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Note from the Chair: Animal Law is Everywhere

The discipline of “Animal Law” encompasses all legal matters involving nonhuman animals. Naturally, in this world inhabited by animals and people, Animal Law is quite literally everywhere—existing far beyond the hearts and minds of Animal Law practitioners.

This issue of *Laws & Paws*TM, the Official Publication of the New York State Bar Association Committee on Animals and the Law, demonstrates the breadth and depth of the field of Animal Law. The articles that follow examine the relationship between animals and humans, their place in our homes and our communities, non-human animals themselves and the important roles and functions animals maintain in our world and at facilities with diverse purposes, both in the U.S. and across the globe. Animal Law is everywhere!

Over the last decade, the New York State Bar Association Committee on Animals and the Law and its members have been dedicated to “making a difference for animals and people.” Our members make a difference as caring professionals, working together to build upon and improve Animal Law in creative ways that ultimately help both animals and people. *Laws & Paws*TM, the Committee’s official publication, represents just one way in which the Committee works to move Animal Law forward. The committed and compassionate professionals who comprise the Committee on Animals and the Law are proud to share this resource with you, along with the myriad Animal Law resources available on our website, www.nysba.org/animals.

*Laws & Paws*TM is the culmination of the ongoing efforts of the Committee’s Publications Subcommittee. The contributions of the Subcommittee members, editors, and authors whose ideas and expertise fill this publication are all greatly appreciated. Further, the Committee gratefully acknowledges the invaluable support of the New York State Bar Association leadership and staff, as well as the vision of the late Lorraine Power Tharp, a past NYSBA President whose love of animals made this Committee possible.

Thank you for taking the time to read and use *Laws & Paws*TM, and for helping our Committee make a difference for animals and people.

James F. Gesualdi, Esq.
Chair

COMPANION ANIMALS IN COOPERATIVE AND CONDOMINIUM APARTMENTS

By Darryl M. Vernon

I. INTRODUCTION

For owners of cooperative and condominium apartments, where animals are often—at least theoretically—prohibited by proprietary leases or house rules, it is important to be aware of state and local laws that nevertheless guarantee the right to have companion animals in one’s home. Two common examples are local laws that impose a “three-month rule”¹ forbidding the eviction of owners who have kept their pets “openly and notoriously” for three months, and state laws that grant disabled persons the right to have companion animals.

Perhaps more problematic than apartment owners’ lack of awareness of these laws is that boards of co-ops and condominiums may be similarly ignorant, or may be under the false impression that their policies take precedence over such laws—perhaps because their buildings are “democratically run.” (Anecdotal evidence suggests that disabled unit owners, after asserting their rights, are frequently informed that regardless of how medically helpful a companion animal is, the building’s rules simply “do not allow pets.”) Even worse, boards may be aware of the binding power of these laws and yet choose to ignore them.

Disability laws typically require housing providers to make “reasonable accommodations” for the disabled, while also allowing courts to consider the financial burden

¹ See, e.g., New York City Admin. Code § 27-2009.1; Westchester Cty. Code § 695.

placed on the non-disabled party, if the accommodation is legally enforced.² Unlike other reasonable accommodation requests (such as a request for a physical change to a building), a request for a service dog or other animal that accommodates one's disability will, intuitively, entail little or no monetary expense by the non-disabled party in most cases. Nevertheless, a board's or landlord's resentment at the prospect of having to grant exceptions to a no-pet policy may have less to do with money, and more to do with power. As a result, a disabled person invoking his statutory right to keep a companion animal may find himself met with a terse rejection or be required to undergo an arduous process of proving "how disabled" he is and how the proposed animal will help.

For reasons explained in this article, boards should be wary of engaging in such obstructionist tactics. If a court later finds that unlawful discrimination has occurred, a landlord, co-op, or condominium, as well as their agents and even individual board members may be liable for significant compensatory damages, legal fees, and perhaps even punitive damages.

II. LAWS AFFECTING THE RIGHTS OF THE DISABLED TO KEEP A COMPANION ANIMAL

A. Federal and Statewide Statutes; Local Ordinances

1. *Federal Fair Housing Act*

Federal statutory law prohibits discrimination "because of a handicap" in the sale or rental of housing, whether in the actual decision to proceed with a sale or rental; in the terms, conditions, or privileges of the sale or rental; or in the provision of services and facilities.³ The law requires landlords and other responsible parties to provide "reasonable accommodations in

² See, e.g., *United Veterans Mutual Housing No. 2 Corp. v. New York City Commission on Human Rights*, 207 A.D.2d 551, 616 N.Y.S.2d 84 (2nd Dept. 1994); John P. Herrion, *Developments in Housing Law and Reasonable Accommodations for New York City Residents with Disabilities*, 27 FORDHAM URB. L.J. 1295 (2000).

³ Federal Fair Housing Act, *codified at* 42 U.S.C. § 3604(f) ("FHA"). The federal FHA does not invalidate state or local laws providing greater protection to "handicapped persons." *Id.* at § 3604(f)(8).

rules, policies, practices, or services when such accommodation may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling.”⁴ The law includes a caveat that “nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.”⁵

2. *New York State Statutes*

New York Civil Rights Law § 47 provides:

No person shall be denied admittance to and/or the equal use of and enjoyment of any public facility solely because said person is a person with a disability and is accompanied by a guide dog, hearing dog, or a service dog.

Although this law applies to public and private housing accommodations,⁶ anecdotal evidence suggests that very few disputes have arisen over the use of dogs by the seeing- and hearing-impaired. While it is indeed difficult to imagine a landlord or board instructing an apartment owner to use a cane instead of a service dog, a tenant or owner who asserts an *emotional* need for a companion animal may receive a significantly less sympathetic response. The acceptance of guide dogs is, without a doubt, more firmly embedded in our culture than the acceptance of so-called “comfort animals,” but for reasons explained herein, boards should hesitate before rejecting a request for the latter out of hand.

More generally, New York Executive Law § 296(5)(a)(2) prohibits discrimination

against any person because of race, creed, color, national origin, sexual orientation, military status, sex, age, *disability*, marital status, or familial status in the terms, conditions or privileges of the sale, rental, or lease of any such housing accommodation or in the

⁴ *Id.* at § 3604(f)(3)(B).

⁵ *Id.* at § 3604(f)(9).

⁶ N.Y. Civ. Rights Law § 47(2).

furnishing of facilities or services in connection therewith.

(Emphasis added.) Like the federal Fair Housing Act, N.Y. Exec. Law § 296(18)(2) prohibits a landlord or other responsible party from “refus[ing] to make reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford [a] person with a disability equal opportunity to use and enjoy a dwelling[.]”

3. Local Ordinances

The New York City Administrative Code, Title A (NYC Code §8-107) provides that it is unlawful to discriminate in housing accommodations (subdiv. 5). This applies to various categories including “actual or perceived race, creed, color, national origin, gender, age, sexual orientation, marital status, partnership status, or alienage or citizenship status,” as well as disability. Thus, discrimination is prohibited not only in the selling, renting and leasing, or related activities of the premises, (subdiv. 5 [1]) but also in the terms and privileges of the rental or lease and in the furnishing of facilities for services (subdiv. 5[2]).

Unlike the New York State Human Rights Law, the New York City Human Rights Law allows claims by those who are associated with a disabled person (*e.g.*, a corporation and its executive director).⁷

III. CASE LAW ON ANIMALS AND DISABILITIES

3.1 Generally

The case of *H.U.D. and Exelberth v. Riverbay Corp.*, H.U.D. ALJ 02-93-0320-1-9894; FH-FLRPTR 25, 080 (H.U.D. Office of ALJ 1994) is instructive on many levels. In that case, the court held that the plaintiff, one Beatrice Exelberth, could exercise her rights under the disability laws even after a co-op had obtained a final judgment of possession against her and a

⁷ *Bartman v. Shenke*, 5 Misc.3d 856, 786 N.Y.S.2d 696 (Sup. Ct. N.Y. Co. 2004).

warrant of eviction issued to a marshal. The case details how an animal can provide emotional and medical benefits. It shows how mental disabilities can severely impact one's life, and more accurately for purposes of the law, one's major activities. Finally, the case shows how a disabled person can be protected even if she does not know to raise these issues long before a marshal is about to evict. The court stayed Ms. Exelberth's eviction. She remained in her home, with her dog, and with a monetary award.

It is illuminating to contrast *Exelberth* with *Contello*, where the court ruled in favor of the landlord.⁸ In that case, the court found no proof that a tenant's daughter had a disability that limited a major life activity, and the dog was found "not essential" to the daughter's use of the apartment. Note, however, that contrary to the *Contello* court's ruling, there is no requirement that the accommodation be essential under any federal, state or city law; the standard is only that it be "medically helpful." For example, a person is allowed a handrail in a bathroom due to a physical disability because it is medically helpful, though not essential or absolutely necessary. Similarly, it is unacceptable for a co-op or a condominium to resort to discrimination in response to a request to have an animal due to chronic depression by telling the unit owner to use medication instead of a companion animal. Again, it is sufficient if the dog is *medically helpful*.

One compelling example of the benefits of an animal arose in a case litigated at the NYC Department of Housing Preservation and Development ("HPD"). In this case a unit owner in a subsidized co-op sustained her right to have her companion animal by proving that the dog helped alleviate the effects of her spasmodic torticollis, a symptom of Parkinson's Disease. A physician at NYU Medical Center's Parkinson's unit gave expert testimony demonstrating how, in this case, the companionship of a dog actually had changed the unit owner's hormone levels,

⁸ *Contello Towers II Corp. v. N.Y.C. Dept. of H.P.D.*, N.Y.L.J. Nov. 19, 2004, p. 17 col. 1 (Sup. Ct. Kings Co.).

decreasing both the spasms and associated depression of spasmodic torticollis.

3.2 Appellate Division Case Law

An Appellate Division recently described the elements and proof required for a case concerning an accommodation animal under a case litigated at the New York State Division of Human Rights (“DHR”).⁹ At a hearing at the D.H.R., the complainants presented evidence of how “having the dog in the apartment helped ameliorate their symptoms of depression.” The Administrative Law Judge found that the complainants’ dog should be allowed as a reasonable accommodation of those disabilities, and the commissioner adopted the ALJ’s recommendations. However, the Appellate Division disagreed, holding:

To establish that a violation of the Human Rights Law (Executive Law art 15) occurred and that a reasonable accommodation should have been made, the complainants must demonstrate that they are disabled, that they are otherwise qualified for the tenancy, that because of their disability it is necessary for them to keep the dog in order for them to use and enjoy the apartment, and that reasonable accommodations could be made to allow them to keep the dog (see Executive Law §296 [2] [a]; *Matter of One Overlook Ave. Corp. v New York State Div. of Human Rights*, 8 AD3d 286, 287 [2004]).

In *Overlook*, cited in the *Nathanson* case, the Appellate Division found that the complainant failed to demonstrate through medical or psychological expert evidence that an accommodation animal was required. The *Nathanson* court found the evidence to be similarly lacking, stating that the complainants

failed to present any medical or psychological evidence to demonstrate that the dog was actually necessary in order for them to enjoy the apartment. Accordingly, the SDHR’s determination was not supported by substantial evidence (see *Matter of Jennings v New York State Off. of Mental Health*, 90 N.Y.2d 227, 239 [1997]; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*,

⁹ *Kennedy Street Quad, Ltd. v. Nathanson*, 62 A.D.3d 879, 879 N.Y.S.2d 197 (2nd Dept. 2009).

45 NY2d 176, 180 [1978]; *Matter of 105 Northgate Coop. v Donaldson*, 54 A.D.3d 414, 416 [2008]; *Matter of Genovese Drug Stores, Inc. v Harper*, 49 A.D.3d 735 [2008]; *Matter of One Overlook Ave. Corp. v New York State Div. of Human Rights*, 8 A.D.3d 286 [2004]).

Here again, the court cites cases where the complainants generally failed to demonstrate with medical or psychological expert testimony both a disability and a medical need for the companion animal.

Some have argued that *Nathanson* can be read for the proposition that if a person is disabled, and an accommodation animal would be medically helpful, he or she must also show some additional proof that the accommodation animal is also necessary to use and enjoy the apartment. This author submits that such a reading is illogical. Once a person has shown that an accommodation would be medically helpful to his or her proved disability, there should not be a separate and additional requirement of showing how the accommodation animal is required to use and enjoy one's home. When someone proves that he or she has a disability and need for an accommodation animal, that accommodation animal must be allowed in the person's home, or the disabled person would not be able to use or enjoy that home. To interpret the *Nathanson* ruling otherwise would mean that while one can keep his or her accommodation animal, he or she cannot necessarily keep his or her *apartment*.

Such a rule would be tantamount to a requirement that a physically disabled person—who, for example, require a ramp to get in and out of his home, or a handrail to be able to use the shower—move elsewhere in order to receive these accommodations. Virtually the entire purpose of the laws protecting the disabled in housing concerns is to allow disabled people to have reasonable accommodations in their current or desired housing, not merely to provide some portable accommodation that they must take elsewhere. Moreover, the aforementioned

interpretation of *Nathanson* would prevent any disabled person from taking his particular accommodation to any housing that was the subject of the disability laws. Obviously, this is illogical and contrary to the purpose of the laws protecting the disabled.

A slightly older case concerning the need for animals among some disabled individuals is *Pelton v. 77 Park Avenue Condominium*, 38 A.D.3d 1, 825 N.Y.S.2d 28 (1st Dept. 2006), which concerned the interplay of the business judgment rule and disability laws requiring physical alterations to accommodate a disabled unit owner. In *Pelton*, the court found that the Board had made numerous efforts to provide a reasonable accommodation and, indeed, had provided one. Specifically, the court found that “[a]side from engaging two separate architects to render opinions as the building’s handicap accessibility, [the Board] provided a reasonable accommodation to Pelton by way of the Garaventa lift during the elevator renovation.” 38 A.D.3d at 12.

In *Pelton*, the appealing defendants were only the individual board members -- as the court put it, “the nine volunteer members of the board.” Thus, it must first be kept in mind that the court was concerned only with individual liability. Second, while the court said that the business judgment rule can prohibit inquiry into board members’ actions, the case it relied upon for this rule, *Matter of Levandusky v. One Fifth Avenue Apartment Corp.*, 75 N.Y.2d 530 (1990), did not concern discrimination laws. No laws of much public concern applied to the dispute over alterations in *Levandusky*. In this regard, the Court of Appeals decision in *Biondi v. Beekman Hill House Apartment Corp.*, 94 N.Y.2d 659, 731 N.E.2d 577 (2000) is more applicable. In *Biondi*, the board discriminated against a mixed race couple. In finding against the individual board members, the court held that “willful racial discrimination cannot be considered an act in

the corporation's best interest.”¹⁰

In *Pelton*, the court simply found that the board, with whom the court clearly sympathized, had reasonably accommodated Mr. Pelton by installing the Garaventa Lift. As for Mr. Pelton, the court determined that he had essentially agreed to the accommodations anyway and then sued for an amount for compensatory and punitive damages that was “outrageous.”¹¹

As several other cases hold, in both federal and state courts, a co-op's policies cannot trump discrimination laws.¹² For this reason, ***a board cannot claim that the business judgment rule allows them to make a judgment that unlawfully discriminates against the disabled***, or for that matter, against any other protected class.

Although not an animal-related accommodation case, *Hirschmann v Hassapoyannes*, 16 Misc.3d 1014, 843 N.Y.S.2d 778 (Sup. Ct. N.Y. Co. 2007), *aff'd*, 52 A.D.3d 221, 859 N.Y.S.2d 150 (1st Dept. 2008), is relevant insofar as it held that the board's action in rescinding its approval of a disabled prospective purchaser was unlawfully discriminatory. The co-op argued that as part of its approval process it had a right to be told that Hassapoyannes would need an accommodation in the form of allowing a washing machine in his apartment. Apart from limited exceptions, the law plainly prohibits any inquiry into one's disability (or race, nationality or other protected categories.) As the Appellate Division held:

[B]y law, buyer was not required to disclose, and the co-op was not permitted to inquire into, buyer's disability, and consequent need for a reasonable accommodation, at the interview, or indeed at any time prior to its decision on the application.

In sum, and as with many other cases, the co-op's expressed needs for information – even

¹⁰ See also *Stern v Nalbandian*, 2000 U.S. Dist. LEXIS 19942 (S.D.N.Y. 2000).

¹¹ *Pelton*, *supra*; 42 U.S.C. §3601 (1999).

¹² See, e.g., *Majors v. Housing Auth. of County of DeKalb Georgia*, 652 F.2d 454, 457-58 (5th Cir., 1981); *Whittier Terrace Assoc. v. Hampshire*, 532 N.E.2d 712 (Mass. App. Ct. 1989).

if believed – and their rules limiting the rights of the unit owners, did not trump the laws protecting the disabled.

Finally, the issue of unlawful retaliation must be kept in mind. In the case of *Hassapoyannes*, one of the interviewing Board members did not like that Hassapoyannes was “pushing the ADA down their throats.” Needless to say, such language strongly suggests retaliation.

3.4 Legal Fees

Executive Law §297.10 provides:

With respect to cases of housing discrimination only, in an action or proceeding at law under this section or section two hundred ninety-eight of this article, the commissioner or the court may in its discretion award reasonable attorney's fees to any prevailing or substantially prevailing party; provided, however, that a prevailing respondent or defendant in order to recover such reasonable attorney's fees must make a motion requesting such fees and show that the action or proceeding brought was frivolous; and further provided that in a proceeding brought in the division of human rights, the commissioner may only award attorney's fees as part of a final order after a public hearing held pursuant to subdivision four of this section. In no case shall attorney's fees be awarded to the division, nor shall the division be liable to a prevailing or substantially prevailing party for attorney's fees, except in a case in which the division is a party to the action or the proceeding in the division's capacity as an employer. In order to find the action or proceeding to be frivolous, the court or the commissioner must find in writing one or more of the following:

(a) the action or proceeding was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another; or

(b) the action or proceeding was commenced or continued in bad faith without any reasonable basis and could not be supported by a good faith argument for an extension, modification or reversal of existing law. If the action or proceeding was promptly discontinued when the party or attorney learned or should have learned that the action or proceeding lacked such a reasonable

basis, the court may find that the party or the attorney did not act in bad faith.

In short, under the discrimination laws—in addition to compensatory and punitive damage awards—legal fees may be awarded. Under RPL § 234, a tenant, or a co-op unit owner, as a proprietary lessee, has a reciprocal right to legal fees if the lease or proprietary lease has a provision allowing the co-op to receive legal fees. Since most, if not all, proprietary and regular leases have a clause stating that the co-op is entitled to legal fees if the lessee breaches the lease (some are broader), a tenant or a co-op unit owner will have a right to legal fees for the “successful defense” of any case brought by the co-op to enforce a no-pet provision in the house rules. Under § 234, a tenant or co-op owner can also win legal fees by showing that the landlord or co-op breached the lease.

RPL § 234 can also apply to condominiums where there is an agreement, for example in the by-laws or house rules, that obligates the unit owner to pay legal fees. Moreover, sometimes the legal fee provision in a condominium’s by-laws is reciprocal by its own terms apart from RPL §234. In that case, the unit owner can win fees under the clause, as well as under the discrimination laws.¹³

IV. PROCESS FOR KEEPING A REASONABLE ACCOMMODATION ANIMAL

4.1 Initial Posture

Many people already have their service dog, or other disability-related animal, before any dispute concerning the approval of their accommodation animal begins, while others apply for approval in advance. These two situations set up different processes for approval. If the animal

¹³ See *Board of Managers v LaMontanero*, 616 N.Y.S.2d 744, 206 A.D.2d 340 (2nd Dept. 1994) (unit owner won right to have a pet under §27-2009.1 of the Administrative Code of the City of New York and won fees under the reciprocal legal fee provision in the by-laws).

is already present, a condo or co-op that objects will often start the process to evict or for injunctive relief. The tenant or unit owner is then initially on the defensive, although he may apply to an appropriate agency (see below) for a determination of his rights and seek a stay of any lawsuit. Alternatively, the tenant or unit owner may counterclaim under the relevant discrimination laws. However, if the tenant or unit owner chooses this route, there is a prerequisite that the board be aware of 1) the disability and 2) the request for accommodation. The following section addresses this specific situation.

Parenthetically, it should be kept in mind that when someone crafts his own accommodation, such as obtaining a comfort animal, without first seeking permission, and only seeks permission after an objection is made, board members may think that the tenant or unit owner fabricated the disability claim and only asserted the disability because he or she was, so to speak, “caught.” Regardless of whether this accurately describes some situations, there are undoubtedly many instances in which tenants or owners either assume animals are allowed because they see other animals in the building, or are not familiar with the mechanisms for “activating” their rights.

4.2 The Reasonable Accommodation Request

The best method for all concerned is to begin with a request for a reasonable accommodation in the form of a sufficiently detailed letter. The tenant or unit owner should describe 1) the nature of the disability and 2) how it impacts major life activities. The request should include supporting medical documentation describing *both* the disability and how the animal will be medically helpful. (Two sample letters, along with a bibliography, appear at the end of this article.)

The board’s response may be to ask for more information. Sometimes a blanket HIPAA

form is given for the applicant to sign. This form might be appropriate, but it might well be too broad. Both parties should confine their communications to what is relevant and specifically requested. The board should ensure it is fully aware of controlling law and not respond to the request by saying, simply, “we don’t allow dogs.”

4.3 Administrative Proceedings and Lawsuits

If the co-op or condo does not grant the accommodation request, several different scenarios may occur. The tenant or unit owner may file a complaint with the U.S. Department of Housing and Urban Development (“HUD”). In New York, HUD typically transfers the case to New York’s Department of Human Rights (“DHR”), where a complaint could also be directly filed. Alternatively, for administrative remedies, the tenant or unit owner may initiate proceedings via a complaint with the New York City Commission on Human Rights (“CCHR”).

In the initial stage, the agency will conduct an investigation by contacting the parties and medical witnesses and collecting other pertinent information. In the case of the CCHR, the parties may attempt to resolve the matter on their own. If those efforts are unsuccessful, the agency will likely then determine whether there is “Probable Cause.” That determination will result in a so-called “Probable Cause Finding,” which, unsurprisingly, states that there is/is not probable cause to believe that unlawful discrimination has occurred. After a probable cause finding has been issued, the parties have various options to proceed at the agency or in court; depending on the posture, a complainant may use the agency’s counsel or private counsel. At this point, the legal fees at this point may become substantial, whether at the agency or in court, but will generally be higher in court.¹⁴

¹⁴ The parties should keep in mind the standard for administrative review proceedings and the scope of issues that a reviewing court may consider in “Article 78” proceedings.

As there is no requirement that a complainant exhaust administrative remedies in this context, he or she could skip the administrative process altogether and go straight to court. This may happen as a matter of course if the board is the first to initiate suit. This brings us to issues of timing.

4.4 The *Exelberth* Case and Timing Issues

A brief note on timing issues: in *Exelberth, supra*, Ms. Exelberth did not raise her rights under the disability laws until the board of her co-op was on the brink of evicting her. That case establishes that one has the *option* of waiting until such a late stage to raise disability claims; however, the more prudent practice is to assert them before an eviction or injunction suit is on the horizon.

In the event that the co-op starts suit first, stays are often granted pending the outcome of the administrative proceeding on the right to the accommodation.¹⁵

V. THE THREE-MONTH RULE

Section 27-2009.1 of the Administrative Code of the City of New York, often informally referred to as “The Pet Law,” or “The Three-Month Rule,”¹⁶ is a local law that was enacted in 1983. In essence, it provides that an eviction suit must be commenced within three months of a tenant’s “openly and notoriously” keeping a pet, or alternatively, when a landlord’s agent could be reasonably expected to have knowledge of the pet. If suit is not timely commenced, then any no-pet clause in the governing lease is considered waived and unenforceable. (One caveat: Section 27-2009.1 is inapplicable to nuisance proceedings.) Significantly, as discussed in cases applying the The Pet Law, knowledge of on-site employees is sufficient to commence the

¹⁵ See, e.g., *East 72nd Realty, LLC v. Dakis*, QD N.Y.L.J. p 22, col. 6 (Civ. Ct. Kings Co. 1998).

¹⁶ NYC Administrative Code §27-2009.1. Westchester County has a similar law under §694 of the laws of Westchester County.

running of the three-month waiver period.

A unit owner's rights under §27-2009.1 may not be restricted.¹⁷ Thus §27-2009.1 overrides any agreements a unit owner may sign to waive such rights, as well as any lease clauses that prohibit pets or require written permission to maintain pets in an apartment.

In several early cases, the constitutionality of §27-2009.1 was upheld and the law was held to apply retroactively, as it was considered remedial legislation necessary to protect pet owners from potential hardship and dislocation. Shortly after §27-2009.1 was passed, it was found to be applicable to cooperative apartments.¹⁸ The Appellate Division in the Second Department has held that the law also applies to condominiums.¹⁹ The First Department, covering the Bronx and Manhattan, came to the opposite conclusion, ruling that §27-2009.1 does

¹⁷ NYC Administrative Code §27-2009.1(c).

¹⁸ In *Corlear Gardens Housing Co., Inc. v. Ramos*, 481 N.Y.S.2d 577, 126 Misc.2d 416 (Sup. Ct. 1984), the court made three crucial findings: first, the Pet Law did not violate the "Urstadt Law," which "was not intended to place restrictions on a municipality other than with respect to rent control regulation The Urstadt law was passed by the legislature to restrict municipalities from enacting more stringent economic and rent controlled restrictions and in order to encourage the construction of new housing in the City of New York." 481 N.Y.S.2d at 579. Second, the court found that there was no reason to exclude cooperative owner-shareholders and tenants from the Three Month Law. Third, the court found that the pet law was retroactive by virtue of its remedial purpose. (The Pet Law's legislative declaration states that "because household pets are kept for reasons of safety and companionship . . . it is hereby found that the enactment of the provisions of this section is necessary to prevent potential hardship and physical dislocation of tenants in this city.") The court cited *Garsen v. Nimmo*, which had likewise found a statute to have retroactive effect "in light of the laws remedial purpose as expressed in the stated legislative declaration - to wit that under the existence of the continued housing emergency it is necessary to protect pet owners from retaliatory eviction and to safeguard the health, safety and welfare of tenants who harbor pets [and] to prevent potential hardship and dislocation of tenants within this city." See also *Gordon & Gordon v. Matavan, Ltd.*, 108 Misc.2d 349, *aff'd*, 85 A.D.2d 937 (1981); *Tegreh Realty Corp. v. Joyce*, 88 A.D.2d 820 (1982).

¹⁹ In *Board of Managers v. Lamontanero*, 616 N.Y.S.2d 744, 206 A.D.2d 340, (2nd Dept. 1994) the court held that the Three Month Law is applicable to condominiums. The court found that while the pet law does not "specifically include or exclude condominiums, it is conceded to apply to multiple dwellings that consist of rental apartments and it has been applied to residential cooperative apartments." (Citations omitted.) Since the only buildings specifically excluded from the Law were those owned and managed by the New York City Housing Authority, the court held that "had it chosen to do so, the city council could easily have broadened the exclusion or more specifically identified other structures not intended to be covered by Article 27." The court concluded that "it would be pernicious to create an exception for condominiums from the generally beneficial requirements of Article 27 of the Administrative Code [the pet law]. In addition to substantive harms, an exception for condominiums could lead to anomalies such as permitting the tenant of a condominium owner to invoke the protection of the 'Pet Law,' while the condominium owner himself could not."

not apply to condominiums.²⁰

5.1 Preliminary Issues Concerning The Pet Law: Settlement Talks

While it is always important to explore settlement possibilities, this must be done carefully. Although the Appellate Division in *Seward, supra*, recently held that the 1983 case of *Park Holding v. Lavigne*²¹ is not to be followed, the *Lavigne* court had held that if a landlord reasonably delays commencing suit because of settlement talks, that landlord may be given more time than the usual three months to commence suit under §27-2009.1. The “best practice” for a unit owner is to avoid leading a landlord to believe that he may move out or give up the animal.

5.2 When Suit is Considered Commenced Under the Three Month Law

The First Department has repeatedly ruled that a suit is not commenced until a petition and notice of petition (in the case of a summary landlord/tenant proceeding), or a summons (in the case of an action), is properly served or filed. The predicate notices to such suit, such as a notice to cure or a notice to terminate, are ***not*** sufficient to commence suit.²² Since well before the enactment of § 27-2009.1, a long line of cases have affirmed this principle.²³

²⁰ In *Board of Managers v. Quiles*, 234 A.D.2d 130, 651 N.Y.S.2d 36 (1st Dept. 1996), the First Department held that the Three Month Law is not applicable to condominiums, reasoning that, by its terms, the Law only applies where there is a landlord tenant relationship, and this is not true of condominiums. The court said that the law refers only to “covenants contained in multiple dwelling leases, and [is not applicable to condominiums, which] are a form of fee ownership.” The First Department disagreed with the Second Department that condominiums should be deemed covered by the Law because not explicitly excluded. However, in the recent First Department decision in *Seward Park Housing Corp v. Cohen*, 734 N.Y.S.2d 42, 287 A.D.2d 157 (App. Div. 1st Dept. 2001), the court approved of *Board v. Lamontanero, supra*, for the proposition that only the New York City Housing Authority was excluded from coverage. The issue may be ripe for revisiting.

²¹ 498 N.Y.S.2d 248, 130 Misc.2d 396 (App. Term 1st Dept. 1985).

²² In *Arwin 74th Street Co. v. Rekant*, N.Y.L.J., Dec, 19, 1988, p.23 col.4 (App. Term 1st Dept), *aff'd*, 151 A.D.2d 1056, 544 N.Y.S.2d 406 (1st Dept. 1989), the Appellate Division affirmed the Appellate Term’s holding that the failure to commence a suit, as opposed to merely serving predicate notices, will cause a waiver of any no-pet provision to occur under the Three Month Law. *See also Park Holding Co. v. Grossman*, N.Y.L.J., April 4, 1993, p.25 col.2 (App. Term 1st Dept. 1993).

²³ In *Harmir Realty Co. v. Zagarella*, 10 Misc.3d 1070(A) (Sup. Ct. Westchester Co. 2005), a lower court followed *Grossman, supra*, citing only the Appellate Term opinion in that case and ignoring contrary Appellate Term cases. However, as a procedural matter, the Appellate Division’s opinion in *Arwin 74th Street Co., supra*, controls.

If a suit is dismissed due to improper service, and another suit is not commenced within the three months, a subsequent suit will be barred.²⁴ The only exception of which this author is aware is a unique case that “turned on a stipulation of discontinuance without prejudice.”²⁵

5.3 Keeping a Pet Openly and Notoriously Under the Pet Law

As noted above, Section 27-2009.1 requires either actual knowledge or that a pet be kept openly and notoriously to trigger the benefits of this law.²⁶ In general, “open and notorious” has been interpreted to mean that the pet is kept openly—as in visible, apparent, and not hidden.

To illustrate, in *Robinson v. City of New York*, 579 N.Y.S.2d 817, 152 Misc. 2d 1007 (Sup. Ct. N.Y. Co. 1991), a landlord argued that because Robinson’s small dog was paper trained and did not go for regular walks, she was not kept openly and notoriously. The court disagreed, finding that requiring that a “daily walks” requirement would be improperly narrow and restrictive. In the court’s view, such a requirement was “arbitrary and capricious” because it “would lead to a conclusion that all small dogs or other animals whose masters elected to treat only as house pets could not have the benefit of [the Pet Law.]” Of particular concern to the court was the potential disparate impact of a contrary ruling on tenants with restricted mobility who have deliberately chosen pets that do not require outdoor walks.

Following *Robinson*, the Appellate Division in *184 W. 10th St. Corp. v. Marvits*, 18 Misc. 3d 46, 852 N.Y.S.2d 557 (App. Term 1st Dept. 2007), *aff’d*, 59 A.D.3d 287, 874 N.Y.S.2d 403 (App. Div. 1st Dept. 2009) found that openly keeping evidence indicative of a cat’s presence (*e.g.*, bowls, litter box) satisfied the “open and notorious” requirement of the statute, stating:

²⁴ *Metropolitan Tower Life Ins. v. Raffes*, 34 HCR 970A (2006).

²⁵ *Baumrind v. Fidelman*, 584 NYS2d 545, 183 A.D.2d 635 (App. Div. 1st Dept. 1992). In *Seward*, *supra*, the court held that *Baumrind* had unique facts and “turned on a stipulation of discontinuance without prejudice.”

²⁶ See *Seward v. Cohen*, *supra*; *Park Holding Co. v. Tzeses*, *infra*.

[T]he presence of the cats' litter box in the bathroom was an unmistakable indicia of cat ownership. The cats' shy nature and tendency to hide from strangers notwithstanding, respondent was not required to display the cats in public.²⁷

By contrast, where a dog owner produced evidence of only isolated walks, and where the owner had boarded the dog for an unspecified period of time, the dog owner failed to satisfy the three-month requirement.²⁸

5.4 What Triggers A Waiver Under §27-2009.1

In 2001, the First Department considered at length the types of on-site employees and agents that could trigger a waiver under §27-2009.1.²⁹ In the widely-cited *Seward* case, Max Cohen purchased a dog for companionship on September 13, 1996 and brought it into his apartment in the Seward Park complex. Various maintenance personnel and porters soon became aware of the dog. In late November 1996, the managing agent became aware of the dog; the landlord commenced suit on February 10, 1997. Although the landlord commenced the action within three months of the managing agent's discovery, the court held that the knowledge of the on-site employees, five months prior, was sufficient to trigger the waiver, barring the landlord's claim.

The circuitous path of the *Seward* case is noteworthy. Initially, the district court ruled in the tenant's favor, relying on Appellate Term precedent such as *Amalgamated Housing Corp. v. Rogers*.³⁰ The same Appellate Term that had issued the *Amalgamated* opinion (albeit with one of the three judges dissenting), reversed, ruling that since the Seward Park complex consisted of some 1,700 apartments, and the subject companion animal was not there for long, the record did

²⁸ *Gidrina Partners v. Marco*, 34 HCR 35B (App. Term 1st Dept. 2006).

