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The Development of Anti-Cruelty Laws During the 1800s

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"[L]aws and the enforcement or observance of laws for the protection of dumb brutes from cruelty are, in my judgment, among the best evidences of the justice and benevolence of men."[1]

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INTRODUCTION

The nineteenth century saw a significant transformation of society's attitude toward animals,[2] which was reflected in the

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1. Stephens v. State, 3 So. 458 (Miss. 1887) (Arnold, J., plurality).

2. Access to nineteenth century writing on the topic of animals is limited. There is almost no discussion from the legal perspective. *See* CHARLES R. MAGEL, A BIBLIOGRAPHY ON ANIMAL RIGHTS AND RELATED MATTERS 51-451 (1981).

legal system. The legal system began the century viewing animals as items of personal property not much different than a shovel or plow. During the first half of the century, lawmakers began to recognize that an animal's potential for pain and suffering was real and deserving of protection against its unnecessary infliction.

The last half of the nineteenth century saw the adoption of anti-cruelty laws which became the solid foundation upon which today's laws still stand. As will be discussed, during the 1860's and 1870's Henry Bergh of New York City was a primary force in the adoption, distribution, and enforcement of these laws in the United States. Underlying the changes of the law were parallel changes of social attitude toward animals. This Article will explore the changes within the legal world during the nineteenth century.

I. The British Set the Stage

Notwithstanding the political independence that the United States obtained from Great Britain during the late 1700's and early 1800's, there was still a considerable transfer of ideas from the intellectually mature mother country to the newly formed and basically frontier United States. The first articulations of concern for the moral and legal status of animals appeared in British writing.[3] Reverend Humphrey Primatt in *A Dissertation on the Duty of Mercy and Sin of Cruelty to Brute Animals,* written in 1776, pleaded for the care of animals.

> See that no brute of any kind . . . whether intrusted to thy care, or coming in thy way, suffer thy neglect or abuse. Let no views of profit, no compliance with custom, and no fear of ridicule of the world, ever tempt thee to the least act of cruelty or injustice to any creature whatsoever. But let this be your invariable rule, everywhere, and at all times, to do unto others as, in their condition, you would be done unto.[4]

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3. For a fuller discussion of the English debate about duty toward animals, see Roderick F. Nash, The Rights of Nature 16-25 (1989); James Turner, Reckoning with the Beast: Animals, Pain and Humanity in the Victorian Mind (1980).

4. Sydney H. Coleman, Humane Society Leaders in America 18 (1924) (quoting Rev. Humphrey Primatt, A Dissertation on the Duty of Mercy and Sin of Cruelty to Brute Animals (1776)).

Jeremy Bentham, an English barrister, was one of the few legal writers who addressed the issue of animals and the legal system. His *Introduction to the Principles of Morals and Legislation*[5] was closely studied at the time by a large number of individuals, some of whom went on to propose legislation for the protection of animals.[6] Bentham argued that there was no reason why animals should not be accorded protection under the law. Bentham pointed out that animals, "on account of their interests having been neglected by the insensibility of the ancient jurists, stand degraded into the class of *things*."[7] Within a footnote entitled "Interests of the inferior animals improperly neglected in legislation,"[8] Bentham argued that the capacity for suffering is the vital characteristic that gives a being the right to legal consideration.[9] The final sentence of the footnote is often used today as a rallying cry for those seeking to promote the cause of animal rights: "The question is not, Can they *reason*? nor, Can they *talk*? but *Can they suffer*."[10]

Having made intellectual arguments for concern about animals, the British followed up with changes in the legal system. On May 15, 1809, Lord Erskine addressed Parliament in support of the bill which he had introduced for the protection

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5. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Oxford, Clarendon Press 1781).
6. *See* COLEMAN, *supra* note 4, at 14-15; NASH, *supra* note 3, at 25.
7. BENTHAM, *supra* note 5, at 310.
8. *Id.* at 310-11 n.1.
9. *Id.*
10. *Id.* The following is a more extensive portion of the footnote:

> The day has been, I grieve to say in many places it is not yet past, in which the greater part of the species, under the denomination of slaves, have been treated by the law exactly upon the same footing as, in England for example, the inferior races of animals are still. The day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. . . . It may come one day to be recognized, that the number of legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps, the faculty of discourse? But a full-grown horse or dog is beyond a comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month old. But suppose the case were otherwise, what would it avail? the question is not, Can they *reason*? nor, Can they *talk*? but *Can they suffer*?

