Recent Developments in Efforts to Enhance the Protection of Animals

by

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*All animals are equal but some animals are more equal than others.** Recent Developments in Efforts to Enhance the Protection of Animals

I. INTRODUCTION

Armed with shotguns, participants in the Annual Fred Coleman Memorial Shoot in Hegins, Pennsylvania stand twenty yards from caged pigeons. The object of the shoot is to blast the birds when they are released. At the 1990 competition, roughly 150 protesters gathered to picket the event. Just before the birds were to be released, a group of the protesters charged onto the field. Several fights developed, a police car was damaged and three state police officers were injured. As the state police attempted to restore order, the spectators implored the troopers to shoot the demonstrators. Twenty-five of the protesters were arrested and charged with criminal trespass or disorderly conduct.[1]

The incident in Hegins is not an isolated event. Animal rights activists[2] have harassed hunters from Connecticut's Paugussett State Forest to California's Grizzly Island. These activists have not limited their efforts to harassing hunters. Animal rights groups such as Friends of Animals, Fund for Animals, Animal Rights Front, Animal Rights Foundation, People for the Ethical Treatment of Animals (PETA), and Citizens to End Animal Suffering and Exploitation (CEASE) have been linked to a variety of activities. These activities include bombing businesses that experiment on animals, sabotaging animal traps, polic-

* G. ORWELL, ANIMAL FARM 123 (1985).

1. Topeka Capital-Journal, Sept. 4, 1990, at 9A.

2. *See* Thomas, *Antinomy: The Use, Rights, and Regulation of Laboratory Animals*, 13 PEPPERDINE L. REV. 723, 725-26 (1986). Proponents of animal rights and welfare are referred to by a variety of often interchangeable terms. These terms include animal activists, animal extremists, animal liberationists, anti-vivisectionists, and animal advocates. Whatever they are called, these persons are generally divided into three groups: 1) persons who use peaceful methods to improve the plight of animals, 2) persons who use violence and other illegal acts to draw attention to the plight of animals, and 3) persons who are concerned about animals but are unwilling to actively participate in efforts to enhance animal rights and welfare. *Id.*

ing factory farms, harassing persons wearing fur, and promoting vegetarianism.[3] Not all animal rights groups participate in or condone all of these activities.[4] However, each of these groups, in its own way, is dedicated to the advancement of animal rights and welfare.

As recently as ten years ago, only a small number of persons participated in efforts to protect animals. The movement has since gained considerable momentum. Ten million individuals belong to the approximately 7000 animal rights and welfare organizations in the United States.[5] Membership in organizations such as PETA and the Humane Society of the United States has grown considerably. In 1980 PETA had six members. Only a decade later, 300,000 persons belonged to this one animal rights organization.[6] In the same time period, the membership of the Humane Society ballooned from 160,000 to nearly one million members.[7] Friends of Animals 1988 membership in Connecticut alone totaled 7000 members.[8]

In addition to the growing popular interest in animal rights and welfare, there is a growing interest in animal rights within the legal community. The "animal defense bar" includes a small number of attorneys who practice exclusively in the area of animal rights, plus approximately 320 attorneys who practice in the area at least part-time.[9]

The growing popular and legal interest in animal rights and welfare is reflected in recent judicial and legislative activity at both the state and federal level. Animal rights activists repeatedly attempt to further their cause through the courts. Efforts to enhance the protection of animals through legislative reform are also common. This Note focuses on these recent judicial and legislative developments in the field of animal rights and welfare. Use of the courts by animal rights activists to foster the protection of animals is examined. Particular emphasis is given to cases addressing the standing requirements imposed upon claimants by the courts. Legislative efforts to advance the protection of animals are also examined. Specifically, recent amendments and attempts to amend the Federal Animal Welfare Act (AWA)[10] are discussed. This Note reviews recent changes on the state level in anti-cruelty statutes, pound animal seizure and release statutes, anti-hunting statutes, anti-trapping statutes, and statutes regulat-

3. *See* N.Y. Times, Nov. 27, 1988, § 12CN (Magazine), at 1, col. 3 (activities of various animal rights groups described).

4. *Id.* While there is some overlap, different groups have different tactics and areas of concentration. For example, Friends of Animals focuses on prevention of pet overpopulation and combating hunting. *Id.* The Animal Rights Front concentrates on anti-hunting measures. *Id.* Citizens to End Animal Suffering and Exploitation (CEASE) and People for the Ethical Treatment of Animals (PETA) are very active in the anti-fur movement. Christian Sci. Monitor, Jan. 17, 1990, at 12. The Animal Liberation Front, one of the more radical animal rights groups, has been linked to 75 attacks on animal research facilities to free animals and wreck equipment. Nat'l L.J., April 16, 1990, at 28.

5. Nat'l L.J., April 16, 1990, at 28.

6. Christian Sci. Monitor, Jan. 17, 1990, at 12.

7. Wash. Post, June 16, 1990, at A23.

8. N.Y. Times, Nov. 27, 1988, § 12CN (Magazine), at 1, col. 3.

9. Nat'l L.J., April 16, 1990, at 28. In addition, animal rights has been included in the curriculum of several law schools. *Id.* There is also a political action committee, PAW PAC; that supports candidates sympathetic to the cause of animal rights. *Id.*

10. Animal Welfare Act of 1970, Pub. L. No. 91-579, 84 Stat. 1560, *amended by* 7 U.S.C. §§ 2131 to 2156 (1982), *amended by* 7 U.S.C. §§ 2131 to 2141 (1985)(codified as amended at 7 U.S.C. §§ 2131 to 2157 (1985 & Supp. 1990)).

ing the use of animals in laboratory research. Finally, this Note examines "backlash" legislation aimed at restricting the activities of animal rights activists.

This Note does not attempt to address the plethora of ethical and moral issues related to animal rights and welfare. Nor does this Note deal with the debate over the value of medical or industrial research using animals. Also beyond the scope of this Note are rights issues such as whether the first amendment protects the freedom to research or whether animals have "rights" equal to those of human beings.[11]

II. STANDING: HURDLE OR ROADBLOCK TO THE COURTHOUSE DOOR

The problems confronting groups and individuals working to enhance the rights and welfare of animals are numerous and formidable. An estimated 200 to 250 million animals are used annually in laboratory research.[12] In addition, licensed hunters killed an estimated 52,489,740 mammals and 111.5 million birds in 1988 and 1989.[13]

To a large degree, efforts by activists to curb the abuse of animals have focused on the courts. These efforts have produced mixed results. The main consideration in the majority of these cases is whether the claimants have standing to advance the cause of the animals they are seeking to protect.[14]

Whether a party has standing depends on the claimant's ability to demonstrate "a sufficient stake in an otherwise justiciable controversy to obtain judicial

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11. These issues and topics are discussed in the following publications: M.A. FOX, THE CASE FOR ANIMAL EXPERIMENTATION: AN EVOLUTIONARY AND ETHICAL PERSPECTIVE 1 (1986)(an essay written in support of animal use for human needs); T. REGAN, POLITICAL THEORY AND ANIMAL RIGHTS (1990)(a collection of essays designed to integrate contemporary political theories with the animal rights movement); T. REGAN, THE CASE FOR ANIMAL RIGHTS (1983)(lays the philosophical foundation for animal rights movement); T. REGAN, ALL THAT DWELL THEREIN: ANIMAL RIGHTS AND ENVIRONMENTAL ETHICS (1982)(a collection of essays dealing with human obligations to animals); B.E. ROLLIN, THE UNHEEDED CRY: ANIMAL CONSCIOUSNESS, ANIMAL PAIN AND SCIENCE (1989)(intended to enlighten readers about the issue of animal consciousness, "particularly subjective states like pain"); S. SPERLING, ANIMAL LIBERATORS: RESEARCH AND MORALITY (1988)(discusses the history of the animal rights movement).

12. Dudeck, *The Use of Animals in Medical Research and Testing: Does the Tail Wag the Dog?*, 14 OHIO N.U.L. REV. 87, 87-88 (1987). Forms of research classified as laboratory research include: theoretical research, disease research, research designed to develop specific drugs for specific purposes, and research designed to test the safety and toxicity of consumer goods. *Id.* Animals are also used "in medical and educational institutions for dissection, surgical practice, and for the extraction of products such as serum and antidotes." *Id.* at 88.

In 1988 the Department of Agriculture reported "that 140,471 dogs, 42,271 cats, 51,641 primates, 431,457 guinea pigs, 331,945 hamsters, 459,254 rabbits and 178,249 'wild animals' were used experimentally." These numbers represent an annual toll. Wash. Post, June 16, 1990, at A23.

13. U.S. NEWS & WORLD REP., Feb. 5, 1990, at 31. The Fund for Animals accumulated these figures using data supplied by the United States Fish and Wildlife Service and local fish and game agencies. *Id.*

14. Dudeck, *supra* note 12, at 96. Not all cases involving animal rights and welfare have centered on standing requirements. *See, e.g.*, New England Anti-Vivisection Soc'y v. United States Surgical Corp., 889 F.2d 1198 (1st Cir. 1989). The plaintiffs proposed to include a statement critical of the defendant's use of animals in the corporation's proxy statement. *Id.* at 1199. The plaintiffs failed and then brought this action alleging that the claims made by the corporation urging shareholders to reject the plaintiffs' proposal were false and misleading. *Id.* at 1200. The court concluded that the corporation's statements in opposition to the plaintiffs' proposed proxy statements were reasonable and did not mislead shareholders. *Id.* at 1204; *see also* Progressive Animal Welfare Soc'y v. Department of the Navy, 725 F. Supp. 475, 479 (W.D. Wash. 1989)(plaintiffs successfully challenged Navy's decision to use Atlantic bottlenose dolphins at submarine base).

resolution of that controversy."[15] The constitutional requirement for standing is found in article III of the United States Constitution. Article III restricts the jurisdiction of federal courts to cases and controversies.[16] While a variety of tests have been formulated by the courts, generally an individual has standing if "he or she can show two things— 'injury in fact' arising from the action and injury 'arguably within the zone of interests to be protected' by a violated statute."[17]

The test for whether an organization has standing to bring suit on behalf of its members is delineated in *Hunt v. Washington State Apple Advertising Commission*.[18] The *Hunt* three-prong test requires the organization to establish that: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[19]

In a series of recent cases, a trend regarding the grant or denial of standing in animal rights cases has developed. Individuals and organizations are generally denied access to the courts unless they have a statutory basis for standing to sue on behalf of privately owned animals. Alternatively, organizations relying on statutes that directly or implicitly grant standing to private actors are allowed to bring actions on behalf of animals living in areas open to public access.

Parties who sue on behalf of animals and fail for lack of standing are usually unsuccessful for two reasons. First, the animals are privately owned or confined to private property. Second, the claimants do not have a statutory basis for standing. This trend is illustrated by three recent cases: *Animal Lovers Volunteer Association, Inc. (A.L.V.A.) v. Weinberger*[20] (*Animal Lovers*), *International*

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15. Sierra Club v. Morton, 405 U.S. 727, 731 (1972)(group lacked standing because neither it nor its members were adversely affected by government action).

16. U.S. CONST. art. III, § 2.

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between citizens of different States; between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

17. Animal Lovers Volunteer Ass'n v. Weinberger, 765 F.2d 937, 938 (9th Cir. 1985)(quoting Sierra Club v. Morton, 405 U.S. 727, 733 (1972)).

18. 432 U.S. 333 (1977).

19. *Id.* at 343. The first prong of the *Hunt* test is analogous to the general standing requirement of injury in fact. The "germaneness" prong is analogous to the "zone of interest" test. The third prong is unique to organizational standing.

For a discussion of general standing requirements as applied to animal rights cases, *see* Masonis, *The Improved Standards for Laboratory Animals Act and the Proposed Regulations: A Glimmer of Hope in the Battle Against Abusive Animal Research*, 16 B.C. ENVTL. AFF. L. REV. 149, 169-72 (1988)(discusses standing in context of International Primate Protection League v. Institute for Behavioral Research, Inc., 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987); Animal Welfare Inst. v. Kreps, 561 F.2d 1002 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); and the Animal Welfare Act); *see also* Thomas, *supra* note 2, at 737-39 (standing requirements make statutory remedies primary means for bringing suits concerning animal rights and welfare).

20. 765 F.2d 937 (9th Cir. 1985).

Primate Protection League v. Institute for Behavioral Research, Inc.[21] (*I.P.P.L.*), and *International Primate Protection League v. Administrators of the Tulane Educational Fund*[22] (*I.P.P.L. II*).