²⁹ *Seward v. Cohen*, *supra*.

³⁰ N.Y.L.J., Aug. 13, 1991, p.21, col.2 (App. Term 1st Dept. 1991) (knowledge of various on-site employees was sufficient to effect waiver of landlord's rights under §27-2009.1).

not support a finding of a §27-2009.1 waiver. In particular, the Appellate Term seized on evidence that the on-site employees in question were both unidentified *and* independent contractors, who had only casually observed the companion animal at issue.

The Appellate Division reversed again. The court reviewed its previous decisions, in particular *MetLife v. Friedman, infra*, which held that a proceeding or action must be commenced within three months of learning of the pet. The court determined that the *MetLife* decision trumped an Appellate Term decision in *Park Holding v. Lavigne, infra*, that might lead to a result in favor of the landlord. As for the “open and notorious harboring” and knowledge requirements of §27-2009.1, the Appellate Division held that *either one or the other* was sufficient to effect a waiver of the landlord’s rights. This meant that the “corporate landlord or his on-resident managing agent” need not have actual knowledge. The court reasoned:

Common sense dictates that landlords will have an agent or employee checking the property regularly. The [New York City] council’s assumption in its ordinance conforms with common sense, providing an easily understood and objective determination of an instance when a waiver should be implied The ordinance leaves to the landlord’s common sense what needs to be done for the landlord to become apprised of such a situation so that the landlord can, within this time, ‘commence a summary action or proceeding.’

Thus, the term “agent” in the statute included maintenance staff, porters and security guards, *even if* these individuals were employed by an outside company as independent contractors. In the court’s view, §27-2009.1 did not permit the landlord to create a class of building employees that were not required to report pets, or allow landlords to employ independent contractors in order to avoid the public policy embodied in the Pet Law. Instead, as the court stated in a straightforward manner, “[t]hree months means three months.”

Of further interest is the court’s ruling in *Park Holding Co. v. Tzeses* that §27-2009.1 was only intended to require either open harboring, or actual knowledge, for the three-month

period.³¹ This case illustrates the proposition that, in general, lower courts try to determine if building agents knew, or *should have known* about the animal because of open and notorious harboring. Naturally, the length of time a pet has been kept will be a significant factor in the court's determination of constructive knowledge. At the same time, *Seward* illustrates that even several months of possession may be sufficient to effect a waiver of the landlord's rights.

There is an interesting "wrinkle" in the law concerning the Pet Law's knowledge requirement when a rental tenant lives in a co-op or condominium. In *1725 York Venture v. Block*, 19 Misc.3d 81 (App. Term 1st Dept. 2008), *aff'd*, 64 A.D. 3d 495 (1st Dept. 2009),³² a landlord claimed he held unsold shares in the co-op at issue, and had *his own managing agent* separate from the co-op's. The landlord thus claimed that any building employees (such as the superintendent, doormen, etc.) were employees solely of the co-op's, and their knowledge should not result in a waiver of his rights.

The *Block* landlord ran into an obstacle, however, in the form of General Business Law §352's prohibition of a separate managing agent for rental units. The Appellate Term in *111 East 88th Partners v. Reich*, L&T #91298/98 (NY Co. Civ. Ct.), *aff'd*, 2002 WL 77029 (1st Dept. 2002) held that knowledge of *building* employees counts under GBL §352. *Seward, supra*,

³¹ 17 HCR 251 (Civ. Ct. N.Y.), *aff'd* N.Y.L.J. 4/13/89, p.22 col. 6 (App. Term, 1st Dept. 1988). The lower court in *Tzeses* stated:

Section 27-2009.1: A landlord waives the right to enforce a no-pet clause by failing to commence suit within three months after learning of an animal's presence. The waiver applies where landlord lacks actual knowledge but is chargeable with such knowledge by the tenant's conduct -- e.g., frequent goings and comings in view of building employees. [Note: the statute speaks of the tenant's harboring the pet 'openly and notoriously...and the owner or its agent hav[ing] knowledge of this fact' [my emphasis, but the necessary interpretation of 'and' in this instance is as the disjunctive "or." See *McKinney's Statutes*, §143, 144, 145 and 341; see also *Bowne Overseas Corp. v. Paries*, Queens Civil Court, L&T 17956/85 (not reported). Thus, the defense is established even if tenant proves only constructive notice.

³² For the sake of disclosure, the author wishes to note that his firm represented appellants-tenants before the Appellate Term and Appellate Division in the cited case.

supported the same broad principle. Thus, the landlord in *Block* lost before both the Appellate Term and the Appellate Division, which affirmed its adherence to *Seward* and noted:

[In *Seward*,] we rejected the landlord’s narrow interpretation of the term “agent” and the landlord’s reliance on the fact that neither it nor the managing agent required the building personnel to report animals, which would have allowed landlord to turn a “blind eye” to a tenant’s open and notorious harboring of a pet and would have thwarted the statute’s remedial purposes[.]

The First Department in *Block* went on to hold that under GLB §352, a building that is a co-op with non-purchasing tenants must be managed by one managing agent. The building employees that work for that managing agent “serve all the residents, not only the shareholders.” Therefore, whether or not the landlord in *Block* directly employed the building personnel, those personnel serve the landlord’s non-purchasing tenants just as they serve the shareholders. In short, as in *Seward*, “the building employees were the ones best situated to acquire knowledge of whether a tenant was harboring a pet, and petitioner should not be able to defeat the remedial purposes of the Pet Law by pointing to its own failure to instruct or request the employees to report the presence of animals.”

5.5 Proof of A Retaliatory Motive by the Building is Not Required

Throughout the history of §27-2009.1 case law, it has often been argued that the law should only apply when there is proof that the building is acting against the tenant with an ulterior motive. However, the Appellate Division in *Metropolitan Life Insurance v. Friedman* held that the Pet Law imposes no such evidentiary requirement.³³ The *Friedman* court, in ruling that the plaintiff had waived a “no pets” lease provision by failing to commence its lawsuit within the required three-month period, stated that it “reject[ed] plaintiff’s argument that the statutory three

³³ 613 N.Y.S.2d 8, 205 A.D.2d 303 (1st Dept. 1994). The Appellate Division’s approval of this principle was reiterated in *Seward*.

month period is inapplicable absent a finding that a no-pet provision is being used as a pretext for a retaliatory eviction or some other bad faith motive.” (While a thorough discussion of retaliatory eviction is beyond the scope of this article, it should be mentioned that there is a statute protecting tenants from such conduct by landlords.³⁴)

5.6 Application of §27-2009.1 to Cooperative and Condominium Apartments

Section 27-2009.1 states that it applies to tenants with leases and multiple dwellings. Owners of cooperatives have proprietary leases. Thus, perhaps unsurprisingly, soon after §27-2009.1 was enacted, courts found that the Pet Law applied to cooperative buildings as well as rental apartments. In *Corlear Gardens Housing Co. Inc. v. Ramos, supra*, the court reached this conclusion by noting, *inter alia*, that “all tenants, including cooperative tenants, are in need of the protection of the Pet Law.”

Condominiums present a different issue. There is no document titled a “lease” governing the rights and obligations between a unit owner and a condominium board. However, in condominiums where pets are prohibited (which, anecdotally, is less often the case than in co-ops and other housing), there exists a document that restricts a unit owner’s activities in much the same way a lease does. That document is generally the “house rules,” which are incorporated by the condominium’s by-laws. Further, since condominium unit owners can rent their units to tenants, and would do so with a “lease,” the relationship between a unit owner and a tenant is without question subject to §27-2009.1. In light of the foregoing, the Second Department ruled in *Board of Managers v. Lamontanero*³⁵ that

[t]he legal status of the occupant of a multiple dwelling unit (i.e., whether he pays rent, owns cooperative shares, or is the owner in

³⁴ See Real Property Law § 223-b, which prohibits landlords from commencing a suit to recover an apartment when they are retaliating against a good faith complaint by a tenant to a governmental authority, or for other actions taken in good faith to secure certain rights of a tenant.

³⁵ 616 N.Y.S.2d 744, 745, 206 A.D.2d 340 (App. Div. 2nd Dept. 1994).

fee simple of a condominium unit) is not relevant to the purposes of the statute, which include preventing abuses in the enforcement of covenants prohibiting the harboring of household pets and preventing the retaliatory eviction of pet owners for reasons unrelated to the creation of nuisance.

We conclude that it would be pernicious to create an exception for condominiums from the generally beneficial requirements of Article 27 of the Administrative Code [the pet law]. In addition to substantive harms, an exception for condominiums could lead to anomalies such as permitting the tenant of a condominium owner to invoke the protection of the “Pet Law,” while the condominium owner himself could not.

Arriving at the opposite conclusion, the First Department in *Board of Managers v. Quiles*³⁶ reasoned that § 27-2009.1, by its terms, applies only where there is a “landlord-tenant relationship.”

5.7 Old Pet, New Pet

It is important to note that the waiver of a no-pet clause in a lease for a particular pet does not act as a waiver of the no-pet clause for a *future* pet.³⁷ Thus, a unit owner must prove a waiver under § 27-2009.1 for each new pet that she brings into her apartment.

The New York City Council, which originally passed § 27-2009.1, may at some point clarify that tenants need not make such a showing. Indeed, there is legislative history supporting this interpretation of the Pet Law. Further, the court in *Seward* did use language, albeit in *dicta*, implying that once the three months has run, the clause may be waived for future pets, noting that “all extant leases were thereby amended by operation of law [referring to §27-2009.1] to render no pet clauses waivable under the terms of the ordinance.”³⁸

³⁶ 651 N.Y.S.2d 36, 234 A.D.2d 130 (1st Dept. 1996). *But see supra* at note 8 (noting that the *Seward* court cited, with apparent approval, *Board v. Lamontanero* for the proposition that only the New York City Housing authority is excluded from the scope of the Pet Law).

³⁷ *Park Holding Co. v. Eimecke*, N.Y. L.J., April 16, 1996, p.25, col. 3 (App. Term 1st Dept. 1995).

³⁸ *See Seward; Megalopolis Prop. Assn. v. Buvron, infra.*

Of further relevance to this issue is *Megalopolis v. Buvron*, 110 A.D.2d 232, 494 N.Y.S.2d 14 (2nd Dept. 1985), in which the Second Department ruled that once the three-month period passes, “the lease provision shall be deemed waived.” Naturally, this provides support for the argument that once a Pet Law waiver has occurred, the waived provision cannot be revitalized by a tenant’s later actions. Likewise, the Appellate Division’s ruling in *Baumrind v. Fidelman*, *supra*, approved of an earlier decision that found a waiver applies to future pets.³⁹

With that said, until either the legislature or a court *definitively* determines otherwise, the law most likely remains that a tenant or unit owner must prove a three-month waiver for each new pet he brings into his home.

VI. NUISANCE CASES

Where cooperative unit owners are concerned, nuisance cases are usually brought based on a breach of the “lease” or on “house rules” prohibiting nuisances or objectionable conduct. Indeed, §27-2009.1 specifically provides that it will not apply where a companion animal is a nuisance.⁴⁰ Therefore, if a companion animal may be kept by virtue of the three-month waiver provision of §27-2009.1, but *later* becomes a nuisance as defined by the law, a landlord could bring suit against the pet’s owner.

A “nuisance” is defined as a condition that threatens the comfort and safety of other tenants in the building.⁴¹ Common nuisance claims include allegations that a pet is noisy, has bitten or attacked someone, or creates an odor in the building. A key to the legal definition of “nuisance” is whether there is a *pattern* of objectionable conduct; some degree of permanency is

³⁹ The *Baumrind* court cited *Brown v. Johnson*, 139 Misc.2d 195, 527 N.Y.S.2d 679 (N.Y. City Civ. Ct., 1988) for the proposition that “the right to enforce the no pet clause is waived for a ‘failure to bring a proceeding.’” Justice Kupferman dissented, and would have reversed for the reasons stated in the lower court ruling of Judge Mark H. Spires (who wrote the *McCullum v. Brotman* decision)—that the failure to properly serve process in a relevant lawsuit within the three-month period effects a waiver under the Pet Law.

⁴⁰ NYC Admin. Code § 27-2009.1(d).

⁴¹ *Frank v. Park Summit Realty Corp.*, 175 A.D. 2d 33, 573 N.Y.S.2d 655 (1st Dept. 1991); *Novak v. Fischbein, Olivieri Rozenholg & Badillo*, 151 A.D.2d 296, 299, 542 N.Y.S.2d 568 (1st Dept. 1989); 2 Rasch, New York Landlord and Tenant - Summary Proceedings, §30:60 [3d ed.].

an essential element of the concept of nuisance.⁴² Thus, an isolated instance of misconduct by a unit owner's pet will often fail to rise to the level of a nuisance.⁴³

VII. CPLR § 4544

For strategic or other reasons, it may be advantageous for a tenant who wishes to keep a pet to invoke Section 4544 of New York's Civil Practice Laws and Rules. That law provides that a residential lease (or other consumer contract) that has printed type of less than eight points, or is not printed clearly, is not admissible into evidence. While the utility of § 4544 for a pet-harboring tenant is obvious, the court may in some cases require the testimony of a "print" expert.

VIII. CONCLUSION

In light of the laws protecting the disabled from discrimination, as well as New York City and Westchester laws that favor the keeping of pets, landlords and co-op/condominium boards, as well as unit owners, may find that the legal landscape in this area is more complex (and, depending on one's perspective, more favorable or unfavorable) than expected. All parties would be well-served to consult counsel with specific knowledge of these laws before taking any actions that could potentially prejudice their rights. As this article has hopefully demonstrated, attorneys handling "pet harboring" matters should acquaint themselves with the relevant portions of diverse bodies of law, including real property, federal and state antidiscrimination law, and even evidentiary rules.

⁴² See, e.g., *Ford v. Grand Union Co.*, 240 A.D.2d 294, 296, 270 N.Y.S. 162, 165 (3rd Dept. 1934); *Valley Courts, Inc. v. Newton*, 263 N.Y.S.2d 863 (Syracuse City Ct. 1965).

⁴³ See, e.g., *87 Realty v. Shoskensky*, 11 Misc.3d 128(A) (App. Term 2nd Dept. 2006) (two weeks of cat odors did not rise to a "pattern of continuity"). Of additional interest is a recent case in which a landlord unsuccessfully argued that harboring pigeons was illegal under § 12 of New York State's Multiple Dwelling Law ("MDL"), and thus the possession of the pigeons was exempt from the Pet Law. In *Midtown v. Kline*, 34 HCR 380A (2006), an expert for the tenant testified that there was no biological difference between Antwerp pigeons (permitted under MDL § 12) and other pigeon breeds. The court also ruled that the "mere harboring of pigeons" is not a nuisance.

APPENDIX

Sample letters requesting reasonable accommodations*

Re:

Dear :

We represent _____ and have copies of your letter concerning our client's dog.

As I believe you and the co-op board have been advised, our client suffers from a disability that substantially interferes with ___ major life activities. ___ has been under care for _____. For this condition, a _____ animal has been found to be medically helpful. The attached letter from treating physician, Dr. _____, attests to these facts..

Under Federal, State and New York City laws, the co-op (and others responsible such as the managing agent) must reasonably accommodate our client's needs.

Please advise by _____ whether you will allow our client to keep _____ dog. Failing that, you will leave our client with little alternative but to file an appropriate complaint against all responsible parties for violations of the Federal, State and local laws prohibiting discrimination against the disabled.

It certainly seems in everyone's best interest that this matter be resolved and our client be allowed to keep ___ dog. Please also have the co-op understand that we hope this matter is not pursued and can be resolved, but if it is not our client will make all appropriate claims including claims for compensatory damages, punitive damages if appropriate, and for legal fees and expenses.

An example of a doctor's disability letter is as follows:

To:
From:
Re:

_____ has been my patient since _____. I am intimately familiar with her

* This letters, like the contents of this article more generally, are for informational purposes only, and should not be used in lieu of representation by a qualified attorney.

history and the functional limitations imposed by her disability.

She meets the definition of disability under the Americans with Disabilities Act, the Fair Housing Act, and the Rehabilitations Act of 1973, which defines disability as a physical or mental impairment that substantially limits one or more of the major life activities of such individuals.

[Or: She meets the definition of disability under the New York State Human Rights Law, which defines disability as a physical, mental or medical impairment that prevents the exercise of a normal bodily function; or having a record of such impairment; or being regarded as having an impairment.]

[Or: She meets the definition of disability under the New York City Human Rights Law, which defines disability as any physical, medical, mental or psychological impairment, or history or record of such impairment.]

She suffers from _____, which was initially diagnosed in _____. I have been treating her for this since _____. She has been treated with _____, for _____ years. The _____ has persisted despite treatment and has substantially interfered with her ability to [e.g., work and pursue social activities] and/or other major life activities. In order to help alleviate these impairments, and to [e.g., enhance her ability to live independently and fully use her apartment], I prescribed an emotional support animal, that assists _____ in coping with her disability by [examples of how assists].

[Recently, she obtained a dog.] [She plans to obtain a dog.] Having the dog [has already enabled] [will enable] her to cope better with her disability. [Examples:] The needs of the dog [will] give structure to her day and get her out of the house enabling her to interact with neighbors. In addition she [is getting] [will get] exercise by walking the dog. The walking [helps] [will help] keep her blood pressure normal and assist[s] in weight control. All these changes [have caused] [have the potential to cause] a significant elevation in her mood. [Add how companion help helps equal enjoyment of housing accommodation.]

The dog is medically necessary. This conclusion is supported by a voluminous literature. Studies have consistently shown the therapeutic benefits of assistance animals in relieving loneliness, depression, hypertension and other health problems. A bibliography is attached for your review.

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“PIT BULL” BANS: THE STATE OF BREED-SPECIFIC LEGISLATION IN NEW YORK AND AMERICA TODAY*

By Dana M. Campbell

When the New York City Housing Authority (“NYCHA”) banned certain dog breeds—“pit bulls,” Rottweilers, and Doberman pinschers among them—from public housing in the spring of 2009, owners like Marc Hernandez were forced to choose between keeping their home or their family pet.ⁱ Mr. Hernandez raised Tyson, a Staffordshire bull terrier, from infancy, and maintains Tyson never exhibited any aggressive behavior. Despite Tyson’s unblemished record, he was surrendered to an East Harlem animal shelter after the aforementioned ban went into effect.ⁱⁱ Considering the difficulties associated with adopting pit bulls, a breed maligned by the media and politicians alike, the NYCHA policy was more than likely not a death sentence for Tyson. Tyson’s story is only one of many, as controversial “breed” bans, also known as “pit bull bans” or “breed-specific legislation” (“BSL”) grow in popularity.

What problems have prompted BSL?

Addressing the issue of so-called “dangerous dogs” is a problem that has perplexed communities for decades, leading some communities to resort to passing laws banning certain breeds of dogs perceived as being especially prone to dangerous behavior. The passing of such laws usually occurs after a well-publicized attack on a human. A particularly gruesome case in 2008ⁱⁱⁱ, where a 90-year-old Staten Island man died after two pit bulls tore off most of his leg, is one reason that many New York City residents are calling for a ban. This effort, to purge certain breeds of dogs, may appear to the public to be the easiest way to reduce the probability of an attack.

As the American Kennel Club (“AKC”), the nation’s largest dog breed registry, does not

recognize a “pit bull” breed *per se*, the breeds most commonly included within current BSL are a mix of bulldog and terrier breeds already recognized by the AKC: Bull Terriers, American Staffordshire Terriers and Staffordshire Bull Terriers. Also frequently included in the bans are Rottweilers, Chow Chows, Mastiffs, and Presa Canarios. Interestingly, the breeds considered “dangerous” by the public have changed over time: for example, German Shepherds were a source of particular concern in the 1970s, and the torch was passed to Doberman Pinschers in the 1980s.

Who has passed BSL?

Hundreds of municipalities of varying sizes and geographic locations throughout the country have adopted BSL. Perhaps the most comprehensive list of BSL jurisdictions, which is frequently updated, is the list maintained at www.understand-a-bull.com.^{iv} Yet, one can observe an interesting countervailing trend, as twelve states, including New York and Colorado, have passed laws *prohibiting* local governments within the state from enacting BSL. (Colorado, ironically, is the home of Denver, the city with perhaps the most tortured history of BSL. Denver passed BSL in 1989, but the Colorado State Legislature outlawed BSL in 2004. Denver later reinstated BSL after the City successfully challenged the state’s BSL prohibition by invoking the so-called “Home Rule exception.”^v)

Some dog owners in Hempstead, New York, are required to register and obtain insurance policies for “dangerous” dogs, though this law may be legally unenforceable as a result of the above-mentioned prohibition.^{vi}

Hempstead is not alone in imposing an insurance requirement. A bill proposed in Oregon in 2009 would have required minimum liability insurance coverage of one million dollars for “pit bull” owners, but the bill did not pass. One possible motive for such proposals is that, because

some dog owners would be unable to obtain such insurance due to cost, burdensome insurance requirements would serve as an indirect restriction on the ownership of certain breeds.

Just two weeks before former President Bush left office, the U.S. Army issued a memo detailing pet policy changes for privatized housing on military installations. These policy changes banned American or English Staffordshire Bull Terriers, Rottweilers, Chow Chows, Doberman Pinschers, and wolf hybrids, as well as, a host of other pet and exotic animals, including reptiles, rats, hedgehogs, ferrets, and farm animals. The policy, which went into effect immediately, “grandfathers in” existing pets and contains a clause allowing for certain exceptions, but provides no criteria to guide the exception-granting process. However, since the military’s new breed ban came into effect, some military families have lamented online and in the media that the nature of military service requires frequent moves from base to base, rendering the grandfather clause nearly meaningless. Michelle Obama has stated that helping military families is one of her priorities as First Lady; at the time of writing, however, the Obama administration had promised to look into the military’s breed ban but not yet issued a formal opinion on the subject.

BSL in the Courts

Court cases challenging BSL have focused on constitutional concerns such as substantive due process, equal protection, and vagueness. Based on past results and intuition, it seems that most BSL will survive the minimum scrutiny analysis allowed by the due process clauses of the Constitution’s Fifth and Fourteenth Amendments, as there is no “fundamental right” at issue. Since state and local jurisdictions enjoy broad policing powers, including the power to protect public safety, courts have had no trouble finding that BSL satisfies the permissive standard of bearing a “rational relationship” to the goal of protecting the public from “dangerous” breeds.

Challenges based on Equal Protection arguments are similarly difficult to sustain. Here, courts look at whether there is a rational purpose for treating pit bull breeds differently from other dog breeds. Dog owners have attacked the rational purpose requirement by arguing either that BSL is over-inclusive, because it bans all dogs of a breed when only certain individuals within the breed have proven to be vicious. Opponents have also argued that the rational purpose requirement is not satisfied because these bans are under-inclusive, because many other breeds of dogs not banned by BSL have injured people. However, again under minimum-scrutiny/“rational basis” review, BSL will survive as long as the government can establish that the proposed BSL is rationally related to its purpose, *even if* the law is indeed over - or under - inclusive.

Claims that BSL is unconstitutionally vague have brought dog owners mixed—though somewhat greater—success. The constitutional guarantee of procedural due process requires that laws provide the public with sufficient notice of the activity or conduct being regulated or banned, and laws that fail to do so may be struck down as unconstitutionally vague. Thus, owners of pit bulls or other banned breeds have sometimes argued that breed ban laws do not adequately define what a “pit bull” is for the purposes of a ban. An alternative argument is that BSL laws are too vague to help the dog-owning public or the relevant enforcement agency—such as animal control or police—to identify whether a dog falls under the BSL. This argument carries some force in instances where the dog was adopted with an unknown origin, or the dog is a mixed breed.

Enforcement Issues

Relatedly, enforcement of BSL naturally leads to the question: who determines whether a dog is one of the banned or regulated breeds, and what is the procedure for that determination? Surprisingly, in some places like the city of North Salt Lake, Utah, it is the “city manager” who

has sole authority to make that call. Some jurisdictions have passed their BSL legislation without any input from veterinarians, who are presumably the type of expert most capable of identifying dog breeds.

Attorney Ledy VanKavage has spent the last decade following and studying BSL, and is considered one of the country's foremost experts on the subject. Ms. VanKavage is now general counsel for Best Friends Animal Society, after working for years as the senior director of legislation and legal training for the American Society for the Prevention of Cruelty to Animals ("ASPCA"). "I call these breed discrimination laws," she says, and asserts that with the advent of technology facilitating DNA analysis for dogs, the days of mere "canine profiling" and arbitrary enforcement are numbered. VanKavage believes that since the government has the burden of proving that a dog is one of the breeds banned or regulated by BSL, cities will have to seriously consider whether they can afford to pony up the high cost of DNA tests to be able to enforce their BSL—and if they cannot, whether to give up trying to enforce them.

Is BSL effective?

Extensive studies of the effectiveness of BSL in reducing the number of persons harmed by dog attacks were done in Spain and Great Britain. Both studies concluded that the countries' "Dangerous Animals Acts," which included pit bull bans, had no effect at all on the number of dog attacks. The Spanish study further found that the breeds most responsible for bites—both before and after the breed ban—were those breeds not covered by the ban at all, primarily German Shepherds and mixed breeds.

One of the only known instances in which a breed ban's effectiveness was examined and reported on in the U.S. occurred in Maryland's Prince George's County, where a 2003 task force was formed to assess the effectiveness of a pit bull ban.^{vii} Among the task force's conclusions

was that public safety had not improved as a result of the ban, despite the fact that the county spent more than \$250,000 per year to round up and destroy the dogs in enforcing the ban. Finding that other, non-breed-specific laws already on the books covered vicious animal, nuisance, leash, and other public health and safety concerns, the task force recommended repealing the ban.

In a different study looking at dog-bite data, the Centers for Disease Control and Prevention, the Humane Society of the United States, and the American Veterinary Medical Association joined together to produce a report, entitled “Breeds of dogs involved in fatal human attacks in the US between 1979 and 1998,”^{viii} which appeared in the September 15, 2000, issue of the Journal of the American Veterinary Medical Association (“JAVMA report”). Among their findings was that during that 20-year period, over 25 breeds of dogs were involved in 238 human fatalities. Pit bull-type dogs caused 66 of the fatalities, which results in an average of just over three fatal attacks per year; Rottweilers were cited as causing 39 of the fatalities. The rest were caused by other breeds and mixed breeds. At the time the report was released, Dr. Gail C. Golab, one of the study’s co-authors, was quoted as saying that, “[s]ince 1975, dogs belonging to more than 30 breeds—including Dachshunds, Golden Retrievers, Labrador Retrievers, and a Yorkshire Terrier—have been responsible for fatal attacks on people.”

The authors noted that the data in the report cannot be used to infer any breed-specific risk for dog bite fatalities, such as for pit bull-type dogs or Rottweilers, because to obtain such risk information it would be necessary to know the total numbers of each breed currently residing in the US, and that information is unavailable.

Another study compared the type of media coverage given for dog attacks that occurred during a 4-day period in August of 2007,^{ix} and revealed intriguing results:

On day 1, a Labrador mix dog attacked an elderly man, sending him to the hospital. News stories of his attack appeared in one article in the local paper.

On day 2, a mixed-breed dog fatally injured a child. The local paper ran 2 stories.

On day 3, a mixed-breed dog attacked a child, sending him to the hospital. One article ran the story in the local paper.

On day 4, two pit bulls broke off their chains and attacked a woman who was trying to protect her small dog, sending her to the hospital. Her dog was uninjured. This attack was reported in *more than 230 articles*, in national and international newspapers and on the major cable news networks.

Such statistics make clear how news coverage could influence calls for breed-specific bans from the frightened public and the legislators who pass laws on their behalf.

What are the alternatives to condemning an entire breed?

The woman who conducted the above media coverage study, Karen Delise, is now with the National Canine Research Council, which identified the most common factors found in fatal dog attacks occurring in 2006:

97% of the dogs involved were not spayed or neutered.

84% of the attacks involved owners who had abused or neglected their dogs, failed to contain their dogs, or failed to properly chain their dogs.

78% of the dogs were not kept as pets, but as guard, breeding, or yard dogs.

Stephan Otto, Director of Legislative Affairs for the Animal Legal Defense Fund, notes that “if a person keeps a dangerous dog to guard their drugs or property or for fighting purposes, they’ll just switch to a different breed and train that dog to be dangerous to get around a breed ban. The BSL accomplishes nothing in those cases.” People have raised similar concerns with

the NYCHA ban, fearing those who want violent dogs will train other breeds to be just as aggressive as the breeds perceived to be aggressive that are covered by the ban.

Ms. VanKavage points to the factors mentioned above as reasons for communities to focus on “reckless owners”, rather than singling out specific breeds to be regulated. She also recommends improving dangerous dog laws generally, with attention to the relevant factors, but *without* singling out particular breeds.

The ASPCA has proposed a list of solutions for inclusion in breed-neutral laws that hold reckless dog owners accountable for their aggressive animals:

Enhanced enforcement of dog license laws, with adequate fees to augment animal control budgets, and surcharges on ownership of unaltered dogs to help fund low-cost pet-sterilization programs. High penalty fees would be imposed on those who fail to license a dog.

Enhanced enforcement of leash/dog-at-large laws, with adequate penalties to supplement animal control funding and to ensure the law is taken seriously.

Dangerous dog laws that are breed-neutral and focus on the behavior of the individual dog, with mandated sterilization and microchipping of dogs that are deemed dangerous. Options for mandating muzzling, confinement, adult supervision, training and owner education should be included. The ASPCA also recommends a hearing process, incorporating graduated increasing penalties, including euthanasia, to address aggravated circumstances such as when a dog causes unjustified injury, or simply cannot be controlled. (“Unjustified” is typically understood to mean that the dog was not being harmed or provoked by anyone when the attack occurred.)

Laws that hold dog owners financially accountable for failure to adhere to animal control laws, as well as civilly and criminally liable for unjustified injuries or damage caused by their dogs.

Laws that prohibit the chaining or tethering of dogs, coupled with enhanced enforcement of animal cruelty and fighting laws. Studies have shown that chained dogs are—to use a term of art from tort law—an “attractive nuisance” to children and others who approach them.

Laws that mandate the sterilization of shelter animals and make low-cost sterilization services widely available.

Recently, Ms. VanKavage revealed that Best Friends Animal Society is working on devising an economic analysis tool that would help cities determine the cost of enforcing BSL, as compared with the cost of enforcing more empirically justified, non-breed-specific laws. This analysis would provide a valuable source of data for cities to consider before enacting BSL.

For the reasons state above (and others), national animal-related organizations such as the American Veterinary Medical Association, Humane Society of the United States, Animal Legal Defense Fund, Best Friends Animal Society, the ASPCA, the AKC, and the National Animal Control Association all oppose. Mr. Otto sums up the position of these organizations in this way: “if the goal is dog-bite prevention, then dogs should be treated as individuals under effective dangerous dog laws and not as part of a breed painted with certain traits that may not be applicable to each dog. By doing so, owners of well-trained, gentle dogs are not punished by a breed ban, while dangerous dogs of all breeds are regulated and may have their day in court to be proven dangerous.”

Consider the experiences of the Westchester Society for the Prevention of Cruelty to

Animals (“ Westchester SPCA”). Police discovered two severely abused pit bulls dumped in a trashcan in 2008. Despite the cruelty these dogs endured, the surviving dog, Oscar, was rehabilitated and became a loving pet.^x The executive director of the Westchester SPCA, Shannon Laukhauf, believes that “[t]hese are not bad dogs.” Based on her experience at the Westchester SPCA, Ms. Laukhauf states, “even the most severely abused animals will respond to the right kind of care and approach.”^{xi}

Similarly, in the 2007 Michael Vick dog fighting case, 50 of the former pro-football player’s fighting dogs were seized for euthanasia.^{xii} However, in an unprecedented move, the court agreed with amicus briefs filed by animal welfare groups and appointed a special master, Animal Law professor Rebecca Huss, as a guardian for the dogs. Ms. Huss was responsible for the oversight of temperament evaluations performed on each dog by a team of behaviorists. As a result, only one dog was destroyed due to temperament; the other forty-nine were saved and shipped to rescue groups where they were rehabilitated and are now, by all accounts, beloved family pets. Time will tell whether this unexpected outcome has helped to turn on its head the conventional argument that fighting dogs or certain breeds are inherently dangerous, untrainable and hopeless.

Conclusion

Perhaps the most accurate way to summarize the state of BSL in the United States today is to say that the laws are controversial, generating both howls of protest and vehement support wherever they have been considered. The number of jurisdictions passing breed bans and prohibiting breed bans continues to fluctuate widely, but the one constant is the dogs, who surely want nothing more than to be with and to please their human companions.

*A version of this article originally appeared in the July/August 2009 issue of the ABA’s GP Solo Magazine.

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- ⁱ New York City Housing Authority, Pet Policy Overview, http://www.nyc.gov/html/nycha/downloads/pdf/pet_policy_overview.pdf.
- ⁱⁱ Manny Fernandez, *Large Dogs in Public Housing Are Now Endangered Species*, N.Y. TIMES, Sept. 22, 2009.
- ⁱⁱⁱ Reuven Blau and Melissa Klein, *City Dogs Gone Wild: Bites Soar as Bureaucrats Bungle*, N. Y. POST, Aug. 2, 2009.
- ^{iv} Breeds affected by BSL, <http://www.understand-a-bull.com/BSL/BreedsaffectedbyBSL.htm>
- ^v Barbara Whitaker, *Pit Bull Owners Put Laws to the Test*, N.Y. TIMES, Sept. 10, 2006.
- ^{vi} *See id.*
- ^{vii} Prince George's County Task Force Report, *available at* http://www.canineadvocatesofohio.org/Docs/Prince_Georges_County0001.PDF.
- ^{viii} Journal of the American Veterinary Medical Association (JAVMA report), *Breeds of dogs involved in fatal human attacks in the US between 1979 and 1998, available at* <http://avmajournals.avma.org/doi/abs/10.2460/javma.2000.217.836>.
- ^{ix} National Canine Research Council, *Media bias 2007, Pit bull paparazzi*, <http://nationalcanineresearchcouncil.com/wp-content/uploads/2009/01/paparazzincrc.pdf>.
- ^x Juli S. Charkes, *With More News of Abuse, a Harder Search for Homes for Pit Bulls*, N.Y. TIMES, March 16, 2008
- ^{xi} *See id.*
- ^{xii} *Jonathan Lee Riches v. Michael Vick*, 3:2007cv00434 (E.D. Va. Jul. 23, 2007).