Id. at 311.

of animals.[11] This date may represent the first time animal protection was seriously debated by a full legislative body. In his address, Lord Erskine stated:

> They (animals) are created, indeed, for our use, but not for our abuse. Their freedom and enjoyment, when they cease to be consistent with our just dominions and enjoyment, can be no part of their natures; but whilst they are consistent I say their rights, subservient as they are, ought to be as sacred as our own . . . the bill I propose to you, if it shall receive the sanction of Parliament, will not only be an honor to the country, but an era in the history of the world.[12]

The bill passed the House of Lords, but was defeated in the House of Commons.[13]

Some thirteen years later the battle was taken up again, this time by Richard Martin. On June 10, 1822, Martin succeeded in obtaining passage of a law known as "Dick Martin's Act . . . An Act to Prevent the Cruel and Improper Treatment of Cattle."[14] As compromise was necessary for its passage, it was a limited first step. It was made illegal for any person to "wantonly and cruelly beat or ill-treat[] [any] horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep or other cattle . . . ."[15] The law imposed a "fine of not more than five pounds or less than ten shillings, or imprisonment not exceeding three months."[16] It was during this period of time that an organization was formed in London that would become the Royal Society for the Protection of Animals and be an inspiration for Henry Bergh.[17]

II. The Legal Framework in the United States

Under the legal system of the United States there are two primary sources of law which govern the conduct of individuals.

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11. Coleman, *supra* note 4, at 20-21.
12. *Id.* at 21-22 (quoting Lord Erskine, Address to Parliament (1809)). For a few more details see Richard D. Ryder, Animal Revolution 81-88 (1989).
13. Coleman, *supra* note 4, at 21.
14. *Id.* at 26, 29.
15. *Id.* at 29.
16. *Id.* For a full discussion of the English law with quotes and references, see Davis v. American Soc'y for the Prevention of Cruelty to Animals, 75 N.Y. 362 (1873) [hereinafter Davis v. A.S.P.C.A.].
17. Ryder, *supra* note 12, at 89-92.

The first is legislation. While the first half of the 1800's saw tentative attempts at the adoption of anti-cruelty legislation, the real legislative effort would not occur until the 1860's and beyond.[18] The second source of law is the cumulative result of court decisions. For centuries legal concepts had been developed and applied within the English court system. These were transferred to the colonies and slowly became modified as the United States legal system developed independent of the English system. The concepts that arise out of this tradition are generally referred to as the common law.[19]

It is doubtful whether cruelty to animals was a criminal offense in England in the early common law period before 1800.[20] There are no recorded cases which resulted in criminal penalties.[21] When an animal was the property of someone, then there was no doubt as to the ability of the owner to bring a civil action for the loss under the concept of trespass.[22] However, acts against animals might be indictable as other offenses.[23]

Between 1800 and 1850 in the United States there were a handful of cases which allowed criminal prosecution for harm to animals under an assortment of theories.[24] One legal theory

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18. *See infra* notes 65-83 and accompanying text.

19. *See* SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Oxford, Clarendon Press 1765) (setting forth the first encyclopedic treatment of the common law. It is a four volume set which attempts to set out the entire system of law in England. During the colonial days in the United States it was the portable library used by many horse riding lawyers and judges).

20. The Chief Justice of the New Jersey Supreme Court in 1858 stated: "The general rule is that no injuries of a private nature [to animals], unless they some way concern the king or effect the public, are indictable at common law." State v. Beekman, 27 N.J.L. 124, 125 (1858) (giving a full discussion of the English law). "The offense charged [of cruelly beating a horse] was not a crime or misdemeanor at common law . . . ." McCausland v. People, 145 P. 685, 686 (Colo. 1914).

21. Davis v. A.S.P.C.A., 75 N.Y. 362 (1873).

22. In a Mississippi case, a man shot some hogs that had invaded his field after several attempts at hearding them out failed. The court noted that this would not violate the cruelty law but might nevertheless give rise to a civil action of trespass. Stephens v. State, 3 So. 458 (Miss. 1888).

23. "In England, at Common Law, acts of cruelty perpetrated upon animals in public, constituted a common nuisance and were indictable as such." *Davis*, 75 N.Y. at 370.

24. See *Davis*, 75 N.Y. 362 for a list of 13 cases.

utilized was that of malicious mischief. As explained by one court:

> There is a well-defined difference between the offense of malicious or mischievous injury to property, and that of cruelty to animals. The former constituted an indictable offense at common law, while the latter did not. The former has ever been recognized as an indictable offense as a measure of protection to the owner of property liable to be maliciously or mischievously injured. The latter has, in more recent years, been made punishable as a scheme for the protection of animals without regard to their ownership.[25]

Another early case made the distinction clear when the court stated that an indictment for malicious mischief would lie only if it could be proved that the animal killed was the property of another.[26]

In addition to this approach, courts could fashion a cause of action under the concepts of public nuisance; that is, a breach of the public peace.[27] The pain and suffering of the animal was not as much of a legal concern during this time as was the moral impact of the action on humans.[28] What a man did in the privacy of his home to his animals, his children, and sometimes even his wife, was his concern alone, not that of the legal system. To make cruelty to animals a crime would require legislation.

A. Early American Legislation

Statutory language expressly adopted by a legislative process usually reflects the broader societal attitudes which in essence the legislature represents. The evolution of statutory language concerning animals during the nineteenth century paralleled the

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25. State v. Bruner, 12 N.E. 103, 104 (Ind. 1887). *See also* State v. Beekman, 27 N.J.L. 124 (1858).