A. *Animal Lovers Volunteer Association, Inc. (A.L.V.A.) v. Weinberger*

The claimants in *Animal Lovers* sought to enjoin the Secretary of Defense and the Secretary of the United States Navy from implementing a plan to kill the goats that roamed wild on San Clemente Island, California. The island was under the military jurisdiction of the Navy and was not open to public access. The Navy planned to shoot and remove the goats because the Fish and Wildlife Service of the Department of the Interior had determined that the animals were a danger to "threatened animals and plants in a critical habitat covering approximately one third of the island."[23] The Navy planned to use marksmen in helicopters to shoot the goats. The Fund for Animals, the animal rights group originally involved in the dispute, wanted the Navy to trap the goats and resettle them off the island. Pursuant to an agreement with the Fund for Animals, the Navy twice unsuccessfully attempted to trap the goats. The Navy then announced its intent to proceed with the original plan to kill and remove the goats. The Fund for Animals abandoned the cause and A.L.V.A. took over. A.L.V.A. asked for injunctive relief based on the contention that the Navy's environmental impact statement was inadequate.[24]

The court did not reach the merits of A.L.V.A.'s claim because it concluded that A.L.V.A. lacked standing. Citing the standing requirements delineated in *Sierra Club v. Morton*,[25] the court decided A.L.V.A. had "not

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21. 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987); *see* Note, *International Primate Protection League v. Institute for Behavioral Research: The Standing of Animal Protection Organizations Under the Animal Welfare Act*, 4 J. CONTEMP. HEALTH L. & POL'Y 469 (1988)(court refused to accept a "liberalized approach to traditional standing").

22. 895 F.2d 1056 (5th Cir. 1990).

23. *Animal Lovers*, 765 F.2d at 938.

24. *Id.* Since the court decided that A.L.V.A. lacked standing, it never reached the merits of A.L.V.A.'s claim regarding the impact statement. *Id.*

25. 405 U.S. 727 (1972). Courts have cited *Sierra Club* as the principal case on the validity of aesthetic injuries. *See, e.g.*, Humane Soc'y of the United States v. Hodel, 840 F.2d 45, 52 (D.C. Cir. 1988)("The leading case on the legitimacy of aesthetic injuries is *Sierra Club*"). In *Sierra Club*, the United States Supreme Court evaluated, for the first time, an allegation of standing based on injury of a non-economic nature. *Sierra Club*, 405 U.S. at 734.

The dispute in *Sierra Club* centered on the Mineral King Valley, "an area of great natural beauty nestled in the Sierra Nevada Mountains" neighboring Sequoia National Park. Since 1926, the valley has been part of the Sequoia National Forest and is a designated national game reserve under the maintenance and administration of the United States Forest Service. *Id.* at 728-29. In 1969, the Forest Service approved a plan that allowed Walt Disney Enterprises to build a $35 million ski resort, complete with hotels, restaurants, swimming pools, parking lots, ski lifts, ski trails, and other facilities in the valley. *Id.* at 729. The Sierra Club wanted to maintain the valley in its natural state and brought suit to stop the development. *Id.* at 729-30. The Club asserted that the "proposed development contravene[d] federal laws and regulations governing the preservation of national parks, forests, and game refuges." *Id.* at 730. The Sierra Club claimed that its members would be injured because the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." *Id.* at 734.

Addressing whether the Sierra Club's injury was sufficient to confer standing, the Supreme Court concluded that:

> Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of

demonstrated what injury in fact its members" would suffer if the goats were shot by the Navy.[26] The court reasoned that if the goats had been an endangered species or if A.L.V.A. had shown that the Navy's actions "would affect its members' aesthetic or ecological surroundings," the outcome might have been different.[27] A.L.V.A., however, could not establish standing merely by asserting an organizational interest in the goats without an actual injury to its members. The court also denied standing because A.L.V.A. did not demonstrate that it, or any of its members, had a personal stake in the outcome of the suit.[28]

The court in *Animal Lovers* explicitly limited its holding to A.L.V.A. It concluded that another organization with a stronger interest in the litigation might have standing to sue the Navy and force a more humane removal of the goats.[29] This "limitation," however, is arguably illusory. The court recognized that the Navy's actions involve "ridding its own property of its own goats." It is difficult to imagine how any organization or individual could gain access to the island necessary to develop a " 'distinct and palpable,' . . . and not 'abstract' " injury.[30]

B. *International Primate Protection League v. Institute for Behavioral Research*

The claimants in *Animal Lovers* failed to establish the required injury because the animals in question were private property living on private property. The plaintiffs in *I.P.P.L.* faced a similar problem with similar results. In *I.P.P.L.*, the plaintiffs requested that the court name them guardians of several monkeys seized from the Behavioral Biology Center of the Institute of Behavioral Research (IBR). Police seized the monkeys when the IBR's chief was accused of cruelty toward the animals. The court denied I.P.P.L.'s guardianship request, holding that the plaintiff organization lacked standing.[31]

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legal protection through the judicial process. But the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.

Id. at 734-35. The Club failed to demonstrate that any of its members used the valley in any way and therefore standing was denied. *Id.* at 741.

26. *Animal Lovers*, 765 F.2d at 938 (citing Sierra Club v. Morton, 405 U.S. 727, 733 (1972)).

27. *Id.*

28. *Id.* at 939. The court concluded that A.L.V.A. lacked "the longevity and indicia of commitment to preventing inhumane behavior" necessary to confer standing. *Id.*; *cf.* Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986). The Court concluded that the respondents "alleged a sufficient 'injury in fact' in that the whale watching and studying of their members will be adversely affected by continuing whale harvesting." *Id.* at 230-31 n.4; *see also* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 686-87 (1973)(possible increase of refuse in national parks injurious enough to justify standing); National Wildlife Fed'n v. Hodel, 839 F.2d 694, 704 (D.C. Cir. 1988)(injury of viewing despoiled landscapes sufficient to confer standing on wildlife organization challenging surface mining regulations).

29. *Animal Lovers*, 765 F.2d at 939.

30. *Id.* (citing Allen v. Wright, 468 U.S. 737, 751 (1984)).

31. International Primate Protection League v. Institute for Behavioral Research, 799 F.2d 934, 936-37 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987). The litigation focusing on the *I.P.P.L.* monkeys is an interesting case study of animal rights litigation. The initial criminal complaint was filed against Dr. Edward Taub by the Assistant State's Attorney for Montgomery County at the behest of Alex Pacheco. *Id.* at 936. At the time, Dr. Taub was the chief of the Behavioral Biology Center for the Institute of Behavioral Research (IBR) and was studying the ability of monkeys to learn to use an arm or leg after nerves had been cut. *Id.* Pacheco, a graduate student who worked for Dr. Taub, believed that the doctor did not provide the monkeys with adequate food,

The claimants in *I.P.P.L.* made a variety of standing arguments that the court rejected. The main premise behind the plaintiffs' claim was that the activities of the IBR violated the Federal Animal Welfare Act (AWA). Relying on this premise, the plaintiffs argued that as taxpayers they had standing to ensure that the IBR, "a recipient of federal funds," obeyed the law. The court rejected this contention because "payment of taxes does not purchase authority to enforce regulatory restrictions."[32] The plaintiffs also argued that since they paid for the maintenance of the monkeys, they had standing to sue on behalf of the animals.[33] The court refused to accept this argument because the payments were voluntarily made and did not "establish 'a personal stake in the outcome of the controversy.' "[34]

The claimants advanced two standing arguments unrelated to finances. First, the plaintiffs contended that their aesthetic, conservational, environmental, and educational interests would be harmed if they were not granted relief. Second, the plaintiffs claimed that their "personal relationship with these

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care or shelter. Pacheco asked the local police to investigate Dr. Taub's research for possible violations of Maryland's animal anti-cruelty statute. *Id.* The animals were eventually confiscated and Dr. Taub was charged with 17 counts of cruelty toward animals. *Id.* The Circuit Court for Montgomery County ordered the monkeys transferred to a National Institutes of Health (NIH) facility until further order of the court or until the termination of the criminal proceedings against Dr. Taub. *Id.*

Dr. Taub was convicted on six counts and acquitted on the other eleven counts. The People for the Ethical Treatment of Animals (PETA), an organization founded by Pacheco, feared that the animals would be returned to the IBR. Along with several other organizations, including the International Primate Protection League (I.P.P.L.), PETA filed a complaint in the circuit court. The complaint, in which the plaintiffs claimed to speak for the monkeys as next friends, named as defendants the IBR, NIH, local police, and a local veterinarian charged with supervising the care of the monkeys. *Id.* at 936-37. The complaint alleged that the defendants violated the Maryland animal cruelty statute and the Animal Welfare Act. *Id.* at 936. The case was removed to the United States District Court for the District of Maryland and the defendants moved for dismissal because, *inter alia*, the plaintiffs lacked standing. *Id.* at 937.

In the meantime, Dr. Taub's criminal prosecution was concluded. He appealed his initial conviction to the Circuit Court for Montgomery County. He was granted a new trial in which the jury found him guilty on one count. The Court of Appeals of Maryland reversed Taub's second conviction, holding that Maryland's animal anti-cruelty statute did not apply to institutions conducting federally funded research. Note, *supra* note 21, at 473 n.45.

A federal magistrate in the District of Maryland recommended that PETA's suit against the IBR and other defendants be dismissed for lack of standing. The district court adopted the magistrate's recommendation and dismissed the complaint. *I.P.P.L.*, 799 F.2d at 937. The district court's judgment was affirmed by the United States Court of Appeals, Fourth Circuit, in *I.P.P.L.*. *Id.*

Despite the termination of the court order placing the monkeys in the NIH's care, the IBR monkeys remained at the NIH facility. International Primate Protection League v. Administrators of the Tulane Educ. Fund, 895 F.2d 1056, 1058 (5th Cir. 1990)(*I.P.P.L. II*). In 1983, a number of the monkeys were transferred to Tulane's Delta Regional Primate Center. The NIH announced the intent to euthanize these monkeys for experimental purposes. I.P.P.L. and PETA opposed the NIH's decision and the litigation chronicled in *I.P.P.L. II* ensued. *Id.*

Dr. Taub was initially charged in September of 1981. The decision in *I.P.P.L. II* was handed down on March 8, 1990. In over eight years of litigation, the various claimants accomplished very little. Dr. Taub was eventually cleared of all charges. Presumably, the NIH killed the monkeys and conducted its research. Perhaps most damaging to animal rights activists, the *I.P.P.L.* litigation created a line of cases denying claimants the ability to claim standing under the AWA or as next friends on behalf of laboratory animals in the care of others. On the other side of the ledger, the plaintiffs were able to extend the life of a few monkeys for a few years.

32. *I.P.P.L.*, 799 F.2d at 937-38 (citing United States v. Richardson, 418 U.S. 166, 174-75 (1974)).

33. *Id.* at 938. The opinion does not specify how the plaintiffs contributed to the upkeep of the monkeys. The opinion only indicates that the contribution was made after the animals were seized by the police and before the National Institutes of Health took possession. *Id.*

34. *Id.* (citing Baker v. Carr, 369 U.S. 186, 204 (1962)).

monkeys" would be disrupted if the animals were returned to the IBR.[35] Citing *Animal Lovers*, the court concluded that the plaintiffs' mere interest was not enough to confer standing. In addition, since the monkeys were private property and the plaintiffs could not have personal contact with these animals, the plaintiffs could not "claim the direct personal involvement necessary for standing."[36]

The court concluded that the plaintiffs lacked "cognizable injuries" and, therefore, should be denied standing. As an alternative basis for denying standing, the court held that the AWA did not grant the plaintiffs the right to seek relief.[37] The court based this conclusion on, *inter alia*, two factors. First, the court reviewed the AWA and concluded that while the act is committed "to administrative supervision of animal welfare," Congress intended to subordinate this supervision "to the continued independence of research scientists."[38] Second, the court concluded that the AWA is a comprehensive statute that forecloses additional remedies. In short, the act does not create a private cause of action.[39]

In *International Primate Protection League v. Institute for Behavioral Research*, the court implicitly denied the plaintiffs standing because they did not have personal contact with the monkeys and, therefore, did not have a palpable injury.[40] In addition, the court explicitly denied plaintiffs standing because the act they sued to enforce, the AWA, does not grant private individuals standing.[41]

C. *International Primate Protection League v. Administrators of the Tulane Educational Fund*

The court in *I.P.P.L. II* did not address the issue of whether the AWA grants standing to private individuals. Presumably, that was not an issue in this case. However, the court did make it clear that there is a distinction between privately-owned animals and "feral" animals that can be viewed and enjoyed by the public.[42]

The animals in *I.P.P.L. II* were the same monkeys fought over in *I.P.P.L.* A group of the IBR's monkeys was sent to Tulane's Delta Regional Primate Center where the National Institutes of Health (NIH) announced the intent to euthanize a small group of the animals for medical research. The I.P.P.L., among others, sued to prevent the NIH's actions. A Louisiana district court granted the plaintiffs' request for a temporary restraining order (TRO). The NIH removed the case to the United States District Court for the Eastern District of Louisiana. The court decided to continue the TRO. Because the TRO

35. *Id.*

36. *Id.* (citing Animal Lovers Volunteer Ass'n v. Weinberger, 765 F.2d 937, 939 (9th Cir. 1985)). Even though the plaintiffs contributed to the maintenance of the monkeys, the animals continued to be the property of IBR. *Id.* In addition, the animals were in the legal custody of the police during the litigation. *Id.*

37. *Id.* at 938-39.