TALKIN' 'BOUT A HUMANE REVOLUTION:¹ NEW STANDARDS FOR FARMING PRACTICES AND HOW THEY COULD CHANGE INTERNATIONAL TRADE AS WE KNOW IT

By Leslie Peterson*

INTRODUCTION

What we eat and where it comes from matters.² While over the past few decades animal activists have been advocating for the humane treatment of animals,³ the battle over farm animal welfare recently made its way onto the November 2008 California state ballot,⁴ in the form of Proposition 2 (“Prop 2”),⁵ the Prevention of Farm Animal Cruelty Act.⁶ This Act, while arguably “modest,”⁷ will prospectively improve living standards for farm animals by prohibiting conditions that do not allow animals to lie down, stand up, fully extend their limbs, or to turn around,⁸ thus banning in California three widely used agricultural confinement systems:⁹ the

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¹ This title was inspired by Tracy Chapman's song, “Talkin' 'Bout A Revolution.” TRACY CHAPMAN, *Talkin' 'Bout A Revolution*, on TRACY CHAPMAN (Elektra/Asylum Records 1988).

² See, e.g., JONATHAN SAFRAN FOER, *EATING ANIMALS* 32 (2009) (Arguing that “[t]here is something about eating animals that tends to polarize . . . become an activist or disdain activists If and how we eat animals cuts to something deep”).

³ See Kristen Stuber Snyder, Note, *No Cracks In the Wall: The Standing Barrier and the Need for Restructuring Animal Protection Laws*, 57 CLEV. ST. L. REV. 137, 142 (2009).

⁴ See *California Online Voter Guide November 2008 General Election*, CAL. VOTER FOUND., <http://www.calvoter.org/voter/elections/2008/general/props/index.html> (last visited Aug. 19, 2010).

⁵ See *id.*

⁶ The California Health and Safety Code's Farm Animal Cruelty provision provides:

In addition to other applicable provisions of law, a person shall not tether or confine any covered animal, on a farm, for all or the majority of any day, in a manner that prevents such animal from:

- (a) Lying down, standing up, and fully extending his or her limbs; and
- (b) Turning around freely.

CAL. HEALTH & SAFETY CODE § 25990 (West 2010) (effective Jan. 1, 2015).

⁷ *Get Involved, Action Alerts & Updates, November 4, 2008: SUCCESS ON PROP 2!*, FARM SANCTUARY (Nov. 4, 2008), http://farmsanctuary.org/get_involved/yesonprop2.html.

⁸ CAL. HEALTH & SAFETY CODE § 25990 (West 2010) (effective Jan. 1, 2015).

⁹ See, e.g., *Get Involved, Action Alerts & Updates*, *supra* note 7.

battery cage for egg-laying hens,¹⁰ the veal crate for baby male cows,¹¹ and the gestation crate for pregnant pigs.¹² Due to the nature of California's agricultural industry, this act prompted a fight between the egg industry and Prop 2 supporters.¹³ According to the agricultural trade magazine *Egg Industry*,¹⁴ animal activists' efforts to bring Prop 2 to the California ballot was not something to be taken lightly; United Egg Producers ("UEP")¹⁵ stated that it needed "all hands on deck" for what the magazine deemed possibly "one of the biggest and most important battles of U.S. egg industry history."¹⁶ UEP was justified in its concern; on November 4, 2008 animal rights advocates around the United States ("U.S.") celebrated¹⁷ at the expense of agribusiness as

¹⁰ About 95% of commercial egg production in the U.S. takes place in these "caged layers." UNITED EGG PRODUCERS, ANIMAL HUSBANDRY GUIDELINES FOR U.S. EGG LAYING FLOCKS 1 (2010), available at <http://www.uepcertified.com/media/pdf/UEP-Animal-Welfare-Guidelines.pdf>. "Space allowance should be in the range of 67 to 86 square inches of usable space per bird to optimize hen welfare." *Id.* at 18. This translates into "giv[ing] hens less space than the area of a letter-sized sheet of paper in which to eat, sleep, lay eggs, and defecate." Jonathan R. Lovvorn & Nancy V. Perry, *California Proposition 2: A Watershed Moment for Animal Law*, 15 ANIMAL L. 149, 152 (2009).

¹¹ "[V]eal calves are confined in wooden stalls so small that the young animal cannot turn around." Mariann Sullivan & David J. Wolfson, *If It Looks Like A Duck . . . New Jersey, the Regulation of Common Farming Practices, and the Meaning of "Humane,"* in ANIMAL LAW AND THE COURTS: A READER 94, 94 (Taimie L. Bryant, et al. eds., 2008).

¹² "[B]reeding pigs spend nearly all of their three to four years on earth in metal stalls, generally able to take no more than one step forward or back, never able to turn around." *Id.*

¹³ Prop 2 focused on the hens, because "California doesn't have much of a veal or pork industry . . . California produces 6% of the nation's eggs." Julie Schmit, *California Vote Could Change U.S. Agribusiness*, USA TODAY, Nov. 6, 2008, at 4B.

¹⁴ See EGG INDUSTRY, <http://www.eggindustry-digital.com/eggindustry/200912#pg1> (last visited Aug. 19, 2010).

¹⁵ UEP is an organization of egg producers that provides services to its members in "government relations, animal welfare, environment, food safety, industry coalition building, nutrition, egg trading, member service programs, and communications." *History and Background*, UNITED EGG PRODUCERS, <http://www.unitedegg.org/history/default.cfm> (last visited July 7, 2010).

¹⁶ Edward Clark, *Standing-Room-Only as UEP Debates How to Counter Activists*, EGG INDUSTRY 8 (Mar. 2008), <http://www.eggindustry-digital.com/eggindustry/200803?pg=8&pm=2&fs=1#pg8>. Prop 2 "effectively bans" standard battery cages. Schmit, *supra* note 13.

¹⁷ It is important to note that not all animal advocates supported Prop 2. See, e.g., Gary L. Francione & Anna E. Charlton, *Animal Advocacy in the 21st Century: The Abolition of the Property Status of Nonhumans*, in ANIMAL LAW AND THE COURTS: A READER 7, 24 (Taimie L. Bryant, et al. eds., 2008) (in support of the "abolitionist approach" to animal advocacy: "As long as a majority of people think that eating animals and animal products is a morally acceptable behavior, nothing will change"); see also Gary L. Francione, *What to Do on Proposition 2?*, ANIMAL RIGHTS: THE ABOLITIONIST APPROACH (Sept. 2, 2008, 4:02 AM EST), <http://www.abolitionistapproach.com/what-to-do-on-proposition-2/> (Gary Francione's personal blog, which in this posting outlines the reasons why animal advocates should vote "no" for Prop 2).

Prop 2 passed by 63.2%,¹⁸ thus securing more humane treatment for farm animals raised in California.¹⁹

The current American “farm” house, with thousands of animals in a large-scale, factory-type²⁰ setting, is a relatively recent phenomenon.²¹ Although the U.S. Congress enacted the federal Animal Welfare Act²² in 1966 to provide federal protection for animals,²³ it contains a specific exemption for farm animals.²⁴ Thus, states retain the responsibility of protecting farm animals.²⁵ Until the recent passing of Prop 2²⁶ and similar statutes,²⁷ anti-cruelty statutes were

¹⁸ *California - Election Results 2008*, N.Y. TIMES, (Dec. 9, 2008), <http://elections.nytimes.com/2008/results/states/california.html>. More than 8.2 million California voters said “yes” to Prop 2. *Id.*; see Lovvorn & Perry, *supra* note 10, at 167 (citing *Proposition 2 - Standards for Confining Farm Animals*, CAL. SEC’Y OF STATE DEBRA BROWN, http://www.sos.ca.gov/elections/sov/2008_general/maps/returns/props/prop-2.htm (last visited Aug. 19, 2010)).

¹⁹ For the viewpoint that Prop 2 will eliminate California industry and jobs, and will create less safe egg conditions, see generally *Proposition 2, Standards for Confining Farm Animals, State of California*, SMART VOTER, LEAGUE OF WOMEN VOTERS, <http://www.smartvoter.org/2008/11/04/ca/state/prop/2/> (last visited Aug. 19, 2010); see also Michael J. Crumb, *Researchers Ask: Are Caged Chickens Miserable?*, ABC NEWS (Nov. 19, 2009), <http://abcnews.go.com/Technology/wirestory?id=9123424&page=2> (discussing how egg producers claim that “caged chickens are healthier and satisfied with the only lives they’ve ever known”).

²⁰ For a discussion on large-scale factory farms, see Jim Mason, *Brave New Farm?* in IN DEFENSE OF ANIMALS 89, 89–107 (Peter Singer ed., 1985).

²¹ See Sullivan & Wolfson, *supra* note 11, at 95 (discussing how due to industrial farming methods that developed after World War II, farm animal cruelty became “embedded in the methods of production themselves, and the life of each individual animal has become much less valuable to the producers who raise them for food”).

²² See 7 U.S.C. §§ 2131–2159.

²³ See 7 U.S.C. § 2131 (1976).

²⁴ See 7 U.S.C. § 2132(g)(3) (2002); see also Sullivan & Wolfson, *supra* note 11, at 96 (discussing how, since the U.S. does not have a federal law that protects and regulates the way that farmed animals are raised, the U.S. Department of Agriculture (“USDA”) cannot create regulations for farm animal welfare).

²⁵ See Sullivan & Wolfson, *supra* note 11, at 96. Additionally, egg sale regulation is considered to be a part of the state police power, and is valid so long as it is “intended to protect the public health against unwholesome eggs.” 35A AM. JUR. 2D *Food* § 35 (2010); see also *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670 (7th Cir. 1992). Egg sale production regulations must also be reasonable and cannot infringe on the U.S. Constitution’s Commerce Clause. 35A AM. JUR. 2D *Food* § 35 (2010). A law regulating the sale of eggs between states could be challenged under the U.S. Constitution’s Commerce Clause, which gives Congress the right “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes” U.S. CONST. art. I, § 8, cl. 3; see also Kim Walker & Jacob Bylund, *California’s Prop 2: Is It Constitutional? (Commentary)*, FEEDSTUFFS FOODLINK (Dec. 1, 2008), <http://www.feedstuffsfoodlink.com/ME2/dirmod.asp?sid=F4A490F89845425D8362C0250A1FE984&nm=&type=news&mod=News&mid=9A02E3B96F2A415ABC72CB5F516B4C10&tier=3&nid=56A43ADC0FA34373BB2A199FC33AAFC1>.

²⁶ CAL. HEALTH & SAFETY CODE § 25990 (West 2010) (effective Jan. 1, 2015).

²⁷ *Maine Becomes Sixth U.S. State to Ban Extreme Confinement*, HUMANE SOC’Y OF THE U.S. (May 13, 2009), http://www.hsus.org/farm/news/ournews/maine_bans_veal_gestation_crates_051309.html [hereinafter *Maine*];

the sole means of protection for farmed animals, but they were extremely ineffective due to exemptions for “customary” farming practices,²⁸ such as battery cage housing for hens.²⁹ While similar laws previously passed in Florida,³⁰ Arizona,³¹ Oregon,³² and Colorado,³³ Prop 2³⁴ is the first to create minimum farm animal welfare standards for battery cage hens, and thus, is groundbreaking.³⁵ In fact, *Feedstuffs*, deemed “one of the largest agribusiness newspapers in the country,”³⁶ states that Prop 2 will affect the production of livestock and poultry throughout the U.S., and possibly all of North America.³⁷ Since its passing, Maine and Michigan passed similar laws, and Ohio negotiated an agreement between animal advocacy organizations, members of the agriculture industry, and its governor to change industry practices.³⁸ Laws are also pending

2009: *A Record-Breaking Year of State Victories*, HUMANE SOC’Y OF THE U.S. (Dec. 15, 2009), http://www.humanesociety.org/about/departments/legislation/state_leg_victories.html [hereinafter *Record-Breaking*].

²⁸ Sullivan & Wolfson, *supra* note 11, at 97 (discussing how, in states with these exceptions, farmers are able to control what is deemed to be customary).

²⁹ See, e.g., David J. Wolfson, *Beyond the Law: Agribusiness and the Systematic Abuse of Animals Raised for Food or Food Production*, 2 ANIMAL L. 123, 134–5 (1996). Even without exemptions, states have found a host of enforcement problems when it comes to bringing a farm animal cruelty case. *Id.* For a discussion of the difficulty in a prosecutor’s task of bringing an anti-cruelty case, see Sullivan & Wolfson, *supra* note 11, at 96. “There has not been a successful prosecution of a standard practice for the rearing of farmed animals *in any state* pursuant to a general anticruelty statute.” *Id.* at 100.

³⁰ Press Release, Humane Soc’y of the U.S., Voters Protect Pigs in Florida, Ban Cockfighting in Oklahoma, (Nov. 6, 2002), available at http://www.hsus.org/press_and_publications/press_releases/voters_protect_pigs_in_florida_ban_cockfighting_in_oklahoma.html.

³¹ *Election ’06: Animals Win in Arizona and Michigan*, HUMANE SOC’Y OF THE U.S. (Nov. 7, 2006), http://www.hsus.org/legislation_laws/ballot_initiatives/election_06_animals_win_.html.

³² *Oregon Makes History by Banning Gestation Crates*, HUMANE SOC’Y OF THE U.S. (June 28, 2007), http://www.hsus.org/farm/news/ournews/oregon_gestation_crates.html.

³³ *Landmark Farm Animal Welfare Bill Approved in Colorado*, HUMANE SOC’Y OF THE U.S. (May 14, 2008), http://www.hsus.org/farm/news/ournews/colo_gestation_crate_veal_crate_bill_051408.html.

³⁴ CAL. HEALTH & SAFETY CODE § 25990 (West 2010) (effective Jan. 1, 2015).

³⁵ See Lovvorn & Perry, *supra* note 10, at 150 (describing Prop 2 as “the most important animal law reform in the last decade”).

³⁶ *Id.*

³⁷ *Id.* (citing Editorial, *California Dam Must Not Be Breached*, FEEDSTUFFS, June 29, 2008, <http://www.feedstuffs.com/ME2/dirmod.asp?sid=49804C6972614A63A1A10DF54CD95D65&nm=Search+our+Archives&type=Publishing&mod=Publications%3A%3AArticle&mid=AA01E1C62E954234AA0052ECD5818EF4&tier=4&id=6F3F259E892B4329B83E0B0AAFFCE2A6> (last visited July 27, 2010)).

³⁸ *Maine*, *supra* note 27; *Record-Breaking*, *supra* note 27; see Press Release, Humane Soc’y of the U.S., Landmark Ohio Animal Welfare Agreement Reached Among HSUS, Ohioans for Humane Farms, Gov. Strickland, and

before other state legislatures.³⁹ Furthermore, the Humane Society of the United States (“HSUS”) announced a push for federal legislation prohibiting federal programs from contracting with suppliers who raise animals used for meat, egg, and dairy products in conditions of extreme confinement.⁴⁰

However, it is still unclear how far these humane treatment laws will extend. For example, some farms contest what standards are deemed acceptable by Prop 2’s requirements;⁴¹ others speculate that, due to necessary cost-prohibitive renovations, they will have to “downsize or close.”⁴² Furthermore, the new laws for gestation and veal crates currently only apply to in-state agricultural producers, while the law regarding eggs was recently extended to prospectively cover the production methods of all whole eggs sold in California (regardless of the state where they were originally produced).⁴³ The strong public support for Prop 2⁴⁴ begs the question—how

Leading Livestock Organizations, (June 30, 2010), *available at*

http://www.humanesociety.org/news/press_releases/2010/06/landmark_ohio_agreement_063010.html.

³⁹ For example, a bill similar to Prop 2 is currently pending before the New York State Legislature. Assemb. A08163, Reg. Sess. (N.Y. 2010).

⁴⁰ *See Prevention of Farm Animal Cruelty Act*, HUMANE SOC’Y OF THE U.S., http://www.humanesociety.org/action/fed_bill/farm_animals/prevention_of_farm_animal_cruelty_act.html (last visited Aug. 19, 2010); *see also* H.R. 4733, 111th Cong. (2009–2010).

⁴¹ J.S. West & Co., a California egg producer, built a new facility that, in its opinion, meets Prop 2’s requirements: “The new enclosures provide an average of 116 square inches of floor space per hen . . . [and] add[] features designed to meet various hen needs – a curtained area for nesting, a pair of metal tubes for perching and a ‘scratch pad’ that helps the bird clean itself.” John Holland, *J.S. West Enlarges Its Hen Cages But Will They Comply With Space Standards?*, MODESTO BEE, June 22, 2010, at B1, *available at* <http://www.modbee.com/2010/06/21/v-print/1220229/js-west-enlarges-its-hen-cages.html>. However, HSUS believes that no confinement system will meet the requirements. *See id*; *see also* Press Release, Humane Soc’y of the U.S., California Egg Producer Falsely Claims That Inhumane Confinement System Will Comply With Proposition 2, (Sept. 15, 2009), *available at* http://www.hsus.org/press_and_publications/press_releases/js_west_09152009.html.

⁴² Courtenay Edelhart, *Can They Survive? Farmers Worry About Impact of Proposition 2*, BAKERSFIELD CALIFORNIAN (Nov. 7, 2008), <http://www.bakersfield.com/news/business/economy/x1998580391/Can-they-survive-Farmers-worry-about-impact-of-Proposition-2>.

⁴³ *See* Press Release, Humane Soc’y of the U.S., Governor Schwarzenegger Signs Landmark Egg Bill into Law, (July 6, 2010), *available at* http://www.humanesociety.org/news/press_releases/2010/07/ab1437_passage_070610.html.

⁴⁴ The strong public response was demonstrated by voter turn-out in California. *See Proposition 2 - Standards for Confining Farm Animals*, *supra* note 18. It was also demonstrated by Prop 2’s successful passage; *see Californians Make History by Banning Veal Crates, Battery Cages, and Gestation Crates*, HUMANE SOC’Y OF THE U.S. (Nov. 4,

much longer will American consumers continue to accept the production of eggs raised in intensive confinement systems?⁴⁵

Arguably one of the most significant implications of the increase in humane farming legislation in the U.S. is the potential impact on international trade. The U.S. has certain international treaty obligations that it must uphold when trading with other countries;⁴⁶ these commitments can be found in the General Agreement on Tariffs and Trade⁴⁷ (“GATT”), which is the World Trade Organization’s (“WTO”)⁴⁸ agreement to reduce trade barriers for goods.⁴⁹ According to the Vienna Convention,⁵⁰ which contains rules governing treaty enforcement,⁵¹ treaties must be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”⁵² Furthermore, “[s]ince clarity and predictability are goals of the dispute settlement system,⁵³ WTO [dispute settlement] Panels have consistently said that the Vienna Convention is the tool they use to

2008), http://www.hsus.org/farm/news/ournews/prop2_california_110408.html; and subsequent similar bills in other states; *see, e.g., Maine, supra* note 27.

⁴⁵ “[M]ore than four-fifths of Americans believe there should be effective laws that protect farm animals against cruelty, and nearly three-quarters believe there ought to be federal inspections of farms to ensure humane treatment.” Lovvorn & Perry, *supra* note 10, at 153 (citing ZOGBY INT’L, NATIONWIDE VIEWS ON THE TREATMENT OF FARM ANIMALS 6 (2003), available at <http://civileats.com/wp-content/uploads/2009/09/AWT-final-poll-report-10-22.pdf>).

⁴⁶ *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW 102 (2008) (discussing how “[e]ach member of the WTO that undertakes an international trade obligation has a duty to transform and implement that obligation in its domestic legal order”). However, WTO agreements have been defined as “non-self-executing agreements,” which means they do not automatically take effect in U.S. law. *Id.* at 133, 137.

⁴⁷ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

⁴⁸ The WTO was created to “provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments.” Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, art. 2.

⁴⁹ *See id.*

⁵⁰ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

⁵¹ *See* CHOW & SCHOENBAUM, *supra* note 46, at 9.

⁵² Vienna Convention, *supra* note 50, art. 31(1).

⁵³ A WTO dispute settlement panel decides whether a nation has violated one of its obligations under the GATT. *See* CHOW & SCHOENBAUM, *supra* note 46, at 52–3. If so, the WTO recommends that the violating country “bring its non-conforming measure into compliance with the WTO.” *Id.* The WTO has also created an Appellate Body to review Panel decisions. *Id.* at 53.

interpret the GATT.”⁵⁴

Importantly, the GATT’s goal of reducing trade barriers through its various provisions, as interpreted by the Vienna Convention, could conflict with potential new animal welfare standards that lay out new expectations for both domestic and foreign producers. However, the fact that the U.S. and other countries are beginning to recognize and promote animal welfare standards,⁵⁵ suggests that as countries begin to modify their own measures at home, they will demand similar measures from their trading partners, as well.⁵⁶ In turn, this may place pressure on the WTO to accept animal welfare standards as complying with GATT trading obligations. Further, this trend suggests that animal welfare may begin to play a role in determining trade rules between countries, or at the very least, may begin to have a presence amidst trade discussions, concerns, and objectives.⁵⁷ However, when analyzing a dispute between nations, it is still unclear if a WTO dispute settlement panel would see a trade restriction such as a

⁵⁴ Peter C. Maki, Note, *Interpreting GATT Using the Vienna Convention on the Law of Treaties: A Method to Increase the Legitimacy of the Dispute Settlement System*, 9 MINN. J. GLOBAL TRADE 343, 352 (2000).

⁵⁵ An example worthy of recognition is the European Union (“EU”), which passed the EU Laying Hens Directive in 1999, requiring a ban on battery cages for all hen-laying eggs in the EU by 2012. Council Directive 99/74, 1999 O.J. (L 203/53), amended by Council Regulation 806/2003, 2003 O.J. (L 122) (EC); see also *2012 EU Battery Cage Ban Will Be Upheld*, COMPASSION IN WORLD FARMING (Jan. 10, 2008), http://www.ciwf.org.uk/news/laying_hens/cage_ban_will_be_upheld.aspx. Labour Member of the European Parliament (“MEP”) Mark Watts stated, “It is a myth that consumers won’t buy free-range eggs. The fact is that 89% of the British public believe [*sic*] keeping hens in small cages is cruel . . .” *EU Bans Battery Hen Cages*, BBC NEWS, (Jan. 28, 1999), http://news.bbc.co.uk/2/hi/uk_news/264607.stm.

⁵⁶ See, e.g., Gaverick Matheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade*, 70 LAW & CONTEMP. PROBS. 325, 349 (2007) (citing Committee on Agriculture Special Session, *European Communities Proposal: Animal Welfare and Trade in Agriculture*, G/AG/NG/W/19 (June 28, 2000), available at www.wto.org/english/tratop_e/agric_e/ngw19_e.doc) (“[A]nimal welfare standards . . . could be undermined if there is no way of ensuring that agricultural and food products produced to domestic animal welfare standards are not simply replaced by imports produced to lower standards”). The EU has begun to provide for animal welfare provisions in some of its free trade agreements. *Improving Animal Welfare: EU Action Plan*, POULTRY SITE (Jan. 2006), <http://www.thepoultrysite.com/articles/511/improving-animal-welfare-eu-action-plan>. Two examples of such agreements are between the EU and Canada, and the EU and Chile. *Id.* Free trade agreements are permissible under the GATT, Article XXIV.4. GATT, *supra* note 47, art. XXIV.4.

⁵⁷ See, e.g., USDA FOREIGN AGRIC. SERV., GAIN REPORT, EU HOSTS GLOBAL CONFERENCE ON TRADE AND FARM ANIMAL WELFARE (2009), available at <http://www.fas.usda.gov/gainfiles/200902/146327292.pdf> (discussing the January 2009 European Commission’s conference regarding international trade and farm animal welfare).

countrywide ban on the production and importation of battery cage eggs, as a violation of WTO obligations. The WTO should accept and recognize such a restriction as complying with the GATT, due to the fact that the purpose of such a measure coincides with the plain meaning and purpose of certain GATT provisions.

Part I of this Note analyzes the U.S.'s trade obligations under the GATT. Part II discusses the potential ability of various GATT provisions to support a trade measure banning battery cage eggs. Part III discusses the U.S.'s potential ability to create such an animal welfare provision, while upholding its obligations in the Agreements annexed to the GATT. The Note concludes that an appropriately tailored animal welfare measure banning battery cages for hens should be able to survive under the GATT and its annexed agreements.

I. CURRENT LAY OF THE LAND: AN ANALYSIS OF TWO WTO TRADING OBLIGATIONS

While seemingly removed from farm animal welfare issues, trade agreements have the ability to bring about significant animal welfare reform in the agricultural industry.⁵⁸ Currently, the WTO can be seen as both a friend and a foe to initiatives seeking to improve animal welfare in farming practices.⁵⁹ The GATT contains many obligations for member countries that restrict the way that products can be differentiated. For example, under Article I(1),⁶⁰ the Most-Favored

⁵⁸ See DAVID S. FAVRE, *Agricultural Animals*, in *ANIMAL LAW: WELFARE, INTERESTS, AND RIGHTS* 287, 315 (2008). The international trade problems surrounding a country's decision to restrict imports that do not meet the country's animal welfare standards, have already been contemplated. See Matheny & Leahy, *supra* note 56. However, their argument focuses more on the potential for change through consumer and retailer campaigns. *Id.*

⁵⁹ Critics have focused on the WTO's support of "industrial farming by virtue of reducing trade barriers for large farms. On the other hand . . . the WTO is focused on the eventual eradication of subsidies that make these horrific factory farms competitive with traditional animal farming, or indeed enable factory farms to continue operating at all." Kyle Ash, *Why "Managing" Biodiversity Will Fail: An Alternative Approach to Sustainable Exploitation for International Law*, 13 *ANIMAL L.* 209, 221 (2007).

⁶⁰ GATT, *supra* note 47, art. I.1.

Nation (“MFN”) clause, and Article III(1),⁶¹ the National Treatment clause, a WTO member cannot treat “like” products⁶² from other WTO member countries less favorably than the same products from any other country,⁶³ or less favorably than its own domestic products.⁶⁴ These obligations limit WTO members’ abilities to create trade restrictions on battery cage eggs.

Article I’s MFN principle mandates that “any advantage, favour, privilege or immunity” granted by a WTO member to another country’s product “shall be accorded immediately and unconditionally” by that WTO member to any other WTO member’s like product.⁶⁵ In essence, instead of permitting one country to bestow special treatment on another country, MFN requires equal treatment for all WTO members.⁶⁶ Article III contains the National Treatment principle, which mandates that internal charges cannot be applied in a way “so as to afford protection to domestic production.”⁶⁷ It is important to emphasize that in both MFN and National Treatment, the principles only prohibit discrimination against “like” products.⁶⁸ While at first glance, it may appear that the differing manners in which products are produced (such as eggs from battery cages and eggs from cage-free facilities) change them so that they are not “like” one another,

⁶¹ *Id.* art. III.1.

⁶² An examination of whether products are “like” products is conducted case-by-case with several considerations, such as “the product’s end-uses in a given market; consumers’ tastes and habits, which change from country to country; the product’s properties, nature, and quality.” Report of the Working Party on Border Tax Adjustments, ¶ 18, L/3464 (Dec. 2. 1970).

⁶³ GATT, *supra* note 47, art. I.1.

⁶⁴ *Id.* art. III.1.

⁶⁵ *Id.* art. I.1.

⁶⁶ *See, e.g.* MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 143 (2003).

⁶⁷ GATT, *supra* note 47, art. III.1. Through Article III, MFN also incorporates equal treatment for “internal taxes and other internal charges.” *Id.* art. III.2.

⁶⁸ *See, e.g.* MATSUSHITA ET AL., *supra* note 66, at 150. What constitutes “like” products under the MFN principle is deemed case-by-case, but the analysis can include looking at the products’ tariff classifications, product end uses, physical characteristics, and consumer tastes. *See id.* at 150–1. What constitutes “like” products under the National Treatment principle is deemed case-by-case, and it can include the same analyses as MFN, as well as whether the two products are “directly competitive or substitutable product[s].” GATT, *supra* note 47, art. Annex I, Ad Article III.2; *see also id.* arts. I.1, III.2, III.4; MATSUSHITA ET AL., *supra* note 66, at 159–160.

these differences are considered to be “processes and production methods” (“PPMs”),⁶⁹ which generally do not change a product’s likeness to another product.⁷⁰

In *The World Trade Organisation Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare*,⁷¹ Peter Stevenson cites two WTO Panel reports, the *Tuna-Dolphin* cases,⁷² that demonstrate how the WTO has held that two commodities, (in this case, tuna caught in seine nets which cause high mortality rates amongst dolphins (“non-dolphin-safe nets”), and tuna caught in nets designed to reduce dolphin mortality rates (“dolphin-safe nets”)), are the same product, and cannot be distinguished from one another based on the way they are caught.⁷³ Specifically, the first Panel held that Article III requires “a comparison of the treatment of imported tuna *as a product* with that of domestic tuna *as a product*. Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product.”⁷⁴ GATT Panel reports like those from the *Tuna/Dolphin* cases⁷⁵ articulate that a country cannot take into account the way that a product is produced when determining if it is “like” another product,⁷⁶

⁶⁹ See MATSUSHITA ET AL., *supra* note 66, at 461.

⁷⁰ See, e.g., *id.* “Some PPMs are related directly to the characteristics of the products concerned. For example, pesticides used on food crops produce residues on food products . . . Other PPMs, however, are not reflected in the characteristics of the associated product . . . [and] probably cannot be justified under [the other WTO Agreements].” *Id.* at 461–2; see also FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, DEVELOPING ANIMAL WELFARE: THE OPPORTUNITIES FOR TRADE IN HIGH WELFARE PRODUCTS FROM DEVELOPING COUNTRIES (2005), available at http://www.fao.org/fileadmin/user_upload/animalwelfare/Developing%20country%20report.pdf (discussing how almost all animal welfare concerns stem from manners of producing a product, which cannot be seen in the final product, and how “[i]t is generally presumed that product distinctions based on such PPMs conflict with Article III of the . . . GATT[.]”).

⁷¹ Peter Stevenson, *The World Trade Organisation Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare*, 8 ANIMAL L. 107 (2002).

⁷² *Id.* at 111 (citing Panel Report, *United States – Restrictions on Imports of Tuna*, WT/DS 21/R (Sept. 3, 1991) [hereinafter *Tuna-Dolphin I*]; Panel Report, *United States – Restrictions on Imports of Tuna*, WT/DS29/R (Jun. 16, 1994) [hereinafter *Tuna-Dolphin II*]). Neither panel report was adopted by the GATT Council. Stevenson, *supra* note 71, at 111, n. 24, 26.

⁷³ See Stevenson, *supra* note 71, at 114.

⁷⁴ *Id.* (citing *Tuna-Dolphin I*, *supra* note 72, ¶ 5.15).

⁷⁵ *Tuna-Dolphin I*, *supra* note 72; *Tuna-Dolphin II*, *supra* note 72.

⁷⁶ See Stevenson, *supra* note 71, at 110; see also Catherine Jean Archibald, *Forbidden By the WTO? Discrimination Against A Product When Its Creation Causes Harm to the Environment or Animal Welfare*, 48 NAT. RESOURCES J.

because the production method does not change the end product.⁷⁷ Furthermore, whether or not a product is “like” another product is “fundamentally, a determination about the nature and extent of a competitive relationship between and among products.”⁷⁸ For example, tuna products caught in non-dolphin-safe nets are seen as directly competing in the marketplace with tuna products that are caught in dolphin-safe nets. Therefore, the WTO reasons that despite having different PPMs, these tuna products are “like” products.⁷⁹ In fact, no GATT Panel has thus far allowed a country to distinguish “like” products based on differing PPMs (with the exception of differing PPMs that can cause severe health risks).⁸⁰

However, there is a strong argument that eggs produced by battery cage hens and eggs produced by cage-free hens undergo such vastly different production methods, that they should not be considered “like” products.⁸¹ The analysis of whether two products are “like” one another is dependent—at least in part—upon consumer preferences,⁸² since “consumers’ tastes and habits are one of the key elements in the competitive relationship between products in the marketplace.”⁸³ Importantly, consumers who buy cage-free eggs do not see these two products as “like” one another,⁸⁴ since they make the conscious decision to buy one product based on its

15, 17 (2008) (discussing how the “Tuna/Dolphin I dispute panel held that an environmentally and animal-welfare motivated PPM distinction was forbidden by the world trading regime”).

⁷⁷ See, e.g., *Tuna-Dolphin I*, *supra* note 72, ¶ 5.15.

⁷⁸ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 99, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *Asbestos*].

⁷⁹ *Tuna-Dolphin I*, *supra* note 72, ¶ 5.15.

⁸⁰ See generally *Asbestos*, *supra* note 78.

⁸¹ See Stevenson, *supra* note 71, at 111.

⁸² See MATSUSHITA ET AL., *supra* note 66, at 151.

⁸³ Stevenson, *supra* note 71, at 117; see also *Asbestos*, *supra* note 78, ¶ 117.

⁸⁴ See Peter Singer & Jim Mason, *Introduction: Food and Ethics*, in *THE WAY WE EAT: WHY OUR FOOD CHOICES MATTER* 4 (2006) (discussing various reasons, for example, why consumers choose to purchase organic food, from “an ethical concern for the environment to a desire to avoid ingesting pesticides and the conviction that organic food tastes better than food from conventional sources”); see also Stevenson, *supra* note 71, at 111.

more “humane” production method.⁸⁵ Furthermore, if hens are fed grass at pasture (as opposed to a seed diet in battery cages) they arguably produce a healthier egg.⁸⁶ Since consumers treat these two products (battery cage and cage-free eggs) differently, the WTO should follow suit.