26. State v. Pierce, 7 Ala. 728 (1845).

27. In an action for "maliciously, wilfully and wickedly killing a horse," the offense was held to amount to a public wrong. Republica v. Teischer, 1 Dall. 335 (Penn. 1788).

28. Lord Campbell thought that, while the brutes had no legal rights, to inflict cruelty on animals in the public "injur[es] the moral charcter of those who witness it—and may therefore be treated as a crime." Elbrige T. Gerry, The Law of Cruelty to Animals, Address Before the Bar of Delaware County (August 16, 1875) (quoting LORD CAMPBELL, 9 LIVES LORD CHANCELLORS 22-23).

evolution of society's attitude toward animals. Nowhere in the legislative examples set out below do we have any contemporaneous records about the debate in the legislature: We do not know the submitter of the legislation, the nature of the debate, or who supported the measures as adopted. This analysis is limited to the actual language adopted. Indeed, there is a dearth of both legal and nonlegal writing dealing with animal issues during that century. Indirect evidence of their concerns is the best available. However, if the words chosen have the same meaning today, the rather terse legalistic language, once taken apart and examined closely, should reveal much about the attitudes of the day. Insight is available to those willing to be legal archaeologists; to those willing to dig into the dark recesses of law library basements.

An example of a statute that reflects the strict property concept of animals, which existed at the beginning of the nineteenth century, is found in Vermont legislative law.[29] Section 1 made it illegal to steal a horse, but not a cow or dog. Section 2 stated in part:

> Every person who shall wilfully and maliciously kill, wound, maim or disfigure any horse, or horses, or horse kind, cattle, sheep, or swine, of another person, or shall wilfully or maliciously administer poison to any such animal . . . shall be punished by imprisonment [of] . . . not more that five years, or fined not exceeding five hundred dollars . . . .[30]

The statute contained no provision prohibiting the cruel treatment of the animals, the word not being found in the statute. The list of animals protected was limited to commercially valuable animals. Pets or wild animals were excluded. The purpose of this law was to protect commercially valuable property from the interference of others, not to protect animals from pain and suffering.[31]

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29. 1846 Vt. Laws 34.

30. *Id.* at 34.2.

31. Nearly identical language was adopted in 1857 in the Michigan Criminal Code chapter entitled: Offenses Against Property, MICH. COMP. LAWS § 181.45 (1857) which read as follows:

> Every person who shall willfully and maliciously kill, maim or disfigure any horses, cattle, or other beasts of another, or shall willfully and maliciously administer poison to any such horses, cattle or other beasts . . . shall be punished by imprisonment . . . not more than five years, or by fine not exceeding one thousand dollars. . . .

Under the statute a crime was committed only if the harmed animal was owned by someone else, thus the language "of another."[32] Therefore, if a person maimed his own animal it would not be a crime. Nor was it a crime to harm a wild or ownerless domestic animal. Actions had to constitute wilful and malicious conduct before they were deemed illegal. Finally, since the penalty was for up to five years of jail time, a violation of this law was a felony. It appears the legislature sought to control humans harming valuable property of another, not to stop the unnecessary infliction of pain upon animals.

The next step in the legal evolution is represented by the earliest statute yet uncovered; the Maine statute considered in 1821. This tentative law provided:

> § 7. *Be it Further enacted*, That if any person shall cruelly beat any horse or cattle, and be thereof convicted, . . . he shall be punished by fine not less than two dollars nor more than five dollars, or by imprisonment in the common gaol for a term not exceeding thirty days, according to the aggravation of the offence.[33]

In this statute, the operative phrase was "cruelly beat." This phrase encompasses an extremely narrow range of conduct. The common sense definition of the term "cruelly" is assumed to be that only a cruel beating is illegal, not killing, cutting, maiming, or one of a hundred other actions. Like the previously discussed statute, the Maine statute applied only to commercially valuable animals: horses and cattle.[34]

The Maine statute represented a new, tentative step forward because, in this case, no distinction was made as to who owns the animal. It was illegal to cruelly beat your own horse or cattle, as well as that of another. Since common law criminal law concepts did not limit what a person did with their own property, this law suggested a new societal interest: concern for the animal itself. While the motivation and purpose of

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32. This author's interpretation of the Vermont Statute is that if Mr. *X* got mad at neighbor Mr. *Y* and shot three of *Y*'s sheep, killing one and wounding two, he would have been found in violation of this law. If Mr. *X* shot Mr. *Y*'s dog, no violation of the law could have been claimed. If Mr. *X* shot one of his own sheep in the leg and watched it slowly die over the next three days, again, no violation of this law.

