideas. Nothing in the real world says that our concept of property has to be a foreclosure to animals filing lawsuits.

My first law review article that got to this rather deep issue came out in Duke Law Journal about four or five years ago. n34 The article reflected my thinking of about a decade; it takes a long while to get articles out. In that article, I suggested that we have this really nifty little thing within the world of property called equitable interest, and for literally centuries this has been the case. n35 I am the most old-time law professor here to talk about legal interest and equitable interest. Ever since the Statute of Uses, there has been such an important distinction. Why can we not talk about humans retaining their legal property interest in animals, but also about giving animals their own equitable title, and by giving animals that status, allowing them to file lawsuits? I have talked to enough people now to know that this makes for a great discussion among property professors. But when I start trying to explain what equitable self ownership means to most people, the blank stare pops up pretty quickly.

In the last year, I have been thinking about another aspect of the property status issue. In an article that came out about a year ago in the Michigan State Law Review, I proposed a brand new tort, in which the animals are the plaintiffs. n36 In that article, I did not make any reference to equitable self ownership or anything else. n37 Again, I think that might be simply a canard to get to a particular point, to allow the legal system to be comfortable in what it is doing. I am now promoting a new approach. While some people in this room will be unhappy with [*95] my idea, I think a lot of people today are in fact pushing towards this, but we need to articulate it a bit more clearly - I want to create a status of living property. We have personal property; we have real property; we have intellectual property. All animals are now under the category of personal property. I want to create a whole new category of property, called living property, within which the relationships would be construed in the guardianship mode.

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

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

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

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

Egert: We might have to wait for the book to come out to go further into this topic. Thinking about the theoretical side of this property status is interesting, because, true, animals are considered property, but then there is this whole body of case law and statutory law that offers nonhuman animals protection from cruelty. What other property [*96] out there has a similar protection codified in statute that protects it from the unjustifiable infliction of cruelty? So, let us turn to cruelty statutes. Carter [Dillard], if you can give us a brief overview of state cruelty statutes, how they can possibly be used, and some of their limitations, that would be great.

Dillard: Sure. Very simple. Criminal provisions, generally speaking, prohibit the malicious, intentional, or negligent infliction of suffering upon animals. n38 They vary with as many states as we have, and generally, they can only be brought by the state. These provisions come with a range of criminal sentences, including probation, and occasionally provide for special disposition to protect the animals. n39 Criminal provisions are often noted for exempting farm animals n40 and animals used in research; n41 although my personal opinion is that those exemptions are overrated, mostly because they have not been tried. But these are the basic criminal principles that exist to prohibit what society considers to be the reprehensible, immoral treatment of animals.

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

Sullivan: I agree with Carter [Dillard] about the fact that farmed animals themselves are not usually exempted from statutes. What are exempted are customary farming practices, as a general rule. n42 There are many variations, fifty states, and such exemptions exist in only about half the states. We are not exactly sure what they mean at this point, because they have not been litigated. But even where such exemptions do not exist, there are a lot of problems in applying state cruelty laws that do purportedly apply to farmed animals in states, including New York, in that kind of context, or really in any institutional context.

[*97] Anti-cruelty statutes are very simply worded and do not create a regulatory system, by and large, except in New Jersey, which does have a regulatory system. n43 But even New Jersey pretty much only says that you cannot cause an animal unnecessary or unjustifiable pain. n44 So the first problem is that the statutory language is very vague, making it difficult to know exactly what is prohibited in an institutional setting. The proof has to be beyond a reasonable doubt, which is, of course, an extremely high standard. No regulatory system would require that kind of rigorous standard. Plaintiffs frequently have to prove a particular state of mind, either intentional or knowing. n45 In a case that Len [Egert and Amy Trakinski] brought, which perhaps he could talk about - the ISE case - a conviction was lost on the fact that the ISE Corporation, on whose behalf two living hens were thrown into the garbage, could not have known that those hens were thrown in the garbage. n46

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

Also, there is no inspection system. n47 There is no right to go into a farm and find out whether the law is being broken. These are criminal laws. You must have a warrant to go in and investigate a crime, n48 and that warrant must be based on probable cause to believe that a crime is being committed. n49 So you need to have reports coming out, but of course everything is very secretive.

The fact that these statutes are worded in such general terms and are so vague, I think this is probably the greatest single problem in enforcing them. People have been doing this in good faith - confining hens to battery cages, believing it is legal - for years. To bring such people into court and accuse them of a crime, not just of breaking a regulation, not just of doing something they should not have done, but to label it as a crime - a criminal action - and to tell them that as a [*98] result, they have to stop doing this as of now and can no longer be in this business, is a pretty hard thing to ask a court to do. But, as Carter [Dillard] said, it is not necessarily impossible. Maybe Carter [Dillard] could expand on that a little.

Dillard: I would say that in every factory farm in the United States today, there is probably a violation of that state's cruelty code going on, whether or not there is a common practice exemption. For instance, there is a case being brought on Tuesday regarding animals that were trapped in the wires of their battery cages. n50 The defendant was not charged

with using battery cages; he was charged with cruelty, because the animals were trapped in the wires of those cages. n51 And that fine distinction means that we are not challenging the practice itself. So with that in mind, I would say that in every state where there are factory farms, there are probable violations going on. It is not impossible to bring these cases, because as we will discuss, there are private rights of action that allow citizens, Societies for the Prevention of Cruelty to Animals [SPCA], and Animal Control Officers to sidestep recalcitrant DAs. So even in situations that are politically impossible, you may be able to get into court. And if the judge applies the letter of the law and ignores the fact that what he or she is facing is a politically sensitive case, you may win. So I tend to be hopeful about our cruelty statutes and their application to farm animals.

Egert: I will just chime in briefly on farm animal prosecutions. Though they are few and far between, I think we need to really look at the potential there. I think Carter [Dillard] is absolutely right; if the court sticks to the letter of the law and really applies it in a fair manner, there is a potential to win those cases and start pushing the envelope, because it is a closed world there. Basically, whatever a factory farm facility wants to do, it can, because nobody is in there watching what it is doing. I will say that I have been pleasantly surprised, and it depends on which judge you go before. Amy [Trakinski] and I originally obtained a conviction on behalf of those two hens at ISE. n52 This was reversed on appeal based on the intent factor - whether or not the employee knew that the hens were alive when he put them in the garbage with the other dead hens. n53 But in the process, and this is why sometimes it is good to continue litigation, we got rid of a precedent that was floating around in New Jersey that you had to maliciously treat an animal in order to be convicted of cruelty. n54 The court clarified in that case that all you need is a knowing element in your mental state, n55 which was very good according to the SPCA officers, who carry [*99] around that decision from court to court. Another positive result was that the corporation was trying to claim protection from any and all claims of cruelty under the Right to Farm Act, but the court found that the Right to Farm Act did not apply. n56

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

Sullivan: Yes. Another interesting way in which the cruelty law could come into play in the courts is if one were to happen to have a client - it does not have to be in a factory farm situation, it can be any situation - who has, in their belief, rescued an animal, but they have been charged with either trespassing or stealing that animal. In about half the states, there is on the books (these vary a lot, so I am going to talk about the New York one) a type of justification defense. n57 It is often called the lesser of two evils defense. n58 If you will forgive me, I am just going to read through the defense in New York.