However, past Panel decisions have given no indication that future Panels will consider PPMs as affecting products’ likeness to one another.⁸⁷

II. AN ANALYSIS OF THE GATT AGREEMENT AND ANIMAL WELFARE MEASURES UNDER THE EXCEPTIONS ARTICLE

Historically, the GATT treated measures made in pursuit of animal welfare goals unfavorably;⁸⁸ however, some GATT provisions actually indicate that such measures should be protected.⁸⁹ Even if a country’s trade measure violates a trading obligation, such as MFN or National Treatment, it may be upheld as a permissible exception under GATT Article XX,⁹⁰ arguably one of the most important Articles in the GATT.⁹¹ This exceptions provision allows, in

⁸⁵ See Archibald, *supra* note 76, at 45–46 (discussing how “the words ‘like products’ should not refer to two products whose production methods result in vastly different ‘ecological footprints’”); see also Stevenson, *supra* note 71, at 120–121 (holding that in the future, the WTO could rule “that, despite being physically identical or similar, two products are not ‘like’ each other because a significant number of consumers in fact view them as being different [I]n an increasing number of countries . . . consumers distinguish between products derived from cruel practice and those coming from more humane practices”); see also Matheny & Leahy, *supra* note 56, at 350.

⁸⁶ See MICHAEL POLLAN, *IN DEFENSE OF FOOD* 167–168 (2008). Pollan argues that for most animals who are fed grass, the result is animal products with “healthier fats . . . as well as . . . higher levels of vitamins and antioxidants . . . [Though grass-fed and seed-fed products look the same,] they are for all intents and purposes two completely different foods.” *Id.* Importantly, Pollan notes that “free-range” hens do not necessarily have access to fresh grass. *Id.* at 168.

⁸⁷ See, e.g., *Tuna-Dolphin I*, *supra* note 72, ¶ 5.15.

⁸⁸ See Stevenson, *supra* note 71, at 109 (discussing how GATT rules make it difficult for WTO members to introduce animal welfare measures, because “under GATT rules the E.U. cannot prohibit the importation of meat derived from animals reared in non-E.U. countries [in cruel manners] GATT rules act as a powerful disincentive to the E.U. to prohibit the system within its own territory”).

⁸⁹ See GATT, *supra* note 47, art. XX. *But see* Matheny & Leahy, *supra* note 56, at 325 (arguing that “[a]lthough recognition in trade agreements and restrictions on sale could help to protect animal welfare, they may rarely be politically feasible”).

⁹⁰ GATT, *supra* note 47, art. XX.

⁹¹ See, e.g., Hal S. Shapiro, *The Rules That Swallowed the Exceptions: The WTO SPS Agreement and Its Relationship to GATT Articles XX and XXI: The Threat of the EU-GMO Dispute*, 24 ARIZ. J. INT’L & COMP. LAW 199, 200 (2007) (discussing how this exception is linked to “some of the most powerful political and policy debates connected to the WTO—i.e., whether the WTO is sufficiently sensitive to labor, environmental, human rights and other issues”).

“certain circumstances, legitimate public policy considerations other than trade liberalisation to take precedence over the free trade requirements of the main GATT articles.”⁹² When analyzing a country’s trade measure under Article XX, the WTO must first look at the particular provision of the Article, to see if the measure appropriately fits under the provision’s described exception;⁹³ then, the WTO analyzes the measure under the “chapeau”⁹⁴ of Article XX to ensure that the measure is not “arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade.”⁹⁵ The chapeau is important for its role in helping to “rein in national abuse of the exceptions.”⁹⁶ There are three different provisions within Article XX that could potentially be used to protect an animal welfare measure from violating the GATT.

A. Article XX(g): Exception for Exhaustible Natural Resources

Article XX(g) is most likely the weakest of the three potential provisions to support a battery cage ban. This provision allows WTO members to enact measures applying to both foreign and domestic products, in order to conserve “exhaustible natural resources.”⁹⁷ However, it has been analyzed by GATT Panels and the Appellate Body in the *Shrimp/Turtle* cases⁹⁸ in a

⁹² Stevenson, *supra* note 71, at 128. “Increased trade liberalization may be the goal of the WTO, but the organization understands that competing interests should be recognized.” Colm Patrick McInerney, *From Shrimps and Dolphins to Retreaded Tyres: An Overview of the World Trade Organization Disputes, Discussing Exceptions to Trading Rules*, 22 N.Y. INT’L L. REV. 153, 158–9 (Winter 2009).

⁹³ See, e.g., *Asbestos*, *supra* note 78, ¶ 155.

⁹⁴ See, e.g., Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 147, 150, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp/Turtle II*]. The “chapeau” is “[t]he introductory section of Article XX.” CHOW & SCHOENBAUM, *supra* note 46, at 491.

⁹⁵ GATT, *supra* note 47, art. XX.

⁹⁶ Sanford Gaines, *The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT’L ECON. L. 739, 851 (2001).

⁹⁷ GATT, *supra* note 47, art. XX(g).

⁹⁸ See Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (May 15, 1998) [hereinafter *Shrimp/Turtle I*]; *Shrimp/Turtle II*, *supra* note 94; Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 by Malaysia*, WT/DS58/AB/RW (June 15, 2001) [hereinafter *Shrimp/Turtle Malaysia I*].

way that is favourable for only some animal welfare measures.⁹⁹ In *Shrimp/Turtle I*, the Panel recounts how the U.S. passed a regulation in 1987¹⁰⁰ that required shrimp trawling fishermen to use certain methods to decrease turtle mortality caused by traditional shrimp trawling.¹⁰¹ In 1989, the U.S. passed Public Law 609,¹⁰² which prohibited the importation of shrimp products that had been harvested with fishing technology that adversely affected sea turtles.¹⁰³ Malaysia, India, Pakistan, and Thailand challenged this law before the WTO,¹⁰⁴ and after an appeal, the Appellate Body found that the measure did not fit within any Article XX exception, due to the fact that it created “arbitrary or unjustified discrimination.”¹⁰⁵ Consequently, the U.S. changed its law to mandate shrimping in a manner that was “comparable in effectiveness” (but not exactly the same) as that of the U.S.¹⁰⁶ Malaysia again brought an action before the WTO in *Shrimp/Turtle Malaysia I*, but the Panel and subsequent Appellate Body (*Shrimp/Turtle Malaysia II*) found the

⁹⁹ See, e.g., *Shrimp/Turtle Malaysia I*, *supra* note 98.

¹⁰⁰ *Shrimp/Turtle I*, *supra* note 98, ¶ 2.6; see also 50 C.F.R. §§ 217, 222, 227.

¹⁰¹ The regulation required shrimp trawling fishermen to use Turtle Excluder Devices (“TEDs”) or tow time restrictions “in specified areas where there was a significant mortality of sea turtles.” *Shrimp/Turtle I*, *supra* note 98, ¶ 2.6. “A TED is a grid trapdoor installed inside a [shrimp] trawling net . . . to allow shrimp to pass to the back of the net while directing sea turtles . . . out of the net.” *Id.* n. 613. The WTO Panel noted that all marine turtles (which are migratory creatures), were considered to be endangered species by the Convention on International Trade in Endangered Species. *Id.* ¶¶ 2.3, 3.9(d).

¹⁰² Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101–162 (codified at 16 U.S.C. § 1537 (1989)); see also *Shrimp/Turtle I*, *supra* note 98, ¶ 2.7. Public Law 609 did permit shrimp trawling measures taken by a nation if the nation had a comparable regulatory program and incidental take rate to the U.S., or if it had a fishing environment that did not “not pose a threat of the incidental taking of sea turtles in the course of shrimp harvesting.” *Shrimp/Turtle II*, *supra* note 94, ¶ 3. The U.S. subsequently passed guidelines in 1991 and 1993 which assessed how foreign regulatory programs compared to those of the U.S. *Id.* ¶¶ 3–4. After the US Court of International Trade (“CIT”) found the guidelines to be “contrary to law,” the U.S. modified them in 1996. *Shrimp/Turtle I*, *supra* note 98, ¶¶ 2.10, 2.11.

¹⁰³ 16 U.S.C. § 1537 (1989).

¹⁰⁴ The countries argued that the law was not covered by Article XX(b) or XX(g) exceptions, and that the law effectively “nullified or impaired benefits” owed to the countries. *Shrimp/Turtle I*, *supra* note 98, ¶ 3.1.

¹⁰⁵ *Shrimp/Turtle I*, *supra* note 98, ¶ 5.394.

¹⁰⁶ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 5, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter *Shrimp/Turtle Malaysia II*]; see also Archibald, *supra* note 76, at 46.

revised U.S. law to be non-discriminatory.¹⁰⁷ This holding significantly deviated from the previous cases in that it allowed the U.S. to restrict trade based on the objective of protecting a natural resource,¹⁰⁸ albeit not in an unjustifiable or arbitrarily discriminatory manner.¹⁰⁹

Some argue that the *Shrimp/Turtle Malaysia II* decision should extend to future cases and the WTO should “interpret any ambiguities in the regime in a way that is favourable to protecting the environment and/or animal welfare.”¹¹⁰ The impact of *Shrimp/Turtle Malaysia II* should not be understated; it was the first time in GATT and WTO history that a “unilateral extraterritorial national measure was upheld on environmental grounds.”¹¹¹ The *Shrimp/Turtle* decisions demonstrate that a country can restrict or ban foreign products to conserve “exhaustible natural resources”¹¹² if the restriction is concurrent with similar domestic restrictions,¹¹³ and indicates that a country may be able to exert some control over PPMs.¹¹⁴

¹⁰⁷ However, the Appellate Body held that the U.S. needed to continue “ongoing serious, good faith efforts to reach a multilateral agreement” with other nations regarding how to protect the turtles. *Shrimp/Turtle Malaysia II*, *supra* note 106, ¶ 152; *see also* Archibald, *supra* note 76, at 46.

¹⁰⁸ Archibald, *supra* note 76, at 47–48.

¹⁰⁹ *Shrimp/Turtle Malaysia II*, *supra* note 106; *see also* Archibald, *supra* note 76, at 48. Archibald stresses that if a country wants to create a measure restricting trade for the conservation of a natural resource, the country should ensure that the standards that the foreign country has to meet are “no harsher” than the domestic standards; that the country “attempt[s] to start . . . negotiations . . . ha[s] full transparency of the decision-making process . . . [and has flexible standards] so that a country . . . [can] meet the environmental or animal welfare goal through different methods than those used by the importing and restricting country.” *Id.*

¹¹⁰ Archibald, *supra* note 76, at 18.

¹¹¹ *Id.* at 47; *see also* Andres Rueda, *Shrimp and Turtles: What About Environmental Embargoes Under NAFTA?*, in RECONCILING ENVIRONMENT AND TRADE 519, 537 (Edith Brown Weiss & John H. Jackson, eds., 2001) (discussing how environmentally, “the Shrimp-Turtle decision is almost unprecedented. It allows for the imposition of unilateral sanctions for extraterritorial, process-related reasons, provided that certain basic conditions are met”).

¹¹² GATT, *supra* note 47, art. XX(g).

¹¹³ Archibald, *supra* note 76, at 48. *But see* Gaines, *supra* note 96, at 804 (“By disqualifying under the Article XX chapeau any measure that has the result of applying the economic pressure of a trade restriction on other governments unless they change their resource conservation policies, the Appellate Body effectively nullified Article XX(g)”).

¹¹⁴ *See Shrimp/Turtle Malaysia I*, *supra* note 98. For a criticism of the two *Shrimp/Turtle* decisions and the idea that “the latest [*Shrimp/Turtle* decisions] establish a WTO rule that imposes extraordinary preconditions on member governments before they resort to Article XX for environmental measures,” *see* Gaines, *supra* note 96, at 745.

However, the decision’s usefulness in relation to a battery cage egg ban may be limited. A dispute settlement panel would be unlikely to extend the *Shrimp/Turtle Malaysia II* holding, which affected an endangered species,¹¹⁵ to farm animals such as egg-laying hens that eventually will be killed for food.¹¹⁶ The fact that hens are nowhere near species exhaustion¹¹⁷ suggests that a dispute settlement panel may not interpret this provision to protect an animal welfare measure for cage-free eggs. However, the “exhaustible natural resources” provision¹¹⁸ applies to more than just endangered species. In fact, in compliance with the Vienna Convention’s treaty interpretation method, according to the ordinary meaning of the treaty’s words,¹¹⁹ a farm animal like a hen can be considered a “natural resource.”¹²⁰ Furthermore, under XX(g), the measure does not need to be “necessary” for conserving the natural resource, as is the case for some other Article XX measures;¹²¹ it must simply “relate to” conserving the natural resource.¹²² In sum, XX(g) could still be an option, but other provisions may provide stronger support.

B. Article XX(b): Exceptions for Human, Animal, and Plant Health

Unlike Article XX(g), Article XX(b) may be more successfully used to uphold a trade measure differentiating between farm products that are produced more humanely than others.

¹¹⁵ *Shrimp/Turtle Malaysia II*, *supra* note 106.

¹¹⁶ Compare Archibald, *supra* note 76, at 50 (noting that the *Shrimp/Turtle* decisions “leave open the question as to whether a measure that protects the welfare of a non-endangered species would receive as much protection as a measure that protects an endangered species”), with Stevenson, *supra* note 71, at 141 (“One must be careful not to extrapolate too far from the latest Shrimp-Turtle decisions as that case involves an endangered species, seen by some as more worthy of protection than non-endangered animals”).

¹¹⁷ See Sullivan & Wolfson, *supra* note 11 (“It is hard to comprehend the number of animals killed for food in the United States. More than ten billion animals (excluding fish) die every year”).

¹¹⁸ GATT, *supra* note 47, art. XX(g).

¹¹⁹ Vienna Convention, *supra* note 50, art. 31(1).

¹²⁰ “Natural resource” is defined as “[a] material source of wealth, such as timber, fresh water, or a mineral deposit, that occurs in a natural state and has economic value.” *Renewable Energy Program: Definitions*, BUREAU OF OCEAN ENERGY MGMT., REG., AND ENFORCEMENT: OFFSHORE ENERGY & MINERALS MGMT., <http://www.boemre.gov/offshore/RenewableEnergy/Definitions.htm> (last visited Sept. 9, 2010).

¹²¹ See, e.g., GATT *supra* note 47, arts. XX(a), XX(b).

¹²² Stevenson, *supra* note 71, at 127; GATT, *supra* note 47, art. XX(g).

This provision allows WTO members to enact measures “necessary to protect . . . animal . . . health.”¹²³ It is unclear whether a dispute settlement panel would interpret a measure banning battery cages for hens (in order to protect their welfare) as related to animal health; “the argument that animal health includes animal welfare . . . has not yet been fully established or accepted.”¹²⁴ Additionally, previous GATT Panels have seen Article XX(b) as relating solely to “animal life and health” and not animal welfare.¹²⁵ This ambiguity, as to whether the WTO intended animal “health” to encompass animal “welfare,” could lead some critics to allege that this provision was not meant to protect the welfare of *all* animals. This sentiment is illustrated by the fact that some countries, like the U.S., have federal laws purporting to protect the welfare of all animals, but these laws specifically exempt farmed animals from their protection.¹²⁶ Traditionally, the WTO limits its recognition of animal health provisions to those regarding disease prevention and food product safety for humans.¹²⁷

¹²³ GATT, *supra* note 47, art. XX(b).

¹²⁴ FAVRE, *supra* note 58. However, at least one international body believes that there is a link between animal health and animal welfare. See *The OIE’s Objectives and Achievements in Animal Welfare*, WORLD ORG. FOR ANIMAL HEALTH (Sept. 9, 2009), http://www.oie.int/Eng/bien_etre/en_introduction.htm [hereinafter *The OIE’s Objectives*].

¹²⁵ Edward M. Thomas, Note, *Playing Chicken at the WTO: Defending an Animal Welfare-Based Trade Restriction Under GATT’s Moral Exception*, 34 B.C. ENVTL. AFF. L. REV. 605, 618 (2007); see also Matheny & Leahy, *supra* note 56, at 350.

¹²⁶ See 7 U.S.C. § 2132(g)(3) (2002):

. . . (g) The term “animal” means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal . . . but such term excludes . . .

. . .

(3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber”

See also Mariann Sullivan & David J. Wolfson, *What’s Good for the Goose...The Israeli Supreme Court, Foie Gras, and the Future of Farmed Animals in the United States*, 70 LAW & CONTEMP. PROBS. 139, 139 (2007) (discussing how “laws [in the U.S.] that govern the welfare of these animals have been altered to exempt cruel common practices or, when it comes to such practices, [they] are simply ignored”).

¹²⁷ Thomas, *supra* note 125, at 618; see also Matheny & Leahy, *supra* note 56, at 350. In his article, Peter Stevenson does make the argument, though, that Article XX(b) should be expanded so that measures can be adopted for animal welfare. Stevenson, *supra* note 71, at 135–6.

Additionally, it is unclear if a panel would interpret Article XX(b) as permitting Country A to enact a trade measure that would protect the welfare of hens in Country B (based on the idea that the eggs will eventually be imported into Country A).¹²⁸ In *Tuna-Dolphin I*, the Panel held that Article XX(b) should be interpreted to allow a country to protect health only inside its own borders, because if a country was allowed to protect health outside of its borders, “each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.”¹²⁹ Further, a measure protected by Article XX(b) must be deemed “necessary”¹³⁰ in order to be upheld—this is a difficult standard to meet, since “any number of hypothetical policies could fulfill a social objective without trade restrictions, even if such policies are unrealistic.”¹³¹

However, regardless of these problems, a future Panel should find that Article XX(b) can uphold a battery cage ban. While “[w]elfare” is a broader term than “health,”¹³² the International Office of Epizootics (“OIE”)¹³³ sets international standards for The Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”),¹³⁴ which is annexed

¹²⁸ “One major problem with Article XX is the ‘rule’ on extra-territoriality. The general position is that a WTO member nation may act to protect animals within its own territory but, generally, not those located outside its territorial jurisdiction . . . [however, this position is not] clear-cut and absolute.” Stevenson, *supra* note 71, at 122.

¹²⁹ *Tuna-Dolphin I*, *supra* note 72, ¶ 5.27; *see also* Archibald, *supra* note 76, at 32.

¹³⁰ Stevenson, *supra* note 71, at 135 (citing Panel Report on *United States -- Section 337 of the Tariff Act of 1930*, ¶ 5.26, (Nov. 7, 1989), GATT B.I.S.D. (36th Supp.) (1990)).

¹³¹ Matheny & Leahy, *supra* note 56, at 350.

¹³² Stevenson, *supra* note 71, at 136.

¹³³ *The World Organisation for Animal Health (OIE)*, WORLD ORG. FOR ANIMAL HEALTH, http://www.oie.int/eng/OIE/en_about.htm?e1d1 (last visited Oct. 5, 2010).

¹³⁴ *See* Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1165 (1994) [hereinafter SPS].

to the GATT (and discussed in Part III of this Note),¹³⁵ and has deemed the terms to be interconnected.¹³⁶ As will be discussed, the connection between Article XX(b) and the SPS Agreement,¹³⁷ as well as the current enhancements being made to the SPS Agreement, strengthen the case that animal welfare is related to animal health (and thus an animal welfare measure should be protected by Article XX(b)). Additionally, research has been conducted to show that battery cages prohibit hens from engaging in their normal behaviors and cause them to have health and psychological problems.¹³⁸ Also, based on the ordinary meaning of Article XX(b), there is no indication of an intention to only allow a country to protect animal health within its borders,¹³⁹ and throughout history, countries have enacted trade measures which have the effect of controlling production in other countries.¹⁴⁰ Finally, a battery cage ban is “necessary” to protect animal welfare, since the battery cage production method itself has a detrimental effect on hens.¹⁴¹

¹³⁵ See discussion *infra* Part III.A.

¹³⁶ See, e.g., WORLD ORG. FOR ANIMAL HEALTH, TERRESTRIAL ANIMAL HEALTH CODE §7.1.2.1 (2009), available at http://www.oie.int/eng/normes/mcode/en_chapitre_1.7.1.htm [hereinafter TERRESTRIAL ANIMAL HEALTH CODE] (the OIE recognizes that “there is a critical relationship between animal health and animal welfare”).

¹³⁷ See SPS, *supra* note 134, Annex A(1).

¹³⁸ See, e.g., SARAH SHIELDS & IAN J.H. DUNCAN, AN HSUS REPORT: A COMPARISON OF THE WELFARE OF HENS IN BATTERY CAGES AND ALTERNATIVE SYSTEMS, HUMANE SOC’Y OF THE U.S. 1, 4, available at <http://www.hsus.org/web-files/PDF/farm/hsus-a-comparison-of-the-welfare-of-hens-in-battery-cages-and-alternative-systems.pdf>:

Cages prevent hens from performing the bulk of their natural behavior, including nesting, perching, dustbathing, scratching, foraging, exercising, running, jumping, flying, stretching, wing-flapping, and freely walking. Cages also lead to severe disuse osteoporosis due to lack of exercise. Alternative, cage-free systems allow hens to move freely through their environment and engage in most of the behavior thwarted by battery-system confinement . . . all caged hens are permanently denied the opportunity to express most of their basic behavior . . . [t]he science is clear that this deprivation represents a serious inherent welfare disadvantage compared to any cage-free production system . . . Barren, restrictive environments are detrimental to the psychological well-being of an animal. *Id.*

See also Stevenson, *supra* note 71, at 136.

¹³⁹ See, e.g., Archibald, *supra* note 76, at 32 (arguing that “[t]he plain reading of [Article XX] sets no limits and instead lets each country decide which life or health it wishes to protect”); see also GATT, *supra* note 47, art. XX(b).

¹⁴⁰ See Archibald, *supra* note 76, at 32 (discussing how throughout history, before GATT negotiations, “countries were using trade bans to protect the environment . . . beyond their borders . . .”).

¹⁴¹ See, e.g., Shields & Duncan, *supra* note 138.

A dispute settlement panel may give great weight to the monetary burden that such a production change would place on another country, particularly a developing country. Two disputes brought before the Appellate Body, one using Article XX(b) successfully as a defense¹⁴² and another using Article XX(g) successfully as a defense,¹⁴³ demonstrate that the WTO will seriously consider the implications of a trade restriction on a developing country, even if it is otherwise appropriate under Article XX. In both cases, the Appellate Body considered the greater difficulty that developing countries may have in implementing animal welfare trade measures, but ultimately, concluded that the trade measures could succeed, as long as they were not too constrictive.¹⁴⁴

With a battery cage ban, the alleged “costs” may not be as constrictive as critics assume. For example, developing countries may be better equipped to implement animal welfare standards than even some developed countries, due to the fact that more humane production methods are generally more “labor-intensive”¹⁴⁵ and developing countries tend to have cheaper labor costs than developed countries.¹⁴⁶ If the U.S. was to enact a trade measure that only sanctioned certain types of egg production for animal welfare-related reasons, it would need to acknowledge developing countries’ abilities to implement and enforce such a measure, and

¹⁴² In *Brazil – Measures Affecting Imports of Retreaded Tyres*, the Appellate Body “stated that when a complaining member presents an alternative measure, the responding member must [sic] have the capabilities to enact it.” McInerney, *supra* note 92, at 200; *see also* Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 156, WT/DS332/AB/R (Dec. 3, 2007).

¹⁴³ In *Shrimp/Turtle Malaysia II*, the Appellate Body states that a country’s trade measure that is protected under Article XX “should take account of differing technology levels of other members trying to meet the standard and should provide sufficient flexibility to do so.” McInerney, *supra* note 92, at 199–200; *see also Shrimp/Turtle Malaysia II*, *supra* note 106, ¶ 149.

¹⁴⁴ *See generally Brazil – Measures Affecting Imports of Retreaded Tyres*, *supra* note 142; *Shrimp/Turtle Malaysia II*, *supra* note 106.

¹⁴⁵ Matheny & Leahy, *supra* note 56, at 353 (discussing how “less-abusive production methods tend to be more labor-intensive while [common intensive farming] systems are more capital-intensive).

¹⁴⁶ *Id.* (discussing how cheaper labor could give developing countries “a comparative advantage in satisfying the demand for welfare-enhanced meat, eggs, and milk”).

consequently would need to be flexible due to these differing abilities. If the U.S. created a battery cage ban with these considerations in mind, Article XX(b) should be able to defend such a measure.

C. Article XX(a): The “Public Morals” Exception

Article XX(a), which allows WTO members to create measures “necessary to protect public morals,”¹⁴⁷ should also support a battery cage egg ban. While this provision has only been used on rare occasions,¹⁴⁸ trade restrictions in favor of more humane practices may be covered¹⁴⁹ as a result of society’s views on the need to treat animals humanely.¹⁵⁰ In fact, the public morals provision may soon be invoked with regard to two recent requests for WTO dispute settlement consultations launched by Canada and Norway (non-EU members)¹⁵¹ against the EU for its ban on imported seal products, which began in August 2010.¹⁵² Canada and Norway allege that the ban violates the EU’s trade obligations under the WTO.¹⁵³ The EU defends its ban based on public outrage over the cruelty associated with seal slaughtering practices,¹⁵⁴ in his expert

¹⁴⁷ GATT, *supra* note 47, art. XX(a).

¹⁴⁸ See, e.g., Shapiro, *supra* note 91, at 215.

¹⁴⁹ See, e.g., Gaines, *supra* note 96, at 799 (discussing how Article XX(a) may allow “a country to protect its ‘public morals’ against the effects of trade—most likely imported products—that undercut its own moral preferences within its borders . . .”).

¹⁵⁰ See, e.g., Joseph Vining, *Animal Cruelty Laws and Factory Farming*, 106 MICH. L. REV. FIRST IMPRESSIONS 123, 123 (2008) (discussing the U.S.’s “background public policy of humane treatment of sentient creatures . . .”).

¹⁵¹ See *European Commission External Relations: Norway*, EUROPEAN COMM’N, http://ec.europa.eu/external_relations/norway/index_en.htm (last visited Sept. 9, 2010).

¹⁵² See *Canada, Norway Launch WTO Complaint Over EU Seal Ban*, INT’L CTR. FOR TRADE AND SUSTAINABLE DEV. (Nov. 13, 2009), available at <http://ictsd.org/i/news/biores/59391/> [hereinafter *Canada, Norway*]. The ban prohibits trade with “commercial sealing operations,” but exempts non-commercial trading in Inuit communities. *Id.*

¹⁵³ *Id.* Presumably, Canada and Norway will challenge the ban based on GATT Article XI, which prohibits restrictions on a country’s number of imports. See Robert Galantucci, *Compassionate Consumerism Within the GATT Regime: Can Belgium’s Ban on Seal Product Imports Be Justified Under Article XX?*, 39 CAL W. INT’L L. J. 281, 286 (2009).

¹⁵⁴ See, e.g., *EU Ban Looms Over Seal Products*, BBC NEWS EUROPE (May 5, 2009), <http://news.bbc.co.uk/2/hi/europe/8033498.stm> (quoting MEP Arlene McCarthy as saying that the majority of Europeans “are horrified by the cruel clubbing to death of seals and this law will finally put an end to the cruel cull.” Furthermore, “anti-hunt campaigners say some seals are skinned while still conscious. Hunters typically shoot the seals with rifles or bludgeon them to death with spiked clubs”).

submission to the European Parliament’s Committee on the Internal Market and Consumer Protection, Jacques Bourgeois said, “it is fairly easy to demonstrate that the inhumane killing and skinning of seals is a matter of [European] public morality.”¹⁵⁵ However, to meet XX(a)’s standards, the EU’s ban must also be “necessary” to the protection of public morals and must meet the chapeau’s requirements.¹⁵⁶ Humane Society International (“HSI”) alleges that a total ban on seal products meets the “necessary” requirement because no alternative measures will produce the same desired effect,¹⁵⁷ that the ban meets the requirements of the chapeau since it applies to all seal products (and does not discriminate against one country’s products over another’s), and that it is not a disguised restriction on trade because it does not favor the EU’s seal products over foreign products.¹⁵⁸

¹⁵⁵ JACQUES BOURGEOIS, WRITTEN EXPERT SUBMISSION TO THE COMMITTEE ON THE INTERNAL MARKET AND CONSUMER PROTECTION OF THE EUROPEAN PARLIAMENT ON THE PROPOSED REGULATION CONCERNING TRADE IN SEAL PRODUCTS, EUR. PARL., (2009), *available at* <http://www.europarl.europa.eu/document/activities/cont/200901/20090130ATT47720/20090130ATT47720EN.pdf>. The ban may also be defended under the Technical Barriers to Trade (“TBT”) Agreement, which allows a WTO member to restrict trade in order accomplish a “legitimate objective.” *Id.*; *see also* Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493, art. 2.2.

¹⁵⁶ GATT, *supra* note 47, art. XX(a); *see also* Sarah Stewart & David Thomas, *Comments on the Council’s Legal Service’s Paper On the WTO Compatibility of Measures Regulating the Seal Products Trade*, HUMANE SOC’Y INT’L & RESPECT FOR ANIMALS (Mar. 23, 2009), *available at* http://www.hsus.org/about_us/humane_society_international_hsi/seal_trade_ban/learn_more/wto_compatibility.htm l. (discussing how the Appellate Body in *Asbestos* upheld France’s total ban on asbestos, based on France’s desire to protect the public from health risks associated with the product; this demonstrates that a total ban, in some instances, can be deemed appropriate and legal under the chapeau’s “flexibility” test, and, as in *Shrimp/Turtle Malaysia II*, the EU has engaged in attempts to create a multilateral agreement regarding welfare issues in seal hunting).

¹⁵⁷ Neither of the two alternatives to a complete seal ban, (products from “humanely killed” seals or labeling to give purchasers information about the slaughter method), would work, because “[c]ommercial seal hunts, particularly in the environments in which they take place, cannot be consistently humane,” and because the seal hunt is the type of event “when moral sensibility demands that trade in an inhumanely produced product is banned . . . that public morality is offended by the very presence on the market of something which is inhumanely produced.” Stewart & Thomas, *supra* note 156.

¹⁵⁸ *Id.*

Moreover, the dispute settlement panel may also consider the costs such a trade measure will impose on countries like Canada and Norway.¹⁵⁹ As previously acknowledged, higher animal welfare standards typically translate into increased production costs.¹⁶⁰ In this case, the EU is not proposing an alternative method of seal slaughter so the costs are even more significant, since the countries selling seal products will no longer have access to the EU market. Thus, such a measure may be seen as a trade barrier¹⁶¹ that directly conflicts with the WTO's overall mission to promote trade liberalization.¹⁶² However, a dispute settlement panel should ultimately view these costs, even in the case of a total elimination of a market, as less important than the fact that the animal welfare measure meets all of the requirements of Article XX(a), as it is a necessary measure for the protection of public morals that doesn't violate the chapeau.

If the seal product ban is successful in defeating a WTO violation claim, it should open the door to use Article XX(a) to defend other animal welfare-driven measures.¹⁶³ Seal slaughter

¹⁵⁹ See, e.g., *Shrimp/Turtle Malaysia II*, *supra* note 106, ¶ 149 (discussing how a successful trade measure needs to take into account any other country's "specific conditions"); see also Archibald, *supra* note 76, at 48 (discussing how a country's trade measure must be flexible enough so that another country is able to successfully meet the measure's requirements through other methods).

¹⁶⁰ See, e.g., D. Bowles et al., *Animal Welfare and Developing Countries: Opportunities for Trade in High-Welfare Products from Developing Countries*, 24 REV. SCI. TECH. OFF. INT. EPIZ. 783, 783 (2005), available at <http://www.oie.int/boutique/extrait/bowles783790.pdf> (discussing how "there is often a cost consequence from improving [animal welfare] standards").

¹⁶¹ One example of a trade barrier that the WTO is concerned with is "internal government regulations and practices that impede imports or discriminate against foreign goods." CHOW & SCHOENBAUM, *supra* note 46, at 348.

¹⁶² The GATT states that the WTO members chose to enter into agreements "directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce." GATT, *supra* note 47, pmb1.

¹⁶³ Although, especially in the case of banning certain practices in agriculture, it may be more difficult to succeed under the "necessary" section of Article XX. Unlike the slaughter of seals, which occurs on isolated ice floes, U.S. slaughterhouses are regulated by the Department of Agriculture. See, e.g., *Slaughter Inspection 101*, DEP'T OF AGRIC. FOOD SAFETY & INSPECTION SERV., http://www.fsis.usda.gov/Factsheets/Slaughter_Inspection_101/index.asp (last visited Aug. 19, 2010); see also HUMANE SOC'Y INT'L, A COMPLETE BAN ON SEAL PRODUCTS IS JUSTIFIED UNDER THE WORLD TRADE ORGANIZATION (WTO) AGREEMENTS (2009), available at <http://bansealtrade.files.wordpress.com/2009/10/hsi-seals-wto-handout.pdf> ("commercial seal hunting occurs in uncontrolled field settings plagued by . . . moving ice floes,

may be considered “inherently cruel”¹⁶⁴ because of the weather conditions and its isolated nature, while farming conditions can be controlled and changed. However, it is difficult to see how the seal hunt’s practices are any more inhumane than those common to intensive farming practices, such as battery cages.¹⁶⁵ Further, intensive confinement practices continue for the farm animals’ entire lives; this fact could offend public morals even more than an abhorrent seal slaughter technique. According to 2003 survey data, 96% of Americans believe that animals should have “at least some protection from harm and exploitation”¹⁶⁶ and 62% of Americans support the passage of “strict laws concerning the treatment of farm animals.”¹⁶⁷ As shown by these statistics, conventional intensive farming techniques that cause severe harm to animals are offensive to the American public. Furthermore, as previously discussed relevant to Article XX(b),¹⁶⁸ a total ban on battery cages would meet the “necessary” requirement of Article XX(a),¹⁶⁹ because the intensive production methods would need to be eliminated in order to reduce the harm to animal welfare. The ban would satisfy Article XX’s chapeau, since it would apply to all battery cage eggs from all countries, including those within the U.S. Additionally, a battery cage ban would not be a total trade barrier for eggs, since battery cage eggs could be replaced by cage-free eggs. Based on all of these factors, a dispute settlement panel should deem

extreme weather conditions, poor visibility, and high ocean swells. These conditions prohibit hunters from . . . consistently applying humane slaughter methods designed to protect animal welfare and avoid pain and suffering . . . [and] preclude authorities from adequately monitoring . . . and enforcing regulations”).