33. Me. Laws ch. IV, § 7 (1821).

34. *Id.*

this statute is not known to us, the limited nature of its coverage suggests a modest motivation. Perhaps some member of the legislature may have observed an "unnecessary"[35] beating of a horse or a cow that was outrageous enough to trigger the drafting of this law. This provision did not contain the language which we will later see as reflective of the thoughtful legislative process and broad considerations of social policy.

Finally, note the level of punishment contained in the Maine statute: a two to five dollar fine and/or up to thirty days in jail.[36] One of the best ways to gauge the seriousness with which the legislature views an issue is to examine the level of punishment provided. Unlike the felonious horse-maiming statute set out above,[37] the penalties provided here suggest the bare threshold of criminality. While the legislature thought the cruel beating of cattle and horses was wrong, they were not so sure there should be a criminal punishment for committing the wrong.

The first known anti-cruelty law in the United States was passed the year *before* the first such law was passed in England. However, there is no record that this law was followed by the creation of any public organization to help enforce the law or compel change in public conduct, as was the case in England at this time or in New York in the 1860's. It marked the initiation of concern, but not the birth of a social movement.

More representative of the first wave of anti-cruelty laws in the United States was the New York law of 1829:

> § 26 Every person who [part one] shall maliciously kill, maim or wound any horse, ox or other cattle, or any sheep, belonging to another, or [part two] shall maliciously and cruelly beat or torture any such animals, whether belonging to himself or another, shall upon conviction, be adjudged guilty of a misdemeanor.[38]

The criminal prohibitions consisted of two distinct parts. The first part was qualified with the phrase "belonging to another"

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35. *See infra* text accompanying notes 133-38.
36. Me. Laws ch. IV, § 7 (1821).
37. 1846 Vt. Laws 34.
38. N.Y. REV. STAT. tit. 6, § 26 (1829). The key phrase "maliciously kill, maim or wound . . ." was also used in the 1823 act adopted by the English Parliament. 3 Geo. IV ch. 54 (1823). The phrase "cruelly beat, abuse or ill treating . . . ." had been part of the first English law. It is not known whether or not the New York Legislature was aware of these English laws when it adopted the 1829 law. *See* Davis v. A.S.P.C.A., 75 N.Y. 362 (1873).

while the second was qualified "belonging to himself or another."[39] The purpose of the first part was to provide protection for private property, while the second dealt with cruelty to animal regardless of ownership. The two parts prohibit very different actions. In the first part, the legislature made criminal those actions which would most likely interfere with the commercial value of the animal: killing, maiming, or wounding. In the second part, the legislature focused upon that which might be perceived as causing pain and suffering to the animal: beatings and torture. One result of the different language was that it was not illegal to maliciously kill or maim your own animal. The legislature most likely presumed that financial self-interest would protect against this possibility. However, if you killed your own horse by beating it to death, the beating, but not the killing, was illegal.

Both parts of this legislation attempted to stop the affirmative acts of individuals. Under neither parts of the legislation would it have been illegal to kill a horse by starvation. Requiring a person to care for an animal, imposing an affirmative act, had always been considered more burdensome than prohibiting an action. The affirmative duty of care would be added later as the concern for the well-being of animals became stronger.[40]

In the New York statute, the level of crime was denoted as a mere misdemeanor, with jail time of no more than one year. The New York legislature took this issue more seriously than Maine as judged by the punishment, but New York still defined violations as a misdemeanor rather than a felony. Some additional insight on legislative attitude can be obtained from observing other crimes of that time period and the level of punishments that were set by the legislature. Under a Pennsylvania statute, it was a misdemeanor with a maximum fine of two hundred dollars to cruelly beat a horse.[41] To expose and abandon your own child under the age of seven was also a misdemeanor, but with a maximum fine of one hundred dollars.[42]

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39. N.Y. REV. STAT. tit. 6, § 26 (1829).
40. *See infra* notes 75-78 and accompanying text.
41. Pa. Laws tit. IV, § 46 (1860).
42. *Id.* § 45.

The most serious limitation of the New York legislation was the limited list of protected animals. It was not yet illegal to torture a dog or a bear. The limited list set forth in both parts was most likely utilized because this was the list with which the legislature was familiar. The legislature had not yet made the conceptual bridge that, if it was wrong to cruelly torture a cow, it should also have been wrong to torture a cat or dog. The critical factor ought not be the value of the animal to the owner, but the ability of the animal to suffer.[43]

Initially, the societal concern about cruelty to animals contained mixed motives. While some did not believe moral duties were owed to animals, they did accept that cruelty to animals was potentially harmful to the human actor, as it might lead to cruel acts against humans. Thus, the concern was for the moral state of the human actor, rather than the suffering of the non-human animal. This focus of concern was reflected in the early state laws by the location of the anti-cruelty provision within the criminal code. In many states, these provisions were found in chapters of the criminal code entitled, "Of Offenses Against Chastity, Decency and Morality."[44] This was the case in New Hampshire,[45] Minnesota,[46] Michigan,[47] and Pennsylvania[48] among others.[49]

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43. Because of the incremental nature of the legislative development process, it is not unusual for laws to progress in small steps even though the result may be, in part, logically inconsistent.