38. *Id.* at 939.

39. *Id.* at 940. "The uniformity and specialization normally thought to accompany regulatory oversight, in this case that of the Secretary [of Agriculture], would not inhere in enforcement of the statute through private rights of action." *Id.*

40. *Id.* at 938.

41. *Id.* at 940.

42. *I.P.P.L. II*, 895 F.2d 1056, 1059 (1990).

was extended beyond the twenty-day limitation established by Federal Rule of Civil Procedure 65(b), "the extended TRO became the functional equivalent of a preliminary injunction, appealable under 28 U.S.C. § 1292(a)(1)."[43] On appeal, the NIH argued that the plaintiffs lacked standing, that the supremacy clause barred the plaintiffs' claim, and that Louisiana law did not grant a private cause of action to enforce anti-cruelty statutes. The court decided the case on the standing issue and did not address the remaining issues.[44]

In order to establish standing, the plaintiffs advanced three injury claims. The court rejected each claim. First, the plaintiffs argued that killing the monkeys would disrupt their personal relationship with the animals. Citing *I.P.P.L.* and *Animal Lovers*, the court rejected this claim. The court reasoned that the plaintiffs did not have a personal relationship with the animals and, even if the animals were not killed, the plaintiffs would not be able to establish a personal relationship with the monkeys because they were private property.[45] The court distinguished the privately-owned animals in *I.P.P.L. II* from the animals in cases where standing was granted.[46] In each of these cases, except one, the animals were wild and could be enjoyed by the public. In the one exception, *Humane Society v. Lyng*,[47] the plaintiffs were granted standing because a state statute explicitly empowered the organization to enforce anti-cruelty statutes.[48]

The plaintiffs next argued that they had "a long-standing, sincere commitment to preventing inhumane treatment of animals" and that the NIH's intended actions would detrimentally affect this interest.[49] The court rejected this argument, holding that the injury was too general and failed to "distinguish [the plaintiffs] . . . from other members of the public."[50]

Finally, the plaintiffs argued that if they were not granted standing, there would be no one to protect the monkeys' rights. The court dismissed this argument, holding that "the mere fact that the monkeys would be left without an advocate in court does not create standing where it otherwise does not exist."[51]

The plaintiffs in *Animal Lovers*, *I.P.P.L.*, and *I.P.P.L. II* were denied standing because they lacked sufficient personal contact with the animals they sought to protect. Using the parlance of standing, the plaintiffs in these three cases could not establish a personal injury in fact. In addition, these plaintiffs were

43. *Id.* at 1058 (citing Fernandez-Rogue v. Smith, 671 F.2d 426, 429 (5th Cir. 1982)).

44. *Id.*

45. *Id.* at 1059 (citing *I.P.P.L.*, 799 F.2d 934, 938 (4th Cir. 1986); Animal Lovers Volunteer Ass'n v. Weinberger, 765 F.2d 937, 939 (9th Cir. 1985)).

46. *Id.* As support for their standing arguments, the plaintiffs cited the following cases: Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 231 n.4 (1986)(plaintiffs demonstrated an "injury in fact" since "whale watching and studying" would be "adversely affected"); Alaska Fish & Wildlife Fed'n v. Dunkle, 829 F.2d 933, 937 (9th Cir. 1987)(plaintiffs granted standing to challenge government decision allowing hunting of migratory birds), *cert. denied*, 485 U.S. 988 (1988); Animal Welfare Inst. v. Kreps, 561 F.2d 1002, 1006 (D.C. Cir. 1977)(plaintiffs granted standing to challenge lifting of moratorium on importation of baby seal skins), *cert. denied*, 434 U.S. 1013 (1978); American Horse Protection Ass'n v. Frizzell, 403 F. Supp. 1206, 1214 (D. Nev. 1975)(organization's members had intent and right to use land and wildlife in question).

47. 633 F. Supp. 480, 485 (W.D.N.Y. 1986). The regulation at issue required hot iron branding of dairy cattle. *Id.*

48. *Id.* at 485. For a discussion of the holding in *Lyng*, see *infra* notes 66-69 and accompanying text.

49. *I.P.P.L. II*, 895 F.2d at 1060 (1990).

50. *Id.*

51. *Id.* at 1060-61.

unable to establish a statutory basis for standing. By contrast, the plaintiffs in *Animal Welfare Institute v. Kreps*,[52] *Humane Society v. Lyng*,[53] *Alaska Fish & Wildlife Federation v. Dunkle*,[54] and *Humane Society of the United States v. Hodel*[55] established either the necessary personal contact, a statutory foundation for a claim of standing, or both personal contact and a statutory foundation.

D. *Animal Welfare Institute v. Kreps*

In *Kreps*, the plaintiffs challenged the government's decision to waive the "moratorium on taking or importation of marine mammals or marine mammal products" enacted by the Marine Mammal Protection Act (MMPA).[56] This particular waiver allowed the importation of baby seal skins. The district court dismissed the plaintiff's challenge to the waiver, holding that they lacked standing.[57]

The court of appeals reversed, holding that the plaintiffs had standing for two reasons. First, the court concluded that the MMPA conferred standing on the claimants. The court relied on language in the act that specifically allows "any party opposed" to a waiver to "obtain judicial review of the terms and conditions" of the waiver.[58] Second, the court held that even if the MMPA had not conferred standing on the plaintiffs, they satisfied the three criteria for standing previously established by this court.[59]

In their complaint, the plaintiffs alleged that the harvest of the fur seals would injure their "recreational, aesthetic, scientific, and educational interests."[60] Specifically, the claimants asserted that the slaughter of the animals would impair their ability to observe and study the "seals alive in their natural habitat under conditions in which the animals are not subject to excessive harvesting, inhumane treatment and slaughter of pups that are very young and still nursing."[61] The plaintiffs submitted affidavits of several members indicating that they had observed the seals in the past and planned to do so again in the near future.[62] The court concluded that these allegations were sufficient to establish the injury in fact component of standing.[63] Addressing the causation criteria for standing, the court concluded that enforcement of the MMPA and denial of the waiver would effectively protect the seals and reduce the harvest.[64] The third and final criteria, zone of interest, was not contested in *Kreps*. All the

52. 561 F.2d 1002 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).
53. 633 F. Supp. 480 (W.D.N.Y. 1986).
54. 829 F.2d 933 (9th Cir. 1987), *cert. denied*, 485 U.S. 988 (1988).
55. 840 F.2d 45 (D.C. Cir. 1988).
56. 16 U.S.C. §§ 1361 to 1407 (1984 & Supp. 1990).
57. Animal Welfare Inst. v. Kreps, 561 F.2d 1002, 1005 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).
58. *Id.* (quoting Marine Mammal Protection Act, 16 U.S.C. § 1374(d)(6) (1975)).
59. *Id.* at 1006. The standing requirements are: "(1) the existence of an injury in fact, (2) whether the requisite causal connection exists between plaintiff's injury and defendant's action, and (3) whether the interest to which the injury is claimed is arguably within the zone of interests to be protected by the statute." *Id.* at 1005.
60. *Id.* at 1007.
61. *Id.*
62. *Id.* at 1008.
63. *Id.* at 1007.
64. *Id.* at 1010.

parties agreed that the plaintiffs' interests, allegedly impaired by the waiver, were within the zone of interests safeguarded by the act.[65]

E. *Humane Society v. Lyng*

The plaintiffs in *Kreps* were successful because they established a personal stake in the outcome of the litigation and a statutory basis for standing. This framework has become the basis for successful suits by animal rights activists. For example, the plaintiffs in *Lyng* successfully challenged a "hot-iron facial branding regulation" issued by the Department of Agriculture. The regulation required all dairy cows to be branded in the face with a hot iron, and prohibited more humane branding techniques such as freeze and chemical methods.[66]

The court granted standing to the Humane Society of Rochester and Monroe County because a New York statute specifically authorized the Society to enforce state animal cruelty laws.[67] Additional plaintiffs, Douglas and Mary Jane Burdick, were granted standing because the challenged regulations forced them "to brand their cows on the face with a hot-iron, and thereby expose themselves to the risk of prosecution for animal cruelty."[68]

The plaintiffs in *Kreps* and *Lyng* benefitted from a statutory basis for standing and a personal stake in the outcome of the litigation. The argument has been made that these two factors together are needed to establish standing for an animal rights activist seeking to protect endangered animals.[69] This contention is refuted by *Dunkle* and *Hodel*.

F. *Alaska Fish & Wildlife Federation v. Dunkle*

In *Dunkle*, the plaintiffs challenged a decision by the United States Fish and Wildlife Service (Service) to allow out-of-season hunting of migratory birds by Alaskan Natives. The district court held that the Service did not have the authority to restrict subsistence hunting by native Alaskans, and the plaintiffs appealed.[70]

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65. *Id.* Addressing the merits, the court concluded that the waiver was contrary to the provisions of the MMPA. The waiver would have allowed the importation of furs taken from young seals, still nursing when killed. The court set aside the waiver and implementing regulations. *Id.* at 1014.

66. Humane Soc'y v. Lyng, 633 F. Supp. 480, 482 (W.D.N.Y. 1986).

67. *Id.* at 485. New York authorizes the Humane Society to bring complaints for violations of the state's animal cruelty laws and to aid in the prosection of these complaints. N.Y. NOT-FOR-PROFIT CORP. LAW § 1403 (1970); *see also* KAN. STAT. ANN. § 21-4311 (1988)("agent of any incorporated humane society . . . may take into custody any animal . . . show[ing] evidence of cruelty to animals"); 90-72 Op. Kan. Att'y Gen. 2 (June 13, 1990). The legislatures in seven states have vested humane societies with the power to prosecute violators of animal cruelty statutes. *Id.* Most states, however, limit the authority of humane societies to arresting or assisting in prosecution of offenders. *Id.*

68. *Lyng*, 633 F. Supp. at 485. The court concluded that the type of branding required by the Department constituted cruelty to animals and enjoined the Department from enforcing the regulation. *Id.* at 487.

69. Masonis, *supra* note 19, at 169-74. The author suggests that, for practical purposes, both a legislative basis for standing and personal contact with the animals sought to be protected are necessary for an animal rights activist to claim standing to sue. *Id.*

70. Alaska Fish & Wildlife Fed'n v. Dunkle, 829 F.2d 933, 934-35 (9th Cir. 1987). The district court held "that the 1925 Alaska Game Law . . . superseded the 1918 Migratory Bird Treaty Act," which limited hunting of migratory birds. *Id.* at 935. The court reasoned that the 1925 law prevented the Department of Agriculture from restricting subsistence hunting and that this restriction

The defendants argued that the plaintiffs lacked standing to challenge the Service's actions. Addressing this issue, the court adopted a typical three-part test for standing.[71] The plaintiffs met the "personal injury" component of the standing test by demonstrating that increased hunting would impair their ability to "hunt, photograph, observe, or carry out scientific studies on the migratory birds."[72] The plaintiffs satisfied the "traceability" and "redressability" standing requirements by proving that subsistence hunting decreases migratory bird populations and that declaring all out-of-season hunting illegal would reduce the injury.[73]

The *Dunkle* court also addressed whether the plaintiff organizations were the proper parties to represent the injured. Citing the *Hunt v. Washington State Apple Advertising Commission* organizational standing requirements,[74] the court concluded that the organizations were proper parties. Both organizations demonstrated that their "members use[d] the resources in question and have been injured by the decrease in migratory bird population."[75] Preventing the extinction of migratory birds was germane to the purpose of both organizations. Finally, the plaintiffs did not seek money damages and, therefore, the participation of individual members was not necessary.[76]

The plaintiff organizations in *Dunkle* satisfied standing requirements because they successfully established injury in fact and demonstrated that the injuries alleged were germane to their interests. The importance of injury in fact and germaneness in claims brought by organizations is also illustrated in *Hodel*.[77]

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remained in force. *Id.* The two plaintiff organizations were the Alaska Fish and Wildlife Federation and Outdoor Council, Inc. and the Alaska Fish and Wildlife Conservation Fund, Inc. *Id.* at 933.

71. *Id.* at 937. "A plaintiff's claim must include three allegations: (1) a personal injury, (2) which is fairly traceable to the defendant's allegedly unlawful conduct, and (3) which is likely to be redressed by the requested relief." *Id.*

In formulating this three-part test, the Ninth Circuit Court of Appeals relied on *Allen v. Wright*. The respondents in *Allen*, parents of minority children, challenged Internal Revenue Service (IRS) guidelines for determining whether a private school discriminates on the basis of race. *Allen*, 468 U.S. 737, 743 (1984). The respondents alleged that discriminatory private schools were still receiving tax exempt status. *Id.* at 744-45. For standing purposes, they claimed to be injured in two ways. Respondents claimed that they were harmed directly by government aid to private schools that discriminate. The Court concluded that this claim could be interpreted in two ways: "It might be a claim simply to have the Government avoid the violation of law alleged in respondents' complaint. Alternatively, it might be a claim of stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race." *Id.* at 753-54. Respondents also asserted that the tax exemptions prevented the integration of their public schools. *Id.* at 752-53. The Court held that the respondents lacked standing because the alleged injuries were too abstract and not traceable to the IRS guidelines. *Id.* at 755, 759.