Conduct which would otherwise constitute an offense is justifiable... [where] such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. n59

In New York, if somebody takes an animal that is being mistreated (you do not even have to establish that the cruelty to that animal was actually illegal, although it is probably a good idea to be able to do that) this defense could establish that they were not actually guilty of a crime, because they were justified in that act. It is an interesting way of bringing the whole anti-cruelty law into court in the reverse posture. A particularly nice thing about this is that the burden of proof is, of course, reversed. n60 The prosecutor has to prove beyond a reasonable doubt that the act was unjustified. n61 So rather than proving that the animal was treated cruelly, as in a typical criminal animal abuse scenario, the state, seeking a conviction for trespass or theft, has to prove that the animal was not treated cruelly, making the taking of the animal unjustified. n62

I am not suggesting that anybody go out and steal chickens. Please do not take this to be my suggestion. But if you were in a position [*100] of representing somebody who is being accused of that kind of crime, this is certainly a defense that you want to keep in mind.

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

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

Dillard: Yes, I will try to be brief about it. Essentially, any situation where an animal is used to produce a good or is used in the rendering of a service, the person using the animal will have to advertise the good or service to consumers by making representations. Those representations have to jive with the actual use of the animal and not misrepresent it. n63 Advertising is false if it misrepresents the use of animals. This applies equally to animal products as it does to any other consumer product on the shelf. To some extent, the market can help improve animals' lives. Consumers generally want to make ethical choices and purchase goods that cause less suffering to animals. The reason false advertising claims might be a helpful tool for animal welfare and rights litigators is that, by eliminating false advertising in the marketplace, consumers can begin to make more perfect market choices and drive the level at which animals are treated, sort of bring the level of humaneness up by their purchase choices. We can use false advertising as a tool to eliminate deceptive advertising that prevents consumers from making humane choices and thus changing the way that the subject animals are treated. I would not say that it has proven to change conditions, but it has been shown to drive people creating the standards - and creating the advertising - to reconsider (a) whether they want to put the advertising on the product, which is the immediate effect of false advertising law, and (b) whether they want to raise the level at which they treat the animals to meet the advertising, making it true. To the extent that happens, it is good for animals used in goods and services.

Egert: By no means are we suggesting that this list of topics is all encompassing. Obviously, we all need to think about what types of [*101] claims could be brought and we all should think about that. These are areas where claims have been filed and dealt with. I think it is important that we look beyond that. And in that vein, I turn to Eric [Glitzenstein] and ask a simple question: Laurence Tribe suggested that the Eighth Amendment's prohibition against cruel and unusual punishment seems well suited to the problem of cruelty to animals, given that it does not limit itself with regard to who is being punished. n64 What are your thoughts about this?

Glitzenstein: It seems like we are going from the very practical to the extremely abstract and theoretical in the flash of the moment. This is obviously a huge topic that I will just touch on very briefly - the concept of using constitutional provisions, including not only the Eighth, but also the Thirteenth Amendment, to really create not only evolutionary, but revolutionary, change in the way that animals are treated under federal law. I think Professor Tribe's suggestion really reflects the kind of opportunities, but also difficulties, that we all face. The reason he suggested the Thirteenth Amendment is because it does not contain a particular word - and that particular word is "person." n65 His argument is that the amendment basically prohibits a kind of activity, as opposed to on its face conferring specific rights on a set of entities. n66 In particular, it prohibits the institution of slavery. n67 As I presume people know, even though the Thirteenth Amendment was passed specifically to outlaw the slavery of African Americans, it has been widely extended to prohibit any kind of slavery of human beings, broadly defined. n68 So the question this raises is, can we look to that kind of constitutional protection, or some other basis in constitutional law, to extend such protections to at least some categories of animals?

This obviously could be an enormous topic in and of itself. I would simply say that it is the kind of issue, as the last panel suggested and others here have already touched upon, that is worth continuing to take a hard look at. It is worth looking for the right opportunity to at least debate the issue, get the concept out there, particularly with regard to certain kinds of animals like chimpanzees, gorillas, bonobos, and other great apes, as to which there is an enormous new range of scientific, cultural, and other kinds of information available to suggest that this presumed gulf between human beings and at least some of our closest relatives is really not quite as wide as people may have assumed. n69

[*102] My own view is that this kind of case would encounter significant problems, to say the least. For one thing, it is difficult, I think, to define exactly what slavery means in the context of a particular nonhuman animal. The question would be: if slavery applies to the great apes, why would it not also apply to other kinds of animals that are held in captive situations? I think obviously one would - particularly with this federal judiciary and this Supreme Court - rapidly get into the problem of looking to determine the original intent of the Thirteenth Amendment. Clearly, some members of the Supreme Court largely consider themselves to be originalists, which means that they look to the original intent of the framers of whatever provision is in question. n70 One would be hard-pressed to imagine Justices Roberts, Alito, Scalia, and the like concluding that that original intent was sufficient to encompass nonhuman animals. Obviously, there are enormous difficulties with that.

Very quickly, the other constitutional provision that I personally think is at least worth taking a continuing look at is the Fifth Amendment. This amendment does obviously apply to persons and says you cannot deprive persons of life, liberty, or property without due process; it has also been held to extend to nonhuman entities, even though it refers to "persons." n71

It refers not only to noncitizens, as we know from the recent Guantanamo line of cases, n72 but it also applies to, for example, corporations. n73 I found it fascinating, when I was doing some research in this area, to look back at the original way in which corporations became recognized as persons in 1886. n74 As Justice Rehnquist, of all people, in the later decision noted, the Supreme Court pretty much just made that up without almost any analysis or any argument. n75 There was a Supreme Court decision way back then that seemed to assume that it was so obvious that corporations should be given legal rights that they were willing to recognize them as persons without extended discussion of the issue, which probably tells you more about what was going on in [*103] 1886 in this country than anything else. n76 But what it clearly suggests is that there are opportunities, perhaps not today and perhaps not tomorrow, to convince the court that the same kind of expansive view of what a person can be is something that should extend to the kinds of interests we are talking about. So I think that it does at least speak to the appropriateness of what people like Steve Wise, people on this panel, and others are doing in expanding people's consciousness, both legally as well as practically, as to what is possible when you look at constitutional protections. I think that is probably sufficient for an overall introduction.

The only other area that feeds into all that is using the habeas corpus statute as a potential avenue, and the Constitution's habeas language actually does not contain the word "person" either. n77 Once again, I think arguing that the habeas corpus provisions can be used to, at least at this juncture in time, address a specific animal's interest is obviously farfetched. That is not to say it is not worth thinking about, and perhaps even bringing a case. And I am one who thinks that there may be some value to bringing a case, particularly with regard to one of the great apes, in the right factual context, for publicity purposes and to use it as a vehicle for getting people like Jane Goodall and Roger Fouts and others into a courtroom to testify on Court TV and really sort of raise the profile of peoples' thinking on this issue. I do not think that is too farfetched a notion, even if legally it may have not a great chance of success. So I just throw that out as a provocative thought that we perhaps can pick up on later.

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

Glitzenstein: Just one point that I neglected to mention. People tend to look at this personhood thing as an all or nothing proposition, and I think what the corporation example shows is that it is not. The courts have actually been rather nuanced in their approach as to what rights corporations have. Courts have said that corporations have certain limited First Amendment rights, and certainly due process rights when it comes to property, but they obviously do not have the right to vote. n78 Corporations do not have full liberty rights; there are all kinds of rights they do not have. n79 So I think one way of approaching the whole concept of personhood is by saying, "Look, the courts for more [*104] than one hundred years have had no trouble having a fairly nuanced flexible notion of what personhood can mean. And it doesn't necessarily imply this whole slippery slope problem is going to come in if you just simply say, well the right not to be tortured doesn't imply the right to vote, or the right never to be subject to any form of captivity." I think it does allow a sort of line drawing in the history of constitutional law. It shows that, if nothing else, courts have proven themselves to be rather adept in engaging in that kind of fine line drawing when they regard it as necessary.