44. *See infra* notes 45-48.

45. N.H. REV. STAT. § 219.12 (1843).

46. MINN. STAT. § 96.18 (1858).

47. MICH. REV. STAT. § 8.22 (1838).

48. PA. LAWS tit. IV, § 46 (1860).

49. In addition to prohibiting cruelty to animals, these chapters made an assortment of morally reprehensible acts illegal. Consider the list of section titles found in chapter 219 of New Hampshire's law. *See supra* note 45. All are under the heading "Of Offences Against Chastity, Decency and Morality." This contained provisions concerning adultery, lewdness, fornication, cohabiting, incest, blasphemy, profane swearing, digging up dead bodies, injuring tombs, and cruelty to animals. In Minnesota's equivalent chapter, the section after the cruelty to animals section prohibited performing labor or attending a dance on the Lords Day. MINN. STAT. § 96.19 (1858). Anyone convicted of the "abominable and detestable crime against nature with any beast," (presumably this language referred to the crime of bestiality) received 20 years in jail. MICH. REV. STAT. § 8.14 (1838). Eight sections below this the cruel torture of a horse had a maximum sentence of one year. *Id.* at § 8.22. One is left with the clear impression that for many of the legislatures before 1860 this was an issue predominately of human morality.

The ideas contained in the 1829 Act were replicated by many state legislatures over the following thirty years. Michigan's 1838 law,[50] Connecticut's 1854 law,[51] Minnesota's 1858 law,[52] and Vermont's 1854 law[53] adopted part two of the New York law. All of these laws were broader than New York's law, as they applied to acts against, not only horses and oxen, but to other animals, so long as the animals were owned by someone. In 1843, New Hampshire adopted a law that only used the language from part one of the New York law.[54] Tennessee adopted a law in 1858 about animal cruelty, which was drafted distinctly different from New York's law.[55] Pennsylvania's law of 1860 used both portions from the 1829 New York law. But like Michigan, Pennsylvania expanded the scope to include "other domestic animals."[56]

One case under the Minnesota law demonstrates the continued confusion about the purpose of the these cruelty laws. A defendant was indicted for the shooting of a dog under the criminal statue which provided that "[e]very person who shall wilfully and maliciously kill, maim or disfigure any horses, cattle or other beasts of another person . . . shall be punished."[57] The court decided that the indictment failed as a dog could not be considered a beast.

> [I]t seems to me, that all [animals] such as have, in law, no value, were not intended to be included in that general term. . . . The term beasts may well be intended to include asses, mules, sheep and swine, and perhaps, some other domesticated animals, but it would be going quite too far to hold that dogs were intended.[58]

This was reflective of the continued confusion about the intended purpose of the law: to protect valuable personal property or to restrict the pain and suffering inflicted upon animals.

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50. MICH. REV. STAT. § 8.22 (1838).
51. CONN. STAT. tit. V, ch. X, § 142 (1854).
52. MINN. STAT. § 96.18 (1858).
53. 1854 Vt. Laws 51.1.
54. N.H. REV. STAT. § 219.12 (1843).
55. TENN. CODE §§ 1668-1672 (1858). This statute is structured to allow a private law suit and recovery of a fine for the person bringing the cause of action. If the offense is committed by a slave, the punishment is 39 stripes (lashes). To jail a slave would be to punish the master who loses the services of the slave. *Id.*
56. Pa. Laws tit. IV, § 46 (1860).
57. United States v. Gideon, 1 Minn. 292, 296 (1856).
58. *Gideon*, 1 Minn. at 296.

B. The Bergh Era Begins

The life of Henry Bergh is set out elsewhere and will not be repeated here.[59] His impact on the legal world began in 1866. After his return from a trip to Europe, where he observed both the cruelty inflicted upon animals and the efforts of the Royal Society for the Protection of Animals on behalf of animals, he became focused on the animal cruelty issue.[60] Because of his social and political connections, it was not difficult for him to approach the New York legislature in Albany.

Although not a lawyer, Henry Bergh was able to direct the drafting of substantially different legislation.[61] He also understood that the mere passage of legislation was insufficient—without dedicated enforcement, the laws would never actually reach out and touch the lives of the animals about which he was concerned. Therefore, beside the drafting and passage of new criminal laws, Bergh sought the charter of an organization which, like the Royal Society of London, would be dedicated to the implementation of the law.[62] He asked the New York Legislature for a state-wide charter for the American Society for the Prevention of Cruelty to Animals ("A.S.P.C.A."), whose purpose, as set forth in its constitution, was "[t]o provide effective means for the prevention of cruelty to animals throughout the United States, to enforce all laws which are now or may hereafter be enacted for the protection of animals and to secure, by lawful means, the arrest and conviction of all persons violating such laws."[63] The charter was granted on April 10, 1866. Henry Bergh was unanimously elected as the A.S.P.C.A.'s first president, a position he continued to hold until his death in 1888.[64]

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59. Materials on the early events of Bergh's life are set out in SYDNEY H. COLEMAN, HUMANE SOCIETY LEADERS IN AMERICA 33-35 (1924).