72. *Dunkle*, 829 F.2d at 937.

73. *Id.*

74. *Id.* at 937-38 (citing Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)). For a discussion of the *Hunt* organizational standing requirements, see *supra* notes 18-19 and accompanying text.

75. *Dunkle*, 829 F.2d at 938.

76. *Id.*

77. Humane Soc'y of the United States v. Hodel, 840 F.2d 45, 45 (D.C. Cir. 1988); *see* Note, *Humane Society v. Hodel: Protecting the Protectors*, 9 J. ENERGY L. & POL'Y 267, 278 (1989). In addition to emphasizing the importance of injury in fact to organizational standing, the author suggests "[t]he *Hodel* decision effectively eliminates an onslaught of standing battles on the grounds of germaneness." *Id.*

G. *Humane Society of the United States v. Hodel*

In *Hodel*, the Humane Society of the United States challenged actions of the United States Fish and Wildlife Service. Specifically, the Society challenged the Service's actions permitting hunting in wildlife refuge areas. The Society alleged that these actions were taken before the preparation of adequate environmental impact statements. The Society sought declaratory and injunctive relief. In defense, the Service argued, *inter alia*, that the Society lacked standing.[78]

Citing the traditional tripartite standing test,[79] the court concluded that this case turned on whether the first prong of "injury in fact" had been met. This question, the court reasoned, involved two distinct inquiries: "(1) whether the injuries alleged by plaintiffs here are constitutionally cognizable ones; and (2) if so, whether the Humane Society is qualified to press those claims under the United States Supreme Court's test for representational standing."[80]

Attempting to establish injury in fact, the Society advanced two arguments. First, the Society argued that it had a strong interest in laws protecting wildlife refuges. Second, the Society contended that its members who visited these wildlife habitats were forced "to witness animal corpses and environmental degradation" caused by the hunting.[81]

Rejecting the first standing argument made by the Society, the court, however, concluded that interest alone, no matter how impassioned, is not enough to confer standing. The court, however, did hold that the Society's environmental degradation claims were enough to establish injury in fact. These types of injuries, in the words of the court, "are classic aesthetic interests, which have always enjoyed protection under standing analysis."[82]

The court committed almost all of the opinion to the question of germaneness.[83] Following a thorough analysis of the germaneness standing test, the court concluded that the test serves two functions. First, "[i]t ensures a modi-

78. *Hodel*, 840 F.2d at 49.

79. *Id.* at 51 (relying on Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 472 (1982)).

80. *Id.*

81. *Id.* at 51-52.

82. *Id.* at 52. "Non-economic criteria are as valid a measure of personal injury as economic criteria." Alaska Fish & Wildlife Fed'n v. Dunkle, 829 F.2d 933, 937 (9th Cir. 1987)(citing United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 686 (1973))(refuse in national parks); *see also* Sierra Club v. Morton, 405 U.S. 727, 734 (1972)(destruction of scenery, natural objects, historical objects, and wildlife in national park); Port of Astoria v. Hodel, 595 F.2d 467, 476 (9th Cir. 1979)(increased pollution and decreased "enjoyment of recreational facilities"); Trustees for Alaska v. Watt, 524 F. Supp. 1303, 1307 (D. Alaska 1981)(deterrence of use of wildlife resources "for food, material, and cultural needs"), *aff'd*, 690 F.2d 1279 (9th Cir. 1982); *cf.* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 73 (1977)(thermal pollution); National Wildlife Fed'n v. Agricultural Stabilization & Conservational Serv., 901 F.2d 673, 677 (8th Cir. 1990)(decrease in wetlands available for aesthetic purposes); Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1040 (8th Cir. 1988)(destruction of endangered species in foreign countries); Sierra Club v. Simkins Indus., 847 F.2d 1109, 1112 (4th Cir. 1988)(pollution of Patapsco River); Friends of the Earth v. United States Navy, 841 F.2d 927, 931 (9th Cir. 1988)(limitation of Puget Sound for aesthetic activities); National Wildlife Fed'n v. Hodel, 839 F.2d 694, 707 (D.C. Cir. 1988)(threat of surface mining to aesthetic value of affected area).

83. Note, *supra* note 77, at 278. The author questions how the Society's interest in the refuges could be considered not germane to the organizations purpose. *Id.* "The group has shown enormous dedication to the welfare of animals. . . . The harm done to the Humane Society's members by the Fish and Wildlife Service's violation of environmental protection statutes is entirely germane to the purpose of the group." *Id.*

cum of concrete adverseness by reconciling membership concerns and litigation topics by preventing associations from being merely law firms with standing."[84] Second, the test prevents organization leaders from abusing their positions by bringing suits not supported by or germane to the organization's rank-and-file members.[85] Finally, the court joined with a number of jurisdictions that have declared the germaneness test "undemanding." Under this standard, members only need to show a reasonable connection between the litigation and the organization's purpose.[86] Given this relaxed standard, the court determined that the Society satisfied the germaneness test. The court pointed to a "plethora of affidavits" from organizational members contesting the Service's actions. In addition, the court concluded that the Society's purpose of protecting animals was reasonably linked to the goals of this litigation.[87]

Whether *Hodel* will prevent future litigation focusing on the grounds of germaneness is yet to be seen. *Hodel* and the other cases discussed illustrate the parameters within which a plaintiff must work to satisfy standing requirements. A trend apparently exists. Individual plaintiffs without a substantial relationship with the animals sought to be protected and without a statutory foundation for standing will not be able to satisfy standing requirements. Alternatively, organizations with a demonstrated commitment to animal welfare have an excellent chance of passing established standing tests. These organizations possess the "special expertise" cited by courts as the principle advantage of organizational litigation.[88] In addition, if the litigation is consistent with the goals of the organization, the organization can easily supply the proof needed to satisfy the *Hunt* organizational standing requirements. As illustrated by *Kreps* and *Lyng*, standing becomes a *fait accompli* when plaintiffs demonstrate a statutory basis for standing and the requisite injury in fact.[89]

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84. *Hodel*, 840 F.2d at 58.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*; *see also* UAW v. Brock, 477 U.S. 274, 283 (1986). These special advantages are listed as follows: (1) organizations often possess expertise, capital and research resources that individuals often lack; (2) members often join with the intent of supporting the organization's interests; and (3) members police the organization's activities and ensure that its actions coincide with its goals. *Id.* at 289-90; *cf.* Harlem Valley Transp. Ass'n v. Stafford, 360 F. Supp. 1057, 1064 (S.D.N.Y. 1973)(discusses advantages of organizational plaintiffs); *see also* Note, *From Net to Sword: Organizational Representatives Litigating Their Members Claims*, 1974 U. ILL. L. F. 663, 669 (1974). The author suggests six advantages of organizational plaintiffs over class action claimants. Organizations will be more zealous in pursuing a suit in order to demonstrate its potency and effectiveness, with the hope of attracting new members. Suits put organizations in the "litigation spotlight" and, therefore, they have a great deal of incentive to be successful. In addition, organizations have financial assets, expertise and resources not available to normal class action plaintiffs. Finally, the author contends that since organizations usually have a single purpose they do not have competing interests that often distract class action plaintiffs. *Id.*

89. State courts have long adhered to standing requirements consistent with the tests established by federal courts. *See, e.g.*, Central Westchester Humane Soc'y v. Hilleboe, 116 N.Y.S.2d 403, 407, 202 Misc. 881, 884 (1952). In *Hilleboe*, the plaintiffs challenged a statute that allowed the use of pound animals in scientific tests and experiments. *Id.* at 404, 202 Misc. at 882. The court held that a person may not challenge a law that does not specially and actually affect his personal or property rights. *Id.* at 407, 202 Misc. at 885; *see also* Hillsborough County v. Snyder, 516 So. 2d 1105, 1106 (Fla. Dist. Ct. App. 1987)("special injury" required to vest plaintiff with standing to challenge decision to supply pound animals to university for research); Walz v. Baum, 345 N.Y.S.2d

III. LEGISLATIVE CONTROLS: A TWO EDGED SWORD

While under certain circumstances courts are willing to grant standing to plaintiffs seeking to protect animal welfare, the outcome is never certain. This is particularly true for individual plaintiffs suing without the benefit of organizational support or for plaintiffs suing to protect privately owned animals. This uncertainty of outcome in the courts is the primary reason many consider legislation as the most pragmatic and convenient way to enhance animal rights and welfare. This is true at both federal and state levels.[90]

Animal rights activists do not have a monopoly on legislative efforts regarding animal welfare. There is growing opposition to animal rights activists' efforts to restrict hunting, trapping, animal experimentation, and other uses of animals. Legislators at both state and federal levels have either passed bills or are considering "backlash" legislation designed to restrict the activities of animal rights activists.

A. *Federal Legislative Developments*

1. *The Animal Welfare Act and Amendments*

The mainstay of federal legislation designed to promote animal welfare is the Animal Welfare Act (AWA).[91] The AWA has received much attention from commentators, and several articles detailing the history of the AWA and its provisions are available.[92] A brief recitation of the AWA's history and provisions is necessary to place recent developments in perspective.

159, 160, 42 A.D.2d 643, 644 (1973)(plaintiffs unable to show personal or property rights at stake lacked standing to challenge slaughtering techniques).

The standing requirement cuts both ways. For example, an action was brought in Texas challenging a decision by the Texas Parks and Wildlife Commission to ban hunting in three Texas counties. *See* Tri County Citizens Rights Org. v. Johnson, 498 S.W.2d 227, 227-28 (Tex. Civ. App. 1973). The court denied the plaintiffs standing, holding that they had not suffered any damage that was not suffered by the public at large. *Id.* at 229.

State courts have shown a reluctance to review administrative decisions regarding the disposition of animals in the care of the state. *See, e.g.*, State v. LeVasseur, 1 Haw. App. 19, 27, 613 P.2d 1328, 1333 (theft of dolphins from university lab a greater evil than university's violation of Animal Welfare Act), *cert. denied*, 62 Haw. 690 (1980); New Jersey S.P.C.A. v. Board of Educ., 91 N.J. Super. 81, 89, 219 A.2d 200, 205 (1966)(State Department of Health has power to authorize scientific experiments on animals); Jones v. Beame, 408 N.Y.S.2d 449, 451, 45 N.Y.2d 402, 407, 380 N.E.2d 277, 278 (1978)(court refused to accept responsibility for administrative decisions regarding operation of zoos).

90. Masonis, *supra* note 19, at 174; *see also* Thomas, *supra* note 2, at 739 (federal and state remedies chief avenue for suing on behalf of animals); Note, *supra* note 21, at 476 (*I.P.P.L.* indicates that courts will not go beyond what legislators intend).

91. Masonis, *supra* note 19, at 150. There are several other federal acts designed to protect animals. *E.g.*, Humane Slaughter Act, 7 U.S.C.A. §§ 1901 to 1906 (1988 & Supp. 1990)(purpose is to ensure that animals are slaughtered by humane methods); Migratory Bird Treaty Act, 16 U.S.C.A §§ 703 to 712 (1985 & Supp. 1990)(purpose is to maintain "optimum sustainable population keeping in mind the optimum carrying capacity of the habitat"); Wild Free-Roaming Horse and Burros Act, 16 U.S.C.A. §§ 1331 to 1340 (1985 & Supp. 1990)(purpose is to protect free-roaming horses and burros from "capture, branding, harassment, or death"); Marine Mammal Protection Act, 16 U.S.C.A. §§ 1361 to 1407 (1985 & Supp. 1990)(purpose is to "maintain the health and stability of the marine ecosystem"); The Endangered Species Act, 16 U.S.C.A. §§ 1531 to 1543 (1985 & Supp. 1990)(purpose is to protect endangered species and their ecosystems).

92. *See* Masonis, *supra* note 19, at 152-67; *see also* Dukes, *The Improved Standards for Laboratory Animals Act: Will it Ensure that the Policy of the Animal Welfare Act Becomes a Reality?*, 31 ST. LOUIS U.L.J. 519, 520-25 (1987)(details the history of the AWA from its inception to the 1985 amendments); McDonald, *Creating a Private Cause of Action Against Abusive Animal Research*, 134

The Laboratory Animal Welfare Act (LAWA) of 1966,[93] the federal government's first major attempt to regulate in this area, was enacted to protect household pets from theft for use in research and to regulate animal dealers and research laboratories.[94] The AWA was passed in 1970 to encompass a larger collection of animals and animal handlers than covered by the LAWA.[95] In 1976 the AWA was amended to control the activities of carriers and transitional animal handlers.[96] The AWA, in its 1976 form, did not address the use of animals during experimentation.