Egert: One of the cases Mariann [Sullivan] mentioned that we handled was prosecuted on behalf of Gene Bauston at Farm Sanctuary, as an individual. n80 And it was one of those unique situations where we found a provision, in this case, under state law in New Jersey, where an individual has a private right in certain low-level offenses, within which animal cruelty fell, to go in as an individual, file a criminal complaint, and hire an attorney to represent the complainant on behalf of the state. n81 Our role in that case was representing the state of New Jersey on behalf of Gene Bauston at Farm Sanctuary, which thrilled us, because we had control and could prosecute this factory farm for abusing their hens. n82 Are there other examples of which the panel is aware? And are there other opportunities in that regard?

Favre: The North Carolina statute is one, but not identical, because it is more limited in nature. n83 In North Carolina, "any person" - this is the actual phrase used - can enforce the cruelty law of the state. n84 That is the hook that the Animal Legal Defense Fund (ALDF) used when it went into North Carolina and took out, I forget how many hundreds of animals, in one particular hoarding situation. n85 It also had the effect of encouraging the prosecutor to ultimately bring criminal charges that went in parallel to our civil action. n86 Unfortunately, they are both still ongoing after well over a year of activity, again suggesting that this is not a trivial activity in which to be engaged. n87

Waisman: I just want to clarify that the North Carolina statute allows for a civil action, as opposed to the criminal. n88

Sullivan: And I just want to clarify, not that I am any expert on the North Carolina statute, but even though procedurally it is probably the best in the country, substantively it is probably the worst. It [*105] exempts virtually everything the drafters could think of exempting. n89 So it is interesting that they were willing to be very progressive on one end and very conservative on another. It kind of works together.

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

Dillard: There exists what is generally called a private attorney general statute. It is simply any situation where a private entity steps in to enforce a law on behalf of public interests. n90 Probably the most well known statute was in California, up until its change two or three years ago pursuant to a state initiative, that allowed private citizens to bring unfair competition cases against businesses that were violating any state law, including cruelty laws. n91 The statute gave In Defense of Animals a toehold to bring a cruelty case against a foie gras producer in California, and that litigation, along with what was at the time a sort of budding state lobbying front, resulted in state legislation banning the production and sale of foie gras in the state. n92 It was a great substantive win, banning a horrific practice. Unfortunately, the cause of action fell shortly thereafter.

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

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

Glitzenstein: There are a whole series of federal laws that we use in the absence of a strong citizen suit provision of the Animal Welfare Act (AWA), as well as other provisions specifically geared toward animal protection, that we have employed to safeguard and pursue the [*106] interests of animals. n93 These laws range from the Endangered Species Act (ESA) to the Clean Water Act to the Toxic Substances Control Act, and many others. n94 I think the ESA is one that is worth profiling, both because it has a very far ranging and effective citizen suit provision that I think could serve as a model for virtually any other state or federal law, and also because those of us who are actively litigating in this area have, in fact, employed the ESA in some contexts pretty much as a direct animal welfare statute. n95

The example that Kathy [Meyer] mentioned in the last panel, the Ringling Bros. case, was brought under the ESA, which prohibits the taking of listed animals not only in the wild, but also in captivity - a little known fact. n96 That case was brought directly under the broad citizen suit provision of the ESA. n97 Let me disagree with David [Favre] a little bit on this: to me, it does not matter really who the plaintiff is, as long as you can bring a lawsuit and effectively accomplish the result you want. I think animals may be different from human beings in at least one respect, which is that as long as their interests are being addressed, I do not think they care that much what their designation under the law is. I may get some disagreement on that, but to me it has to be an entirely functional test. Are you in fact accomplishing the result of reducing the cruel, inhumane treatment of animals, or are you not? And if John Doe is the one who is bringing the case, who cares?

In the ESA context, I do not think standing has turned out to be a huge barrier to bringing those cases. Because of the citizen suit provision, the cause of action has not proven to be a serious problem. In particular, and I am talking mainly in the wildlife context - it is more of a problem in the captive animal context - the statute, on its face, allows any person to bring a lawsuit. n98 It essentially eliminates, with that language, any kind of zone of interests requirement. You do not have to worry about prudential standing, which has proven to be a problem in a number of areas. The ESA also allows litigation to be brought against two critically important classes of entities: violators and implementers of the statute. n99 The class of violators includes, broadly speaking, any corporation, private party, municipality, or state government. n100 This is obviously subject to Tenth and Eleventh Amendment limitations, which have proven to be something of a problem. n101 [*107] The class of implementers includes entities such as the Department of the Interior

and the Department of Commerce, who are subject to litigation for failing to carry out mandatory duties under the law. These duties include not only the failure to list species, but also the failure to protect habitat, and in some instances, the failure to extend other protections to the list of endangered and threatened species. n102

Finally, and of particular value to those of us who must figure out not only how to bring these cases, but how to keep bringing them, the ESA has a very favorable and broad attorneys' fees provision under which, if you prevail, you could actually get a court to award attorneys' fees so you can bring your next case. n103 I think the ESA actually provides a good blueprint for how these cases can be brought. However, one thing I would say is: the fact that many lawsuits have been brought under the ESA - and there are many - has not shamed the federal government into effectively implementing the law. In fact, it is arguable that, if anything, the fact that the government knows it can sit back and wait for private parties to bring litigation may have had the effect of suppressing enforcement, which I do not believe would have ever been substantial, anyway, given the resources available. But it is sort of an empirical example of where that shaming effect has certainly not been the case.

The other aspect of the ESA I would mention - I do not know if there was discussion before I came in - is the Cetacean Community case from the Ninth Circuit, with which a lot of you may be familiar. n104 In that case, the Ninth Circuit determined whether or not something called the Cetacean Community could itself bring a lawsuit under the ESA. n105 It concluded that although Congress could, in principle, confer standing on animals under Article III that could be brought by some kind of a next friend or someone on behalf of the animals, the Cetacean Community was not a person within the meaning of the ESA's citizen suit provision. n106 This was a kind of narrow analysis of what "person" meant within that particular context. But just to tie it back to what we were talking about a moment ago, this case will probably prove to be very unhelpful in other contexts in which people try to argue that animals can be considered persons within various legal constructs. The Ninth Circuit said that however you read the word "person," Congress did not mean for it to encompass that "community" or to broadly read [*108] other animals in under the ESA. n107 So that is sort of a cautionary note for people to be aware of.

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

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

Sullivan: It is actually not my proposal; the New York City Bar Association adopted this proposal several years ago. n108 Kathy [Meyer] very passionately advocated for a citizen suit provision for the AWA, and I will try to do the same. The Committee on Legal Issues Pertaining to Animals felt that, even though it is very difficult to imagine Congress passing such a thing, it was a good vehicle for the bar association to advocate for, to bring to other bar associations, and to perhaps bring to the American Bar Association at some point, if we can get enough support. Lawyers like standing, because it means they get to bring lawsuits, and it is also a good educational tool to teach people a little bit about animal law in the bar association context.

The Committee put together this proposal, and since then, Cetacean Community v. Bush has come out. n109 Although this case has very bad implications in a number of ways, it did reinforce our position, in that if Congress wanted to give standing to animals, it could. n110 This was stated in very strong language. Of course, it is dicta, and it is the Ninth Circuit, but still there it is, in print. This is the only court that has ever addressed the issue.