60. *Id.* at 35-36.

61. *Id.* at 38.

62. *Id.*

63. *Id.* at 39-40 (quoting AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, CONSTITUTION (1866)).

64. *Id.* at 40.

III. NEW LEGISLATION

Henry Bergh realized the short comings of the existing New York law, and therefore sought strengthening amendments. His first attempt was in 1866 when the prior language of 1829 was amended to read: "Every person who shall, by his act or neglect, maliciously kill, maim, wound, injure, torture, or cruelly beat any horse, mule, ox, cattle, sheep, or other animal, belonging to himself or another, shall, upon conviction, be adjudged guilty of a misdemeanor."[65]

This law represented several significant steps forward for animals. First, the provisions applied regardless of the ownership of an animal. Second, the negligent act, as well as the intentional act, of an individual could lead to criminal liability. Third, the list of illegal actions was expanded. Note that the word "cruelly" modified only the word "beat."

While this law was a step forward, it was still in the mold of the early anti-cruelty statutes and contained two significant shortcomings when enforcement was sought. First, and most obviously, the list of animals was still limited to those that were commercially valuable. Certainly Mr. Bergh's vision would not have been limited by such categorization. The second shortcoming, and even more significant from a legal perspective, was the continued use of the qualifying term "maliciously." No action of a human against an animal was illegal unless the state could prove, under the criminal law standard of beyond a reasonable doubt, that the defendant acted with malicious intent.[66] This was difficult to do as it required the reading of an individual's mind. If one were to whip the back of a horse to make it move a wagon to which it was attached, it would not normally be considered malicious. Such an act may not be done out of feeling of ill will toward the horse, rather it may be out of a desire to get on with a job. So long as some excuse could be presented to the court, it was difficult to prove malice.[67] If an individual were to approach

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65. N.Y. REV. STAT. ch. 682, § 26 (1881) (amending N.Y. PENAL LAW § 26 (1866)).

66. *Id.*

67. State v. Avery, 44 N.H. 392 (1862). According to the court, when the defendant is charged with an offense to "willfully kill, maim, beat or wound"

a horse in a field and whip it out of hate of the owner, or hate of the horse, this clearly satisfied the requirement of malice.

The 1866 New York Act included a second section. This was a first attempt to address a special problem which did not fit within the words of the first section. It stated: "Every owner, driver or possessor of an old, maimed or diseased horse or mule, turned loose or left disabled in any street, lane or place of any city in this state . . . for more than three hours . . . shall . . . be adjudged guilty of a misdemeanor."[68] Apparently, in the City of New York it was often the case that, when a work animal reached a point of age, disease, or exhaustion, so as to no longer have economic value, it was simply abandoned in the streets.[69] This was the first law in the United States adopted to deal with the issue of animal abandonment.

With the adoption of the A.S.P.C.A. charter and the passage of the above law, Henry Bergh went to work and was immediately active in enforcing the law. However, he clearly wanted more because within months, drafts for a new law were created. By the first anniversary of the A.S.P.C.A., a new, restructured, and greatly expanded law was passed by the New York Legislature.[70] The following paragraphs set out a summary of the key points of the law. Section 1 provided

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certain animals, an instruction is proper which informs the jury that

> malice [is] not limited to ill-will to an animal, or its owner, or to wanton cruelty but [that an] act will be malicious if it results from any bad or evil motive [such as] cruelty of disposition, violent passion, a design to give pain to others, or a determination [by the owner of an animal] to show that he will do what he will with his own property without regard to the remonstrances of others.

Avery, 44 N.H. at 396. Defendant, who was convicted of cruelly whipping his horse, could not complain of these instructions, for "if the beating was wrongful . . . and without just cause or excuse, the law would regard it as malicious and therefore, [if] it was done from any of the motives enumerated in the instructions malice would be implied." *Id.* "Punishment administered to an animal in an honest and good faith effort to train it is not without justification" and not an offense. *Id.* The court equated criminal intent with evil intent, demonstrating that it was the actor's moral sense that was at issue. *Id.*

68. N.Y. REV. STAT. § 682.2 (1866). "An Act better to prevent cruelty to animals." *Id.*

69. Remember all transportation of commerce at this point was either by man or beast.

70. N.Y. REV. STAT. §§ 375.2-.9 (1867). *See* app. A.

for the law to apply to "any living creature." This marvelously sweeping statement finally eliminated the limitation that protection was only for animals of commercial value.[71] All provisions of this section applied regardless of the issue of ownership of the animal.[72] The list of illegal acts was greatly expanded to include: overdriving and overloading; torturing and tormenting; depriving of necessary sustenance; unnecessarily or cruelly beating; and needlessly mutilating or killing.[73] Yet, note that none of the acts were qualified by the term "maliciously." The focus changed from the mind set of the individual to objective evidence of what happened to the animal.