A great deal of criticism has been directed at the Department of Agriculture's Animal and Plant Health Inspection Service (APHIS), the government body empowered to enforce the provisions of the AWA. A General Accounting Office (GAO) 1985 report indicated APHIS employees spent very little time inspecting facilities covered by the act. The GAO study also concluded that the quality of APHIS inspections was not monitored and that the training of APHIS inspectors was inadequate.[97] In order to remedy inadequacies of the AWA, Congress in 1985 passed the Improved Standards for Laboratory Animals Act (ISLAA) as an amendment to the AWA.[98] The goal of ISLAA is to restrict the amount of suffering experienced by animals during experimentation. The ISLAA directs the Secretary of Agriculture to promulgate regulations "for animal care, treatment, and practices in experimental procedures to ensure that animal pain and distress are minimized."[99] The amendments require the experimenter to consider alternatives to any experiment likely to cause pain to animals; to consult a doctor of veterinary medicine; and to use tranquilizers, analgesics, and anesthetics.[100]

The ISLAA generated a great deal of optimism among animal welfare proponents. These animal rights activists hoped that the new regulations, when promulgated, would convert the "toothless" AWA "into an effective regulatory device."[101] More than six years later, however, APHIS has yet to promulgate all of the regulations in their final form.

U. PA. L. REV. 399, 402-08 (1986)(delineates history of AWA with emphasis on inadequacies of the statute); Thomas, *supra* note 2, at 742-45 (brief history of the AWA).

93. Act of Aug. 24, 1966, Pub. L. No. 89-544, § 1, 80 Stat. 350 (1966).

94. *See* S. REP. NO. 1281, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 2635, 2636.

95. *See* 7 U.S.C. § 2143 (1985). Act now covers "intermediate handlers, air carriers, or other carriers, of animals consigned by any dealer, research facility, exhibitor, operator of an auction sale, or other person, or any department, agency, or instrumentality of the United States or of any State or local government, for transportation in commerce." *Id.*

96. *See* 7 U.S.C. § 2146(a) (1985)(AWA applies to carriers and transitional animal handlers).

97. Masonis, *supra* note 19, at 156-58.

98. Food Security Act of 1985, Pub. L. No. 99-198, §§ 1751 to 1759, 99 Stat. 1645 (1985)(codified in relevant part at 7 U.S.C. §§ 2131 to 2157 (1986)).

99. 7 U.S.C. § 2143(a)(3)(A) (1986).

100. *Id.* § 2143(a)(3)(A) to 2143(a)(3)(C) (1986); *see also* Masonis, *supra* note 19, at 158-62 (detailed discussion of ISLAA provisions).

101. Masonis, *supra* note 19, at 174.

Two out of three parts of the proposed regulations were first published for public comment March 31, 1987.[102] Nearly 8000 comments were received.[103] Release of the third part, containing the majority of substantive changes, was delayed by a GAO review. Frustrated by the delay, the Animal Legal Defense Fund brought suit to force publication. In late 1988, a federal district court judge ordered that the regulations be published in early March, 1989.[104] The Fund and the government reached an agreement and the third part of the proposed regulations was finally released for public comment on March 15, 1989.[105] Over 10,000 comments relating to part three were received.[106]

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102. 52 Fed. Reg. 10,292 (1987)(to be codified at 9 C.F.R. pts. 1 & 2)(proposed Mar. 31, 1987). Part one contains definitions of terms. For example, "euthanasia" is defined as "the humane destruction of an animal accomplished by a method which produces instantaneous unconsciousness and immediate death without evidence of pain or distress, or a method that utilizes anesthesia produced by an agent which causes painless loss of consciousness, and death following such loss of consciousness." *Id.* at 10,296. A "federal research facility" is broadly defined as "each department, agency, or instrumentality of the United States which uses live animals for research or experimentation." *Id.* Part two contains regulations covering licensing, registration, research facilities, veterinary care, identification of animals, stolen animals, records, compliance with standards and holding periods, and miscellaneous provisions. *Id.* at 10,308. One provision requires "[e]ach licensed or registered research facility, dealer or exhibitor . . . [to] have an attending veterinarian . . . who shall provide adequate veterinary care to their animals in compliance with this section." *Id.* at 10,315.

For the first time, regulations were promulgated covering intermediate handlers. These regulations apply whenever an animal is sent C.O.D. or when the cost of the animal or its transportation is to be paid and collected upon delivery of the animal to the consignee. *Id.* at 10,319. Generally, the intermediate handler regulations are designed to ensure proper record keeping, safe transportation, and a guarantee that the animals will be promptly delivered. *Id.*

103. BUREAU OF NAT'L. AFF., INC., DAILY REP. FOR EXECUTIVES (Mar. 13, 1989, No. 47). A wide variety of comments were received. For example, many commentators indicated that it was difficult to evaluate parts one and two without part three. 54 Fed. Reg. 36,112 (1989). Several hundred commentators requested a more definite statement regarding which farm animals are covered by the regulations. *Id.* at 36,113. A number of commentators argued that all animals, including rats and mice, should be covered. A nearly equal number, however, argued that all rodents should be excluded. *Id.* Some commentators addressed parochial interests. For example, one exhibitor contested regulations dividing non-domestic animals into "wild animals" and "exotic animals." *Id.*

104. BUREAU OF NAT'L. AFF., INC., DAILY REP. FOR EXECUTIVES (Mar. 13, 1989, No. 47); *see* Animal Legal Def. Fund v. Yeutter, No. 88-3640 (D.C. filed Dec. 22, 1988).

105. 54 Fed. Reg. 10,897 (1989)(to be codified at 9 C.F.R. pt. 3)(proposed Mar. 11, 1989). The regulations set very specific standards for the humane handling, care, treatment, and transportation of dogs and cats. For example, the temperature in an indoor housing facility cannot drop below 45 degrees Fahrenheit at any time, and must not rise above 95 degrees Fahrenheit. Air conditioning must be provided when the temperature exceeds 85 degrees Fahrenheit. *Id.* at 10,932. In outdoor housing facilities, a shelter from the sun must be provided. In addition, the surfaces in contact with animals must be impervious to moisture. Clean and dry bedding material must be provided. *Id.* Animal health and husbandry standards require that all animals be housed with compatible breeds. *Id.* at 10,934-35. In addition, dogs must be able to see and hear other dogs. *Id.* at 10,935. If only one dog is housed, the animal must receive "positive physical contact with humans at least once a day. The positive physical contact with humans must total at least 60 minutes each day and may be given in one or more periods." *Id.* Regulations also cover, *inter alia*, feeding, watering, cleaning, sanitization, housekeeping, and pest control. *Id.*

106. 55 Fed. Reg. 33,448 (1990). The vast majority of these comments concerned dog, cat and nonhuman primate regulations. Because of the number and variety of comments, they are difficult to summarize. Of the comments regarding dogs, cats and nonhuman primates, over 600 were received from dealers and exhibitors; nearly 3000 were received from the research community; and over 7000 were received from the general public. *Id.* A large number of commentators generally supported the regulations. A large number opposed them. *Id.* at 33,449. The reasons given are as diverse as the issues addressed. Some commentators favored increased exercise and space for laboratory animals. *Id.* Many opposed these requirements on the grounds that compliance would cost too much. *Id.* at 33,450. A large number of commentators argued that the proposed regulations were "not supported by scientific documentation," and that they were "arbitrary and capricious." *Id.* In addition, many argued that the regulations would interfere with research. *Id.* at 33,451. Some com-

Since publication on March 15, 1989, some of the regulations in their final form have been released. The final regulations for part one[107] and part two[108] were published on August 31, 1989. On July 16, 1990, the final regulations "for the humane handling, care, treatment, and transportation of guinea pigs and hamsters, and rabbits, respectively" were published.[109] These regulations were not particularly controversial and "a relatively small number" of the thousands of comments received by APHIS related to these subparts.[110] The controversial sections of part three relating to the treatment of cats, dogs and nonhuman primates have not been finalized. On August 15, 1990, APHIS announced that it had revised the March 15, 1989 draft of these regulations and invited additional comments. The Service set October 1, 1990 as the deadline for receipt of comments.

The delay and "foot-dragging" on the part of APHIS is not surprising. Officials at the Department of Agriculture have never wanted responsibility for enforcing the LAWA or the AWA. As early as 1966, the Secretary of Agriculture argued that his department should not be required to enforce laboratory animal regulations.[111] As recently as 1985, the Department proposed that money allocated for inspections, the core of the AWA, be eliminated. It suggested that state and private organizations assume responsibility for enforcing the AWA.[112] Given this backdrop, it is debatable whether the new regulations will actually put "teeth" in the AWA. It has been suggested that the AWA will be effective only if legislation is passed to grant standing to private individuals to enforce its provisions.[113] Such a bill was introduced and defeated in 1986.[114]

Granting private individuals standing to sue for the enforcement of federal animal welfare legislation is not an entirely novel idea. As already discussed, the court in *Kreps* concluded that the Marine Mammal Protection Act (MMPA) grants standing to private citizens. The MMPA, however, is significantly differ-

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mentators contended that they could not understand the regulations and, therefore, could not comment on them. *Id.* at 33,452.

107. 54 Fed. Reg. 36,112 (1989)(to be codified at 9 C.F.R. pt. 1)(effective Oct. 30, 1989).

108. 54 Fed. Reg. 36,123 (1989)(to be codified at 9 C.F.R. pt. 2)(effective Oct. 30, 1989).

109. 55 Fed. Reg. 28,879 (1990)(to be codified at 9 C.F.R. pt. 3, subparts B and C)(effective Aug. 15, 1990).

110. *Id.* Most commentators who objected to the regulations said the cost of compliance would be prohibitive. *Id.* at 28,880.

111. Dukes, *supra* note 92, at 525.

112. *Id.* at 525-26. In 1983, 1984, and in 1985 the USDA suggested that money for inspections be decreased or eliminated. *Id.* at 526. The USDA's Animal and Plant Health Inspection Service (APHIS) is responsible for administration of the Animal Welfare Act. The Service allots only two percent of its budget to animal health and welfare programs. This amount is spread over more than nineteen programs. *Id.* In addition, APHIS inspectors devote only six percent of their time to animal welfare activities. *Id.* Many of the inspectors are not formally trained. The few inspectors who are formally trained need updated training. *Id.* at 531. While APHIS policies recommend four inspections a year, in any given year, many facilities may not be inspected at all. *Id.* at 532; *see also* Masonis, *supra* note 19, at 156-58 ("[e]nforcement of the AWA [by the USDA] has been suspect since its inception.").

113. Dukes, *supra* note 92, at 537-39 (AWA will never be vigorously enforced until Congress gives private citizens standing to enforce act).

114. *See* H.R. 4535, 99th Cong., 2d Sess. (1986). The bill was introduced by Congressmen Charlie Rose and Rod Chandler. Dukes, *supra* note 92, at 538. The bill would have allowed any person to initiate a civil action to compel the Secretary of Agriculture to enforce the AWA. *Id.* Fees and costs would be awarded to prevailing plaintiffs and, in the case of frivolous suits, to the government. *Id.*

ent from the AWA and a comparison between the two statutes may not be valid. Although one goal of the AWA is to reduce animal suffering, Congress has repeatedly emphasized that the act does not authorize "disruption or interference with scientific research or experimentation. Under . . . [the AWA] the research scientist still holds the key to the laboratory door."[115] Under the MMPA, there are no such constraints. Congress explicitly intended the MMPA to protect Marine animals, especially animals close to extinction.[116]

While there are no current legislative efforts to grant standing to private individuals under the AWA, several amendments to the AWA were introduced in the 101st Congress. Two of these proposed amendments prohibited the use of live lures in training and racing greyhounds. A third allowed the Attorney General, upon notification by the Secretary of Agriculture, to issue temporary restraining orders and injunctions in certain cases.[117] None of these amendments became law.[118]

2. *Federal "Backlash" Legislation*

A fourth amendment to the AWA, designed to protect animal research facilities, was expected to become law.[119] This amendment reflected the growing "backlash" against the militant activities of animal rights activists. Its aim was to stop the "vandalism, thefts, and break-ins by so-called animal liberationists." The bill made it illegal to steal or cause the unauthorized release of an animal from a research facility; to damage, vandalize or steal research facility property; to gain unauthorized access to research facility records, data, materials, equipment, or animals; to receive property stolen from a research facility; and to break-and-enter a research facility.[120] The proposed statute also granted a pri-

115. H.R. REP. NO. 1651, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5103, 5104.

116. *See* Marine Mammal Protection Act, 16 U.S.C. § 1361(2) (1984)(goal is to prevent extinction of species).

117. *See* H.R. 1064, 101st Cong., 1st Sess. (1989)(would require use of mechanical lures in greyhound race training); H.R. 578, 101st Cong., 1st Sess. (1989)(same); H.R. 425, 101st Cong., 1st Sess. (1989)(amends AWA provisions dealing with temporary restraining orders and injunctions).