¹⁶⁴ *Canada, Norway, supra* note 152.

¹⁶⁵ See, e.g., Michael Hlinka, *Money Talks: Michael Hlinka: EU Ban on Seal Products Outrageous*, CBC NEWS, (May 7, 2009), http://www.cbc.ca/money/moneytalks/2009/05/michael_hlinka_eu_ban_on_seal.html (“We’re supposed to believe that there’s a heightened sensitivity to animal welfare on [the European] continent . . . [b]ut there’s no mention of the treatment of geese for foie gras, or the killing of baby calves for veal . . . this particular bill is just so selective in its outrage . . .”).

¹⁶⁶ David W. Moore, *Public Lukewarm on Animal Rights*, GALLUP NEWS SERV., (May 21, 2003), <http://www.gallup.com/poll/8461/public-lukewarm-animal-rights.aspx>.

¹⁶⁷ *Id.*

¹⁶⁸ See *supra* Part II.B.

¹⁶⁹ GATT, *supra* note 47, art. XX(a).

a battery cage ban protected under Article XX(a).

III. POSSIBLE OPPORTUNITIES FOR ANIMAL WELFARE MEASURES UNDER THE SPS AGREEMENT AND THE AGREEMENT ON AGRICULTURE

Additionally, two Agreements annexed to the GATT should provide support for the legality of a trade measure such as a battery cage ban. First, the SPS Agreement was created to give WTO members “the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health,”¹⁷⁰ and is meant to be an elaboration of certain GATT provisions, “in particular the provisions of Article XX(b).”¹⁷¹ Second, the Agreement on Agriculture (“AoA”)¹⁷² was created to “strengthen[] multilateral rules for trade in agricultural products and require[] WTO members to reduce protection against imports, trade-distorting domestic support programs, and export subsidies.”¹⁷³ It also allows countries to create “non-trade-distorting,” or Green Box, subsidies.¹⁷⁴ The SPS Agreement and the AoA should be used to defend animal welfare trade measures and programs,¹⁷⁵ respectively, to incentivize the more humane treatment of farm animals.

A. The SPS Agreement and OIE International Standards

The SPS Agreement, especially when coupled with GATT Article XX(b), should provide protection for an animal welfare measure banning battery cages. Although the SPS Agreement applies to sanitary and phytosanitary measures to protect food safety or human, animal, or plant

¹⁷⁰ SPS, *supra* note 134, art. 2(1).

¹⁷¹ *Id.*, art. 2(4). For the argument that the SPS Agreement only applies to Article XX(b), see Shapiro, *supra* note 91, at 201–2.

¹⁷² Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter AoA].

¹⁷³ OFFICE OF THE USTR, THE URUGUAY ROUND AGREEMENTS ACT STATEMENT OF ADMINISTRATIVE ACTION, AGREEMENT ON AGRICULTURE, (Sept. 27, 1994), *available at* 1994 WL 761603. The AoA is necessary because “[t]rade in agricultural products is the area of international trade most subject to government intervention and other protectionist measures that distort free trade.” CHOW & SCHOENBAUM, *supra* note 46, at 457.

¹⁷⁴ Phoenix X. F. Cai, *Think Big and Ignore the Law: U.S. Corn and Ethanol Subsidies and WTO Law*, 40 GEO. J. INT’L L. 865, 875 (2009).

¹⁷⁵ *See, e.g.*, Matheny & Leahy, *supra* note 56, at 352.

life or health,¹⁷⁶ the connections made between animal health and animal welfare¹⁷⁷ suggest that measures concerning animals who produce food products (such as egg-laying hens), are relevant under this Agreement. The SPS Agreement’s “principal objective . . . is to promote the harmonization of national standards;”¹⁷⁸ measures that “conform to international standards, guidelines, or recommendations” are automatically deemed “necessary” for the protection of human, animal or plant life.¹⁷⁹ In connection with this goal of harmonization, the OIE, which is seen as “the primary source of . . . international health standards” on animal health issues,¹⁸⁰ is mandated by the SPS Agreement “to safeguard world trade by publishing health standards for international trade of animals and animal products.”¹⁸¹ The OIE’s Terrestrial Animal Health Code (“Terrestrial Code”)¹⁸² contains a chapter with Animal Welfare provisions,¹⁸³ but the chapter focuses on transporting animals by sea,¹⁸⁴ land,¹⁸⁵ or air;¹⁸⁶ slaughtering animals;¹⁸⁷

¹⁷⁶ SPS, *supra* note 134, Annex A(1).

¹⁷⁷ See, e.g., *The OIE’s Objectives*, *supra* note 124.

¹⁷⁸ David G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years*, 32 N.Y.U. J. INTL’L L. & POL. 865, 884 (2000); see also SPS, *supra* note 134.

¹⁷⁹ SPS, *supra* note 134, art. 3.2; see also Shapiro, *supra* note 91, at 204 (discussing how SPS measures that follow international standards have a “presumption of compliance with the GATT because they are presumed to satisfy GATT Article XX(b)”). But see *The International Standards of the OIE*, WORLD ORG. FOR ANIMAL HEALTH, http://www.oie.int/eng/normes/A_standardisation_activities.pdf (last visited July 31, 2010) (discussing how even when following an OIE-prescribed standard, a risk assessment may be necessary, to “link[] the hazards identified for the specific commodity, the disease statuses of the exporting and importing countries, and the recommendations in the [OIE-prescribed] Codes”).

¹⁸⁰ FAVRE, *supra* note 58, at 316.

¹⁸¹ *What Is the OIE?*, WORLD ORG. FOR ANIMAL HEALTH (Feb. 2, 2010), http://www.oie.int/eng/oie/en_oie.htm.

¹⁸² TERRESTRIAL ANIMAL HEALTH CODE, *supra* note 136. The Code includes standards “to assure the sanitary safety of international trade in terrestrial animals.” *Id.*, forward, available at http://www.oie.int/eng/normes/Mcode/en_preface.htm#sous-chapitre-0.

¹⁸³ *Id.*, § 7: Animal Welfare, available at http://www.oie.int/eng/normes/Mcode/en_titre_1.7.htm.

¹⁸⁴ *Id.*, ch. 7.2: Transport of animals by sea, available at http://www.oie.int/eng/normes/Mcode/en_chapitre_1.7.2.htm.

¹⁸⁵ *Id.*, ch. 7.3: Transport of animals by land, available at http://www.oie.int/eng/normes/Mcode/en_chapitre_1.7.3.htm.

¹⁸⁶ *Id.*, ch. 7.4: Transport of animals by air, available at http://www.oie.int/eng/normes/Mcode/en_chapitre_1.7.4.htm.

¹⁸⁷ *Id.*, ch. 7.5: Slaughter of animals, available at http://www.oie.int/eng/normes/Mcode/en_chapitre_1.7.5.htm.

killing animals for controlling disease;¹⁸⁸ guidelines on how to control stray dog populations;¹⁸⁹ and guidelines for using animals for research or education purposes.¹⁹⁰ The Code references the importance of animal welfare by stating that humans who use animals have an “ethical responsibility” to ensure animal welfare “to the greatest extent practicable,”¹⁹¹ and also that higher animal welfare can often improve food safety.¹⁹²

While the OIE’s current statements do not set international standards that easily translate to animal welfare measures,¹⁹³ there are signs that this may soon change. The OIE publicly vocalized its commitment to setting standards for animal welfare;¹⁹⁴ the organization further defined the link between animal health and welfare by declaring that “animals managed in accordance with the OIE recommendations on animal welfare may be more productive, with associated benefits for food security and poverty alleviation.”¹⁹⁵ An ad hoc Animal Welfare Group convened to develop new chapters for the Terrestrial Animal Health Code, which may be used to help uphold animal welfare measures in the future.¹⁹⁶ The Agreement’s main purpose is to create international standards, the Agreement specifically gives the OIE the power to create

¹⁸⁸ *Id.*, ch. 7.6: Killing animals for disease control purposes, available at http://www.oie.int/eng/normes/Mcode/en_chapitre_1.7.6.htm.

¹⁸⁹ *Id.*, ch. 7.7: Guidelines on stray dog population control, available at http://www.oie.int/eng/normes/Mcode/en_chapitre_1.7.7.htm.

¹⁹⁰ *Id.*, ch. 7.8: Use of animals in research and education, available at http://www.oie.int/eng/normes/mcode/en_chapitre_1.7.8.htm.

¹⁹¹ *Id.*, art. 7.1.2.6, available at http://www.oie.int/eng/normes/mcode/en_chapitre_1.7.1.htm.

¹⁹² *Id.*, art. 7.1.2.7.

¹⁹³ However, the Terrestrial Code does acknowledge the “five freedoms” (“freedom from hunger; thirst and malnutrition; freedom from fear and distress; freedom from physical and thermal discomfort; freedom from pain, injury and disease; and freedom to express normal patterns of behaviour”) and how they provide “valuable guidance in animal welfare.” *Id.*, art. 7.1.2.2.

¹⁹⁴ The OIE’s website states that it intends to “elaborate recommendations and guidelines covering animal welfare practices, reaffirming that animal health is a key component of animal welfare.” *The OIE’s Objectives*, *supra* note 124; see also Matheny & Leahy, *supra* note 56, at 351; Michael Bowman, “Normalizing” the International Convention for the Regulation of Whaling, 29 MICH. J. INT’L L. 293, 341 (2008).

¹⁹⁵ Committee on Sanitary and Phytosanitary Measures, *Considerations Relevant To Private Standards in the Field of Animal Health, Food Safety and Animal Welfare*, ¶ 9, G/SPS/GEN/822 (Feb. 25, 2008), available at <http://ec.europa.eu/food/international/organisations/sps/docs/G-SPS-GEN-822.pdf>.

¹⁹⁶ *The OIE’s Objectives*, *supra* note 124.

those standards for animal safety, and through the OIE's creation of a new chapter, it will formally recognize that animal welfare is interrelated with animal health. At the same time, the OIE's animal welfare chapter could just result in minimum standards. Further attention should be paid to ensure that the OIE's standards do not become the de facto setting (and that countries are allowed to create higher animal welfare standards than those proscribed by the OIE).

However, even without OIE-prescribed international standards, the SPS Agreement should provide a safe-haven for animal welfare measures. While SPS Article 2 mandates that a sanitary or phytosanitary measure be “based on scientific principles and [that it] is not maintained without sufficient scientific evidence,” it also recognizes that there may not be relevant evidence available.¹⁹⁷ In that case, under Article 5.7, a WTO member may “provisionally adopt” measures “on the basis of available pertinent information,” but must thereafter try to acquire more information in order to make a “more objective assessment of risk” and to review the measure “within a reasonable period of time.”¹⁹⁸ However, in *European Communities – Measures Concerning Meat and Meat Products*,¹⁹⁹ the Appellate Body found that the European Community's (“EC”) ban of meat from cattle that had received growth hormones was inconsistent with the requirements of the SPS Agreement.²⁰⁰ In that case, the EC created a measure which was more stringent than international standards²⁰¹ and failed to ensure that its measure was based on an appropriate risk assessment.²⁰² Thus, even measures such as the EC's,

¹⁹⁷ SPS, *supra* note 134, arts. 2.2, 5.7.

¹⁹⁸ *Id.* art. 5.7.

¹⁹⁹ Appellate Body Report, *EC – Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC – Measures Concerning Meat*].

²⁰⁰ *Id.*

²⁰¹ WTO members are able to create measures higher than the international standard, “if there is a scientific justification,” or if they conform with the risk assessments found in Article 5. *See* SPS, *supra* note 134, arts. 3.3, 5.

²⁰² *EC – Measures Concerning Meat*, *supra* note 199, ¶ 208. The EC invoked the “precautionary principle” in connection with SPS Article 5.7, which allows a WTO member to adopt SPS measures on a provisional basis when

which “were previously regarded as purely internal policy measures,” now must be justified to fit under the SPS Agreement’s protection.²⁰³

Nevertheless, this case should not undermine the use of the SPS Agreement to defend a battery cage ban. Nations are generally given wide latitude “in setting their own food safety standards . . . [and] nearly all bona fide attempts to protect food safety will be consistent with the SPS Agreement.”²⁰⁴ In *EC – Measures Concerning Meat*, the available scientific evidence specifically did not support the EC’s allegation that a hormone ban was necessary.²⁰⁵ Additionally, in the case of a battery cage ban, there is little data on current intensive confinement practices’ detrimental effects on animal health and welfare,²⁰⁶ and much of the present data in the U.S. may be inaccurate since it is based on research funded by agribusiness.²⁰⁷ It is clear that more studies need to be conducted by neutral third-parties; however, a few studies not funded by agribusiness do exist, which show the detrimental effects of battery cages on hens’

there is insufficient scientific evidence (however, WTO members must still follow Article 5.7 guidelines). *Id.* ¶ 13; SPS, *supra* note 134, art. 5.7. However, the Appellate Body “rejected this argument . . . the precise bounds of the precautionary principle remain unsettled . . . [but] [i]t appears that the precautionary principle may be used to justify time-limited SPS measures, but [it] is not an alternative to risk assessment and scientific evidence for a definitive standard.” MATSUSHITA ET AL., *supra* note 66, at 500.

²⁰³ Victor, *supra* note 178, at 923.

²⁰⁴ *Id.* at 872.

²⁰⁵ See, e.g., *EC – Measures Concerning Meat*, *supra* note 199, ¶ 196–7.

²⁰⁶ See, e.g., Crumb, *supra* note 19 (discussing how the USDA is funding a three-year study to determine how battery cage practices affect hens, but animal welfare groups contend that this is a “delaying tactic” to banning cages; another study funded by the American Egg Board “weighs several issues involving caged chickens, including their welfare and impact on the environment and human health as well as food quality and safety”); see also Steven M. Wise, *An Argument for the Basic Legal Rights of Farmed Animals*, 106 MICH. L. REV. FIRST IMPRESSIONS 133, 135 (2008) (“We do not know much about the cognitive abilities of farmed animals, because those who make billions of dollars exploiting them have never bothered to conduct significant research into what sorts of beings they are”).

²⁰⁷ See, e.g., What’s Good for the Goose, *supra* note 126, at 163 (discussing how U.S. animal welfare science is controlled by agribusiness, in contrast to Europe, where animal welfare science “appears to have developed in a relatively objective manner”); see also F. Bailey Norwood & Jayson L. Lusk, *The Farm Animal Welfare Debate*, CHOICES MAGAZINE (2009), <http://www.choicesmagazine.org/magazine/article.php?article=89> (“Industry groups, especially the United Egg Producers . . . assert that their welfare standards are based on ‘sound’ science . . . but there are many studies backing HSUS’s claim that cage-free eggs are superior to cage eggs in terms of animal welfare . . .”).

welfare and health.²⁰⁸ Furthermore, in terms of human health risks, the Council for Agricultural Science and Technology (“CAST”),²⁰⁹ with help from the OIE,²¹⁰ issued a 2005 report concluding that modern day intensive confinement systems have created a world in which “global risks of disease are increasing.”²¹¹ In the meantime, the U.S. should be able to enact a measure on a provisional basis under SPS Article 5.7, while alleging insufficient available scientific evidence.²¹² Under this measure, the U.S. could allege that on the basis of available information,²¹³ intensive confinement severely reduces animal health and welfare, which is directly correlated to sanitary and phytosanitary issues, and it could cite the EU’s recent directive banning battery cages to show that other countries are similarly concerned and are passing similar measures.²¹⁴

Of course, an SPS measure such as a battery cage ban could also be seen as a trade barrier due to the fact that it would affect a country’s production costs.²¹⁵ However, a GATT Panel should give these costs less weight considering the fact that the SPS Agreement was created, in part, to protect animal health, which OIE has proclaimed to be connected to animal welfare.²¹⁶ Therefore, if the welfare of a hen is compromised, so is her health. Additionally, as shown through a recent OIE study, even some developing countries demonstrate an interest in

²⁰⁸ See, e.g., Shields & Duncan, *supra* note 138.

²⁰⁹ CAST is a non-profit organization that is dedicated to publishing reports of science-based information, regarding issues of “animal sciences, food sciences and agricultural technology” *About CAST*, CAST, <http://www.cast-science.org/about.asp> (last visited Aug. 1, 2010).

²¹⁰ CAST, *GLOBAL RISKS OF INFECTIOUS ANIMAL DISEASES 1 (2005)*, available at <http://www.cast-science.org/publicationDetails.asp?idProduct=69>; see also FOER, *supra* note 2, at 142.

²¹¹ CAST, *supra* note 210, at 6; see also FOER, *supra* note 2, at 142.

²¹² SPS, *supra* note 134, art. 5.7.

²¹³ See, e.g., Shields & Duncan, *supra* note 138.

²¹⁴ See Council Directive 99/74, 1999 O.J. (L 203/53), amended by Council Regulation 806/2003, 2003 O.J. (L 122) (EC).

²¹⁵ See CHOW & SCHOENBAUM, *supra* note 46, at 348.

²¹⁶ See *The OIE’s Objectives*, *supra* note 124.

animal welfare concerns²¹⁷ and organic food production, which can lead to increased animal welfare,²¹⁸ thus illustrating that both developed and developing countries can still successfully produce products under an appropriately constructed animal welfare trade measure. Based on support from Article XX(b), the SPS Agreement, the OIE’s acknowledgment of the link between animal health and welfare, and its plan to create animal welfare international standards,²¹⁹ a battery cage ban should be upheld under the SPS Agreement.

B. The Agreement on Agriculture: Green Box Subsidies

There should also be an opportunity for the AoA to support animal welfare measures. The AoA creates limits on a country’s ability to give subsidies to its domestic agricultural producers “depending on how much [the subsidies] distort production and trade.”²²⁰ Subsidies that are “highly trade-distorting” are called “Amber Box;” “minimally trade-distorting” subsidies are called “Blue Box;” and “non-trade-distorting” subsidies are called “Green Box.”²²¹ The AoA allows countries an unlimited allowance of Green Box subsidies,²²² provided that the subsidies are in the form of “publicly-funded government program[s] . . . not involving transfers from consumers” and provided that they do not “have the effect of providing price support to producers.”²²³ An example of a program which would affect production is the Biomass Crop

²¹⁷ See, e.g., Bowles, *supra* note 160, at 784 (“Good agricultural practices and traceability systems are being implemented in Namibia, Botswana, South Africa and Zimbabwe”).

²¹⁸ See, e.g., *id.* at 787 (“In both Argentina and Thailand, organic production is being promoted with government support . . . [g]rowth within the organic foods market is expected and will continue to allow many exporters in developing markets to access markets . . . organic production . . . can bring benefits for animal welfare”).

²¹⁹ See *The OIE’s Objectives*, *supra* note 124.

²²⁰ Cai, *supra* note 174.

²²¹ *Id.* at 877. However, Green Box subsidies must meet the “minimally trade-distorting test,” otherwise they risk reclassification or limitation. *Id.*; see also Stacey Willemsen Person, Note, *International Trade: Pushing United States Agriculture Toward A Greener Future?*, 17 GEO. INT’L ENVTL. L. REV. 307, 327 (2005) (“[E]ven green box programs can have a trade-distorting effect if done on a large scale”).

²²² See AoA, *supra* note 172, Annex 2.1.

²²³ *Id.*; see also CHOW & SCHOENBAUM, *supra* note 46, at 459 (discussing how Green Box subsidies include “programs for research, pest and disease control, training, extension and advisory services, marketing and

Assistance Program, which “provides direct payments to farmers for establishing crops that can be converted to biomass.”²²⁴ However, if properly devised, Green Box subsidies should provide an opportunity for countries to create farm animal welfare programs to increase humane treatment.²²⁵ Gaverick Matheny and Cheryl Leahy’s article *Farm-Animal Welfare, Legislation, and Trade*²²⁶ argues that subsidies to agricultural producers “for more animal-friendly housing, equipment, training, and certification” may meet Green Box requirements.²²⁷ However, Green Box subsidies for animal welfare payments have not yet been “explicitly allowed” by the WTO²²⁸ and “[b]ecause Green Box payments mean extra costs for governments, they must have widespread political support”²²⁹ to rationalize those costs being passed on to taxpayers. Furthermore, some countries within the WTO are pushing to place limits on Green Box subsidies, alleging that they need to be amended to better reflect the concerns of developing countries.²³⁰ For example, some developing countries argue that *any* type of subsidy causes trade distortions, because “[g]overnments in developing countries simply do not have the financial resources needed to subsidize their own farmers at the same levels that farmers in developed

promotional services, domestic food aid, insurance schemes, regional assistance, environmental programs, structural adjustment assistance, and income support payments ‘decoupled’ from agricultural production”).

²²⁴ Kelly Christian, Note, *Worth Keeping Around? The United States’ Biofuel Policies and Compliance with the World Trade Organization*, 38 GA. J. INT’L & COMP. L. 165, 190 (2009).

²²⁵ See Erin Morrow, *Agri-Environmentalism: A Farm Bill for 2007*, 38 TEX. TECH. L. REV. 345, 363 (2006) (discussing how concessions such as Green-Box Subsidies are a result of “the AoA recogniz[ing] that countries have a legitimate interest in protecting nontrade commodity benefits . . . [such as] environmental protection[] and animal welfare”); see also Gerrit Meester, *European Union, Common Agricultural Policy, and World Trade*, 14 KAN. J.L. & PUB. POL’Y 389, 410 (2005) (discussing how in order for European agriculture to remain competitive worldwide and maintain EU animal welfare standards, it might need “to aim for policies that stimulate and reward the ‘public functions’ of agriculture in a way that does not distort trade”).

²²⁶ Matheny & Leahy, *supra* note 56.

²²⁷ *Id.* at 352.

²²⁸ *Id.*

²²⁹ *Id.* at 352–3.

²³⁰ See INT’L CENTRE FOR TRADE AND SUSTAINABLE DEV., AGRICULTURAL SUBSIDIES IN THE WTO GREEN BOX: ENSURING COHERENCE WITH SUSTAINABLE DEVELOPMENT GOALS: INFORMATION NOTE 16 13 (Sept. 2009), available at <http://ictsd.org/downloads/2009/10/green-box-web-1.pdf> (discussing how during the Doha round of trade negotiations, several developing countries have worked to reduce Green Box subsidies, while developed countries such as Japan, Norway, Switzerland, the EU and the U.S. have argued against Green Box reform).

countries are being subsidized.”²³¹

However, the U.S. asserts that animal welfare subsidies should be considered as Green Box subsidies.²³² Furthermore, while a country must notify the WTO of its new Green Box programs, it has “a broad amount of discretion in the calculation and classification of [its] own domestic support programs.”²³³ Given the degree of leeway permitted through self-reporting, countries should be able to experiment with new programs with little oversight. However, this could lead to an abuse of power, as a subsidy program can affect production decisions. If a farmer uses the subsidy to create a more humane production system, the long-term labor costs associated with humane production, which are passed on to consumers in the form of higher prices, may affect the farmer’s decision to produce more or less in the future.

On the other hand, if a Green Box subsidy program is created to give farmers financial and technical assistance or “income compensation for loss of competitiveness”²³⁴ due to making animal welfare improvements, these changes can be viewed as comparable to U.S. environmental conservation programs that have already been deemed to meet Green Box requirements.²³⁵ For example, the Conservation Technical Assistance program, which “provides technical assistance to farmers and ranchers who implement soil and water conservation and water quality improvement,” is considered a Green Box program,²³⁶ as is the Conservation

²³¹ Person, *supra* note 221, at 327. Some developing countries believe that even green box subsidies “may cause irreparable injury . . . [because the developing countries] cannot compete against foreign treasuries.” *Id.*

²³² HUMANE SOC’Y & GLOBAL ALLIANCE FOR SUSTAINABLE DEV., HUMANE, SUSTAINABLE, AND ENVIRONMENTALLY FRIENDLY DEVELOPMENT: OPPORTUNITIES FOR EQUITABLE ACCESS TO INTERNATIONAL TRADE UNDER THE DOHA DEVELOPMENT AGENDA 4 (Dec. 13–18, 2005), *available at* http://www.hsi.org/assets/pdfs/hsi_position_sixth_wto_conference.pdf.

²³³ Christian, *supra* note 224, at 181.

²³⁴ DAVID BLANDFORD & TIMOTHY JOSLING, INT’L FOOD & AGRIC. TRADE POL’Y COUNCIL, SHOULD THE GREEN BOX BE MODIFIED? 14 (2007).

²³⁵ *See, e.g.*, Utpal Vasavada, et al., *AoA Issues Series: Green Box Policies and the Environment*, (Jan. 3, 2001), *available at* <http://www.ers.usda.gov/BRIEFING/wto/environm.htm>.

²³⁶ *Id.*

Reserve Program, which “provides [technical and financial] assistance to farmers and ranchers in complying with Federal, State, and tribal environmental laws”²³⁷ Like farmers who utilize these types of environmental conservation subsidies in order to conserve resources, farmers should be able to make their animal production systems more humane without having to sacrifice their market share. Furthermore, a program that provides support for animal-friendly housing should serve as a helpful tool for egg producers to use in order to comply with the new laws in the U.S.;²³⁸ the U.S. should welcome such measures, given the recent increase in concern over animal welfare, as evidenced by statutes like Prop 2.

CONCLUSION

Animal welfare is connected to public morals, animal health, and food safety issues that are all acknowledged in GATT Articles XX(a), XX(b), and the SPS Agreement.²³⁹ Therefore, the WTO should recognize animal welfare measures such as the battery cage bans that countries are beginning to enact. Although there are costs involved in implementing a battery cage ban given that producers will have to create new production systems,²⁴⁰ WTO dispute settlement panels should find that any potential costs to a country will be outweighed by the fact that the measure is not discriminatory and it truly goes to the heart of Articles XX(a), (b), or the SPS Agreement. Finally, the U.S. should develop and offer Green Box subsidies to create incentives to producers

²³⁷ *Conservation Reserve Program*, USDA, NATURAL RES. CONSERVATION SERV., (June 23, 2009), <http://www.nrcs.usda.gov/programs/CRP/>.

²³⁸ *See, e.g.*, Person, *supra* note 221, at 322 (citing CHARLES H. HANRAHAN ET. AL., CONG. RESEARCH SERV. REP. FOR CONG., AGRICULTURAL TRADE ISSUES IN THE 108TH CONGRESS, 15 (Apr. 3, 2003)) (discussing how the “Conservation Reserve Program” is considered a Green Box subsidy).

²³⁹ *See* GATT, *supra* note 47, art. XX; *see also* SPS, *supra* note 134.

²⁴⁰ *See, e.g.*, G.L. Bagnara, Main Lecture at the Poultry Welfare Symposium: The Impact of Welfare on the European Poultry Production: Political Remarks, (May 18–22, 2009), (discussing how some EU farmers, particularly in Italy and Hungary, do not have the financial means to modify their production systems to comply with the EU battery cage phase-out, and that in Poland, the agricultural ministry “will support the egg producers to ask for a delay to apply the [new production methods]”).

to create more humane agricultural production systems, especially given the recent outpouring of public support for the more humane treatment of animals.²⁴¹

Public sentiment in the U.S. looks longingly back at traditional farming practices, when animals were perhaps treated more like sentient beings, and less like egg making machines. Yet, at the same time, factory farms still dominate the agricultural landscape. Globalization has and continues to change the way that our food is produced, yet current agricultural methods will need to be revised to comply with demands for more ethical practices.²⁴² While the WTO traditionally left animal welfare out of trade negotiations, the changing tide of public concern suggests that it is time to take a practical look at the interrelatedness of trade and animal welfare. As Steven Wise so succinctly stated, “There is only one reason not to determine what rights farmed animals are due and recognize them. That is the reason that once justified human slavery: powerful economic interests are arrayed against it.”²⁴³ More humanely produced foods are in real demand, “based on consumers’ common sense understanding that such practices as gestation crates, veal crates and battery cages are not humane.”²⁴⁴ One day, economics and animal welfare will need to strike a balance, and both interests will need to be preserved within international trade negotiations. Though it may not be today, we are moving in the right direction.

²⁴¹ See, e.g., *Maine*, *supra* note 27; *Record-Breaking*, *supra* note 27.

²⁴² See, e.g., Meester, *supra* note 225, at 409. Meester makes a compelling argument about emerging clashes between globalization and consumer demands, and how it is predicted that in the future, “four or five supermarkets will operate worldwide. In the food processing industry around ten large producers will dominate . . . This, together with a new kind of consumer who is increasingly critical about quality and production methods, mean that primary agriculture become [*sic*] much more dependent on demands in the chain . . .” *Id.*

²⁴³ Wise, *supra* note 206, at 137.

²⁴⁴ Sullivan & Wolfson, *supra* note 11, at 122.

TRANSFORMING TRAGEDY INTO CONSTRUCTIVE LESSONS TO PROTECT PEOPLE AND ANIMALS

By James F. Gesualdi, Esq.*

Trouble brings experience, and experience brings wisdom.

-- Anonymous

INTRODUCTION

On December 25, 2007, an incident involving an escaped tiger at the San Francisco Zoo left young Carlos Sousa, Jr., dead and two others injured. The incident also resulted in the death of the tiger, known as Tatiana.

In the aftermath of this tragedy, serious concerns were voiced regarding animal welfare, public safety, professional practices and the effectiveness of federal regulations governing zoological institutions. An examination of these concerns yields constructive lessons for these institutions and related professional organizations.

This article briefly reviews two major areas of concern – animal welfare and public safety, as well as professional practices – primarily in relation to the Animal Welfare Act,¹ which regulates the handling, care, and treatment of covered species at facilities engaged in the public display or exhibition of such animals. This article provides a framework of proactive measures for zoos and related professional organizations that will help to foster compliance with the AWA and applicable professional practices, while simultaneously improving animal welfare.²

* The information herein does not constitute legal advice; any opinions expressed are solely those of the author.

¹ 7 U.S.C. § 2131 *et seq.* (the “AWA”).

² Civil tort liability, including strict liability, is generally a matter of state law and is beyond the scope of this article.

ANIMAL WELFARE AND PUBLIC SAFETY

A. *AWA Regulations*

Animal welfare and public safety are inextricably linked, both intuitively and legally.

Thus, AWA regulations provide:

During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public.³

This provision, one of those within the “general handling regulation,” recognizes that the safety of the visiting public is related to proper animal handling and training, as well as “sufficient distance and/or barriers”.⁴ Another provision emphasizes the importance of staff monitoring and supervision of potentially dangerous animals, providing “[d]uring public exhibition, dangerous animals such as lions, tigers, wolves, bears, or elephants must be under the direct control and supervision of a knowledgeable and experienced animal handler.”⁵

Two other big cat related regulations are directly relevant to public safety. One requires that big cat enclosures must be structurally sound and “shall be maintained in good repair to protect the animals from injury and to contain the animals.”⁶ The second sets forth requirements that outdoor housing enclosures have perimeter or secondary containment fences.⁷

³ 9 C.F.R. § 2.131(c)(1) (2011) (emphasis added). “*Handling*” means petting, feeding, watering, cleaning, manipulating, loading, crating, shifting, transferring, immobilizing, restraining, treating, training, working and moving, or any similar activity with respect to any animal. 9 C.F.R. § 1.1 (2011).

⁴ 9 C.F.R. § 2.131(c)(1) (2011).

⁵ 9 C.F.R. § 2.131(d)(3) (2011).

⁶ 9 C.F.R. § 3.125(a) (2011).

⁷ 9 C.F.R. § 3.127(d) (2011).

B. *Guidance on AWA Compliance*

More detailed guidance on APHIS' administration and enforcement of its role in protecting animal welfare and public safety via the "general handling regulation" can be found in APHIS' Animal Care Resource Guide: Exhibitor Inspection Guide.⁸ The Exhibitor Inspection Guide includes guidance for agency staff on the entire inspection process, including the inspections themselves and the substantive requirements contained in the AWA regulations. It is an essential reference tool for any regulated zoological institution. The Guide specifically discusses animal and public safety for public exhibition and public contact, personnel and public safety, and emergency contingencies. It states, for example, that "[t]he exhibitor should have a written contingency plan to address restraint, recapture, and/or euthanasia of an animal(s) in the event of aggressive behavior, escape, or other emergency situation." Suggestions for the details and evaluation of said contingency plan are also provided. A 2008 proposed rule on contingency plans,⁹ discussed below, should also be consulted.

The Exhibitor Inspection Guide also discusses processes for animal incident reviews within the agency. Enumerated incidents include: a wild/dangerous animal escape; an animal injuring or killing an individual; an animal injury; and an animal causing property damage. Self-reporting by zoological institutions of any such substantial incidents is generally a much better practice than allowing media or other third-party reports to serve as the first notification to the agency.

⁸ Animal Care Resource Guide: Exhibitor Inspection Guide, available at http://www.aphis.usda.gov/animal_welfare/eig.shtml, and specifically, in "Handling of Animals" 12.4.1-12.4.6, http://www.aphis.usda.gov/animal_welfare/downloads/manuals/eig/12.4_eig.pdf (2010).

⁹ 73 Fed. Reg. 63085 (Oct. 23, 2008).

In 2000, APHIS released a “Draft Policy on Training and Handling of Potentially Dangerous Animals.”¹⁰ The Draft Policy included provisions on personnel, handling techniques and procedures, and contingency plans. APHIS decided not to publish a policy on this issue, instead relying on current regulations and possible future regulatory changes. A 2004 Federal Register Notice withdrawing the Draft Policy referred to applicable existing regulations, *e.g.*, the “general handling regulation,” and indicated that any clarification of the regulations will come in the form of new regulations.¹¹ Though scuttled by the agency, the Draft Policy remains a useful resource for looking more closely at personnel, handling and emergency planning concerns relating to potentially dangerous animals.