To address the ongoing problems of animals being forced to fight each other, often to their death, for the owners and spectators delight, section 2 of the New York Act made animal fighting illegal. While specifically identifying bull, bear, dog and cock fighting, it applied to any living creature. The ownership and keeping of fighting animals as well as the management of the fights themselves was illegal.[74]

For the first time the law imposed a duty to provide "sufficient quality of good and wholesome food and water" upon anyone who kept (impounded) an animal.[75] Just as important from a practical enforcement perspective, the new law allowed any persons, even the A.S.P.C.A., to enter private premises and care for the animal's needs. This was a very practical provision which allowed immediate help to the animals regardless of the criminal action which might or might not be brought later against the owner or keeper.[76]

Another first for this legislation was its concern about the transportation of animals. Section 5 made it illegal to transport "any creature in a cruel or inhuman manner." Again with an eye to helping the animal, the law allowed the taking away by officials, such as A.S.P.C.A. officers, of any animal being transported cruelly so that they might be given the proper care.[77]

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71. *Id.* § 375.1.
72. *Id.*
73. *Id.*
74. *Id.* § 375.2.
75. *Id.* §§ 375.3-.4.
76. *Id.* § 375.4.
77. *Id.* § 375.5.

Section 6 was a curious provision requiring the registration of dogs, but no other animal, used by businesses for the pulling of loads. The registration number was to be placed on the vehicle being pulled by the dog.[78] Perhaps this was to make identification of owners easier, but little explanation of this section is found in the sources of the time.

As a follow up to the second section of the 1866 Act, section 7 of the 1867 Act made illegal the abandonment of any "maimed, sick, infirm or disabled creature." Under the previous law it was not at all clear what could be done with an abandoned animal. Under the 1867 Act, a magistrate or the captain of the police could authorize the destruction of such a creature.[79]

Focusing on the issue of enforcement, Mr. Bergh must have realized that normal police forces could not be counted upon to seriously and vigorously enforce this new law. Therefore, section 8 specifically provided that agents of the A.S.P.C.A. could be given the power to arrest violators of the adopted law.[80] This delegation of state criminal authority to a private organization was, and is, truly extraordinary. This, more than any other aspect of the 1867 Act, reflected the political power and trust that Bergh must have had within the city of New York and in the state capital. Another unusual provision was the requirement that all collected fines would be given to the A.S.P.C.A.; the pragmatic Bergh again at work.[81]

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78. *Id.* § 375.6.

79. *Id.* § 375.7.

80. *Id.* § 375.8. This power was further expanded in a later Act:

> Any officer, agent or member of said Society may lawfully interfere to prevent the perpetration of any act of cruelty upon any animal in his presence. Any person who shall interfere with or obstruct any such officer, agent or member in the discharge of his duty, shall be guilty of a misdemeanor.

N.Y. REV. STAT. § 12.3 (1874).

81. For the first twelve months of the society's existence, 66 convictions were secured out of 119 prosecutions, and more than $7400 was received for support of the society, including $296 from criminal fines. AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, 1867 ANNUAL REPORT 47-54 (1867) [hereinafter REPORT 1867]. By 1889 the income of the A.S.P.C.A. had increased to over $100,000 for the year, but money from fines amounted to only $2126. AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, 1890 ANNUAL REPORT 11 (1890).

With the threat of actual enforcement of meaningful anti-cruelty statutes came the first lobbying for an exemption from the law. Section 10 of the Act provided an exemption for "properly conducted scientific experiments or investigations," at a medical college or university of the State of New York.[82] Thus, one of the more heated debates of today must have been carried out over 120 years ago in the New York Legislature.[83]

With the 1867 Act, an ethical concern for the plight of animals was transformed for the first time into comprehensive legislation. The focus of social concern was on the animals themselves. While it is not known who drafted the specific words used, the language was visionary in scope while addressing a number of specific, pragmatic points.

A. Enforcement on the Streets of New York

A law is meaningless unless it directs or controls the conduct of individuals. For this to happen the laws must be enforced. This is normally the responsibility of the government, but Henry Bergh realized early on that if the law was to have any meaning in the streets of New York, where the animals lived and suffered, that it was up to him and his newly formed A.S.P.C.A.[84] He had the power to arrest law breakers, normally reserved for the police, and was appointed a prosecutor in New York so that he could argue for the conviction of the offenders before a judge.[85] It is a testament to the character of Henry Bergh that this extraordinary power of the state, vested in one private individual, was apparently never abused. It was, however, aggressively used.[86]

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82. N.Y. REV. STAT. § 375.10 (1867).

83. In 1991 when the federal government proposed regulations dealing with the use of animals in research laboratories over 10,000 comments were received from the general public. *See generally* 56 Fed. Reg. 6426 (1991).