118. H., CONG. INDEX, 101st Cong. 28,215, 28,185, 28,176 (CCH) (1989-90). Each of these three amendments was sent to the House Agriculture Committee. *Id.* The amendments were never discharged to the House by the Committee.

The bills were not expected to become law. The greyhound bills were given a 16% chance to pass the House and less than a 15% chance of passing the Senate. The injunction bill was given a 20% chance to pass the House and an 11% chance to pass the Senate. "Billcast" (WESTLAW, Genfed library, Legislation file).

Representative Robert K. Dornan, the original sponsor of one of the greyhound bills, has introduced the bill into the 102nd Congress. H.R. 318, 102nd Cong., 1st Sess. (1991). This measure was referred to the House Agriculture Committee. H., CONG. INDEX, 102nd Cong. 28,169 (CCH) (1991-92).

119. S. 727, 101st Cong., 1st Sess. (1989). The bill was introduced and referred to the Senate Agriculture Committee on Apr. 7, 1989. S., CONG. INDEX, 101st Cong. 20,017 (CCH) (1989-90). The Committee discharged the bill and it passed the Senate on November 20, 1989. *Id.* The bill was referred to the House Agriculture Committee on July 31, 1990. *Id.* Even though the amendment was given an 80% chance of passing the House, it was never discharged from the Agriculture Committee. "Billcast" (WESTLAW, Genfed library, Legislation file).

A House version of the Animal Research Facilities Protection Act was also introduced. H.R. 3223, 101st Cong., 1st Sess. (1989). The bill was referred to the House Agriculture Committee and was never discharged. H., CONG. INDEX, 101st Cong. 28,343 (CCH) (1989-90).

120. S. 727, 101st Cong., 1st Sess. § 1783(a)(1)(A) to 1783(a)(1)(E) (1989).

vate right of action to any research facility damaged by violations of the act.[121] While unwilling to grant a private cause of action to activists seeking to protect animals, many members of Congress are apparently willing to allow private citizens to prosecute animal rights activists.

Another example of proposed "backlash" federal legislation was the National Forest Hunter Safety and Protection Act.[122] This bill was designed to allow the Secretary of the Department of Agriculture to protect hunters within federally controlled lands from harassment by animal rights activists.[123] In support of the bill, Senator Burns, a co-sponsor, argued that "[h]unting is a traditional and beneficial recreation." The goals of the groups harassing hunters are described by the Senator as follows:

> [T]o end all use of animals, including the use of animals in medical research and testing; the raising and eating of meat; the wearing of fur, leather, wool, and silk; the circus and rodeo; the keeping of pets; and the many varied uses of animal products in industrial processes.[124]

No specific animal welfare group was cited by Senator Burns and it is doubtful that any group exists with all of the goals enumerated by the legislator. The rhetoric employed by the Senator is typical of that used by "backlash" legislation supporters. Senator Heflin, arguing in support of the animal research facilities protection amendment to the AWA, stated that the price for vandalism to research facilities is paid by the sick and infirm. "Research into Alzheimers disease, cancer, AIDS, substance addiction, and mental health is at stake here."[125]

Even though the federal hunter harassment statute did not pass,[126] this bill and the research facilities protection bill reflect a growing anti-animal rights activist sentiment. Organizations that lobby Congress for legislation to restrict the activities of those who abuse animals will need to defuse this sentiment.

B. *State Legislative Developments*

There has been a notable rise in the amount of animal research legislation filed on the state level.[127] A review of all recent changes in state laws regarding

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121. *Id.* § 1786(a) (1989).

122. H.R. 3768, 101st Cong., 1st Sess. (1989); S. 2880, 101st Cong., 1st Sess. (1990). The House version was referred to the following Committees: Agriculture, Interior and Insular Affairs, and Merchant Marine and Fisheries. H., CONG. INDEX, 101st Cong. 28,376 (CCH) (1989-90). The Senate version was referred to the Environment and Public Works Committee. S., CONG. INDEX, 101st Cong. 14,307 (CCH) (1989-90). Neither version was discharged from any committee.

123. 136 CONG. REC. S10,094 (daily ed. July 19, 1990)(statement of Sen. Burns).

124. *Id.* at S10,095.

125. 135 CONG. REC. S16,309 (daily ed. Nov. 20, 1989)(statement of Sen. Heflin).

126. *See* "Billcast" (WESTLAW, Genfed library, Legislation file)(bill was given 18% chance of passing the House, and 6% chance of passing the Senate).

127. NATIONAL ASS'N. FOR BIOMEDICAL RESEARCH, STATE LAWS CONCERNING THE USE OF ANIMALS IN RESEARCH 1 (2d ed. 1987)[hereinafter STATE LAWS].

> What is new concerning the research animal use controversy is the increase in activity on the state level concerning this issue. Particularly in the last five years, there has been a significant increase in the number of bills filed on the use of laboratory animals, an increase in the number of states that are grappling with such bills, and, perhaps most importantly, the potential threat to the conduct of biomedical research that these state bills pose through increasingly restrictive requirements.

animal welfare and rights is beyond the scope of this Note.[128] Recent legislative

Id; *see also* 90-72 Op. Kan. Att'y Gen. 2 (June 13, 1990)(in recent years many states have enacted anti-cruelty animal statutes).

Twenty-two states and the District of Columbia exempt or specifically mention research in their animal cruelty statutes. STATE LAWS, *supra*, at 11. Twenty-five states do not mention research in their animal cruelty statute. *Id*. There is limited case law that indicates that when a state's animal cruelty statute does not specifically exempt or mention research, the statute is not intended to apply to medical or scientific experiments using live animals. *See* Taub v. State, 296 Md. 439, 444, 463 A.2d 819, 821 (1983)(legislature did not intend for cruelty statute to apply to incidental or unavoidable infliction of pain); New Jersey S.P.C.A. v. Board of Educ., 91 N.J. Super. 81, 91-92, 219 A.2d 200, 205 (statute prohibited only unnecessary pain, needless mutilation or needless death of animal), *aff'd*, 49 N.J. 15, 227 A.2d 506 (1966).

128. A comprehensive discussion of cases challenging these statutes is also beyond the scope of this Note. Since the majority of animal related statutes are penal in nature, many of these cases center on questions regarding criminal procedure and the issues litigated are not directly relevant to animal rights concerns. *See* Rushin v. State, 154 Ga. App. 41, 42, 267 S.E.2d 473, 474 (1980)(evidence insufficient to support conviction for cruelty to animals); State v. Hollie, 416 So. 2d 542, 545 (La. 1982)(evidence insufficient to establish beyond a reasonable doubt that defendant abused animal); State v. Tweedie, 444 A.2d 855, 858 (R.I. 1982)(evidence sufficient to establish that defendant placed healthy cat into microwave oven and turned on the oven); Lopez v. State, 720 S.W.2d 201, 203 (Tex. App. 1986)(evidence sufficient to support conviction for cruelty to animal); McGinnis v. State, 541 S.W.2d 431, 432 (Tex. Crim. 1976)(instruction on what constitutes torture of animal was erroneous).

Several jurisdictions have examined the constitutionality of a variety of animal welfare statutes. *See, e.g.*, People v. Bunt, 462 N.Y.S.2d 142, 118 Misc. 2d 904 (1983). The defendant was arrested for beating a dog with a baseball bat. The central issue in *Bunt* was whether New York Agriculture and Markets Law § 353 (1986) was "too vague for the ordinary person to know what conduct is proscribed by the statute." *Id*., 118 Misc. 2d at 904. Section 353 made it a misdemeanor for any person to cause, procure or permit "any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed." *Id*. at 143, 118 Misc. 2d at 905. After reviewing case law from a variety of jurisdictions with similar statutes, the court held that § 353, while not well drafted, was constitutional. The court concluded that "prohibiting the unjustified, needless and wanton unhumanity [sic] towards animals" was a legitimate legislative activity and that the statute itself was not so broad as to violate due process. *Id*. at 146, 118 Misc. 2d at 910.

Florida's Supreme Court addressed the issue of whether "every living dumb creature" is a legitimate statutory definition for "animal" in *Wilkerson v. State*. The defendant in *Wilkerson* was charged with violating Florida's anti-cruelty statute, Florida Statutes § 828.12 (1979), by abusing a raccoon without provocation. *Wilkerson*, 401 So. 2d 1110, 1111 (1981). Attacking the constitutionality of the statute, the defendant argued that the legislature had not given enough guidance as to what animals were covered by the statute. *Id*.

The court began its analysis by noting "that the majority of state courts confronted with this issue have upheld the constitutionality of cruelty to animal statutes against claims of unconstitutional vagueness." *Id*. (citing State v. Kaneakua, 61 Haw. 136, 143, 597 P.2d 590, 594 (1979)(anti-cockfighting statute found constitutional); Moore v. State, 183 Ind. 114, 117, 107 N.E. 1, 1-2 (1914)(anti-cruelty statute found constitutional); State *ex rel*. Miller v. Claiborne, 211 Kan. 264, 268, 505 P.2d 732, 735 (1973)(anti-cockfighting statute found constitutional); State v. Hafle, 52 Ohio St. 2d 9, 12, 367 N.E.2d 1226, 1229 (1977)(anti-cruelty statute found constitutional); King v. State, 75 Okla. Crim. 210, 212, 130 P.2d 105, 107 (1942)(same); McCall v. State, 540 S.W.2d 717, 719 (Tex. Crim. App. 1976)(same)). The court concluded that the Florida statute was constitutionally valid and affirmed the defendant's conviction. *Wilkerson*, 401 So. 2d at 1112.

A final example of cases addressing the constitutionality of anti-cruelty statutes is *Cannady v. North Carolina Wildlife Resources Commission*. In *Cannady*, the plaintiff, the owner of a black bear, brought an action against the defendants to prevent them from enforcing a law making it illegal to purchase, sell or possess a black bear. *Cannady*, 30 N.C. App. 247, 248, 226 S.E.2d 678, 678-79 (1976). The plaintiff advanced three arguments. First, he contended that the statute allowed the taking of his property without compensation. Second, he argued that the statute allowed the taking of his property without due process. Third, the plaintiff asserted that the statute did not provide equal protection because it provided exceptions for zoos. *Id*. at 249, 226 S.E.2d at 680. The court rejected all three of the plaintiff's arguments. Citing the long recognized authority of the state to protect animals, the court concluded that the statute was reasonable. No "taking" of private property was involved because the statute allowed an owner to keep his or her bear if the owner complied with certain standards. In addition, if an owner wished to give up his or her bear, the state paid the owner up to $100 in compensation. Finally, the statute's exceptions for zoos were held to be supported by a rational basis. *Id*. at 249, 226 S.E.2d at 680.

changes have addressed subjects as wide-ranging as the protection of police dogs[129] and the elimination of bear and dog fights.[130] This Note reviews a sample of recent state legislative developments with the goal of identifying trends and major areas of concern. As on the federal level, these developments fall into two broad categories: (1) legislation designed to enhance animal welfare and (2) legislation designed to restrict the activities of animal rights activists.

1. *State Legislation Enhancing Animal Welfare*

A number of states have recently revised their basic anti-cruelty statutes. Some states have increased the fines and penalties for animal abuse.[131] Several states have broadened the scope of already existing cruelty statutes. For example, Indiana recently passed a law making it a Class B misdemeanor to "recklessly, knowingly, or intentionally" abandon or neglect a vertebrate animal in a person's custody.[132] Similarly, Iowa recently made it a simple misdemeanor to abandon cats or dogs.[133] South Carolina in 1988 expanded its definition of animal cruelty to include acts of torture, mutilation, and repeated unnecessary infliction of pain.[134] Methods used to euthanize animals have been the focus of several state legislatures. The result has been statutes prohibiting the use of decompression chambers,[135] allowing for the use of sodium pentobarbital and sodium pentobarbital with lidocaine,[136] and generally calling for more humane destruction of animals.[137]

Some changes are more sweeping. Georgia recently enacted its own version of the AWA, The Georgia Animal Protection Act.[138] The act establishes licensing procedures for pet dealers, kennel, stable and animal shelter operators.[139] Specific grounds for denial or revocation of licenses are also established. The

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129. *See, e.g.*, ALA. CODE § 13A-11-15 (Supp. 1990)(Class C felony to "intentionally, knowingly, recklessly or with criminal negligence kill a dog used by a police officer"); ILL. REV. STAT. ch. 8, para. 704.04 (Supp. 1990)(makes it a crime to injure or kill a police dog); S.C. CODE ANN. § 47-3-610 (Law. Co-op. Supp. 1989)(makes it unlawful to taunt, torment, tease, beat, strike, or administer desensitizing drug to police dog).

130. For a discussion of laws addressing animal fights, see *infra* notes 144-55 and accompanying text.

131. *See, e.g.*, CAL. PENAL CODE § 597 (West Supp. 1990)(makes offenses alternately punishable as misdemeanors or felonies and sets the maximum fine at $20,000); CONN. GEN. STAT. § 53-247 (Supp. 1990)(increased basic fine from $750 to $1,000).