The actions regarding the 2000 Draft Policy Statement also provide a history lesson and useful background for APHIS’ 2008 proposed rule on the “Handling of Animals: Contingency Plans.”¹² The proposed rule would require contingency planning and training of personnel¹³ for “all animals regulated under the Animal Welfare Act in an effort to better prepare for potential disasters.”¹⁴ The proposed rule seeks to ensure humane animal care “in the event of an emergency or disaster . . . which could reasonably be anticipated and expected to be detrimental to the good health and well-being of animals” One situation discussed is animal escape.¹⁵

C. *Application of the AWA*

Interestingly, the interconnection between animal welfare and public safety has been the subject of a “big cat”-related AWA enforcement proceeding that resulted in an instructive

¹⁰ 65 Fed. Reg. 8318 (Feb. 18, 2000).

¹¹ 69 Fed. Reg. 30601 (May 28, 2004).

¹² 73 Fed. Reg. 63085 (Oct. 23, 2008).

¹³ See, James F. Gesualdi, Understanding The Legal Significance of Training in Providing Animal Care, published in *Soundings* (4th Qtr. 2007).

¹⁴ 73 Fed. Reg. 63085 (Oct. 23, 2008). (The preamble to the proposed regulation notes that the only contingency planning currently required under the AWA relates to marine mammals, at 9 C.F.R. § 3.101(b).)

¹⁵ 73 Fed. Reg. at 63089.

opinion by the U.S. Court of Appeals for the Seventh Circuit. In *Hoctor v. United States Department of Agriculture*,¹⁶ the Seventh Circuit considered the validity of a sanction imposed by the U.S. Department of Agriculture Animal and Plant Health Inspection Service (“APHIS”) for failure to comply with the Department’s minimum height requirement for secondary containment or perimeter fences for “big cat” enclosures. The court, in an opinion by Chief Judge Posner, vacated the sanction on the ground that a specific numerical requirement—here, eight feet for “big cat” perimeter fences—was invalid in the absence of a notice-and-comment rulemaking. More important for our purposes, however, is the *Hoctor* court’s following (rather prophetic) statement:

And we may also assume that the containment of dangerous animals is a proper concern of the Department in the enforcement of the Animal Welfare Act, even though the purpose of the Act is to protect animals from people rather than people from animals. Even Big Cats are not safe outside their compounds, and with a lawyer’s ingenuity the Department’s able counsel reminded us at argument that if one of those Cats mauled or threatened a human being, the Cat might get into serious trouble and thus it is necessary to protect human beings from Big Cats *in order to protect the Cats from human beings*, which is the important thing under the Act.¹⁷

APHIS ultimately adopted new perimeter fence regulations which require an eight-foot perimeter fence for certain facilities, including those housing big cats.¹⁸ This specifically operationalized eight-foot requirement is considered an “engineering standard”. AWA regulations do not prescribe any specific height requirements for the actual enclosures in which big cats are housed, but does require that “housing facilities” be “structurally sound” and

¹⁶ 82 F.3d 165 (7th Cir. 1996).

¹⁷ Id. at 168 (emphasis added). In the more recent case of *Antle v. Johanas*, 2007 WL 5209982 (D.S.C. Jun. 5, 2007), *aff’d per curiam*, 264 F. App’x 271 (4th Cir. 2008) , a federal district court likewise recognized and upheld APHIS’ interpretation and enforcement of the AWA to include animal and public safety. *Antle* involved a licensed exotic animal exhibitor who allowed customers to be photographed in close proximity to big cats.

¹⁸ 65 Fed. Reg. 70770 (Nov. 20, 2000).

“maintained in good repair to protect the animals from injury and to contain the animals.”¹⁹

These generalized requirements are considered “performance based” standards as contrasted with engineering standards.

The perimeter fence rulemaking and associated regulatory provisions also refer to possible alternative means of protecting animals from people, and vice versa.²⁰ Those alternatives, which require written approval from the agency, relate to factors such as the construction of the outside walls of the primary enclosure, “effective natural barriers,” and “appropriate alternative security measures.”

The administrative decision in *In re The International Siberian Tiger Foundation*²¹, discussed the connection between animal welfare and public safety.

Animals that attack or harm members of the public are at risk of being harmed. The record establishes that effective methods of extricating people from the grip of an animal can cause the animal harm and can cause the animal’s death. ... Even after an animal attacks a person, the animal is at risk of being harmed for revenge or for public safety reasons. ... [In the latter respect, a] tiger that attacked a small girl was confiscated by the health department and decapitated to test it for rabies. ... Thus, section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)), which requires that, during public exhibition, animals be handled so there is minimal risk of harm to the public, with sufficient distance or barriers or distance and barriers between the animals and the general viewing public so as to assure the safety of the public, is directly related to the humane care and treatment of animals and within the authority granted to the Secretary of Agriculture under the Animal Welfare Act.²²

In 2010, the U.S. Department of Agriculture Office of Inspector General (“OIG”) published an audit report on APHIS licensed exhibitors which featured an examination of big cats, dangerous animals and public safety. The report, one of a number of periodically and

¹⁹ 9 C.F.R. § 3.125(a) (2011).

²⁰ See 65 Fed. Reg. 70770; 9 C.F.R. § 3.127(d) (2011).

²¹ 61 Agric. Dec. 53 (2002).

²² *In re The International Siberian Tiger Foundation*, 61 Agric. Dec. at 76-77.

regularly undertaken program reviews, was entitled Controls Over APHIS Licensing of Animal Exhibitors.²³ OIG noted that:

The AWA, which APHIS enforces, is designed primarily to address the safety of animals rather than that of the public. However, APHIS does have regulations included in Title 9 of the Code of Federal Regulations (9 CFR) which address public safety. ... However, these regulations and other APHIS guidance do not specifically describe how to achieve those assurances.²⁴

In its critique of APHIS' administration of the AWA with respect to big cats and public safety, OIG made recommendations which APHIS agreed to address by implementing various corrective actions.²⁵ These measures included amending current regulations to provide clearer guidance as to what constitutes a sufficient barrier and to require exhibitors to report all escapes and attacks (whereas the only requirement in place now is that inspectors aware of escapes or attacks must notify their supervisors); APHIS' resident animal experts should be better utilized to evaluate facilities and measures to protect public safety; new and existing enclosures will be reviewed for safety compliance; and information about dangerous animal escapes or attacks, including causes and corrective actions should be disseminated among APHIS inspectors.²⁶

In response to the OIG audit and another big cat incident in 2010, APHIS has apparently applied the regulation's performance-based containment standard to evaluate the adequacy of containment for each big cat enclosure based on a number of characteristics including species, animal age and physical condition, area of enclosure, pure height of enclosure barriers, existence of a "kick in" atop the enclosure making it more difficult to climb or jump over a straight surface, presence of a moat or additional features and other factors relating to potential escape.

²³ U.S. Department of Agriculture Office of Inspector General, Controls Over APHIS Licensing of Animal Exhibitors, Audit Report 33601-10-Ch (June 2010) (the "2010 OIG Exhibitor Audit") (available at: <http://www.usda.gov/oig/webdocs/33601-10-CH.pdf>).

²⁴ The 2010 OIG Exhibitor Audit at

²⁵ The 2010 OIG Exhibitor Audit at 13-14.

²⁶ Id.

This new approach is apparently being enforced on a site-by-site, inspection-by-inspection basis. In the absence of explicit guidance from the agency, inspection reports can also provide valuable insights.²⁷

In short, with respect to animal welfare and public safety, there are many elements of the AWA regulations worth reviewing. These elements are primarily important in terms of regulatory guidance and compliance. They also may be incorporated into more detailed examination of potential civil liability beyond the scope of this analysis.²⁸

Professional Practices

Professional practices matter even when not expressly imbued with the force of law via a regulation.²⁹ There are, of course, instances where APHIS' AWA regulations expressly incorporate "professionally recognized standards," as in the marine mammal regulation relating to employee experience and training, which states, "[t]rainers and handlers must meet professionally recognized standards for experience and training."³⁰ Numerous APHIS

²⁷ See, e.g., APHIS, Inspection Report for the Birmingham Zoo, Inc. dated November 17, 2010 (available at: <http://acissearch.aphis.usda.gov/LPASearch/faces/pdfpage.jspx?custid=3036>) (15 foot height for tiger enclosure not sufficient under 9 C.F.R. § 3.125(a)); APHIS, Inspection Report for Cedar Cove Feline Park Inc. dated October 18, 2010 (available at: <http://acissearch.aphis.usda.gov/LPASearch/faces/pdfpage.jspx?custid=8148>) (fencing around tiger exercise area 10 feet high with a 3 foot "kick-in" is "inadequate" under 9 C.F.R. § 3.125(a) to ensure the animals will be contained under all circumstances); and APHIS, Inspection Report for Tiger Ridge Exotics dated October 28, 2010 (available at: <http://acissearch.aphis.usda.gov/LPASearch/faces/pdfpage.jspx?custid=2209>) stating:

The enclosure housing two adult lions in the front of the facility is made of chain link fencing that is approximately ten feet in height. There is also a shelter in the center of the enclosure that is at least four feet in height and approximately three feet from the side walls of the enclosure.

This enclosure is not tall enough to properly contain the animals as these adult lions could easily jump out of the enclosure if they were motivated to do so. The licensee must construct enclosure walls that are taller to ensure the animals are contained properly.

²⁸ For more information on the increased interplay of "animal and public welfare," the reader may wish to consult the author's 1998 article, "Recent Legal and Regulatory Currents: Changing Tides of Potential Managerial Interest", 9 JOURNAL OF THE ELEPHANT MANAGERS ASSOCIATION 212, 213-14 (Sept. - Dec. 1998).

²⁹ For purposes of this analysis, key terms are operationalized as follows. "Professional standards" are professional organization requirements. "Professional guidelines" are professional organization recommendations usually considered guidelines rather than requirements. "Professional practices" may include standards and guidelines as well as other common customs or innovations in place within the zoological community.

³⁰ 9 C.F.R. § 3.108(d).

regulations incorporate by reference or professionally accepted or recognized standards or connect AWA compliance with same.³¹ The AWA regulations also refer to the agency’s use of experts recommended by the American Association of Zoological Parks and Aquariums—now known as the Association of Zoos and Aquariums (“AZA”)—in evaluating requests for variances from marine mammal spatial requirements.³²

APHIS regularly looks to such standards, guidelines and other “professional practices” for reference in its own rulemaking, policy development, interpretative and enforcement activities. This effort is clear from the following excerpt from the proposed “Draft Policy on Training and Handling of Potentially Dangerous Animals”:

We are unaware of any written standards recognized by the industry as a whole. However, individual facility guides and many books and articles exist that contain standards used by members of the industry for training and handling a variety of potentially dangerous animals, and adoption of this policy would not preclude use of those guides and information. We believe the guidance provided in this draft policy is reflective of industry standards as they relate to the specific requirements in the AWA regulations and is based on our experience in enforcing the AWA.³³

The numerous media reports of zoological institutions undertaking remedial actions with respect to non-mandatory “guidelines” for tiger enclosures (in the absence of any direct regulatory guidance) speaks volumes. Such institutional action evidences an apparent understanding that these “guidelines” may be treated as more than mere recommendations if and

³¹ Such regulations include: 9 C.F.R. §§ 2.36(b)(1) (2011) (annual reports for research facilities), 3.2(b) (indoor housing facilities for dogs and cats), 3.13(f) (transportation standards for dogs and cats), 3.75(c)(3) (housing facilities for nonhuman primates), 3.76(a) and (b) (indoor housing facilities for nonhuman primates), 3.77(a) and (b) (sheltered housing facilities for nonhuman primates), 3.78(b) (outdoor housing facilities for nonhuman primates), 3.81 (environmental enhancement for nonhuman primates), 3.82 (feeding for nonhuman primates), 3.86 through 3.88 (transportation standards for nonhuman primates), 3.102 (indoor facilities for marine mammals), 3.108 (employees for marine mammals), 3.129 (for warm blooded animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals), 3.132 (employees for other warm-blooded animals, including big cats), 3.137 (transportation standards for other warm-blooded animals, including big cats) and 3.139 (transportation standards for other warm-blooded animals, including big cats.).

³² 9 C.F.R. § 3.100.

³³ 65 Fed. Reg. 8318 (Feb. 18, 2000). *See also* 71 Fed. Reg. 45438 (Aug. 9, 2006) (APHIS Notice of Petition and Request for Comments regarding elephant care, expressly inquiring about “foot care practices” and asking “[w]hat industry/professional standards are available for elephant care and husbandry?”)

when problems arise. It also suggests that institutions might be well-advised to comply with such guidelines, lest a failure to meet one prove problematic in another context (i.e., civil liability) and to regularly revisit them in light of new developments or situations.

Though seemingly a substantial responsibility for an institution, this phenomenon demonstrates a reality that enlightened institutions within the regulated community “self-police” or contribute to enhanced regulatory compliance or enforcement. Rather, whether driven by civil tort liability concerns, public perception, or enlightened ideals, self-driven institutional action represents a potentially significant move toward voluntary compliance with professionally vetted guidelines or recommendations (and perhaps practices) and, therefore, may in fact be more exacting than regulations carrying the force of law. Put differently, this force may promote animal welfare and human safety even more quickly and effectively than does APHIS rulemaking (which regularly extends over several years).

Suggested Measures for Zoological Institutions

Zoological institutions may find it helpful to undertake systematic institutional assessment of the following, preferably in consultation with local counsel. (Consultation with local zoological institution counsel should reveal the potential benefits under state law of AWA compliance efforts.³⁴) The following framework, while not intended to be comprehensive or relied on in lieu of legal advice, may prove a useful starting point.

A. Animal Welfare Act

1. Internal/external compliance audit, focused on animal welfare, public safety (such as factors now utilized by APHIS with respect to containment evaluations), training and emergency planning-related considerations. For a thorough regulatory review.³⁵

³⁴ Of course, outside of the United States, reference should be made to whatever animal welfare laws apply.

³⁵ 9 C.F.R. § 1.1, et seq. (2011), available online at http://www.aphis.usda.gov/animal_welfare/awr.shtml.

2. Identify and review recent inspection reports of one's facility to ascertain any patterns or trends (to the extent there have been any noncompliant items noted or comments provided.)
 3. Identify and review APHIS publications for potential measures to assist in evaluation or modification of facilities, procedures, or staffing. Examples of such publications include:
 - a. Animal Care Resource Guide: Exhibitor Inspection Guide.³⁶
 - b. The proposed rule on Handling of Animals: Contingency Plans.³⁷
 - c. The proposed Draft Policy on Training and Handling of Potentially Dangerous Animals.³⁸
- B. "Professionally accepted standards," guidelines, and professional practices
1. Identify and review relevant standards, guidelines and publications, including non-mandatory reference manuals published by professional organizations.
 2. Identify and review most recent accreditation-related documents and reports.
- C. Procedures or Protocols
1. Identify, review, and update, as appropriate, relevant emergency contingency plans, public safety policies, procedures, and protocols.
 2. Institute voluntary incident reporting to APHIS and others and internal review and remediation.

³⁶ Animal Care Resource Guide: Exhibitor Inspection Guide, available at: http://www.aphis.usda.gov/animal_welfare/eig.shtml, is strongly recommended for all staff involved in the inspection or regulatory compliance process.

³⁷ 73 Fed. Reg. 63085 (Oct. 23, 2008), available at: <http://www.regulations.gov/search/Regs/home.html#documentDetail?D=APHIS-2006-0159-0001>, and Draft Guidance Document, at http://www.aphis.usda.gov/animal_welfare/downloads/em/final_compliance_assessment_question_set_11feb.doc.

³⁸ 65 Fed. Reg. 8318 (Feb. 18, 2000).

D. Training

1. In addition to making certain training is adequately addressed in procedures or protocols, the actual training program for animal care and all facility staff, as appropriate, should be reviewed or enhanced as needed, including reference to:
 - a. monitoring animal/visitor behavior;
 - b. emergency communications and response.
2. Visitor guidance, signage and etiquette.
3. Cross-training with emergency service personnel outside of the facility/institution.³⁹
4. Identify and review existing liability releases/waivers for program participants and volunteers.

E. Insurance

1. Identify and review coverage and limits of liability.
2. Determine whether insurance costs can be reduced by providing enhanced training.

F. Municipal/Governmental Involvement

1. Institutions with direct municipal or government ownership or involvement may have additional items to consider, including existing contractual relationships and possible regulatory considerations.

Suggested Measures for Professional Organizations

Professional organizations and their member institutions could greatly benefit from the following framework. These measures provided therein may help professional organizations confirm or possibly enhance their roles in guiding and leading their membership with respect to

³⁹ One useful resource is Paul Hanyok, "Guidelines for Police Officers When Responding to Emergency Animal Incidents", ANIMAL WELFARE INFORMATION CENTER BULLETIN (2002), available at: <http://www.nal.usda.gov/awic/newsletters/v11n3/11n3hany.htm>.

enhanced animal welfare and public safety as well as AWA regulatory and professional compliance efforts.

- A. Animal Welfare Act
 - 1. Identify and review APHIS regulations and publications for potential member education/training or other action. For example, review of APHIS inspection reports posted online.⁴⁰
- B. “Professionally accepted standards,” guidelines, and professional practices.
 - 1. Identify and review standards, guidelines, and publications relating to professional practices; revise, as appropriate, to reflect advances and/or modifications based upon new information and situations.
 - 2. Identify and review accreditation status of members, current/pending accreditation reports, and potential areas of improvement, including documentation of same.
 - 3. Identify and review accreditation team experience, training, and reporting requirements, as well as the actual training program for accreditation team members.
 - 4. Insurance
 - a. Identify and review coverage and limits of liability.
 - b. Determine whether insurance costs can be reduced by providing enhanced training.
- C. Lead the way in promoting animal welfare and public safety, through the above techniques and by assisting in institutional audit recommendations, training, suggested policies, procedures, and protocols. Though professional organizations may already be engaged in these or similar activities, this framework may still be useful for re-examination of the efficacy of such efforts in light of the recent tragedy.
 - 1. Create or enhance (as the case may be) a “Quick Response Team” or similar capability—*i.e.*, a small group of professionals with public relations, legal, animal care, veterinary and other expertise, including leaders/past presidents. A Quick Response Team’s sole function is to be

⁴⁰ APHIS Inspection Reports are available online at: <http://acissearch.aphis.usda.gov/LPASearch/faces/Warning.jspx> may reveal patterns or trends necessitating greater attention.

available to help association and its members to prepare for and to respond as professionally and promptly as possible to crisis situations.

2. Make better use of existing resources⁴¹ and activities (*e.g.*, meetings and “Zoo School” for more intensive education and training in addition to more abbreviated but still valuable conference presentations.)
3. Develop and refine empirical database (*e.g.*, as to safety of visitor experience, rarity of incidents involving serious injury or death).
 - a. Animal welfare and public safety are important. (Gather credible data/documentation about tragic incidents, injuries and perhaps zoonotic disease transmission.) Institutional member reporting of incidents and professional organization review and evaluation of same can be helpful in helping other institutions prevent similar incidents.
 - b. Professional standards, guidelines and practices are important. With government regulation as a solid foundation, professional practices provide a more effective and prompt avenue to achieve advances in animal welfare and public safety than protracted government rulemaking, particularly in the short run.

D. Seize the initiative to go further, in advance of potential congressional, agency, or other stakeholder action, by being proactive in proposing changes to the AWA regulations and building consensus to enact same on a fast track. Some possible measures include:

1. Working with APHIS to quickly address and announce new interpretations and enforcement efforts like recent emphasis on comprehensive enclosure containment evaluation (even in the absence of formal rulemaking) if there are important animal welfare and public safety concerns requiring immediate action.
2. Making explicit the requirement for emergency contingency planning, now applicable only to marine mammal facilities.⁴² (This measure is contained in the recent proposed rule on “Handling of Animals: Contingency Plans”)⁴³

⁴¹ (See, *e.g.*, American Association of Zoo Keepers, RESOURCES FOR CRISIS MANAGEMENT IN ZOOS AND OTHER ANIMAL CARE FACILITIES (1999) (S.D. Chan, W.K. Baker, Jr., and D. L. Guerrero eds.),

⁴² 9 C.F.R. § 3.101(b) (2011).

⁴³ 73 Fed. Reg. 63085.

3. Enhancing facility training programs and incorporating “professional recognized standards”.⁴⁴
4. Instituting cross-training requirements with local emergency services providers.
5. Identifying and reviewing literature and other publications, *e.g.*, APHIS’ withdrawn proposed Draft Policy on Training and Handling of Potentially Dangerous Animals and proposed rule on “Handling of Animals: Contingency Plans” to identify other possible measures regarding animal monitoring, and escape response techniques.

CONCLUSION

The ability of zoological institutions to continue their important animal welfare, education, research and conservation work is dependent upon many factors, including those discussed above. These suggestions for various proactive measures provide a path for transforming tragedy into constructive lessons for zoological institutions and professional associations committed to better serving and protecting animals and people through renewed commitment to upholding and exceeding AWA regulatory requirements and other professional responsibilities. Regulatory and professional compliance also may minimize potential liability in other contexts, as it evidences appropriate, reasonable, and responsible action—all of which helps zoological institutions and professional organizations to retain credibility and viability, and have greater resources for animal care and conservation.⁴⁵ Moreover, as Chief Judge Posner noted, “it is necessary to protect human beings from Big Cats *in order to protect the Cats from human beings*, which is the important thing under the Act”.

⁴⁴ See 9 C.F.R. § 3.108(b) and (d).

⁴⁵ This article © 2008, 2009, 2010, 2011 by James F. Gesualdi, Esq. No distribution or publication of the article beyond its inclusion in *Laws & Paws*TM is authorized without the prior express written consent of the author.

WHO'S THE FAIREST OF THEM ALL? – ANIMAL MINDS AND THE LAW

By Lorien House

“For the animal shall not be measured by man. In a world older and more complete than ours they move finished and complete, gifted with extensions of the senses we have lost or never attained, living by voices we shall never hear. They are not brethren, they are not underlings; they are other nations, caught with ourselves in the net of life and time, fellow prisoners of the splendor and travail of the earth.” – Henry Beston¹

INTRODUCTION

Coyotes hunt cooperatively with badgers.² Pigs have “complex emotions”³ and enjoy playing video games.⁴ Wildcats practice deception, once thought to be solely a human capability, by mimicking the voices of their prey.⁵ Chickens “have complex cognition”⁶ and “communicate referentially and intentionally.”⁷ Rats “laugh” during play.⁸ Pigeons perform better on object rotation tests than many humans,⁹ sheep recognize the faces not only of their own kind, but of humans, from photographs¹⁰ and dolphins “are sophisticated, self-aware, highly intelligent beings with individual personalities, autonomy and an inner life [who] are vulnerable to tremendous suffering and psychological trauma.”¹¹ In the scientific community, animal¹² intelligence and emotional complexity,

1 Henry Beston, *THE OUTERMOST HOUSE: A YEAR OF LIFE ON THE GREAT BEACH OF CAPE COD* 25 (2003) [hereinafter “THE OUTERMOST HOUSE”].

2 Carol Kaesuk Yoon, *Mysteries that Howl and Hunt*, N.Y. TIMES, Sept. 27, 2010.

3 *Can You Ask A Pig If His Glass Is Half Full?*, SCIENCEDAILY, July 28, 2010, available at <http://www.sciencedaily.com/releases/2010/07/100727201515.htm>.

4 Amy Hatkoff, *THE INNER WORLD OF FARM ANIMALS* 97 (2009).

5 *Wild Cat Found Mimicking Monkey Calls; Predatory Trickery Documented For The First Time In Wild Felids In Americas*, SCIENCEDAILY, July 9, 2010, available at <http://www.sciencedaily.com/releases/2010/07/100708141620.htm>.

6 See, e.g., *THE INNER WORLD OF FARM ANIMALS*, *supra* note 4, at 33 (“Giorgio Vallortigara of the University of Toronto and Lucia Regolin of the University of Padua have shown that chicks are capable of recognizing a whole object even when it is partly hidden. This is a capacity it was thought only humans possessed. Human babies can only begin to do this at four months of age, while chicks can do it when they are just two or three days old. ‘When human babies do this, it is seen as a milestone of cognitive development,’ comments [Professor Lesley] Rogers. ‘But chicks can do it from the word go’”).

7 Lesley J. Rogers & Gisela Kaplan, *Think or Be Damned: the Problematic Case of Higher Cognition in Animals and Legislation for Animal Welfare*, 12 ANIMAL L. 151, 166-67 (2005) [hereinafter “*Think or Be Damned*”].

8 Jaak Panksepp and Jeff Burgdorf, *‘Laughing’ rats and the evolutionary antecedents of human joy?*, PHYSIOLOGY AND BEHAVIOR 79, at 533-47 (2003).

9 See Jonathan Balcombe, *PLEASURABLE KINGDOM* 53 (2006, 2007) [hereinafter “PLEASURABLE KINGDOM”]; *Think or Be Damned*, *supra* note 7, at 151, 159, 171 (noting at 159 that pigeons perform spatial “odd-man out” tests, widely used in human intelligence tests, “substantially better and faster than humans”).

10 *PLEASURABLE KINGDOM*, *supra* note 9, at 57, 102.

11 *Dolphin Cognitive Abilities Raise Ethical Questions, Says Emory Neuroscientist*, SCIENCEDAILY, Feb. 27, 2010, available at <http://www.sciencedaily.com/releases/2010/02/100218173112.htm>.

even animal “personality,” is “no longer merely the stuff of anthropomorphism or isolated anecdote.”¹³ Instead, as biologists Lesley I. Rogers and Gisela Kaplan note, there has been a “conceptual shift” toward accepting that animals think and feel in ways comparable to humans.¹⁴ This shift has occurred in part because many researchers chose to abandon “the tacit and implicit assumption that humans are better in everything” and that animals, as described by Descartes, are little more than meat machines who respond unconsciously to stimuli in their environment.¹⁵

This conceptual shift has led to many exciting discoveries about higher cognition in animals, which, in turn, have influenced public perception. In a recent *Time* magazine article on Kanzi, a bonobo who communicates with humans through sign language, Jeffrey Kluger noted that “one by one, the berms we’ve built between ourselves and the beasts are being washed away. Humans are the only animals that use tools, we used to say. But what about the birds and apes that we now know do as well? Humans are the only ones who are empathic and generous, then. But what about the monkeys that practice charity and the elephants that mourn their dead? Humans are the only ones who experience joy and a knowledge of the future. But what about the U.K. study just last month showing that pigs raised in comfortable environments exhibit optimism, moving expectantly toward a new sound instead of retreating warily from it? And as for humans as the only beasts with language? Kanzi himself could tell you that’s not true.”¹⁶ Kluger concludes that many “beasts” lead lives that “may be rich and worthy ones, indeed.”¹⁷

But worthy of what? Have human discoveries about the cognitive capabilities and emotions of animals made a difference in the way they are treated—perhaps most importantly, by the legal system? Or are the legal “berms” humans have built between themselves and other animals still fully intact?

12 In this paper, for the sake of brevity only, I will use the term “animal” in lieu of the more cumbersome term “nonhuman animal.”

13 Charles Siebert, *The Animal Self*, N.Y. TIMES, Jan. 22, 2006.

14 *Think or Be Damned*, *supra* note 7, at 151-52.

15 *Id.*

16 Jeffrey Kluger, *Inside the Minds of Animals*, TIME, Aug. 5, 2010, available at <http://www.time.com/time/health/article/0,8599,2008759,00.html#ixzz0x4mUEdjC>.

17 *Id.*

The answer is complicated. The legal berms may be weakening between humans and the other animals in their taxonomic family – the great apes¹⁸ – due in part to discoveries about these animals’ intelligence. However, recent findings on the intelligence and emotional complexity of other animals, such as rats or pigs, have yet to result in greater legal protections for these species. Perhaps this reflects a simple time lag: scientists have known about higher cognition in great apes for decades,¹⁹ while it is only recently that they have made similar discoveries about other animals.²⁰ Alternatively, the disparity in treatment might be attributable to great apes’ genetic proximity to humans; indeed, some animal welfare advocates have argued, perhaps strategically, that their cognitive similarities to humans make apes “special.”²¹ Whatever the reason, only great apes have thus far enjoyed greater protections based in part on evidence of their cognitive abilities. Might the above-mentioned evidence about other species eventually result in similar protections for them? How might that, in turn, affect the treatment of animals who have thus far “failed” to demonstrate anything that humans consider meaningful intelligence?

Part I of this paper describes how arguments based on cognitive discoveries about the intelligence of great apes have influenced recent legislation or proposed legislation in Spain, the European Union (EU), and the United States (US); and played a role in a judicial decision to grant a chimpanzee *habeas corpus* in Brazil. Part I concludes that the arguments employed by proponents of legal protections for great apes rely heavily on their similarity to humans, particularly in the cognitive realm. Part II examines certain problems with this “cognitive similarity” argument, and asks whether there is a role in animal advocacy for cognitive arguments not based in similarity. Finally, Part III explores how a generalized argument based on animal cognition that did *not* rely on the subject

18 See Wikipedia, *Great Apes*, http://en.wikipedia.org/wiki/Great_apes (the taxonomic family Hominidae includes chimpanzees, gorillas, orangutans and humans; the bonobo is a species of chimpanzee).

19 *A Chronology of Key Events in the Scientific Use of Chimpanzees in the U.S.*, PROJECT R&R, http://www.releasechimps.org/pdfs/chronology_of_key_events.pdf [hereinafter *Chronology of Key Events*].

20 See *Think or Be Damned*, *supra* note 7, at 155.

21 See e.g. Paola Cavalieri & Peter Singer, *The Great Ape Project and Beyond*, THE GREAT APE PROJECT: EQUALITY BEYOND HUMANITY 307 (Cavlieri and Singer, eds. 1993) [hereinafter *Great Ape Project and Beyond*] (noting that the similarity of great apes to humans represents a “weak link” in the barrier between humans and animals).

animals' similarity to humans was used in a 1999 Vermont case, to the benefit of the animals.²²

Part I: The mirror: great apes and humans

1. Overview

The past half-decade has been an important one for great apes. In 2005, a Brazilian court indicated for the first time that a chimpanzee may have the requisite legal personhood to obtain a writ of *habeas corpus*.²³ In 2008, a committee in Spain's national legislature approved a resolution granting limited rights to great apes.²⁴ Spanish legislator Joan Herrera justified the measure by pointing out that apes "are capable of recognizing themselves, and have cognitive capabilities."²⁵ In the United States, a bill entitled "the Great Ape Protection Act," which seeks to prohibit all invasive research on great apes, was introduced in the House of Representatives in March 2009,²⁶ and in the Senate in August 2010.²⁷ The sponsor of the Senate bill, Maria Cantwell of Washington, stated on the record that chimpanzees in particular are "highly intelligent and social animals" with the "ability to experience emotions...similar to humans."²⁸ In September 2010, the European Union passed legislation aimed at reducing the number of animals used in laboratory experiments, which included a mandate essentially banning the use of great apes in scientific research.²⁹ The European Council noted that "[d]ue to their . . . highly developed social skills, the use of non-human primates in scientific procedures raises specific ethical and practical problems."³⁰

22 This article is intended to be an overview of the subject, and is in no way exhaustive. Like the field of cognitive ethology itself, legal arguments based on animal cognition studies are a recent (albeit important) development.

23 See *In re Suica*, Correio da Bahia, 19.9.2005 (Brazil), available at <http://www.animallaw.info/nonus/cases/cabrsuicaeng2005.htm> (author's trans.).

24 See Lisa Abend, *In Spain, Human Rights for Apes*, TIME, July 18, 2008, <http://www.time.com/time/world/article/0,8599,1824206,00.html> [hereinafter *Human Rights for Apes*].

25 *Human Rights for Apes*, *supra* note 23.

26 See Great Ape Protection Act of 2009, H.R.1326, 111th Cong. (2009).

27 See Great Ape Protection Act of 2010, S. 3694, 111th Cong. (2010).

28 156 Cong. Rec. S6652, August 3, 2010, available at <http://www.gpo.gov/fdsys/pkg/CREC-2010-08-03/pdf/CREC-2010-08-03-pt1-PgS6652.pdf>.

29 See *Europe adopts new law on animal experiments*, SCIENCEBUSINESS, Sept. 9, 2010, <http://bulletin.sciencebusiness.net/ebulletins/showissue.php3?page=/548/art/19592&ch=1> [hereinafter *Europe adopts new law*].

30 DIRECTIVE 2010/63/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 September 2010 on the protection of animals used for scientific purposes 35, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:276:0033:0079:EN:PDF> [hereinafter DIRECTIVE 2010].

These proposed and adopted legal measures appear to have been driven, at least in part, by the notion that the mental and emotional attributes of great apes entitle them to unique treatment under the law. This is not a new idea. In 1969, *Science* magazine published an article, entitled “Teaching Sign Language to a Chimpanzee,” which detailed the authors’ experience of teaching Washoe, a young female chimpanzee, American Sign Language.³¹ Some advocates seized on the discovery that chimpanzees can learn a human language and communicate their emotions as evidence supporting “profound ethical arguments against their use in harmful research.”³² Subsequently, several scientists published research on great apes in their natural habitat. In 1986, for example, primatologist Jane Goodall published *The Chimpanzees of Gombe: Patterns of Behavior*,³³ which detailed her observations of free-roaming chimpanzees at Gombe National Park in Tanzania. Goodall’s work was highly influential in the scientific community,³⁴ and “set[] the stage for a new understanding of humans and other great apes.”³⁵ Dutch primatologist and ethologist, Franz De Waal, contributed to the scholarship on apes through his research into social behavior and planned social strategies in chimpanzees,³⁶ “peacemaking” in primates,³⁷ and, most famously, conflict resolution and social bonding by means of sex, in bonobos.³⁸ Similarly, Dian Fossey’s observations of mountain gorillas challenged popular notions of their aggressive, brutish nature, and was very likely a driving force behind organized efforts to conserve these animals.³⁹

Research such as Goodall’s, De Waal’s and Fossey’s helped to sensitize the public to the ethical

31 R. Allen Gardner & Beatrice T. Gardner, *Teaching Sign Language to A Chimpanzee*, SCIENCE, Aug. 15, 1969, at 664.

32 *Chronology of Key Events*, *supra* note 19.