Starting off with bad enforcement, also since we first proposed this, the United States Department of Agriculture's (USDA) Office of the Inspector General (OIG), which you have just got to love, has come out with the fourth in a series of audits over about the past ten years, of the Animal and Plant Health Inspection Service (APHIS). n111 APHIS is the division of the USDA that enforces the AWA. n112 The audit report is scathing; it is a great read. You should go on the site and read it if you can, because it is just unrelenting in its criticism. I think things have probably gotten even worse under the Bush Administration; the [*109] country is divided into regions, and particularly in this region - the eastern region - the USDA has completely abdicated enforcement. I think that only a third of the number of cases have been brought this year, compared with the year before. Also, the OIG is critical of the practice of APHIS - the eastern half of it - of allowing violators to use fines to improve their facilities, such that these fines are not even a cost of doing business. The USDA audit report is a great report. It is very, very critical in tone, and seems to show that the agency is not doing its job, so it is a great argument for the idea that there should be a citizen's enforcement mechanism.

The easy thing to do, if you can get Congress to do it, is to just create a private cause of action. It could be exactly the same as in the ESA or a lot of environmental statutes. That is not a particularly complicated thing. We also addressed the question of standing, which is a bit more complicated. Eric [Glitzenstein] does not seem to think standing is a problem anymore, that we could just secure plaintiffs with aesthetic injury. Maybe that is the case. Maybe we overreact to the idea that it would be difficult. But we propose two ways of ensuring that the plaintiff has standing. One is to give animals standing, which sounds very radical. I suppose it is radical, but according to Cetacean Community, Congress can do it. n113 The important thing is, this is not like giving animals a common law cause of action that you have no idea where it is going. It is a much more limited concept when you grant an animal standing to simply enforce a specific statute. You are not opening any floodgates, which ultimately is something perhaps we do not like. We would like to open those floodgates, but this really does not. So it makes a particularly appealing way to argue the case for animal standing.

We did come up with another mechanism, which I directly attribute to a talk that Eric [Glitzenstein] gave ten years ago, probably, at the City Bar Association - which he does not recall - in which he advocated using the False Claims Act (FCA), which is a qui tam statute, to sue. n114 The FCA is a very old Civil War statute that allows individuals to sue on behalf of the government anyone who is filing a false claim, a fraudulent claim, with the government. n115 It was created because of all of the people who were filing bad claims after the Civil War, n116 and it is still on the books. It is still an active statute. Eric [Glitzenstein] suggested finding some vivisectors who were doing particularly nonsensical research financed by the federal government - I may be misquoting him here - and bringing actions against them under the FCA. I had never heard of qui tam statutes before. So the other idea of a way to [*110] create standing, and it really does create standing, is that you can create a provision in the AWA, if you do not want to give animals standing themselves, to give people standing. You just have to provide that they will receive a reward out of the amount that the government recovers, and for some reason, Justice Scalia thinks this creates standing. n117 It astounds me, but there is a fairly recent Supreme Court decision, Vermont Natural Resources Agency, which says that this does create standing. n118

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

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

Egert: Rats, mice, and birds are excluded from the AWA - which is - I will guess - ninety-five percent of animals used in research facilities. n119 Do we need to focus our energies and efforts on being able to go in as private citizens to enforce an otherwise weak act that does not really provide any meaningful protections?

Sullivan: Even more important is the fact that farmed animals are also excluded from the AWA. n120 The AWA really only covers animals in three industries: research, the wholesale pet trade, and exhibition. n121 It is a very limited statute. That is a good point, as a matter of resources. But if we are going to think of the way we want this all to look - not the end game, not eradicating the property status of animals, not where we really want to go, but where we would like to go in a realistic sense legally in the next twenty or thirty years perhaps - we would like to see federal or state statutes that protect all animals and that have a citizen enforcement mechanism. I think we should be looking at both broadening the protection of which animals are covered and how the statute would be enforced. Working on this, even though it does cover a very limited number of animals, would still affect millions [*111] of animals, and it is an important way to get people thinking about the problem.

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

Eric [Glitzenstein] is going to talk briefly about the Administrative Procedure Act (APA) and how that may be used in terms of animal litigation. n122 Then we are going to open up the floor to questions.

Glitzenstein: It is important to understand a little bit about how the federal APA is used for animal protection cases, because that is pretty much what we have got in the absence of a citizen suit provision. If a statute does not have a citi-

zen suit provision, you are stuck with bringing claims under the federal APA, which allows you to bring cases in order to set aside an agency action that is arbitrary, capricious, an abuse of discretion, or contrary to the law, or to try to force an agency to take action which it is illegally withholding. n123 Those are the kinds of claims that have generally been brought. The kind mentioned in the last panel, dealing with primate conditions and psychological enrichment, challenged the regulations that were put out by the USDA on that topic. n124 The case that was brought challenging the exclusion of rats, mice, and birds was an APA claim, arguing that that the exclusion was arbitrary and capricious, before Congress saw fit to step in and confirm that its intent was, in fact, to exclude those animals. n125

Just to be clear about it, when you bring those kinds of claims, there are a couple of concerns that you should have in mind. Those kinds of cases have become more difficult as a result of several recent Supreme Court cases. n126 One overarching concern is that you must be careful you are suing over a discrete federal agency action. A classic example is a formal regulation issued by an agency. It can also be a policy that is less than formal in some circumstances, such as an interpretive rule. But one thing the Supreme Court stated, in a case called Lujan v. National Wildlife Federation, and more recently reinforced in a case called Ohio Forestry, is that basically you cannot challenge an entire agency program, because it is not a discrete agency action. n127 [*112] That does not mean you cannot bring a programmatic challenge, but you should avoid phrasing it in those terms. We can talk more about that later, about how you circumvent those kinds of barriers. But if you basically go in and suggest that you are doing large-scale, institutional type reform, you will be thrown out of federal court extremely rapidly. There are ways of trying to take advantage of civil rights law and sue over what are called "patterns, practices, and policies." Again, for those who are interested, we could talk more about that. It is a huge concern in light of a range of Supreme Court decisions over the last ten or fifteen years.

The other point I would simply reinforce is the point that Kathy [Meyer] made earlier, which is that you cannot generally bring claims under the APA challenging an agency enforcement or lack of enforcement. n128 Unless you have a citizen suit provision which authorizes you to do that, you cannot go in and sue the USDA simply because it is failing to enforce the AWA. n129 That is because of a case called Heckler v. Chaney, which basically said that, just like you cannot sue a prosecutor for failing to enforce the drug laws, you cannot sue a federal agency for failing to enforce other kinds of statutes. n130 Seems counterintuitive, but that is what the case says. There is an exception in a footnote which says that if you can demonstrate that the agency is completely abdicating its statutory responsibilities, then maybe we would allow that kind of lawsuit to proceed. n131 So far, since that case came out in the mid-1980s, I do not believe a single person has prevailed on the "complete abdication" claim in any context; I am not just talking about animal law. So I would not place a great deal of stock in that being a growth industry in the future, as the courts get more conservative. But that is the other enormous barrier, as well as standing, to worry about when you are dealing with any kind of an APA claim. You also have to meet the zone of interests requirement to show that the statute related to your APA claim actually encompasses the kinds of interests you are articulating. n132 Those are the big items to be concerned about in doing APA litigation.