132. IND. CODE § 35-46-3-7 (Supp. 1990).

133. IOWA CODE § 717.4 (Supp. 1990).

134. S.C. CODE ANN. § 47-1-40 (Law. Co-op. Supp. 1989).

135. *See, e.g.*, N.Y. AGRIC. & MKTS. LAW § 374.2a (McKinney Supp. 1990)(illegal to use decompression chamber to destroy animal).

136. *See, e.g.*, FLA. STAT. § 828.055 (Supp. 1990)(only specified chemicals can be used to destroy animal).

137. *See, e.g.*, N.C. GEN. STAT. § 19A-23(9) (Supp. 1990). Euthanasia is defined as the "humane destruction of an animal accomplished by a method that involves rapid unconsciousness and immediate death or by a method that involves anesthesia, produced by an agent which causes painless loss of consciousness, and death during such loss of consciousness." *Id.*

138. GA. CODE ANN. §§ 62-2401 to 62-2416 (Supp. 1989). Like the AWA, the Georgia act requires all pet dealers and kennel, stable and animal shelter owners to obtain a license. *Id.* § 62-2403 (Supp. 1989). The act also provides for inspections and grounds for denial, suspension and revocations of license. *Id.* §§ 62-2407, 62-2409 (Supp. 1989). In addition, the act lists unlawful acts and penalties. *Id.* §§ 62-2410, 62-2416 (Supp. 1989). Unlawful acts include failure "to provide adequate food and water" and failure "to provide adequate and humane care for any dog, cat, equine." *Id.* § 62-2410(3), (4) (Supp. 1989).

139. *Id.* § 62-2403 (Supp. 1989).

grounds are primarily designed to provide humane care for animals under the care of licensees.[140] Tennessee recently made significant revisions in its anti-cruelty statute.[141] The new Tennessee statute expands the definition of "Cruelty to Animals." Not only does the law now cover affirmative behavior such as torture, overworking, and abandonment, the act also covers failure to reasonably "provide necessary food, water, care, or shelter for an animal in the person's custody."[142] In addition, the act enlarges the enforcement powers of societies for the prevention of cruelty to animals. Agents of such societies can lawfully interfere to prevent an act of cruelty, as defined by the act. To obstruct an agent is a Class C misdemeanor.[143]

In addition to revising general anti-cruelty statutes, many states have passed legislation addressing particular problems of animal abuse. One of the most common subjects addressed is animal fighting contests. At least eight states have recently passed statutes outlawing a variety of animal contests. Indiana makes it a crime to purchase or possess animals to be used in an animal fighting contest, to promote or stage such a contest or to attend a fighting contest involving animals.[144] In 1989, Arkansas revised its dogfighting statute and promulgated a new statute making exploitation of bears a crime.[145] The dogfighting statute makes it a crime, *inter alia*, to promote, to engage in or to be employed at a dogfight.[146] The act also makes it a crime to purchase a ticket for admission to or to witness a dogfight.[147] The bear exploitation law creates similar provisions covering bear wrestling matches.[148] In Delaware, it is now a crime to possess, keep or use "any bull, bear, dog, cock or other animal, or fowl, for the purpose of fighting or baiting."[149] The Delaware law also makes it a crime to facilitate such an event. The penalties are potentially stiff. The paraphernalia used to stage such an event and any money involved are forfeited to

140. *Id.* § 62-2407 (Supp. 1989).
141. TENN. CODE ANN. §§ 39-14-201 to 39-14-210 (Supp. 1990).
142. *Id.* § 39-14-202 (Supp. 1990).
143. *Id.* § 39-14-210 (Supp. 1990).
144. IND. CODE §§ 35-46-3-8 to 35-46-3-10 (Supp. 1990).
145. ARK. STAT. ANN. § 5-62-120 (Supp. 1989)(unlawful dog fighting); *Id.* § 5-62-124 (Supp. 1989)(unlawful bear exploitation).
146. ARK. STAT. ANN. § 5-62-120(a)(1) to 5-62-120(a)(2) (Supp. 1989).
147. *Id.* § 5-62-120(b)(1) (Supp. 1989).
148. *Id.* § 5-62-124 (Supp. 1989).
149. DEL. CODE ANN. tit. 11, § 1326(a) (Supp. 1988).

the state.[150] Mississippi,[151] Montana,[152] Nebraska,[153] Oregon,[154] and West Virginia[155] have recently passed similar laws prohibiting animal contests.

Perhaps one of the most controversial animal welfare issues addressed by state laws is pound animal seizure. Pound animal seizure laws require, allow, or prohibit the release of pound animals for use in research. As of 1987, twelve states prohibited the release of pound animals for research use, five states and the District of Columbia required pound animal release, and seven states allowed release for research use. Twenty-four failed to mention pound animal release in state laws.[156]

Since 1987, several states have addressed the pound release issue for the first time or have revised their statutes. Washington, a state that had not directly addressed the pound release issue, recently passed a statute designed to protect pets from use in animal research.[157] The statute requires ownership of animals supplied to research facilities to be certified by the supplier.[158] In the

150. *Id.* The constitutionality of animal fighting statutes has been challenged with mixed results. *See, e.g.*, People v. Superior Court, 201 Cal. App. 3d 1061, 247 Cal. Rptr. 647 (Cal. App. 1988), *cert. denied*, 488 U.S. 1030 (1989)(*Elder*). *Elder* addressed whether the use of the word "spectator" in the state's anti-animal-fighting statute was too vague. *Id.* at 1063-64, 247 Cal. Rptr. at 648. The statute in question, California Penal Code § 597b (1986), made it a misdemeanor for anyone to be present "as a spectator" at an animal fight. After being arrested for violating this statute, the petitioner in *Elder* challenged the law, claiming that the use of the word "spectator" was too vague because someone could pass by and look at an animal fight and be subject to criminal prosecution. *Id.* at 1064, 247 Cal. Rptr. at 648. Rejecting the petitioner's argument, the court "read into the relevant language of section 597b a specific intent requirement and construe[d] it to require knowing presence as a spectator for the purpose of watching the animal fighting." *Id.* at 1073, 247 Cal. Rptr. at 654.

Illinois Gamefowl Breeders Ass'n v. Block, unlike *Elder*, was not an appeal from a criminal prosecution. The plaintiff, a not-for-profit Illinois corporation, filed suit seeking a declaratory judgment that § 4.01, subsections (a) and (c) of Illinois Revised Statutes chapter 8, paragraph 716 (1975) and applicable penalty provisions were unconstitutional. *Block*, 75 Ill. 2d 443, 449-50, 389 N.E.2d 529, 531 (1979). The sections prohibited "owning, breeding, training, selling, shipping or receiving animals which one knows or should know are intended to be used for fighting purposes." *Id.* at 450, 389 N.E.2d at 531. The plaintiff's members owned animals covered by the statute. *Id.* at 451, 389 N.E.2d at 531.

The court upheld the constitutionality of the challenged provisions. The prevention of cruelty to animals and of gambling, the two goals of the statute, constituted a legitimate exercise of the state's police powers. Therefore, the legislation was presumed valid unless it was shown to be arbitrary or unreasonable. *Id.* at 453, 389 N.E.2d at 532. The court concluded that the statute was reasonably related to the legitimate governmental ends of "eliminating the evils associated with animal fighting." *Id.*, 389 N.E.2d at 532-33. *Compare* State v. Tabor, 678 S.W.2d 45, 46 (Tenn. 1984)(statute prohibiting presence as spectator at cockfight constitutional) *with* State v. Abellano, 50 Haw. 384, 386, 441 P.2d 333, 334-35 (1968)(statute prohibiting mere presence at an animal fight unconstitutional); State v. Young, 695 S.W.2d 882, 886 (Mo. 1985)(same); State v. Wear, 15 Ohio App. 3d 77, 81, 472 N.E.2d 778, 781-82 (1984)(same).

151. *See* MISS. CODE ANN. §§ 97-41-11, 97-41-19 (Supp. 1989)(involvement in a dog fight punishable by up to $5,000 fine and/or three years in the State Penitentiary).

152. *See* MONT. CODE ANN. § 45-8-210 (Supp. 1989)(statute outlaws animal fighting between cocks, birds, dogs, or nonhuman mammals).

153. *See* NEB. REV. STAT. §§ 28-1004 to 28-1007 (1989)(dogfighting, cockfighting, bearbaiting, or pitting an animal against another animal is a Class I misdemeanor).

154. *See* OR. REV. STAT. §§ 167.360 to 167.380 (Supp. 1990)(makes dogfighting a Class C felony).

155. *See* W. VA. CODE § 61-8-19a (Supp. 1990)(cruelty to dogs and cats includes "putting such animals in fights against each other").

156. STATE LAWS, *supra* note 127, at 9; *see also* Vetri, *Animal Research and Shelter Animals: An Historical Analysis of the Pound Animal Controversy*, 31 ST. LOUIS U.L.J. 551 (1987)(discussion of the pound animal release controversy).

157. WASH. REV. CODE § 16.52.220 (Supp. 1990).

158. *Id.* § 16.52.220(1)(a) to 16-52.220(1)(b) (Supp. 1990).

case of animal shelters, the certification must state that the animal has been in the possession of the shelter long enough to legally allow the shelter to dispose of the animal.[159] The statute also places substantial record keeping responsibilities on research institutions receiving animals.[160] Finally, the new law prohibits research facilities from using pet animals in research and places an affirmative duty on facilities to investigate the possibility that potential research animals are pets.[161] This law went into effect on May 12, 1989. Given the considerable burden it places on research facilities, the statute might result in eliminating the use of pound animals for research in Washington state. Utah, a state that had previously required the release of pound animals for research use, revised its statute in 1989. The revision allows owners who voluntarily donate their animals to pounds to prohibit the use of the animal in research.[162] West Virginia recently joined the ranks of states prohibiting the use of pound animals in research. As of September, 1989, pound animals in West Virginia can only be adopted or humanely destroyed. No animal may be transferred, either directly or indirectly, to an institution for use in "scientific research or related activities."[163]

Hunting and trapping have also been the target of animal rights activists on the state level. For example, on June 5, 1990 voters in California passed a law prohibiting the hunting of mountain lions.[164] Not all of the efforts to restrict hunting and trapping have been successful. The New York Legislature recently defeated four anti-trapping bills.[165] Early in 1990, a petition to place a trapping ban referendum on the November ballot failed in Colorado for want of signatures.[166] A similar trapping ban petition in Arizona was invalidated because many of the signatures were declared invalid by the Secretary of State.[167] A bill to prohibit black bear hunting in New Jersey was defeated recently.[168]

2. *State "Backlash" Legislation*

Not all of the legislation recently passed by state legislators has been designed to enhance animal rights. Many states have passed bills designed to restrict the activities of animal rights activists. The most prevalent of these stat-

159. *Id.*
160. *Id.* § 16.52.220(2) (Supp. 1990).
161. *Id.* § 16.52.220(3) (Supp. 1990).
162. UTAH CODE ANN. § 26-26-3 (Supp. 1990).
163. W. VA. CODE § 19-20-23 (Supp. 1990).
164. *Anti-hunters Aren't Here — Yet*, Topeka Capital-Journal, Aug. 19, 1990, at 9G. This article suggests that it might be time for Kansas to consider a hunter harassment bill. *Id.* Robert Robel, a Kansas State University professor, predicts that "[u]nless hunters organize and take action now to protect their sport, sport hunting as we know it today could become a memory in the next decade." *Expert Foretells Trouble for Hunting from its Enemies*, Topeka Capital-Journal, Dec. 2, 1990, at F15. The professor blames increased "urbanization and anti-hunting and animal-rights movements" for the potential demise of sport hunting. *Id.* Robel contends that urban people are misinformed. "They think Mother Nature is sweet and animals live like Bambi or Bugs Bunny. We can credit Walt Disney for doing what God didn't do. He made animals talk and gave them human qualities." As a result, "people develop emotional attachments to animals, and hunters become the enemy." *Id.* To protect hunting, Robel argues that hunters must educate legislators and the public about the economic benefits and benefits to wildlife accrued from hunting. *Id.*
165. *Id.* Topeka Capital-Journal, Aug. 19, 1990, at 9G.
166. *Id.*
167. *Id.*
168. *Id.*

utes are intended to prohibit hunter harassment by animal rights activists. Thirty-eight states have passed hunter harassment bills.[169]

The longevity of state harassment laws is questionable given the recent holding of the United States Court of Appeals for the Second Circuit in *Dorman v. Satti*.[170] In *Dorman*, the plaintiff was arrested for violating Connecticut's Hunter Harassment Act. Even though the charges were dropped because the State determined that the plaintiff had not actually violated the statute, the plaintiff filed a civil rights action against the chief prosecutor and the Commissioner of Public Safety. The plaintiff claimed that the arrest and the threat of future arrest violated her free speech and due process rights.[171]

Addressing the merits of the plaintiff's free speech claim, the court reasoned that the State could enforce "regulations of the time, place, and manner of expression which are content-neutral" and which are designed to facilitate a substantial government interest. The court concluded that the Connecticut statute was clearly content-based because it was "designed to protect hunters from conduct — whether verbal or otherwise — by those opposed to hunting."[172] Since the State could not establish that the protection of hunters from harassment constituted a compelling state interest, the statute was held to be unconstitutional.[173]

Whether other courts will follow the holding of *Dorman* in evaluating the constitutional validity of hunter harassment acts is an open question. No other federal court has addressed this issue.[174] Whether it is possible to draft a constitutionally valid hunter harassment statute is also an open question. There is little doubt that these issues will be addressed in the near future. Hunters, trappers, anglers, and animal rights activists have an interest in quickly resolving questions concerning the validity of harassment statutes.