33 Jane Goodall, *THE CHIMPANZEES OF GOMBE: PATTERNS OF BEHAVIOR* (1986).

34 See A.M. McClain & W.C. McGrew, *Jane Goodall And The Chimpanzees Of Gombe: An Analysis Of Publications And Their Impact On Teaching Science*, 10 HUMAN EVOLUTION 117, abstract available at <http://www.springerlink.com/content/6261gm59627704v9/> (noting that *THE CHIMPANZEES OF GOMBE* was the most often cited publication about Gombe’s apes, and the work’s discussion of ape tool-use was the most cited portion. The number of scholarly citations to publications about wild chimpanzees tripled from from the 1960s to the 1980s, suggesting a growing recognition of primatology in the teaching of science.)

35 *Chronology of Key Events supra* note 19.

36 See Franz de Waal, *CHIMPANZEE POLITICS: POWER AND SEX AMONG APES* (1982, 2000).

37 See Franz de Waal, *PEACEMAKING AMONG PRIMATES* (1989).

38 See Franz de Waal, *BONOBO: THE FORGOTTEN APE* (1997).

39 See Dian Fossey, *Making Friends with Mountain Gorillas*, NATIONAL GEOGRAPHIC, Jan., 1970, <http://ngm.nationalgeographic.com/2008/07/archive/fossey-gorillas-1970/dian-fossey-text/1>.

problems of using great apes for invasive research. While “[t]he use of other creatures for invasive medical research has always posed a moral dilemma,”⁴⁰ which has nevertheless been resolved by the assumption that the lives of the other creatures are of lesser value than those of humans, the great apes seemed to be a “special” case, in part because, as Goodall, De Waals, and Fossey showed, they thought and felt and acted in ways that were “human-like.” Advocacy groups, such as the Great Ape Project (GAP), People Against Chimpanzee Experiments (PACE) and the Coalition to End Experiments on Chimpanzees in Europe (CEECE), have emphasized great apes’ “human-like” cognitive and emotional capabilities in their campaigns to end invasive research conducted on these animals.⁴¹ These campaigns have sometimes proven successful: in 1997, for example, then-British Home Secretary Jack Straw announced a ban on licenses to use great apes in laboratories, stating, “This is a matter of morality. The cognitive and behavioural characteristics and qualities of these animals mean it is unethical to treat them as expendable for research.”⁴² Bans on invasive research on great apes followed in New Zealand, the Netherlands, Sweden, Japan, Austria and Belgium.⁴³ Thus, the idea, pressed by advocates, that great apes were “special” among animals due to their cognitive similarities to humans seems to have factored heavily into decisions to prohibit their use in research.

2. The Spanish Resolution

In July 2008, in Spain, this idea was taken to the next level. In perhaps the most stunning recent development in animal law, the Environmental Committee of Spain’s lower house of parliament adopted a resolution in favor of granting great apes some legal rights. The Committee explicitly approved of GAP’s goals⁴⁴—that great apes should be granted the right to life, individual liberty, and

40 *Ban All Experiments On The Higher Primates*, THE INDEPENDENT, Mar. 28, 2001,

<http://www.independent.co.uk/opinion/leading-articles/ban-all-experiments-on-the-higher-primates-689212.html>.

41 *See e.g. International Bans*, PROJECT R&R, <http://www.releasechimps.org/mission/end-chimpanzee-research/country-bans/> [hereinafter *International Bans*].

42 Julia Keddie, *EU Bibliographies: Animal Experiments Directive 5*, SN/IA/5081, last updated Sept. 17, 2010, available at <http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/SNIA-05081.pdf>.

43 *See International Bans*, *supra* note 40.

44 *See Human Rights for Apes*, *supra* note 23, Boletín Oficial de las Cortes Generales, Congreso de los Diputados, IX Legislatura 16 de Julio 2008, http://www.congreso.es/public_oficiales/L9/CONG/BOCG/D/D_052.PDF#page=11 [hereinafter *Boletín Oficial*].

freedom from torture⁴⁵—and asked the Spanish government to declare its compliance with GAP’s declaration on the rights of great apes.⁴⁶ The Committee thus proposed a ban not only on using great apes in experiments, but also requiring their protection from “slavery” and “torture, death and extinction,” along with their use for performance purposes, as in circuses or on television.⁴⁷ Significantly, unlike laws merely prohibiting cruelty toward animals, the Spanish resolution was “couched in the language of recognition of rights . . . rather than a more paternalistic duty of humans to protect them.”⁴⁸ The resolution was likewise fundamentally different from mere research bans, which do not change the status of the animals involved and thus leave intact the possibility of removing the ban, as Colin Blakemore, then-Head of the Medical Research Council in Britain, urged in the United Kingdom in 2006.⁴⁹

The Spanish resolution clearly resulted from the advocacy of GAP, whose Spanish branch advocated heavily for it, and whose goals and declaration were adopted in the language of the resolution. GAP, inspired by a book of the same name written by philosophers Paola Cavalieri and Peter Singer, incorporated the research of Goodall and primatologists Roger and Deborah Fouts, among others, to show that “human beings and great primates share important characteristics, like social organization, communications and strong affectionate bonds among the individuals, demonstrat[ing] that they are intelligent and, consequently, that they should have similar rights to ours.”⁵⁰ Clearly, GAP’s arguments for great ape rights are grounded, in large part, on great ape cognitive and social abilities and similarity to humans, and the language used in the Spanish resolution, and by its proponents like Herrera, reflect GAP’s arguments. Notably, when addressing the resolution, Marta

45 See *GAP Project*, GAP, <http://projetogap.org.br/en-US> (last visited October 26, 2010).

46 See Eoin O’Carroll, *Spain To Grant Some Human Rights To Apes*, CHRISTIAN SCIENCE MONITOR, June 27, 2008, <http://www.csmonitor.com/Environment/Bright-Green/2008/0627/spain-to-grant-some-human-rights-to-apes>.

47 See Boletín Oficial, *supra* note 43.

48 *Language Of Rights Inches Forward*, Groundswell, Center for Earth Jurisprudence, Spring 2009, <http://earthjuris.org/pdfs/Groundswellspring%20FINAL.pdf>.

49 See Nic Fleming, *Medical Tests On Great Apes Should Not Be Banned, Says Research Chief*, Telegraph.co.uk, June 3, 2006, <http://www.telegraph.co.uk/news/uknews/1520152/Medical-tests-on-great-apes-should-not-be-banned-says-research-chief.html>.

50 *History*, GAP Project, <http://projetogap.org.br/en-US/oprojetogap/Historia>.

Tafalla, a law professor who specializes in animal rights at Barcelona's Autonomous University, also employed reasoning similar to GAP's: that great apes "have curiosity, they feel affection and jealousy, they lie, and they suffer horribly when they are deprived of their freedom."⁵¹

The Environmental Committee thus appeared to take seriously the notion that great apes' human-like cognitive capabilities make them "special" among animals and worthy of a new status in the law. Yet the resolution, which was supposed to have been adopted by parliament within four months, has not been acted upon as of this writing; it is thus unclear whether it will become law.⁵² It is also unclear how much of a practical difference the resolution would make in the lives of great apes in Spain, even if it were to pass. Although, as discussed above, the resulting law would ban research on apes, Pedro Pozas, GAP's Spanish director has stated that "[w]e have no knowledge of great apes being used in experiments in Spain"⁵³ Further, while banning the use of great apes in performance, the proposed law would allow Spanish zoos to keep the more than 300 great apes already in captivity.⁵⁴ These concerns aside, the resolution raises tantalizing but thorny questions as to what effect, if any, a shift in legal status for great apes would have on the rights of other types of animals.

3. The EU Directive

In contrast to Spain's proposed resolution, the EU's 2010 legislation on laboratory animals does not change the legal status of great apes, but does specifically ban their use in research.⁵⁵ The 2010 legislation revises Directive 86/609 EEC, on the protection of vertebrate animals used for experimental and other scientific purposes, adopted by the European Council in 1986.⁵⁶ The 1986 Directive contains detailed guidelines on the care and accommodation of laboratory animals, and includes requirements

51 See *Human Rights for Apes*, *supra* note 23.

52 See *Initiatives*, Congreso de los Diputados, IX Legislatura, http://www.congreso.es/portal/page/portal/Congreso/Congreso/Iniciativas?_piref73_2148295_73_1335437_1335437.next_page=/wc/servidorCGI&CMD=VERLST&BASE=IWI9&FMT=INITXDSS.fmt&DOCS=1-1&DOCORDER=FIFO&OPDEF=ADJ&QUERY=%28184%2F049594*.EXPO.%29.

53 Lester Haines, *Spain Plans "Human Rights" For Great Apes*, THE REGISTER, June 26, 2008, http://www.theregister.co.uk/2008/06/26/great_ape_rights/.

54 See *Human Rights for Apes*, *supra* note 23.

55 See *Europe adopts new law*, *supra* note 28.

56 See *Introduction to the Revision*, European Commission, Environment, Laboratory Animals, http://ec.europa.eu/environment/chemicals/lab_animals/nextsteps_en.htm.

that experimenters avoid “unnecessary pain to the animal subjects” and employ alternatives to animal testing where possible.⁵⁷ The requirements imposed by the 1986 directive may well have represented the most stringent rules on the use of animals in research at the time of its enactment.

The 2010 revision, citing “new scientific knowledge” about “the capacity of animals to sense and express pain, suffering, distress and lasting harm,” aims to 1) scale down the number of animals used for scientific purposes, without hindering research, 2) promote alternative testing methods, and 3) reduce the amount of pain caused by experiments.⁵⁸ The legislation effects a general ban on the use of great apes such as chimpanzees, gorillas and orangutans for scientific testing, subject to a “safeguard clause,”⁵⁹ but allows experiments on other primate species in biomedical areas essential for the benefit of human beings, for which no other alternative research methods are yet available.⁶⁰

In 2002, as part of the preparatory work for the revision, the European Commission Directorate General on the Environment (ECDGE) requested that the Scientific Committee on Animal Health and Animal Welfare (SCAHAW) issue an opinion on the welfare of non-human primates used in experiments. The SCAHAW report, adopted in December 2002,⁶¹ contained detailed scientific findings about primate social structures, intelligence, and culture.⁶² With respect to chimpanzees, the report noted: “[i]t has been clearly shown that the chimpanzee, more than other species, possesses mental capacities resembling those of humans and may even understand the mental states, intentions and emotions of others.”⁶³ The SCAHAW Report cited a number of studies, including Goodall’s, that had revealed “striking” similarities between humans and chimpanzees in “mental (i.e. emotional and

57 See *Directive 86/609*, European Coalition for Biomedical Research, http://www.ecbr.eu/directive-86609_2.htm.

58 See *Europe adopts new law*, *supra* note 28.

59 See DIRECTIVE 2010, *supra* note 29, at 50 (Article 55(2) reads in relevant part, “Where a Member State has justifiable grounds for believing that action is essential for the preservation of the species or in relation to an unexpected outbreak of a life-threatening or debilitating clinical condition in human beings, it may adopt a provisional measure allowing the use of great apes in [certain] procedures . . .”).

60 DIRECTIVE 2010, *supra* note 29, at 34.

61 See *The Welfare Of Nonhuman Primates Used In Research*, Scientific Committee on Animal Health and Animal Welfare, adopted Dec. 17, 2002, http://ec.europa.eu/food/fs/sc/scah/out83_en.pdf [hereinafter “SCAHAW Report”].

62 *Id.* at 16.

63 *Id.* at 22.

cognitive) capacities . . . social sophistication, and . . . cultural development.”⁶⁴ SCAHAW further noted that “[c]himpanzees and bonobos resemble humans more in their mental capacities than any other species. They possess not only such primary emotions as anger and fear, but also many that have often been regarded as typical for the human species, such as sadness, joy, despair, jealousy, and sympathy. They express these by means of expressive behaviours that are very similar to those of humans, such as their facial displays; for example, they can laugh in similar contexts as humans.”⁶⁵

The SCAHAW Report discussed studies in which great apes were taught language systems and basic numeric and computational competence, mirror mark tests, studies which showed that great apes may teach one another and develop distinctive cultures, studies showing that they may have a “theory of mind,” empathy, and altruism, as well as manipulative and deceptive behavior, and those showing that they develop “implicit social contracts based on expectations” and a sense of obligation, which can “acquire a normative character.”⁶⁶ The Report posited that such behavior may represent “the roots of morality.”⁶⁷

In sum, SCAHAW concluded that great apes’ “advanced characteristics, which [they] share with humans, [have] confronted humans with the question whether it is morally acceptable to subject beings at this level of sentience and sapience to the treatments involved in invasive biomedical research.”⁶⁸ Yet SCAHAW was decidedly cautious, making recommendations consistent with its mandate to “report on the welfare of non-human primates used in scientific procedures, and to propose how the welfare of these animals could be improved,” *without* “review[ing] the ethical issues of whether or not primates should be used in research.”⁶⁹ Thus, SCAHAW’s recommendations addressed fairly limited welfare improvements, such as providing primates with a “stimulus-rich” environment, keeping more detailed

64 *Id.* at 22-23.

65 *Id.* at 22-23.

66 *Id.* at 23-24.

67 *Id.*

68 *Id.* at 25.

69 *Id.* at 95 (emphasis added).

data on the animals, and providing better training for staff handling them.⁷⁰

Notably, ECDGE also solicited an opinion from the Scientific Committee on Health and Environmental Risks (SCHER) in preparation for the EU's 2010 Directive. SCHER's report, titled "The need for non-human primates in biomedical research, production and testing of products and devices," concluded (perhaps unsurprisingly, given its title) that "[b]ased on the available scientific evidence . . . [there are no] valid scientific reasons to support a discontinuation of the use of primates in basic and applied research, or in the development and testing of new drugs."⁷¹ However, SCHER conceded that laboratory use of nonhuman primates raises "specific ethical questions."⁷²

Thus, ECDGE examined numerous cognitive studies of primates, and great apes in particular, in preparation for its proposal to amend the directive; those studies apparently militated in favor of the general ban on the use of great apes embodied in the Directive. However, as well known animal rights advocate Gary Francione has noted, of the approximately 12 million animals used in research in the EU each year, only about 10,000 are primates, and of those, in 1999, only 6 were great apes.⁷³ In light of these statistics, the EU directive, which bans the use of great apes only—and further, subject to the above-mentioned caveats—is unlikely to effect large-scale changes in animal treatment in the EU. Interestingly, both SCAHAW and SCHER noted that the cognitive abilities of great apes raised ethical questions about their use as research subjects, and yet the EU did not impose a total ban on their use in experimentation. Arguably, this highlights one of the problems inherent in tethering legal protections for animals to their cognitive similarity to humans: as Francione has observed, animals can never win "the similarity game."⁷⁴

⁷⁰ *Id.* at 95.

⁷¹ *The Need For Non-Human Primates In Biomedical Research, Production And Testing Of Products And Devices*, SCIENTIFIC COMMITTEE ON HEALTH AND ENVIRONMENTAL RISKS, at 6, 27, available at http://ec.europa.eu/environment/chemicals/lab_animals/pdf/scher_o_110.pdf, [hereinafter "SCHER Report"].

⁷² *Id.* at 7.

⁷³ See SCAHAW Report, *supra* note 63, at 8; SCHER Report, *supra* note 71, at 6.

⁷⁴ Gary L. Francione, *Equity and Similarity*, in ANIMAL RIGHTS: THE ABOLITIONIST APPROACH, June 10, 2007, <http://www.abolitionistapproach.com/equality-and-similarity-to-humans/#more-110> [hereinafter "*Equity and Similarity*"] ("[T]he 'similarity' game is one that nonhumans can never win. They will never be considered to have the

4. *Chimpanzees in the United States*

The U.S. is the “only remaining large scale user of chimpanzees in biomedical research in the world,”⁷⁵ even though the humane treatment of primates in research has been a matter of concern for a number of years among animal welfare advocates and the general public.⁷⁶ In 1985, the federal Animal Welfare Act (AWA) was modified to include the requirement that captive primates be given “a physical environment adequate to promote [their] psychological well-being.”⁷⁷ The intent of the new standard was “to provide adequate space equipped with devices for exercise consistent with the primate’s natural instincts and habits.”⁷⁸

At least some advocates hailed this requirement as a “turning point” in attitudes toward chimpanzees in captivity.⁷⁹ For example, David Favre has written, “[t]his provision is as close to a trump card as any group of animals has received in our legal system,” because “[t]here is no balancing this interest with human interests; it is an unmodified, unlimited requirement for the housing of primates.”⁸⁰ Yet it is unclear what factors, other than public concern about animal welfare, drove Congress to insert this provision. It “may have been adopted due to recognition of chimpanzees’ intellectual and emotional development, or it may have been adopted due to the belief that ‘happier’ animals make healthier research subjects.”⁸¹ There is at least some reason to favor the former interpretation: in 1985, knowledge of chimpanzee cognition was already playing a role in arguments

‘special’ characteristic to the degree necessary to get us to stop exploiting them if we want to keep doing so. We are wasting our time by thinking that the solution to the problem of animal exploitation is to have cognitive ethologists do experiments, which, ironically, may involve vivisection, in order to show the extent to which nonhuman great apes and other primates, dolphins, parrots, etc. possess some ‘special’ characteristic.”)

75 *End Chimpanzee Research: An Overview*, PROJECT R&R, <http://www.releasechimps.org/mission/end-chimpanzee-research/> [hereinafter “*An Overview*”].

76 *See Summary of U.S. Public Law 99-198 (AWA 1985)*, by Animal Legal and Historical Center, http://animallaw.info/statutes/stusawapl_99_198.htm.

77 *See* 7 U.S.C. § 2143; 9 C.F.R. §§ 3.75, 3.81 (“Standards and certification process for humane handling, care, treatment, and transportation of animals”).

78 H.R. Rep. No. 99-447 (Conf. Rep.), available at http://animallaw.info/administrative/adushconfrep99_447.htm.

79 Alicia S. Ivory, *Chimpanzee Laws in the United States and Abroad*, Animal Legal and Historical Center (2007), <http://www.animallaw.info/articles/dduschimplaws.htm#II> [hereinafter “*Chimpanzee Laws*”].

80 David S. Favre, *Judicial Recognition of the Interests of Animals—a New Tort*, 2005 MICH. ST. L. REV. 333, 347 (2005) [hereinafter “*Judicial Recognition*”].

81 *Chimpanzee Laws*, *supra* note 81.

for their improved treatment.⁸²

In another significant development, Congress passed the Chimpanzee Health Improvement, Maintenance and Protection Act (“CHIMP Act”) in 2000.⁸³ The CHIMP Act provided for retirement and lifetime care of chimpanzees not in active research protocols. It prohibited euthanasia of these “surplus” chimpanzees (except for humane health-related reasons, such as intractable illness), established a federally funded “retirement” system, and required the government to take responsibility for at least part of the cost of lifetime care for these chimpanzees.⁸⁴

The CHIMP Act was based on the recommendations of a Special Committee of the National Research Council (NRC), which had been assigned to examine what should be done with the more than 1,000 long-living chimpanzees that had been part of the U.S. federal research system for many years, but were no longer needed for research.⁸⁵ The Committee found that continued laboratory housing for the chimpanzees would be expensive, particularly when the animals were no longer actively part of research, and that the cheapest alternative would be to euthanize them.⁸⁶ However, the NRC rejected this option, in part because, “[t]he phylogenetic status and psychological complexity of chimpanzees indicate that they should be accorded a special status with regard to euthanasia that might not apply to other research animals, for example, rats, dogs, or some other nonhuman primates. Simply put, killing a chimpanzee currently *requires more ethical and scientific justification than killing a dog, and it should continue to do so.*”⁸⁷ The committee also noted that there was “strong [public] sentiment...that researchers are not justified in using chimpanzees without concurrent commitment for their lifetime

82 See *Chronology of Key Events*, *supra* note 19.

83 Chimpanzee Health Improvement, Maintenance and Protection Act, 42 U.S.C. § 287a-3a (2000).

84 *The CHIMP Act*, PROJECT R&R, <http://www.releasechimps.org/mission/change-laws/the-chimp-act/> [hereinafter “CHIMP Act”].

85 See COMM. ON LONG-TERM CARE OF CHIMPANZEES, INST. FOR LAB. ANIMAL RESEARCH COMM’N ON LIFE SCIENCES, CHIMPANZEES IN RESEARCH: STRATEGIES FOR THEIR ETHICAL CARE, MANAGEMENT, AND USE, at 53-54 (1997), http://www.nap.edu/openbook.php?record_id=5843&page=R1 [hereinafter “NRC Report”].

86 *Id.* at 53-54.

87 *Id.* at 38 (emphasis added).

care and that euthanasia as a means of population control is unacceptable.”⁸⁸ Accordingly, the committee suggested the creation of retirement sanctuaries that would be partially funded by the government as well as nonprofit organizations.⁸⁹

Jane Goodall testified before Congress in support of the CHIMP Act.⁹⁰ According to Favre, while some Congressmen objected to the law, no one on the record hinted at killing the chimpanzees as an alternative.⁹¹ Rather, Senator Smith of New Hampshire explained in the Congressional Record that “*because chimpanzees and humans are so similar*, those who work directly in chimpanzee research would find it untenable to continue using these animals if they were to be killed at the conclusion of the research.”⁹² The CHIMP Act was passed in 2000. Favre hailed this as “representative of incremental legal change on behalf of animals,” and noted that “nobody suggested a retirement home for all of the rats that have been used in scientific studies and are no longer needed.”⁹³ Thus, knowledge of chimpanzee cognition played a role in the decision not to euthanize the “surplus” animals and to grant them lifetime retirement care.

However, the CHIMP Act contained a loophole that allowed retired chimpanzees to be brought back into research. This loophole was created when some proponents of biomedical research opposed the sanctuary system, arguing that chimpanzees were valuable subjects for studying arthritis, diabetes, heart disease, and AIDS, and to address these concerns, the House of Representatives added an amendment to the CHIMP Act while it was still under consideration, in order to allow for the temporary removal of retired chimpanzees for medical research in certain circumstances.⁹⁴ In

88 *Id.* at 59-60. The Report observed: “Many members of the public and the scientific community have called for continuing support for chimpanzees in an acceptable environment, rather than euthanizing them, even when they are no longer wanted for breeding or research. The committee fully recognizes the financial implication of this position in regard to lifetime funding for all animals and for additional space and facilities for an aging population.”)

89 *Id.*

90 See Lee Hall, *Rights for Other Apes, They Insist. Are They Serious?*, DISSIDENT VOICE, Aug. 27, 2008, <http://dissentvoice.org/2008/08/rights-for-other-apes-they-insist-are-they-serious/>.

91 See *Judicial Recognition*, *supra* note 80, at 349.

92 146 Cong. Rec. S11,654, 11,655 (emphasis added).

93 *Judicial Recognition*, *supra* note 80, at 350.

94 See, e.g., Sanctuary System for Surplus Chimpanzees, 42 U.S.C. § 287a-3a (2000) (providing in (d)(3)(A)(ii)(I) that an individual retired chimpanzee might be removed from the sanctuary because of that chimpanzee’s specific prior medical

response, Representative Jim McCrery (R-LA) joined Senator Richard Burr (R-NC) in introducing the “Chimp Haven is Home Act” (CHHA) in 2007, which would eliminate the CHIMP Act’s medical research exception for chimpanzees housed in federal sanctuaries. House Bill 3295, introduced by Representative McCrery, was companion legislation to Senate Bill 1916, which was passed by both houses and became Public Law 110-170 of the 110th Congress on December 26, 2007.⁹⁵ Project Release & Restitution for Chimpanzees in US Laboratories (Project R&R), a campaign of the New England Anti-Vivisection Society (NEAVS) applauded this amendment as “reinforcing a moral commitment to chimpanzees by the U.S. Government.”⁹⁶

Notwithstanding these developments, recent events show that there is in fact little “moral commitment” to retire chimpanzees from research in the U.S., even if they are not in active research protocols. In September 2010, the National Institute of Health (NIH) decided to move a colony of chimpanzees, currently housed in the Alamogordo primate facility at Holloman Air Force base in New Mexico, to the Southwest National Primate Research Center, where they may once again be subject to invasive research.⁹⁷ The aging chimpanzees were used in research for years, but have not been research subjects for nearly a decade, because of an agreement between NIH and the military, which prohibits using the animals for biomedical tests on the base.⁹⁸ However, NIH decided it wanted to use the chimpanzees for research again, primarily to help develop a Hepatitis C vaccine.⁹⁹ Dr. John L. VandeBerg, director of the Southwest National Primate Research Center, stated that the research was “imperative” and “ethical.”¹⁰⁰ But he also noted that the chimpanzees could generate revenue from researchers, and that this gave the research facility “a huge financial advantage . . . over sanctuaries,

history if no retired chimpanzee with a similar history was available in a research facility.)

95 See Chimp Haven is Home Act, Pub. L. No. 110-170, 121 Stat. 2465 (2007).

96 CHIMP Act, *supra* note 84.

97 See *Chimps’ Future Prompts Debate Over NM Primate Lab*, ASSOCIATED PRESS, Sept. 22, 2010, <http://enews.earthlink.net/article/us?guid=20100921/5a95e40a-bc76-4021-b2ef-38f100dcaa5f> [hereinafter *Chimps’ future prompts debate*].

98 See Dan Frosch, *Will Aging Chimps Get to Retire, or Face Medical Research?*, N.Y. TIMES, Sept. 1, 2010.

99 See *id.*

100 *Chimps’ future prompts debate*, *supra* note 97.

which cannot generate any revenue from research.”¹⁰¹ Despite entreaties from organizations such as Project R&R, as of this writing, the transfer is still scheduled to take place.¹⁰²

The most recent chapter in the history of great apes under U.S. law has yet to unfold, however. The Great Ape Protection Act (GAPA), currently before Congress, seeks to end the use of great apes in invasive research in the US.¹⁰³ GAPA was first introduced in the House of Representatives in 2008 by Representative Edolphus Towns (D-NY) and a bipartisan group of seven co-sponsors, and again in 2009 by the same sponsors.¹⁰⁴ The Senate bill followed in August 2010, introduced by Senators Maria Cantwell (D-WA), Susan Collins (R-ME), and Bernie Sanders (I-VT).¹⁰⁵

Cantwell stated in the Congressional Record that “[great apes] are very social, highly intelligent animals—with the ability, for example, to learn American Sign Language. Their intelligence and ability to experience emotions so similar to humans underscore how chimpanzees suffer intensely under laboratory conditions. Their psychological suffering in laboratories produces human-like symptoms of stress, depression and post-traumatic stress disorder after decades of living in isolation in small cages.”¹⁰⁶ Cantwell also argued that chimpanzees make poor research models for human disease, and that retiring the chimps into sanctuaries would save “more than \$170 million taxpayer dollars throughout the chimpanzees’ lifetimes.”¹⁰⁷

Cantwell’s arguments are like those of Project R&R, which is promoting GAPA. Project R&R’s science team uses studies of cognitive research on chimpanzees to argue that it is unethical to use “our next of kin,” in whose “intelligence, social and family life, and complex emotions, we see ourselves,” in invasive research.¹⁰⁸ According to Project R&R, research “has shown that chimpanzees, ‘like

101 *Id.*

102 See *The Faces of Alamogordo*, PROJECT R&R, Sept. 23, 2010, <http://www.releasechimps.org/2010/09/23/the-faces-of-alamogordo/>.

103 See H.R.1326, S. 3694.

104 See H.R. 1326.

105 See S. 3694.

106 156 Cong. Rec. S6652.

107 156 Cong. Rec. S6652.

108 *An Overview*, *supra* note 75.

[humans],’ suffer when confined, stripped of agency, repeatedly physically injured and subjected to constant fear and stress. Project R&R also advances the “practical” argument that chimpanzees are simply not good research subjects for human disease.¹⁰⁹

As of this writing, the GAPA is still in Congress, where it has gained several sponsors.¹¹⁰ If the GAPA passes, it may be a significant step for chimpanzees in the U.S., but it would remain to be seen whether the protections would be lasting. The saga of the Alamogordo chimpanzees shows the fragility of the protections chimpanzees have gained to date.

5. Habeas Corpus for Suiça

Three years before the Spanish resolution, in a judicial decision almost as stunning as that measure, albeit on a much smaller scale, a Brazilian Criminal Court judge found that a chimpanzee may obtain a writ of *habeas corpus*. Although the chimpanzee, Suiça, died before the case was concluded, and the judge therefore dismissed the case on the grounds that any unlawful imprisonment ended with her death, he had previously granted the writ to allow for an “in depth” consideration of whether she had been unlawfully imprisoned.¹¹¹

The case is notable not only for the outcome, but for the unusual legal remedy sought. *Habeas corpus* (Latin for “you have the body”) is a legal action by which a prisoner may petition the court to be released from unlawful detention, and which may be brought by the prisoner herself, or by someone on her behalf.¹¹² In Suiça’s case, public prosecutors sought her release from “imprisonment” in a Salvador zoo and subsequent relocation to a primate sanctuary.¹¹³ The prosecutors alleged that Suiça was being kept at the zoo in an enclosure that was too small, “hindered . . . her right of movement,” and

109 *The Case to End Chimpanzee Research: Scientific Publications*, PROJECT R&R, <http://www.releasechimps.org/flawed-science/dangerous-and-unnecessary/the-case-to-end-chimpanzee-research/>.

110 *See The Great Ape Protection Act, Updates*, PROJECT R&R, <http://www.releasechimps.org/mission/change-laws/the-great-ape-protection-act/>.

111 *In re Suiça*, *supra* note 22.

112 “Habeas Corpus,” Lectlaw.com, <http://www.lectlaw.com/def/h001.htm>.

113 *See Petition for a Writ of Habeas Corpus*, 9th Salvador Criminal Court, Salvador, Bahia, Brazil, 9/19/2005, n 833085-3/ 2005, available at [http://www.animallaw.info/nonus/pleadings/pb_pdf/Habeas%20Corpus%20on%20Behalf%20of%20a%20Chimp%20H.R.1326,111th%20Cong.\(2009\).20Rev2.pdf](http://www.animallaw.info/nonus/pleadings/pb_pdf/Habeas%20Corpus%20on%20Behalf%20of%20a%20Chimp%20H.R.1326,111th%20Cong.(2009).20Rev2.pdf), [hereinafter *Petition for a Writ of Habeas Corpus*].

caused her “great suffering.”¹¹⁴ The first argument in their petition set forth the cognitive, emotional and social similarities between chimpanzees and humans, stating that chimpanzees “resemble human beings more than any other living non-human animals . . . are capable of experiencing and expressing emotions [and] if deprived of socialization . . . exhibit stress symptoms similar to an emotionally starved or mentally ill individual, these symptoms can evidence themselves as self mutilation, dysfunctional sexual behavior, or symptoms of autism.”¹¹⁵ The prosecutors quoted a veterinarian who reported that chimpanzees needed social interaction in order to develop “a sense of self security [and] the maturity of social and emotional skills.”¹¹⁶

However, the prosecutors did not limit themselves to arguments based on cognition. Instead, like GAP, whose founders they cited extensively, the prosecutors argued for expansion of legal personhood based on an “evolutionary continuum,”¹¹⁷ and cited genetic studies to show chimpanzees’ similarity to humans on that basis as well as on a cognitive one. They concluded: “if we consider the new evidence presented by scientists from the most renowned scientific research centers in the world, the current Brazilian law, it is necessary to acknowledge that chimpanzees must, using an extensive interpretation, be covered by the concept of natural person in order to guarantee their fundamental right to bodily freedom.”¹¹⁸

The prosecutors’ petition also presented an extensive examination of jurisprudence and changes in social mores, but their argument for Suiça was largely couched in the similarity arguments used by GAP. However, it is interesting to note that they cited Peter Singer for the proposition that “[t]here is enough scientific evidence to ascertain that apes, dolphins, whales, elephants, dogs, and pigs are intelligent, self-aware beings.”¹¹⁹ While this argument apparently presumes that the extension of personhood should rest on cognitive ability, rather than genetic and cognitive similarity or evolutionary

114 *Petition for a Writ of Habeas Corpus*, *supra* note 113, at 2.

115 *Id.*

116 *Id.* at 2, 3.

117 *Id.* at 9.

118 *Petition for a Writ of Habeas Corpus*, *supra* note 113, at 13.

119 *Id.* at 12.

closeness, it is difficult to see how GAP's argument, as used by the prosecutors, could be marshaled in favor of whales, elephants, dogs or pigs.

The judge granted the writ. He explained that although legal precedent held that animals could not obtain *habeas corpus* relief,¹²⁰ he would grant it “in order to incite debate” of this “highly complex issue.”¹²¹ The judge then granted the parties an extension so that they could gather evidence about Suiça's situation. However, before the deadline for submission of evidence, Suiça died in her cage in the zoo. The judge, noting that “the news took [him] by surprise, no doubt causing sadness,” dismissed the petition on the ground that any unlawful imprisonment had ended with Suiça's death.¹²²

However, the judge stated that “[t]he topic will not die with this writ, it will certainly continue to remain controversial. Thus, can a primate be compared to a human being? Can an animal be released from its cage, by means of a Habeas Corpus?”¹²³ He indicated that his decision had been influenced by the prosecutors' references to GAP, “a group of ‘primatologists, ethologists and intellectuals,’ who ‘openly defend the extension of human rights to large primates,’ and that ‘among the factors that influenced my accepting this matter for discussion is the fact that among the petitioners are persons with presumed broad legal knowledge, such as Prosecutors and Law professors.’”¹²⁴ Thus, the judge made no mention of great ape cognition in his opinion, but rather, appeared to be swayed by the philosophical arguments made by GAP. However, since those philosophical arguments are based on great apes' similarity to humans, it is likely that this similarity played some role in the judge's decision.

6. Summary

The above examples have in common the argument that, because of their cognitive and genetic similarities to humans, great apes should be extended “personhood” (in the case of Spain and Brazil), or granted better welfare protections (in the case of the EU and the U.S.) As noted, this is the argument

120 See *In re Suica*, *supra* note 22 (citing a previous case, in which a petition for habeas corpus had been used to attempt to free a bird from her cage, and had been dismissed).