Waisman: One final point I want to make is that, if we want to effectuate change on behalf of animals, it is imperative that we keep working at all levels, through all means: legislative and through the courts, both federal and state. There is no bad case, unless you have not thought it through, and then it is two steps backwards and one [*113] forward. But if you are thinking it through and you believe it can make any difference on a small or large level, there are voter initiatives, there are shareholder derivative actions, there are all forms of action that each and every individual can take as a lawyer or as a citizen to effectuate change and to work along those cobblestones to make a difference in the long run. And I think it is all very important.

Sullivan: I would just like to add that in addition to the APA at the federal level, there is certainly the possibility of administrative causes of action at the state level. n133 The standards tend to be as difficult; arbitrary and capricious standards usually apply. n134 But there are various kinds of determinations that state agencies may have made. If you can find the right plaintiff, there may be lots of opportunities to bring actions at the state administrative level. I think that is an area where there are a lot of opportunities that have not yet been explored.

I would also like to add one thing to what Sonia [Waisman] was saying about shareholder derivative actions. I do not know anything about them. I heard about them in law school and have not really thought about them since. I do not think anybody has ever brought one on an animal issue. But it just seems like there might be something there. You have to be a shareholder of course, which means that we should all go out and buy one share of Tyson tomorrow, because you never know. These actions are also very limited; it is very hard to bring them. Because of the business judgment rule, the courts will afford enormous discretion to what directors of corporations do. n135 But if you recall from law school, a shareholder derivative action is when a shareholder brings the action on behalf of the corporation. n136 The corporation is the real party in interest, arguing that management has failed to take appropriate action to protect the

corporation. n137 If a corporation is actually breaking the law by being cruel to animals, or in some other way, management is exposing the corporation to liability. It seems like that is an unexplored area that has some potential.

Unfortunately, the business judgment rule not only applies to the actions of directors of the corporation in the first instance, but also in most states, I think you have to give the corporation notice that you would like the suit to be brought. n138 Then the directors can decide [*114] whether they want to bring the suit on behalf of the corporation. The business judgment rule applies to that decision as well. n139 It is totally discretionary and not an easy cause of action to bring. But illegal behavior, and certainly criminal behavior, would be one ground that is a possibility there.

Glitzenstein: Consistent with that, one thing we have not mentioned at all is open government laws. I think part of what Mariann [Sullivan] is suggesting is that using these mechanisms to bring bad practices to light can, itself, have an enormous impact. An old phrase about the First Amendment was that sunlight is the best disinfectant. n140 Many animals have been protected through creative uses of the Freedom of Information Act, Federal Advisory Committee Act, and other open government laws under state statutes. n141 So I think it probably is self evident, but always consider ways of using those mechanisms to bring bad things to light. That sometimes has the beneficial effect that you are looking for without a lot more being done.

Egert: I would just reinforce the notion of looking at state laws as well, because although you may not have a claim to challenge federal agency inaction, you may have a claim under state laws, in at least some states, to challenge the inaction of agencies. n142

Sullivan: We have not mentioned the New Jersey litigation at all. It is really interesting on this note, on agency action. Some of you are probably familiar with the fact that New Jersey, a few years ago, for some reason which is hard to understand, amended their cruelty law n143 - I hate describing this, because there are so many lawyers in this room that know more about this case than I do, and I am looking at Kathy [Meyer] right now - to require the New Jersey Department of Agriculture (NJDA) to develop regulations for the treatment of farm animals. n144

Egert: Humane treatment.

Sullivan: Yes, humane treatment. The law provided that the farming industry would not be exempted from the cruelty law, but in essence, an exemption from the cruelty law would exist if they were following the regulations. n145 In spite of the fact that the NJDA was required to promulgate those regulations in six months, it took seven years, n146 and that was only after the agency was hounded a bit by the animal rights movement. The regulations were staggeringly bad. They [*115] pretty much allowed every common farming practice, no matter how cruel, that anyone has ever thought of. n147

But there is now a lawsuit being brought in New Jersey in the appellate division attacking the regulations as not comporting with the statute. n148 The standard for that cause of action in New Jersey is arbitrary and capricious, which is a very high standard. n149 I think it is a truly fascinating case, and another interesting way that these issues can be brought into court.

Egert: What is really at issue is whether or not these standard farming practices - these horrible cruel practices that happen on factory farms on a daily basis - are "humane," because that is how the statute reads. n150 That was what the NJDA had to determine: whether or not the treatment of hens, pigs, and cows on factory farms is humane. n151 Of course, being the agency that they are, and given the fact that their primary goal is to protect the agricultural industry, the NJDA found this whole host of terrible inhumane practices to be humane. n152 It remains to be seen whether or not we have a chance of prevailing in that case, precisely because of the law on challenging agency action - whether or not the agency's actions were arbitrary or capricious and the amount of deference given to an agency which is supposed to be the expert in the field. That is an uphill battle, but one that is worth fighting, and hopefully we can get something out of it.

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

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

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

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

I also completely agree with, I think, your premise that looking to state claims and state causes of action, particularly in this day and age, makes an enormous amount of sense. My own view is that they are not mutually exclusive, that there will still be an important role for targeted federal court litigation to play. It will not be an era in which we are pushing the envelope, but it will be an era in which we can continue to use the National Environmental Policy Act, which we used to basically indefinitely shut down the hunting of whales by the Makah tribe. n153 We have used the ESA to stop grizzly bear hunting in Montana and to stop the hunting of bears in Florida. n154 So I think there will still be places where you can look to federal law under well entrenched concepts that can be tweaked and fine tuned, but it is not going to be a revolutionary change. I completely agree with that. I do not think that we should then, as a result, throw the baby out with the bathwater and say, "Let's not do it at all." But certainly, putting more resources, time, and attention into the state sphere and other ways of accomplishing change makes an enormous amount of sense to me.

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

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

Egert: I completely understand the frustrations, having dealt with these issues, and usually whenever I am involved with talks or conferences, I come out thinking I have completely depressed everyone in the room, because there is nothing we can do as lawyers, as litigators. Although I have days where I feel like that, I do not think we are at that

point where we need to file cases just to get an article in the paper. We are beyond that. We may not be much further beyond that, but there are claims that could be brought. It is important that we [*118] adjust our expectations of what we are going to get out of a particular case, and I go back to the strategy of what is going to take us along to the ultimate goal. I do not think we are going to go into court and abolish the property status of animals with one case. There has got to be a strategy to get there.

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

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

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

Waisman: I do not practice in the area of criminal prosecution, but I do want to respond to that based on my limited knowledge. I think there are certainly a fair number of DA's offices that are very active, some of which have specific animal abuse task forces and are able to focus on that, and that is wonderful. Unfortunately, there are a large number who are underfunded and understaffed, and I know from [*119] working closely with Pamela Frasch at the ALDF what they go through with this in trying to secure prosecutions, and in bringing these cases to the attention of prosecutors when the ALDF is contacted. Very often, the prosecutors just say, "We do not have the time, we do not have the resources, we cannot do it."

Jenny Rackstraw wrote an article in 2003 in Animal Law, entitled Self-Help Prosecution. n155 Studies cited in that article indicated that basically about three percent of the number of cruelty cases called in were actually being prosecuted. n156 The Massachusetts SPCA did a study on this, showing that out of 80,000 complaints, only 268 were prosecuted. n157 The ALDF also did some studies, looking at one county in Oregon and some place in Ohio. n158 I think it definitely depends on the prosecutor's office and on the particular attorneys working there who have an interest and care and want to make it happen, and who have the resources to make it happen. I do not think it is as consistent as we would like it to be. But we did not mean to imply that there are not prosecutors who take these cases very seriously.