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169. *Id.*; *see, e.g.*, CONN. GEN STAT. § 53a-183a (Supp. 1990)(makes it a Class C misdemeanor to harass hunters, trappers and fishermen); IND. CODE ANN. § 14-2-11-2 (West Supp. 1990)(creates penalties for interference with the lawful taking of a game animal); LA. REV. STAT. ANN. § 56:648.1 (West Supp. 1990)(prohibits harassment and disturbance of lawful hunters); ME. REV. STAT. ANN. tit. 12, § 7541 (Supp. 1990)(prohibits harassment of hunters, trappers and fishermen); MINN. STAT. § 97A.037 (Supp. 1991)(hunter, trapper and angler harassment prohibited); TEX. PARKS & WILD. CODE ANN. § 62.0125 (Vernon Supp. 1991)(prohibits the harassment of hunters, trappers and anglers).

170. 862 F.2d 432 (2d Cir.), *cert. denied*, 109 S. Ct. 2450 (1989).

171. *Id.* at 434.

172. *Id.* at 437.

173. *Id.* The court also concluded that the statute was not of the type that could be "interpreted narrowly to avoid constitutional infirmity." *Id.* The terms "interfere," "harass," and "acts in preparation" used in the statute were too broad. *Id.*

174. *See* WESTLAW, Genfed library, Allfeds file. New Hampshire and Wisconsin appear to be the only state jurisdictions that have addressed the constitutionality of hunter harassment statutes. *Id.*

In 1986, the New Hampshire House of Representatives asked the New Hampshire Supreme Court to evaluate the constitutionality of a hunter harassment bill under consideration by the legislators. Opinion of the Justices, 509 A.2d 749, 751 (N.H. 1986). The court concluded that the proposed bill was unconstitutional because it was "overbroad," too vague, and because it discriminated "among points of view." *Id.* at 752-53.

The Wisconsin statute was declared unconstitutional by Forest County Circuit Judge Robert Kennedy. United Press International, Sept. 14, 1990 (LEXIS/NEXIS, NEXIS library, CURRNT file). Judge Kennedy concluded that the statute was vague, overbroad and, therefore, violated first amendment free speech rights. *Id.*

Final examples of "backlash" legislation designed to restrict the activities of animal rights activists are state statutes that protect research facilities from the activities of animal rights activists. At least three states, Louisiana,[175] Massachusetts,[176] and Kansas[177] have now passed research facility protection acts. The Kansas act, typical of such legislation, is fashioned to protect farms, ranches and animal research facilities from animal rights activists who may enter and vandalize the facility.[178]

Research facility protection acts are opposed by animal rights radicals for obvious reasons. For less obvious reasons, the Kansas act is opposed by Humane Society officials. The act makes it illegal to "enter an animal facility to take pictures by photograph, video camera or by other means."[179] The Society

175. *See* LA. REV. STAT. ANN. §§ 14:102.9, 14:228 (West Supp. 1991)(interference with animal research punishable by $5,000 fine and/or one year imprisonment "with or without hard labor").

176. *See* MASS. GEN. L. ch. 266, § 104B (Supp. 1990)(interference with animal research punishable by $10,000 fine and/or two and one-half years in prison).

177. *See* 1990 Kan. S.B. 776. This bill was signed into law by the Governor on May 12, 1990. Topeka Capital-Journal, May 14, 1990, at 10A. The act defines "research facility" as "any place, laboratory, institution, medical care facility, elementary school, secondary school, college or university, at which any scientific test, experiment or investigation involving the use of any living animal is carried out, conducted or attempted." 1990 Kan. S.B. 776 § 2(i). The act makes it illegal to control or damage a research animal or facility without the consent of the owner. *Id.* § 3(b). It is also illegal to enter or remain concealed in a facility with the intent to damage the enterprise. The act also prohibits entering a facility with the intent to take pictures. *Id.* § 3(c)(1)(2)(3)(4). Violation of these sections is a Class E felony. *Id.* § 3(e)(2).

178. Topeka Capital-Journal, May 14, 1990, at 10A.

179. 1990 Kan. S.B. 776 § (3)(c)(4). This provision of the Kansas Farm Animal and Research Facility Protection Act precipitated a controversy that involved the Governor of Kansas, the Attorney General of Kansas, the California State Legislature, and animal activists.

The controversy began with the passage of amendments to the Kansas Animal Dealers Act. *See* KAN. STAT. ANN. §§ 47-1701 to 47-1731 (Supp. 1990). The amendments, designed to clean up dog and cat breeding operations in Kansas, were labeled the "puppy mill" bill. The Governor of Kansas urged the passage of the bill in order to protect the reputation of Kansas thirty million dollar commercial pet breeding industry. United Press International, Apr. 14, 1988, Section: Regional News, Distribution: Kansas (LEXIS/NEXIS, NEXIS library, CURRNT file). The "puppy mill" bill requires all kennels in Kansas, even those licensed by the United States Department of Agriculture, to obtain a Kansas state license and to be inspected at least once a year. *Id.*; *see* KAN. STAT. ANN. § 47-1702 (Supp. 1990)(animal dealer licensing requirements); *Id.* § 47-1709 (Supp. 1990)(inspection provisions).

The enforcement of acts such as the "puppy mill" bill is carried out, to a large extent, by societies for the prevention of cruelty to animals. 90-72 Op. Kan. Att'y Gen. 2 (June 13, 1990). Kansas law allows "an officer or agent of any incorporated humane society, . . . [to] take into custody any animal, . . . which clearly shows evidence of cruelty to animals." KAN. STAT. ANN. § 21-4311 (1988). Initially, it was thought that the provision of the Farm Animal and Research Facility Protection Act prohibiting people from entering a kennel to take pictures would frustrate efforts by societies to enforce animal cruelty statutes in Kansas. Bob Baker, chief investigator of The Humane Society of the United States (HSUS), contended that this provision stripped his organization of its power to investigate cruelty in Kansas and that "the law appears to be aimed at protecting puppy mills, which raise puppies for sale under often substandard conditions." *HSUS Says Kansas Law Will Hamstring Cruelty Investigations*, PR Newswire, May 14, 1990 (LEXIS/NEXIS, NEXIS library, CURRNT file).

The controversy became a Kansas versus California affair when a group of Californians, angered at the apparent prohibition against picture taking at puppy mills by Humane Society members, attempted to organize a boycott of Kansas pets sold in California. The organizers also planned to collect 15,000 pounds of beef, ham, and chicken bones and to ship these bones to Mike Hayden, the governor of Kansas. The bones were meant to "symbolize a bone" the protesters had "to pick with the governor and the Kansas Legislature." Topeka Capital-Journal, June 14, 1990, at A1. The California Legislature was debating several bills that would have, to varying degrees, restricted the sale of Kansas bred pets in California. Topeka Capital-Journal, June 6, 1990, at A9.

The reaction from Kansans ranged from the sublime to the ridiculous. The Capital Area Security Patrol informed the California bone-collectors that dumping 15,000 pounds of bones on the Kansas Statehouse grounds would constitute littering and would be punishable by a $10 to $500 fine. *Id.*

claims that this provision will impair its investigations because its agents often take pictures as evidence. The former Governor of Kansas promised to introduce a "trailer bill" in the 1991 legislative session to clear up potential problems with the Kansas act.[180] Whether new Kansas Governor Joan Finney will introduce the "trailer bill" remains to be seen.

IV. CONCLUSION

Animal rights activism, in all of its forms and with all of its related issues, has engendered a variety of complex and demanding legal questions. This is not

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The Governor and the Attorney General called a news conference. The Governor blamed the controversy on "publicity-seeking legislators in an election year in California." Topeka Capital-Journal, June 14, 1990, at A1. The Attorney General called the Californians "bozos" and said that "any self respecting Kansan ought to tell them to go to hell, and that's exactly what I am telling them to do today." *Id.* at A16. The Attorney General also announced the release of an Attorney General Opinion holding that the Farm Animal and Research Facilities Protection Act did not apply to puppy mills. *Id.* at A1.

The Opinion holds that Kansas laws allowing Humane Society members to enforce animal cruelty laws and the facilities protection act did not conflict. The Attorney General reasoned that since the act defined "animal" as any "animal *used in* food, fur, or fiber production, agriculture, research, testing or education" and did not include animals sold in pet stores or raised in puppy mills, coverage of the act did not extend to pet breeding facilities. 90-72 Op. Kan. Att'y Gen. 4-5 (June 13, 1990).

With the release of the Attorney General's opinion exempting puppy mills from the facilities protection act, the controversy subsided. The California Legislature passed a "watered-down" puppy mill law. The law requires pet store owners to inform customers about illnesses a puppy might have and its state of origin. In addition, the law makes it illegal to sell dogs in need of hospitalization or surgery. Gannett News Service, Sept. 25, 1990 (LEXIS/NEXIS, NEXIS library, CURRNT file). Instead of dumping 15,000 pounds of bones on the Statehouse grounds, three California protesters delivered forty dog biscuits to the governor's office. United Press International, June 29, 1990, Section: Regional News, Distribution: Kansas (LEXIS/NEXIS, NEXIS library, CURRNT file).

While the dispute between California and Kansas has ended, the controversy involving Kansas puppy mills has not. On Wednesday, December 12, 1990, The Humane Society of the United States announced a boycott of pet stores selling puppies bred in Pennsylvania, Kansas, Missouri, Iowa, Arkansas, Oklahoma, and Nebraska. *Kansas Included in Puppy Boycott Advisory*, Topeka Capital-Journal, Dec. 13, 1990, at E2. The society contends that 600 breeders in the seven states involved in the boycott "force dogs to have multiple litters and then kill them because they can no longer reproduce." *Id.* The puppies produced are weak and diseased. *Id.*

Animal rights activists and California "bozos" are not the only persons opposed to recently passed Kansas animal cruelty statutes. In *Kerr v. Kimmell*, the plaintiff brought an action alleging that the Animal Dealers Act, Kansas Statutes Annotated §§ 47-1701 to 47-1731 (Supp. 1989), violated the United States Constitution. *Kimmell*, 740 F. Supp. 1525, 1527 (D. Kan. 1990). The plaintiff, a kennel owner from Silver Lake, Kansas, advanced a wide variety of arguments. First, the kennel operator argued that the act violated the commerce clause. The court rejected this argument, holding that the act serves the legitimate state interest of "quality control and humane treatment of animals," and that any burden on interstate commerce was incidental. *Id.* at 1529.

The plaintiff also argued that the statute violated the supremacy clause. Essentially, the plaintiff claimed that the Animal Welfare Act preempted state action. Citing specific language from the Animal Welfare Act indicating a congressional anticipation that states would remain active in the area of animal protection, the court held that this argument was without merit. *Id.* at 1529-30.

Because the Animal Dealers Act exempted breeders and brokers of greyhounds, the plaintiff argued that the act violated her equal protection rights. Using a rational basis standard of review, the court held that the decision to exempt greyhounds was reasonable given that jurisdiction over greyhounds was vested in the Kansas Racing Commission. *Id.* at 1530.

Finally, the plaintiff argued that the statute was unconstitutional because it allows the state to seize animals without a warrant, judicial review or probable cause. *Id.* The court did not reach the merits of this claim. Since the state had no plans to seize any of the plaintiff's animals, "no case or controversy concerning the seizure procedure exists." *Id.* The court granted the defendants motion for summary judgment. *Id.* at 1531.

180. Topeka Capitol-Journal, May 14, 1990, at A10.

a passing phenomena. In certain situations animal rights advocates work for specific, limited goals. Advocates also have long-term goals that will not be met until all animal abuse, as they broadly define it, is eliminated. Animal rights activists will persist in their efforts to use the courts to protect the rights and welfare of animals. The success or failure of these efforts often will be determined by whether plaintiffs can satisfy standing requirements. Animal rights advocates will continue to lobby legislators at both federal and state levels. These lobbying efforts will not be unopposed. Research scientists, consumers, hunters, trappers, anglers and others will work to limit the legislative successes of animal rights advocates. The recent enactment of research facility protection and hunter harassment acts demonstrate that these groups can effectively restrict the efforts of animal rights advocates. Future confrontations are inevitable and will continue to challenge the legal community.

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