121 *Id.*

122 *Id.*

123 *Id.*

124 See *In re Suica*, *supra* note 22.

used by GAP, who influenced both the Spanish resolution and the Suiça decision. Cavalieri and Singer of GAP explain that they chose to concentrate on extending rights to great apes in particular, because the barrier that keeps other animals outside of the “protective moral realm” of humanity was weakest between great apes and humans, due to the similarities between the two.¹²⁵

Like GAP, Steven M. Wise, another animal rights proponent, argues that “rights” should be granted to animals based on how similar they are to humans. He envisions a “scale of practical autonomy,” or a “human yardstick,” in which “[t]he more exactly the behavior of any nonhuman resembles ours and the taxonomically closer she is, the more confident we can be that she possesses desires, intentions, and a sense of self resembling ours, and we can fairly assign her an autonomy value closer to ours.”¹²⁶ According to Wise, the higher the animal’s autonomy value, the more “liberty rights” that animal should have.¹²⁷ Wise bases his scale in part on traditional cognition tests applied to animals, such as the mirror self-recognition test, with those who pass that test placed at the top of the scale.¹²⁸

Although GAP and Wise include genetic similarity as well as intelligence in their argument for animal rights, genetic similarity can also be, and often is, invoked by those who want to *continue* to conduct invasive research into human diseases on great apes.¹²⁹ Further, genetic similarity arguments are very easily tossed aside, since even small differences in DNA can be significant.¹³⁰ Accordingly,

125 *Great Ape Project and Beyond*, *supra* note 21, at 307 (emphasis added).

126 Steven M. Wise, *Animal Rights, One Step at a Time*, in ANIMAL RIGHTS, CURRENT DEBATES AND NEW DIRECTIONS 33 (Cass R. Sunstein, Martha C. Nussbaum, eds. 2004) [hereinafter *One Step at a Time*].

127 *One Step at a Time*, *supra* note 126, at 34.

128 *See id.* at 33-34.

129 *See, e.g.*, SCHER report, *supra* note 71, at 20 (noting in conclusions that nonhuman primates are “the most relevant animal” for toxicity studies and studies of brain conditions because of their close similarities to humans”); *Animal Experimentation, Introduction*, Enotes.com, <http://www.enotes.com/animal-exp-article> (noting that the Scientific Steering Committee for the European Commission observed that vaccine research on primates was essential, because their immune systems were similar to humans, and that committee members believed that trials for AIDS, malaria, tuberculosis, hepatitis C, and immune based diseases depend upon primate testing and that neural testing on primates has led to advances in the treatment of Parkinson’s disease. The committee stated: “These advances were made possible by the fact that humans and primates are remarkably similar.”); *IPPL v. Institute for Behavioral Research, Inc.*, 799 F.2d 934 (1986) (“[r]esearch with primates helped to lead, for example, to the development of the polio vaccine”).

130 *See* Tom Geoghegan, *Should Apes Have Human Rights?*, BBC NEWS MAGAZINE, Mar. 29, 2007, http://news.bbc.co.uk/2/hi/uk_news/magazine/6505691.stm (noting that while great apes share approximately 98% of their DNA with humans, mice and humans share approximately 90% of their DNA).

the argument that great apes can think and feel in ways that are similar to humans appears to carry greater persuasive weight than arguments based on their genetic and evolutionary similarity, when arguing for increased protections. That this is so is evident from the language used in the Spanish resolution, by SCAHAW in its opinion on great apes in research for the EU Directive, and by Senator Cantwell in presenting GAPA before Congress. In short, the idea that great apes, because of their cognitive and emotional similarities to humans, are “special” among animals, and therefore deserving of greater protections, has played a strong role in advocacy for these animals.

Part II: Some are more equal than others:¹³¹ Problems with cognitive similarity arguments

Whether advocacy for great ape protections based on cognitive similarity has resulted in lasting protections for them is still an open question, as illustrated in the foregoing examples. However, even assuming the strategies described above have resulted or will result in a difference in the way great apes are treated in the law, will that make it easier for other animals to gain protections? Obviously, the further away from humans an animal is taxonomically, the less compelling an argument based on similarity becomes. Yet new research shows higher cognition in a wide variety of animals that are very different from humans.¹³² Do arguments such as those used by great ape advocates “translate” to other animals, or are they ultimately counterproductive, because they are based on similarities those animals don’t have?

1. The Human Yardstick

The first hurdle to using animals’ cognitive similarity to humans to argue for greater protections is that *humans* have a hard time assessing cognitive ability in other animals. For example, scientists recently discovered that the mirror self-recognition test, which has been used for 40 years to determine whether an animal is self-aware, may not be sensitive enough to measure that attribute.¹³³ In

131 George Orwell, *ANIMAL FARM, A FAIRY STORY* (Secker and Warburg 1945).

132 See e.g. Marla K. Conley, *Caring for Dolphins, Otters, and Octopuses: Speciesism in the Regulation of Zoos and Aquariums*, 15 *ANIMAL L.* 237 (2008) (noting that octopuses show “conditional discrimination,” a complex form of learning typically associated with vertebrates).

133 See *For The First Time, Monkeys Recognize Themselves In The Mirror, Indicating Self-Awareness*, *SCIENCE DAILY*,

September 2010, Luis Populin, a professor of anatomy at the University of Wisconsin-Madison, showed that, under certain conditions, “a rhesus macaque monkey that normally would fail the [mirror] test can still recognize itself in the mirror and perform actions that scientists would expect from animals that are self-aware.”¹³⁴ According to Populin, this finding shows that the mirror test may not be useful in some cases, and that an animal’s self-awareness may be in a “different form [or] it may show up in different situations, using different tests.”¹³⁵ Thus, the primary method by which self-awareness, a quality important to Wise and many other proponents of legal rights for great apes,¹³⁶ is determined, appears not to be a reliable indicator of the trait focused upon. Relatedly, the mirror test may be a poor one to determine self-awareness in species that do not rely primarily on eyesight for recognition, such as dogs.¹³⁷ Further, animals that have evolved in radically different ways than humans, such as birds or marine animals, may have impressive abilities, but their intelligence may be so different from human intelligence that humans may not be able understand it well enough to assess it.¹³⁸ As biologists Rogers and Kaplan argue, there is an implied view in cognitive research that “intelligence” “involves absolute and fixed criteria and . . . that these criteria have something to do with intelligence as [humans] understand it.”¹³⁹ Therefore, “some of [the] extraordinary skills and abilities [of animals] might get lost in tests that are simply inappropriate for the species.”¹⁴⁰

A related, but opposite, problem is that researchers may assign “human-like” cognitive abilities

<http://www.sciencedaily.com/releases/2010/09/100929171739.htm> [hereinafter *monkeys recognize themselves in the mirror*] (explaining the mirror self-recognition test. In this test, researchers put a temporary mark on an animal's face or body to see whether she touches or explores the mark on her own body. This is supposed to determine whether the animal can recognize that the animal in the mirror is a reflection of her, and is thought to show self-awareness.)

134 *Monkeys recognize themselves in the mirror*, *supra* note 133.

135 *Id.*

136 See *One Step at a Time*, *supra* note 126 at 33-34 (Wise assigns animals who pass the mirror mark test to “category one,” on his scale of practical autonomy, meaning that they have the highest claim to an expansion of legal rights.)

137 See Lesley J. Rogers and Gisela Kaplan, *All Animals Are Not Equal, the Interface between Scientific Knowledge and Legislation for Animal Rights*, in ANIMAL RIGHTS, CURRENT DEBATES AND NEW DIRECTIONS 33, (Cass R. Sunstein, Martha C. Nussbaum, eds. 2004) [hereinafter *All Animals are Not Equal*].

138 See Thomas I. White, IN DEFENSE OF DOLPHINS, THE NEW MORAL FRONTIER 12 (2007) [hereinafter IN DEFENSE OF DOLPHINS] (noting that dolphin researcher Diana Reiss characterizes dolphin intelligence as “alien”); *Think or Be Damned*, *supra* note 7 at 151, 183 (explaining that birds show cognitive abilities comparable to those of great apes, and noting that, “the failure of any one species to meet the criteria scientists have set on any given task may merely reflect the limits of our own human intelligence”).

139 *Think or Be Damned*, *supra* note 7 at 158.

140 *Id.*

to animals where they do not exist. Ronald Nadler of the Yerkes Regional Primate Research Center says that researchers who work with great apes, in particular, may “overemphasize the similarities between humans and other great apes, and . . . ignore the differences,”¹⁴¹ because the apes appear so human-like.¹⁴² Franz de Waal raises the concern that arguing for better protection for great apes on the basis of their human-like qualities could backfire because, “if in ten years, say, we prove that [these qualities do not] exist, does it mean we can do anything we want with these animals?”¹⁴³

Thus, human ability to accurately judge intelligence in other species is limited, and is based, in large part, on human understanding of human intelligence, which may not have relevance for animals that have evolved in vastly different ways from us. However, these problems do not mean that cognitive studies are all flawed, or that they should never be used in arguments for greater protections for animals. Rogers and Kaplan contend that new discoveries of animal cognitive ability *should* lead to changes in laws for their protection, but argue that their chief role is to change human attitudes toward *using* animals, not to design legislative protections based on how well some animals pass some tests.¹⁴⁴

In contrast to GAP, which sees advancements for great apes as stepping stones towards greater protections for other species, Rogers and Kaplan warn that the animals so far studied represent a “small fraction” of vertebrate species, and that calls to extend rights or protections to these few species, great apes in particular, would close the door to protections for others, and may even result in *worse* treatment for the unprotected.¹⁴⁵ In contrast to Wise, who envisions a scale of “rights” based on how closely an animal’s cognitive ability resembles that of humans, Rogers and Kaplan argue that cognitive

141 See Rachel Nowak, *Should Great Apes Be Given Legal Rights?*, NEW SCIENTIST, Feb. 13, 1991, at 20-21, , <http://www.scienceblog.com/community/older/1999/C/199902520.html> [hereinafter *Should Great Apes Be Given Legal Rights?*].

142 See e.g. Joseph Calamia, *Renowned Harvard Primatologist Found Guilty of Scientific Misconduct*, DISCOVER, Aug. 23, 2010, <http://blogs.discovermagazine.com/80beats/2010/08/23/renowned-harvard-primatologist-found-guilty-of-scientific-misconduct/> (Marc Hauser, a Harvard University primatologist, was recently found guilty of scientific misconduct for disseminating studies that purported to show that monkeys could recognize sound patterns, a skill for language development, without conducting adequate testing. The studies were the subject of three papers, which were thereafter retracted or modified.)

143 See *Should Great Apes Be Given Legal Rights?*, *supra* note 141.

144 See *Think or Be Damned*, *supra* note 7, at 191.

145 See *id.* at 152, 153, 181-182, 183.

ability is not a “simple linear continuum” from less intelligent to more intelligent.¹⁴⁶ As such, arguments based on such a scale run the risk of creating “a new Scala Naturae based on cognitive ability,” which would leave many animals out, and, worse, would lack the flexibility to change as new abilities were discovered in other animals.¹⁴⁷ The NCR report cited above, which stated that killing a chimpanzee “requires more ethical and scientific justification than killing a dog, and should continue to do so,”¹⁴⁸ is an example of this type of “scale” applied to the detriment of some animals.

Rogers and Kaplan also point to recent research showing higher cognitive ability in birds, animals whose brain structure is very different from humans,¹⁴⁹ and observe that this research has been important in “breaking the nexus between cognitive ability and the primate line.”¹⁵⁰ Therefore, it has challenged the notion that great apes, because of their evolutionary proximity to humans, are the only animals deserving of increased legal protections. However, since new discoveries continue to be made about the cognitive abilities of animals *other* than birds and primates,¹⁵¹ basing increased protections on these abilities may “throw us into a legislative conundrum that would require us to test the cognitive

146 *Id.* at 183.

147 *See id.* at 153, 183.

148 NRC REPORT, *supra* note 85, at 38.

149 *See Think or Be Damned*, *supra* note 7, at 160-161 (noting that “One of the lynch pins of the formerly held opinion that birds have inferior cognitive abilities has always been the fact that they lack a neocortex, that part of the brain known in mammals to be used for higher cognitive function.” (internal citations omitted)).

150 *Id.* at 156-157, 181 (stating that “[d]ecades of research into the abilities of great apes, while valuable and conducted under strict scientific conditions, have generally maintained what Emery and Clayton rightly describe as “primocentrism.” Primocentrism focuses on the primate line, because it is allegedly the only branch in the animal kingdom in which it is worthwhile to search for higher cognitive abilities. We have shown here that primocentrism is an ideology rather than scientific fact. Findings of higher cognitive abilities in birds overturn old assumptions that higher cognition followed a steady and superior evolution along just one evolutionary trajectory. In addition, challenges to these old assumptions have come from new discoveries about the complex cognition of octopuses and fish. Hence, the research on avian species has been extremely important in breaking the nexus between cognitive ability and the primate line. It has also undermined assumptions about the importance of the neocortex as a precondition for any cognitive development.”) (Internal citations omitted.)

151 *Id.* at 157-158 (in recounting the authors’ interaction with a monitor lizard, they state: “we . . . watched a monitor lizard (*Varanus varius*) solve a complex problem. It had found a large dog bone that it could not swallow unless it aligned it at a certain angle to its throat. It tried several postures when the bone was on the ground but did not succeed in getting it right. The lizard then picked up the bone and transported it to a tree stump, which it used as an anvil to strike the bone against until it was at the correct alignment. This small anecdotal observation suggests several parameters of higher cognitive ability: problem solving, tool use by using the trunk of the tree to manipulate the food, and even intentionality, because the monitor lizard carried the bone purposefully to the tree trunk. There was no trial and error, no hesitation, and no mistake.”) (Internal citations omitted.)

abilities of every species needing protection from human cruelty.”¹⁵² This “demand for proof of cognitive ability [as a rationale for legal protections] creates . . . an insoluble dilemma.”¹⁵³

Thus, while Rogers and Kaplan acknowledge that changes must be made to current animal welfare guidelines, they warn that, for the above reasons, designing such protections based on cognitive ability is problematic. They note that the “single unifying characteristic” for all animals in designing animal welfare legislation has heretofore been their capacity for pain. However, given the growing knowledge of animal minds, this may not be enough, because it has not “challenged the basic tenet that animals merely exist for our use and gain,”¹⁵⁴ a notion which *is* challenged by these new discoveries. Therefore, they counsel that “attitudes and legislation must change in ways that will allow flexibility for future change as science provides new knowledge.”¹⁵⁵

Taimie L. Bryant agrees that there are problems with arguments for legal protections based on an animal’s cognitive similarity to humans. First, humans are “heavily invested” in keeping the boundaries between humans and other animals distinct, and “heavily invested” in using other animals.¹⁵⁶ Because of this investment, Bryant, like Francione, argues that humans continually “raise the bar” to what counts as meaningful intelligence when it comes to legal protections for animals.¹⁵⁷ Further, according to Bryant, while an emphasis on cognitive abilities *could* result in expanded protections for animals, it is more likely to be answered in a very limited way, such as the AWA’s requirement that chimpanzees be given larger cages and enrichment activities to promote their “psychological well-being.”¹⁵⁸ She argues in this regard that, despite years of advocacy for chimpanzees in the U.S., primarily rooted in the animals’ cognitive and emotional similarity to humans,

152 *Id.* at 158.

153 *Id.* at 159.

154 *All Animals Are Not Equal*, *supra* note 137, at 196.

155 *Think or Be Damned*, *supra* note 7, at 189.

156 Taimie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans*, RUTGERS L. J. Vol. 39:247, 253 (2008) [hereinafter *Sacrificing the Sacrifice*].

157 *See Equality and Similarity*, *supra* note 74; *Sacrificing the Sacrifice*, *supra* note 156, at 263.

158 9 C.F.R. 3.75 *et seq.*

they are still subject to invasive experiments, and their “owners” still have few legal obligations to them. Thus, “although we could recognize that they have moral standing, we choose not to do so.”¹⁵⁹

The saga of the Alamogordo chimpanzees, arguably, illustrates Bryant’s point.

Bryant contends that this is so in part because defining an animal’s worth by how closely her mind resembles that of humans reinforces the “uncontested notion that it is moral for humans to define morality as it serves their purposes.”¹⁶⁰ She notes that “[b]y focusing so extensively and explicitly on challenging Cartesian notions of *animals* by way of asserting similarity to humans, advocates have failed to sufficiently challenge Cartesian notions of *humans*,”¹⁶¹ namely, that humans are superior in every way to animals, and, are therefore entitled to do as they please with them. Bryant argues that, as long as arguments for animal protections do not challenge the “presumption that humans are the center of the universe and the measure of all worth,” they will amount to little in the way of actual legal protection.

Thus, like Rogers and Kaplan, Bryant feels that arguments for greater protections must challenge the “basic tenet” that animals exist for human use,¹⁶² but she does not believe that arguments based on cognition can change human attitudes in this way. Rather, citing Francione, she points out that there is an “extreme gap between widespread, commonsense recognition of animals as sentient beings and the grossly inadequate legal means of protecting animals from even the most extreme types of human-inflicted suffering.”¹⁶³ Bryant suggests instead that, rather than being forced into supplying “rigorous analytic proofs of moral entitlement” for animals based on their cognitive similarity to humans,¹⁶⁴ proponents of increased protections should focus on making those who would use animals justify *their* positions. Legal arguments for animal protections should therefore aim to “challeng[e]

159 *Sacrificing the Sacrifice*, *supra* note 156, at 263.

160 *Id.* at 253, 266.

161 (emphasis in original). *Sacrificing the Sacrifice*, *supra* note 156, at 260.

162 *All Animals Are Not Equal*, *supra* note 137, at 196.

163 *Sacrificing the Sacrifice*, *supra* note 156, at 255.

164 *Id.* at 268.

humans' primacy at the top of a hierarchical world order," – to "decenter" humans¹⁶⁵ – rather than, in effect, begging for crumbs of protection based on cognitive similarity.

As an example of legislation that successfully "decenter[ed] human supremacy and [broke] down the traditional treatment of animals as mere property,"¹⁶⁶ Bryant cites Hayden's Act, which was signed into law in 1998,¹⁶⁷ and which reformed California's animal shelter legislation by incorporating many features of modern "no-kill" animal shelters. The Act contained two controversial provisions that, according to Bryant, weakened the supposed human entitlement to do anything they want with animals, by prohibiting "convenience euthanasia."

The first of these provisions allowed Internal Revenue Code (IRC) section 501(c)(3) groups to adopt animals slated to be killed by a shelter, and the second required healthy, owner-relinquished animals to be given adoption opportunities, *even if* the owner requested that the animal be euthanized.¹⁶⁸ By requiring that animals be given a chance to live, rather than euthanized for the sake of convenience,¹⁶⁹ these provisions allowed the animal's interest in living to trump humans' interest in getting rid of them easily. The "convenience euthanasia" prohibition proved especially controversial, as indicated by lawsuits and widespread failure to comply—even when there was little to no burden for the owners involved¹⁷⁰—indicating the strength of people's reluctance to give up the "human entitlement."

Arguments based on cognitive studies of animals apparently played no role in Hayden's Law, which concerned companion animals. To Bryant, such arguments might potentially have been counterproductive in this context, as the animals' "right" to not be immediately euthanized appeared to

165 *Id.* at 255, 330.

166 *Id.* at 327.

167 *See id.* at 313 n. 270 (noting that the bill was introduced to the California Senate as Senate Bill 1785. S.B. 1785, 1997-1998 Reg. Sess. (Cal. 1998). It passed both houses with overwhelming support, and was signed into law by then Governor Pete Wilson and chaptered as Chapter 752, Statutes of 1998. Bryant acted as a consultant to Hayden and others, and conducted extensive research on animal shelters.)

168 *See Sacrificing the Sacrifice, supra* note 156, at 314-321.

169 *See id.* at 322.

170 *See id.* at 324-326.

stem primarily from the legislature's skepticism of the motives behind the human owners' desire to immediately euthanize their healthy animals.¹⁷¹ With that said, an argument based in part on animal cognition did influence the outcome of a similar case in which animals' interest in living was pitted against a human's desire to have them euthanized. The case, *In re Estate of Howard Brand*,¹⁷² will be discussed below.

2. *Beyond Similarity – Other Minds, Other Nations*

To recap, arguments based on cognitive similarity of animals to humans (1) do not take into account the facts that intelligence in animals does not lie on a linear, hierarchical continuum and that humans lack adequate knowledge to mete out protections based on similarity or even animal cognition; and (2) do not adequately contest the strong, underlying human prerogative to use animals. Is it possible to use cognitive studies of animal minds in arguing for protections without invoking a similarity gradient? If so, could these arguments be used to help “decenter” human prerogative to use animals?

Catherine MacKinnon offers an interesting shift in perspective. Using feminist theory to critique animal advocacy, MacKinnon, like Bryant, observes that, “endless loops of analysis of sameness and difference” are useless in changing [animals'] status,¹⁷³ and notes, “[w]hy should animals have to measure up to humans' standards for humanity before their existence counts?”¹⁷⁴ But

171 *See id.* at 321-322 (“[T]here was unrefuted evidence that people fraudulently relinquish animals, claiming those animals are their own when, in fact, they are not. Due to embarrassment about relinquishing their animals or for the purpose of securing the immediate killing of the animal they are relinquishing, relinquishing parties will sometimes make untrue claims about the animals, such as stating untruthfully that the animal has bitten someone or that the animal is ill. Sometimes a neighbor turns in a neighbor's companion animal, requesting that the animal be killed, with the expectation that the true owner would not be able to find and reclaim a pet that has been killed immediately upon relinquishment. Sometimes people turn in their girlfriends' or boyfriends' companion animals and request that the animal be killed out of spite or because they do not want the animal to return to the household. Sometimes one family member makes the decision to relinquish the family's companion animal despite the fact that other family members disagree.”)

172 *In re Estate of Howard H. Brand*, No. 28473 (Vt. Prob. Ct. Mar. 17, 1999) (unpublished), available at http://www.animallaw.info/pleadings/pb_pdf/pbusvtbrandorder.pdf [hereinafter *In re Howard Brand*].

173 Catherine A. MacKinnon, *Of Mice and Men: A Feminist Fragment on Animal Rights*, in ANIMAL RIGHTS, CURRENT DEBATES AND NEW DIRECTIONS 264 (Cass R. Sunstein, Martha C. Nussbaum, eds. 2004) [hereinafter *Of Mice and Men*].

174 *Of Mice and Men*, *supra* note 173, at 267.

MacKinnon sees an unexpected role for animal cognition studies in arguing for legal protections. She observes that, although scientists have begun to make inquiries into “animal societies” and “animal governance . . . in the sense of patterns of deference and command, and who gets what, when, how and why,” *lawyers* have devoted little to no attention to these aspects of animal behavior.¹⁷⁵ One point of such an inquiry might be “to see whether, not having made such a great job of it, people might have something to learn.”¹⁷⁶ In other words, MacKinnon suggests that advocates for animal protections look at how animals and animal societies may do some things *better* than human ones.

This insight is useful. First, it shifts the focus on animal cognition away from tests administered in a captive setting, such as the mirror test. This is important because those tests, as noted above, often provide an inaccurate gauge of animal capabilities, and also because using such tests to argue for greater protections for animals runs the risk of inconsistency: that is, if animal minds are worth taking seriously, then their use in captive settings is questionable. Second, Mackinnon’s suggestion is useful because it shifts the perspective of the legal discussion from one that seeks to defend animals by pointing out their similarities to humans, to one that shines light on the flawed notion of automatic human superiority in all things meaningful that underlies the use of animals. It also shifts the focus from the used or abused animal’s individual cognitive attributes, and how they may or may not measure up to the human yardstick, to how animals live and solve problems when among their own.

What would such an argument look like? Some scientists already compare animal societies favorably to human ones. For example, dolphins, highly social animals, engage in sophisticated conflict resolution to avoid physical aggression between members of their societies, even using a separate form of communication, or “language” to do so in situations of high excitement, such as when they are competing for the same food.¹⁷⁷ Most, if not all, members of elephant herds participate in the

¹⁷⁵ *Id.* at 270.

¹⁷⁶ *Id.*

¹⁷⁷ See *Dolphins Use Diplomacy in Their Communication, Biologists Find*, SCIENCE DAILY, June 9, 2010, <http://www.sciencedaily.com/releases/2010/06/100609094355.htm>.

care and protection of their young.¹⁷⁸ There are numerous examples from researchers who study canids and primates, of altruism and culture in their societies.¹⁷⁹ According to a Cornell biologist, bees use a democratic process when selecting a new home that “humans would do well to emulate.”¹⁸⁰ Notably, in business, the idea that humans may have things to learn from how animals do things when left alone is not such a radical one. For example, Barilla, an Italian pasta company, manages its deliveries by using AntRoute, software developed by observing how ant colonies solve the “traveling salesman problem,” by finding the shortest routes to a string of destinations many times faster than computers could.¹⁸¹

Of course, how ants solve the traveling salesman problem probably has little relevance to the law, at least today. While it is interesting to speculate about what kinds of arguments could be made, even outside of the animal law context, based on how animal societies solve problems – using elephant, dolphin, or wolf societies to make arguments in the family law arena, for example – the importance of these examples to animal law is that they demonstrate that humans are not superior in all things meaningful, and that the similarity of an animal to humans has little bearing on the kinds of abilities that animal has. Thus, MacKinnon’s reassessment could, arguably, be used to break the link between similarity and worthiness in cognitive arguments. However, whether this would promote the idea that, as Rogers and Kaplan argue, animals “do not exist merely for our use and gain”¹⁸² without a direct examination of the underlying human sense of entitlement is a matter of speculation. It may be that basing legal protections of animals on proof of ability—cognitive, social, or otherwise—is ultimately a “losing game,” because humans are always the ones assessing the ability in question.

178 See Wikipedia, *Elephants*, http://en.wikipedia.org/wiki/Elephant#cite_ref-53.

179 See e.g. *Bonobo: The Forgotten Ape*, *supra* note 37; Marc Beckoff & Jessica Pierce, *WILD JUSTICE* (2009).

180 *Dancing Honeybees Use Democratic Process When Selecting a New Home*, SCIENCE DAILY, Sept. 30, 2010, <http://www.sciencedaily.com/releases/2010/09/100928153151.htm>.

181 See *Riders on a Swarm*, THE ECONOMIST, Aug. 12, 2010.

182 *All Animals are Not Equal*, *supra* note 137, at 196.

Part III: Who's the fairest of them all? A case of "decentering"

Of course, whether based on the type of argument MacKinnon suggests or not, one practical outcome of the argument that animals do not exist merely for our use and gain is, as Bryant argues, the idea that their interest in living should trump the human interest in "convenience euthanasia." Animal shelter "no kill" legislation, like Hayden's law, reflects this notion. The same reasoning was the basis for a 1999 Vermont judicial ruling in which a judge invalidated a provision in a will that directed that a decedent's horses be euthanized upon his death. However, unlike the legislators behind Hayden's Law, the judge in the Vermont case relied in part on discoveries about animal intelligence in reaching her decision that the horses' interest in living mattered.

The case, *In re Estate of Howard H. Brand*, concerned a man who added a codicil to his will that, upon his death, all of the horses he owned be destroyed, along with, interestingly enough, his Cadillac.¹⁸³ When he died, a group called the "Coalition to Save Brand's Horses,"¹⁸⁴ was granted leave to intervene in the proceeding. The judge, noting that she "[did] not set aside a provision in a person's Last Will and Testament lightly," and that Brand's "clear intention" was to have the horses killed upon his death, nonetheless ruled that the provision violated public policy.¹⁸⁵

The judge's opinion quoted extensively from an amicus brief submitted on behalf of "In Defense of Animals," a national advocacy organization. The judge stated, in part: "[t]he situation of nonhuman animals, although clearly not identical, is analogous to that formerly occupied by slaves and married women. Humans do not possess any characteristics which are not shared by at least one other species. Nonhuman animals *use tools, communicate with language, display emotions, have social relations, establish culture, display rational thought, and even exhibit altruism. The converse is also true. There are no shortcomings displayed by nonhuman animals that are not also reflected in human*

183 *In re Howard Brand*, *supra* note 172.

184 *Id.* (The Coalition was formed by Mary Ingham, who was a prior owner of one of the horses, several humane organizations, and the Vermont affiliate of the Student Animal Legal Defense Fund, among others.)

185 *Id.*

behavior.”¹⁸⁶

Further, she rejected the Estate’s argument that Brand intended to have the horses euthanized in order to spare them the fate of falling into the hands of owners who may possibly abuse them, holding that “public policy and Vermont law should operate to allow these animals an opportunity to continue living.”¹⁸⁷ This holding is interesting because it shows either 1) that the judge did not credit the motive for euthanasia supplied by the Estate (perhaps because Brand also directed that his Cadillac be destroyed), or 2) that she decided that the horses’ interest in living trumped even supposedly humane considerations in having them euthanized. Thus, like Hayden’s Law, the judge’s ruling curtailed “humans’ supposed ‘right’ to kill certain owned animals”¹⁸⁸ – an example of “decentering” human entitlement.

While the judge also cited case law from other states in which similar provisions had been held to violate public policy, it appears from her opinion that the arguments in the amicus brief influenced her decision, including those about animal cognition. Notably, the cognitive discoveries cited in the brief, and noted by the judge, unlike those put forth by GAP, had nothing to do with the horses’ similarity to humans, or, indeed, even the horses’ cognitive abilities themselves. Instead, the arguments were general: that animals’ capabilities are varied, sometimes astonishing to those who do not study them, and sometimes superior to those of humans. The proponents thus apparently declined to supply what Bryant refers to as “rigorous analytic proofs of moral entitlement” for the horses based on their similarity to humans.¹⁸⁹ These arguments might have helped to put the burden on the Estate to prove why the decedent’s desires trumped those of the horses—*i.e.*, because he was human and they were not. In other words, the cognitive studies may have helped to build an argument that decentered Brand’s entitlement to do what he wanted to the horses.

186 *Id.* (emphasis added).

187 *In re Howard Brand*, *supra* note 172.

188 *Sacrificing the Sacrifice*, *supra* note 156, at 256.

189 *Id.* at 268.

While the cognitive arguments adopted by the Vermont judge were not based on the horses' *similarity* to humans, they did clearly rely on the notion that animals are worthy in part because they have cognitive attributes that *compare favorably* to those of humans. In other words, the prevailing arguments rested not on GAP-type detailed explorations of a particular animal's mentality, but rather a loose acknowledgement that "animals" in general have lives that are worthy of consideration, in part because they have attributes that compare favorably to those of humans. This approach might be considered from two different perspectives. First, as Rogers and Kaplan envision, it might be seen as an acknowledgement that animals other than humans have widely different capacities, and that consideration of these attributes must result in consideration of them as something *other* than things to be used by humans. Second, the approach might be seen as a "similarity once-removed" argument, in which an animal's right to be seen as something other than a "thing" is still loosely dependent on its similarity to humans. At the very least, the cognitive arguments advanced by the Estate's opponents appear to have at least legitimized the judge's legal intuition that killing healthy horses to satisfy a codicil in a will was wrong. The lesson for practitioners, perhaps, is that citing to cognition studies in this generalized way may have the effect of sensitizing a judge, as the Vermont judge was sensitized, to the interests of the animals that are the subject of the case without resorting to "endless loops of analysis of sameness and difference"¹⁹⁰ observable in *In re Suiça*. At a minimum, this kind of advocacy could be useful for educating judges who know nothing about animals, or legitimizing intuitions judges have about ruling for animals, and, on a case-by-case basis, may tip the factors in favor of animals, as in *Brand*.

CONCLUSION

In sum, although animal cognition studies have not been widely employed in legal arguments, except in the context of great apes, there is a growing realization among both scientists and animal advocates that such studies increase the urgency of developing greater protections for animals. Before

190 *Of Mice and Men*, *supra* note 173, at 264.

crafting strategies that hinge on cognition studies, it is important for advocates to consider the practical difficulties of carrying out such strategies. First, cognition studies may themselves be flawed, because humans have no real way of assessing animal cognition except self-referentially, and the use of laboratory-based cognition studies to argue for protections for animals runs the risk of inconsistency, because such studies are inherently contrary to the respectful view of animals that many advocates seek to promote. Further, given the diversity of animal minds, it could ultimately be counterproductive to argue for protections based on a specific species' cognitive attributes, perhaps leading inevitably to Rogers and Kaplan's "legislative conundrum." Finally, as Bryant notes, cognition arguments may not be strong enough to overcome the deeply embedded sense of human entitlement; instead, an approach that places the burden of justifying the use of animals *on humans* is more likely to result in improvements to animal treatment. In arenas where human entitlement runs deep, such as animal farms or laboratories conducting experiments on rats, arguments based on animal cognition may *slightly* improve the quality of life for the animals being used, assuming the increased costs did not trump the welfare improvement.¹⁹¹ However, marshalling cognition studies is unlikely to effect massive change for these animals, because knowledge of their abilities often does not matter to those using them.¹⁹² By contrast, studies that show how animals function in *their own societies* could—at least arguably—prove useful as a tool to educate judges' and others' minds about animals on a case-by-case basis, perhaps ultimately promoting a "conceptual shift" in the way animals are viewed by the law.

191 See *Can You Ask a Pig If His Glass Is Half Full?*, SCIENCE DAILY, July 28, 2010, <http://www.sciencedaily.com/releases/2010/07/100727201515.htm> (describing a study funded by Universities Federation for Animal Welfare (UFAW), which was aimed at "improving the quality of life" for farmed stock, because "[q]uality of life of our farm animals is becoming increasingly important to consumers, scientists and government.").

192 See, e.g., William Grimes, *If Chickens are So Smart Why Aren't They Eating Us?*, N.Y. TIMES, Jan. 12, 2003 (stating that "an argument based on chicken intelligence is [not] going to go anywhere."); Cameron Diaz: *Food is one of my biggest pleasures*, Nov. 22, 2006, http://www.starpulse.com/news/index.php/2006/11/22/cameron_diaz_food_is_one_of_my_biggest_p (noting that although celebrity Cameron Diaz famously swore off of eating pork products when she discovered how intelligent pigs were, she went back to eating pork because "it's so goddamn good").