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

Egert: I think you are right. We have worked with very excellent DAs and assistant DAs who take the cases seriously and prosecute to the fullest extent. We have also worked with not-so-great DAs who do not care about animal cases and would just as soon get rid of them. I think it runs the gamut, but I also think you hit the nail on the head when you say that these cases are just not getting to you. There is so much in between that is not happening, and they are not being investigated. Often, when they are investigated, a shoddy job is done, and you are not given a complete case with which you could work. And, again, going back to the lack of interest in some cases, but also the lack of resources as Sonia [Waisman] says, we are really relying on underfunded, and untrained in many respects, SPCAs who, even if they

want to do a good job, cannot. Especially when we are talking about less traditional cruelty cases, cases involving farmed animals, or other situations that are not simple. A lot of work has to go into these cases in order to prove them, and I agree completely, there needs to be a lot more work done in those areas.

Sullivan: That was the point I really wanted to make; I think it is very hard for DAs, particularly in rural counties, which is where most factory farms tend to be, to bring those kinds of institutional abuse cases. In the city, there is a great deal of interest in the prosecutor's [*120] office in prosecuting cruelty cases. In the court where I work, which is here in Manhattan, I would just like to mention that a case came down a couple of weeks ago where the court affirmed a felony cruelty conviction involving stomping on a goldfish. n159

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

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

I also think David [Favre]'s idea is a great analogy, of basically saying, "Okay, animals are property, but we have recognized for years that they are not like other kinds of property, that a dog is not a chair." n160 Everybody knows that. So if a dog is not a chair, why are we treating it exactly like a chair? That does not mean we have to treat it necessarily like a child, but let us find some kind of a legal status which approximates what we all know is the truth. I think the hope we share, and hopefully this is not just misplaced optimism, is that if you speak the truth often enough, people will actually start to recognize it as truth. We do not know what the time frame is going to be, but the hope is that, eventually, our beliefs will be accepted at some level as the truth and will filter into the legal and political systems that way.

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

I think we can take one more question.

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

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

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

Egert: There might be. That is an interesting point. Depending on the jurisdiction, most criminal sentencing provisions contain restitution statutes, although they do not call for noneconomic damages, depending on the language of the particular statute. n161 They typically only call for replacement or reimbursement for the amount lost. n162 But in the brainstorming phase, maybe there is some language, some vague language, that could say, "My loss is X, Y, and Z, and that does not just encompass replacement value."

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

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsAgriculture & FoodAnimal ProtectionTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsDamagesCompensatory DamagesProperty DamageGeneral Overview

FOOTNOTES:

n1. See generally On the Right Side of the Law: The Satya Interview with Amy Trakinski and Len Egert, Satya Mag. 10 (Apr. 2005) (available at http://www.satyamag.com/apr05/trakinski.html) (interviewing Amy Trakinski and Len Egert on their practice and work in animal law).

n2. ABA, Animal Law Committee Leadership 10, http://www.abanet.org/tips/animal/animalldrs0106.doc (accessed Nov. 17, 2006); see generally N.Y. St. Sup. Ct., New York State Supreme Court Appellate Division: First Department, http://www.courts.state.ny .us/courts/ad1/index.shtml (accessed Oct. 15, 2006).

n3. ABA, supra n. 2, at 10 (noting Sullivan's membership and former chair position on the Committee on Legal Issues Pertaining to Animals).

n4. Id.

n5. See e.g. David J. Wolfson & Mariann Sullivan, Foxes in the Hen House; Animals, Agribusiness, and the Law: A Modern American Fable, in Animal Rights: Current Debates and New Directions 205 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004) (one example of Sullivan's work).

n6. Meyer Glitzenstein & Crystal, About Us, http://www.meyerglitz.com/aboutus.html (accessed Nov. 17, 2006).

n7. See e.g. David Favre, Integrating Animal Interests into Our Legal System, *10 Animal L. 87 (2004);* David S. Favre & Murray Loring, Animal Law (Quorum Bks. 1983).

n8. Morrison & Foerster, Attorneys, http://www.mofo.com/attorney/individual .asp?ID=7571 (accessed Nov. 17, 2006).

n9. Sonia S. Waisman, Pamela D. Frasch & Bruce A. Wagman, Animal Law: Cases and Materials (3d ed., Carolina Academic Press 2006).

n10. Morrison & Foerster, supra n. 8.

n11. See e.g. Sonia S. Waisman & Barbara R. Newell, Recovery of 'Non-Economic' Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend, *7 Animal L. 45 (2001).*

n12. HSUS, Humane Society of the United States Seeks Prosecution of New York Foie Gras Producer, http://www.hsus.org/press and publications/press releases/ hsus seeks prosecution ny foie gras.html (Sept. 13, 2006).

n13. See e.g. *Mest v. Cabot Corp., 449 F.3d 502, 519 (Pa. 2006); Kondaurov v. Kerdasha, 629 S.E.2d 181, 187 (Va. 2006).*

n14. *Rodrigues v. State, 472 P.2d 509, 520-21 (Haw. 1970).*

n15. *Id. at 513.*

n16. *Campbell v. Animal Quarantine Station, 632 P.2d 1066, 1066-71 (Haw. 1981).*

n17. *Id. at 1071.*

n18. Id.

n19. *Rabideau v. City of Racine, 627 N.W.2d 795, 798 (Wis. 2001).*

n20. Id.

n21. Id.

n22. *Id. at 798-99.*

n23. *Id. at 801-03.*

n24. *Id. at 803-04.*

n25. David Favre, Symposium, Confronting Barriers to the Court Room for Animal Advocates 8 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with Animal L.).

n26. See Dale Joseph Gilsinger, Relationship Between Victim and Plaintiff-Witness as Affecting Right to Recover Under State Law for Negligent Infliction of Emotional Distress Due to Witnessing Injury to Another Where Bystander Plaintiff Is Not Member of Victim's Immediate Family, *98 A.L.R.5th 609, 609 (2002)* (stating that recovery for negligent infliction of emotional distress as a result of witnessing injury to another is often only allowed where the direct injury was caused to an immediate family member).

n27. *Tenn. Code Ann. §44-17-403* (Lexis 2006) (amended 2004).

n28. Natl. Conf. St. Legiss., Canine Loss Spurs New Law, http://www.ncsl.org/programs/pubs/1011dog.htm (accessed Nov. 17, 2006).

n29. *Tenn. Code Ann. §44-17-403(a)* (The 2004 amendment increased the maximum penalty from four thousdand dollars in section (a) of the original statute to five thousand dollars in section (a)(1) of the current statute).

n30. Id. at §44-17-403(a)(1).

n31. Id. at §44-17-403(e).

n32. Id. at §44-17-403(b).

n33. See e.g. Gary L. Francione, Animals, Property, and the Law (Temple U. Press 1995) (discussing the legal status of animals as property).

n34. David Favre, Equitable Self-Ownership for Animals, *50 Duke L.J. 473 (2000).*

n35. *Id. at 477.*

n36. David S. Favre, Judicial Recognition of the Interests of Animals-A New Tort, *2005 Mich. St. L. Rev. 333, 352.*

n37. Id.

n38. See e.g. *Or. Rev. Stat. §167.315(1)* (2005) (referring to malicious and intentional crimes); *Cal. Pen. Code §597(a)* (1999) (referring to malicious and intentional crimes); see also *Or. Rev. Stat. §167.325(1)* (referring to animal neglect as negligent infliction of suffering); *Cal. Pen. Code §597(b)* (referring to animal neglect as negligent infliction of suffering).

n39. See e.g. *Or. Rev. Stat. §167.350(2)* (regarding the disposition of animals to humane facilities); see also *Cal. Civ. Proc. Code §1208.5* (2004) (regarding liens and reimbursement for costs of seized animals).

n40. See *Or. Rev. Stat. §167.335(3)* (exempting commercially grown poultry).

n41. See id. at §167.335(9) (exempting animal research).

n42. See e.g. *Wyo. Stat. Ann. §11-29-113* (2005) (permitting dehorning of cattle); see also *Or. Rev. Stat. §167.335(1)*, (3) (exempting transportation of livestock and commercial poultry).

n43. N.J. Stat. Ann. §4:22 (West 1998).

n44. Id. at §4:22-17(a)(1)-(3).

n45. See e.g. *Or. Rev. Stat. §167.315(a)* (requiring intentionally or knowingly committing animal cruelty).

n46. N.J. v. ISE Farms, Inc., N.J. Super. 49-50 (N.J. Super. L. Div. Mar. 8, 2001) (on file with Animal L.).

n47. See e.g. *N.J. Stat. Ann. §4:22-46* (West 1998) (New Jersey's statute for the prevention of cruelty to animals authorizes "any court having jurisdiction of violations of the law in relation to cruelty to animals [to] issue search warrants to enter and search buildings or places wherein it is reasonably believed that such law is being violated." However, the statute does not provide for an inspection system by which individuals may regularly enter property to monitor the prevention of cruelty.).

n48. See U.S. Const. amend. IV (providing that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized").

n49. Id.

n50. See Harold Brubaker, Lancaster County Egg Farm Is Cited for Animal Cruelty, Phila. Inquirer (Jan. 10, 2006) (available at http://www.cok.net/inthenews/011006.php) (discussing the charges brought against Esbenshade Farms).

n51. Id.

n52. N.J. v. ISE Am., N.J. Super. 59 (Warren County Ct. Oct. 17, 2000).

n53. ISE Farms, N.J. Super. at 49-50.

n54. Id. at 45.

n55. Id.

n56. Id. at 43-44.

n57. *N.Y. Penal Law §35.05* (McKinney 2006).

n58. Id.

n59. Id. at §35.05(2).

n60. *People v. Gray, 150 N.Y. Misc. 2d 852, 855 (N.Y.C. Crim. Ct. 1991)* (discussing the burdens of proof in necessity defense cases under *N.Y. Penal Law §35.05(2)*).

n61. Id.

n62. Id.

n63. See Lanham Act, *15 U.S.C.A. §1125*(a)(1)(B) (West 2006) ("Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce... any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act." Note that the Lanham Act currently does not include a requirement for disclosure in its express language, only a requirement that representations made be truthful.).

n64. Laurence Tribe, Ten Lessons Our Constitutional Experience Can Teach Us about the Puzzle of Animal Rights: The Work of Steven M. Wise, *7 Animal L. 1, 4 (2001).*

n65. U.S. Const. amend. XIII, §1.

n66. Tribe, supra n. 64, at 4.

n67. U.S. Const. amend. XIII, §1.

n68. *Hodges v. U.S., 203 U.S. 1, 16-17 (1906)* (declaring the Thirteenth Amendment to be a "denunciation of a condition" that "reaches every race and every individual").

n69. See e.g. Dennis O'Neil, Humans, http://anthro.palomar.edu/primate/prim 8.htm (accessed Nov. 17, 2006); Jane Goodall Inst., Chimpanzee Central: Similarities between Chimpanzees and Humans, http://www.janegoodall.org/chimp central/chimpanzees/similarities (accessed Nov. 17, 2006) (discussing the similarities and differences between humans and primates).

n70. See Jack M. Balkin, "Alive and Kicking" - A Commentary by Prof. Jack Balkin, http://www.law.yale.edu/news/1846.htm (Sept. 19, 2005) (stating that Justices Antonin Scalia and Clarence Thomas are both professed originalists); Stephen B. Presser, Whither the Post-O'Connor Court? http://www.law.northwestern.edu/news/article full .cfm?eventid=2557 (May 1, 2006) (noting Justice Samuel Alito's presumed status as an originalist in a discussion of his impact on the Supreme Court).

n71. U.S. Const. amend. V; David Graver, Personal Bodies: A Corporeal Theory of Corporate Personhood, *6 U. Chi. L. Sch. Roundtable 235, 235-36 (1999)* ("Near the turn of the century, the Court granted corporations the equal protection and due process rights accorded persons under the Fourteenth and Fifth Amendments.").

n72. *Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006); Rasul v. Bush, 542 U.S. 466 (2004).*

n73. *First Natl. Bank Bos. v. Belloti, 435 U.S. 765, 780 (1978); Brooks v. St. Bd. Funeral Dirs. & Embalmers, 195 A.2d 728, 733 (Md. 1963).*

n74. *Santa Clara Co. v. S. Pac. R. Co., 118 U.S. 394, 396 (1886).*

n75. *First Natl. Bank of Bos., 435 U.S. at 822.*

n76. *Santa Clara Co., 118 U.S. at 396.*

n77. U.S. Const. art. I, §9, cl. 2.

n78. *First Natl. Bank of Bos., 435 U.S. at 779, 784.*

n79. *Id. at 778, n. 14.*

n80. Farm Sanctuary, Egg Corporation Appeals Cruelty Conviction: Contends That Hens Can be Discarded Like Manure and that Disposing of Live Hens in Trash Can is Legal, http://www.farmsanctuary.org/media/pr eggs.htm (Feb. 25, 2001) (press release regarding the ISE case).

n81. *N.J. Stat. Ann. §§2A:15-18* (West 2000).

n82. Farm Sanctuary, supra n. 80.

n83. *N.C. Gen. Stat. §19A-2* (Lexis 2005).

n84. Id.

n85. ALDF, Resources: ALDF v. Woodley, http://www.aldf.org/resources/details.php?id=162 (Mar. 31, 2005).

n86. Id.

n87. Id.

n88. *N.C. Gen. Stat. §19A-2*

n89. Id. at §19A-1.1.

n90. Jeremy A. Rabkin, The Secret Life of the Private Attorney General, 61 L. & Contemp. Probs. 179, 179 (Winter 1998).

n91. League of Women Voters, Proposition 64: Limit on Private Enforcement of Unfair Business Competition Laws: State of California, http://www.smartvoter.org/2004/11/02/ca/state/prop/64/ (accessed Nov. 17, 2006).

n92. *Cal. Health & Safety Code Ann. §§25980*-84 (West 2004).

n93. See generally Meyer Glitzenstein & Crystal, Wildlife & Animal Protection, http://www.meyerglitz.com/wildlife.html (accessed Nov. 17, 2006) (summarizing cases brought on behalf of animals by Meyer Glitzenstein & Crystal, and some of the federal statutes employed) [hereinafter Wildlife & Animal Protection].

n94. Id.

n95. See e.g. *ASPCA v. Ringling Bros., 317 F.3d 334 (D.C. Cir. 2003)* (one case in which an animal welfare organization brought a claim under the ESA).

n96. Id.; The Endangered Species Act of 1973, *16 U.S.C.A. §1538*(a)(1) (West 2000)

n97. *16 U.S.C.A. §1540*(g).

n98. Id. at §1540(g)(1).

n99. Id. at §1540(g)(1)(A).

n100. Id.

n101. See Mercer U. Sch. L., Virtual Guest Speakers: Professor Susan Smith, Willamette University College of Law: The Endangered Species Act Comes to the City, http://www.law.mercer.edu/elaw/ssmith.html (accessed Nov. 17, 2006) (discussing how the Tenth and Eleventh Amendment limits on federal power may limit actions under the ESA).

n102. *16 U.S.C. §1540*(g).

n103. Id. at §1540(g)(4).

n104. *Cetacean Community v. Bush, 386 F.3d 1169 (9th Cir. 2004).*

n105. *Id. at 1171.*

n106. *Id. at 1176.*

n107. *Id. at 1177-78.*

n108. Assn. of the Bar of the City of New York, Report of the Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York Regarding Its Recommendation to Amend the Animal Welfare Act, *9 Animal L. 345 (2003).*

n109. *386 F.3d 1169.*

n110. *Id. at 1176.*

n111. USDA, Audit Report: APHIS Animal Care Program Inspection and Enforcement Activities, http://www.usda.gov/oig/webdocs/33002-03-SF.pdf (Sept. 30, 2005).

n112. Id. at i.

n113. *386 F.3d at 1176.*

n114. *31 U.S.C. §§3729*-30 (2006).

n115. Id.; see also Gregory C. Brooker, The False Claims Act: Congress Giveth and the Courts Taketh Away, *25 Hamline L. Rev. 373, 375-84 (2002)* (discussing the history of the False Claims Act).

n116. See *U.S. v. Bornstein, 423 U.S. 303, 309, n. 5 (1976)* (citing Cong. Globe, 37th Cong., 3rd Sess., 952 (1863) (remarks of Sen. Howard)).

n117. *Vt. Agency of Nat. Resources v. U.S. ex. rel. Stevens, 529 U.S. 765, 773-74 (2000)* (Scalia, J., writing for the majority).

n118. Id.

n119. See Animal Welfare Act, *7 U.S.C. §2132*(g) (2000) (excluding rats, mice, and birds from AWA standards); See generally Delcianna J. Winders, Student Author, Combining Reflexive Law and False Advertising Law to Standardize "Cruelty-Free" Labeling of Cosmetics, *81 N.Y.U. L. Rev. 454, 486 n. 7 (2006)* (discussing the exclusion of rats, mice, and birds from AWA standards and estimates of the numbers of these animals used in testing).

n120. *9 C.F.R. §1.1 (2006)* (definition of "animal" specifically excludes farm animals).

n121. Animal Welfare Act, *7 U.S.C. §§2131* et seq. (2000).

n122. *5 U.S.C. §551* (2000).

n123. *5 U.S.C. §706*(2)(A).

n124. *ALDF. v. Glickman, 154 F.3d 426, 430-31 (D.C. Cir. 1998).*

n125. *ALDF v. Madigan, 781 F. Supp. 797, 798-99 (D.D.C. 1992);* Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171 §1 0304, 116 Stat. 134, 492-93 (2002).

n126. See e.g. *Lujan v. Natl. Wildlife Fedn., 497 U.S. 871 (1990); Ohio Forestry Assn., Inc. v. Sierra Club, 523 U.S. 726 (1998).*

n127. *497 U.S. at 890; 523 U.S. at 739.*

n128. See *Heckler v. Chaney, 470 U.S. 821, 837-38 (1985)* (holding that an agency's discretion not to enforce a statute is immune from judicial review, unless Congress has indicated that its intent is otherwise within the statute).

n129. The AWA does not contain a citizen suit provision. For an explanation of the requirements for a citizen suit action under the ESA, see *Cetacean Community, 386 F.3d at 1177.*

n130. *470 U.S. at 837-38.*

n131. *Id. at 833, n. 4.*

n132. See *Assn. of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970)* (discussing zone of interests requirement).

n133. For a comparison of Ohio's Administrative Agency Act to other states and the model acts, as well as causes of actions, see Elizabeth Ayres Whiteside, Student Author, Administrative Adjudications: An Overview of the Existing Models and Their Failure to Achieve Uniformity and a Proposal for a Uniform Adjudicatory Framework, *46 Ohio St. L. J. 355 (1985).*

n134. Id.

n135. See e.g. *In re Bal Harbor Club, Inc. v. AVA Dev., Inc., 316 F.3d 1192, 1194 (11th Cir. 2003)* (noting that the business judgment rule recognizes that directors are better qualified to make business decisions than

judges). For a more thorough explanation and list of cases, see 3A Fletcher Cyclopedia of the Law of Corporations §1036 (2002).

n136. *19 Am. Jur. 2d Corporations §1944* (2006).

n137. Id. at §1946.

n138. Id. at §1960.

n139. See e.g. Donner Mgt. Co. v. Schaffer, *48 Cal. Rptr. 3d 534, 543* (Cal. App. 4th Dist.); *Memphis Health Ctr., Inc. v. Grant, 2006 WL 2088407 (Tenn. App. 2006).*

n140. *Skehan v. Kelly, 2005 WL 1023206 (S.D.N.Y. 2005).*

n141. See e.g. In *Def. of Animals v. OHSU, 112 P.3d 336, 341, 344 (Or. App. 2005).*

n142. Cass R. Sunstein, Reviewing Agency Inaction After Heckler v. Chaney, *52 U. Chi. L. Rev. 653, 679-80 (1985); Lewis C. Educ. Assn. v. Iowa Bd. of Educ. Examiners, 625 N.W.2d 687, 692 (Iowa 2001).*

n143. N.J. Stat. Ann. §4:22.

n144. Id. at §16.1.

n145. Id.; see also N.J. Admin. Code 2:8-1.1 (2006).

n146. Id.

n147. Id. at §§4:22-16-16.1.

n148. NJSPCA v. N.J. Dept. of Agric., No. A-006319-03T1 (N.J. Super. App. Div. filed Nov. 4, 2005). This action is now pending. NJFarms.org, Coalition Asks Court to Overturn New Jersey Farming Regulations, http://www.njfarms.org/lawsuit 2005.htm (Nov. 4, 2005).

n149. *Mayurnik v. Bd. of Rev., 2006 WL 2919019 at 2 (N.J. Super. App. Div. 2006).*

n150. See *N.J. Stat. Ann. §4:22-16.1(a)* ("The State Board of Agriculture and the Department of Agriculture ... shall develop and adopt ... (1) standards for the humane raising, keeping, care, treatment, marketing, and sale of domestic livestock; and (2) rules and regulations governing the enforcement of those standards.").

n151. See 37 N.J. Register 2465(b) (July 5, 2005) (record of public comments - and corresponding agency responses - to proposed rules regarding humane treatment standards for farm animals).

n152. NJFarms.org, supra n. 148.

n153. *Anderson v. Evans, 314 F.3d 1006, 1030 (9th Cir. 2002).*

n154. See Wildlife & Animal Protection, supra n. 93 (summarizing cases brought on behalf of animals by Meyer Glitzenstein & Crystal, and some of the federal statutes employed).

n155. Jennifer H. Rackstraw, Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes, *9 Animal L. 243 (2003).*

n156. *Id. at 246.*

n157. Id.

n158. Id.

n159. *People v. Garcia, 812 N.Y.S.2d 66, 73 (N.Y. App. Div. 1st Dept. 2006).*

n160. Review supra pages 12-13 for Favre's discussion of the creation of "living property" as a new category of property, distinguishable from personal property.

n161. See e.g. *Wis. Stat §§951.02*, 951.18 (2006) (requiring that restitution be paid for pecuniary losses as a result of violation of the statute).

n162. Id.