84. SYDNEY H. COLEMAN, HUMANE SOCIETY LEADERS IN AMERICA 38 (1924).

85. *Id.* at 48.

86. *Id.* at 42-46. He and his men were so aggressive that the Broadway and East Side Stage Company sought and obtained an injunction against the A.S.P.C.A. The courts said that the A.S.P.C.A. had no right to stop a stage unless its inspectors could see that the cruelty law was being broken. The State House Cases, 15 Abb. Pr. (n.s.) 51 (N.Y. 1873).

The first case for which Mr. Bergh obtained a successful prosecution under the new statute dealt with the method by which sheep and calves were transported to the "shambles" (slaughter houses). The animals had their four feet tied together and were put into carts on top of one another like sacks. The A.S.P.C.A. brought charges, obtaining a conviction and ten dollar fine.[87]

A landmark case which brought the A.S.P.C.A. and Mr. Bergh to the attention of the general public in its first year was the "turtle case."[88] As described by Sydney Coleman:

> But the general public was still apathetic and Mr. Bergh longed for some case that would turn the spotlight on the society and give it space on the front page of the newspapers. The discovery of a boatload of live turtles that had been shipped from Florida on their backs, with their flippers pierced and tied together with strings, offered this opportunity. When the captain of the vessel refused to turn the turtles over, Mr. Bergh caused his arrest, together with the members of his crew. They were taken to the Tombs, but were later acquitted of cruelty by the court . . . . The judge, before whom the case was tried, told Bergh to go home and mind his own business. Some of the newspapers charged him with being overzealous and many abused him roundly. A lengthy satire in the *New York Herald*, a few days later, set all New York talking. For a time James Gordon Bennett continued to systematically ridicule Bergh and his society, but later the two men became personal friends and the *Herald* one of the staunchest supporters of the movement. The final outcome of the turtle case was to greatly increase the number of supporters and friends of the new society.[89]

During the first year, a number of different types of cruelty were addressed by Mr. Bergh. One of the most abusive situations dealt with the horses used to pull the omnibuses and street railways of the time.[90] Other topics included concern about

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87. REPORT 1867, *supra* note 81, at 4, 47; *see* COLEMAN, *supra* note 84, at 42.

88. REPORT 1867, *supra* note 81, at 5.

89. COLEMAN, *supra* note 84, at 42-43 (citing People v. Tinsdale, 10 Abb. Pr. (n.s.) 374 (N.Y. 1868)). After the case, the Captain of the ship sued Bergh for false arrest, but this action was dismissed on the grounds of lack of malice. REPORT 1867, *supra* note 81, at 48.

90. People v. Tinsdale, 10 Abb. Pr. (n.s.) 374 (N.Y. 1868).

> Nothing did more for the advancement of the [A.S.P.C.A.] than this campaign. Mr. Bergh would station himself at the junction of two or

adulterated food for horses and cattle,[91] and transportation of cattle by railroad.[92] Bergh also fought to eliminate dog and cock fights. Bergh opened a vigorous fight against these cruelties, even instigating raids.[93]

B. The Ripple Effect

While the New York law would not have happened but for the energy and drive of Henry Bergh,[94] his actions clearly struck a responsive cord in a number of individuals around the country. Evidence of the societal readiness for animal

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more lines and examine the team and load of every car that passed. If the load was too heavy he would compel some of the passengers to alight, or if one or both of the horses were unfit for service he suspended them from work.

COLEMAN, *supra* note 84, at 44.

A legal battle ensued when a driver and conductor were arrested for the overloading of the horse cars. The defendants were tried by a jury, and both were convicted and fined $250. On appeal, the supreme court sustained the verdict—this decision was a great victory for the A.S.P.C.A. and Bergh. *Id.*

91. COLEMAN, *supra* note 84, at 44-45.

92. REPORT 1867, *supra* note 81, at 10.

93. *Id.* at 12.

94. One contempory author sought to understand the nature of his personality and the motivation for Bergh's work:

> I have inquired from those who worked at his side, of those who to-day splendidly head the now powerful Society, and they know no more of that mysterious "why" than I do.
>
> He was a cool, calm man. He did not love horses; he disliked dogs. Affection, then, was not the moving cause. He was a healthy, clean-living man, whose perfect self-control showed steady nerves that did not shrink sickeningly from sights of physical pain; therefore he was not moved by self-pity or hysterical sympathy. One can only conclude that he was born for his work. He was meant to be the Moses of the domestic animal, meant to receive the "table of the law" for their protection, and to coax, drive, or teach the people to respect and obey those laws.
>
> How else can you explain that large, calm, impersonal sort of justice, that far-seeing pity that was not confined to the sufferers of the city's streets, but sent forth agents to protect the tormented mules and horses of the tow-path; to search out the ignorant cruelties of the rustic, whose neglect of stock caused animal martyrdom—the incredible horrors of stabling in cellars and roofless shanties. Good God! the hair rises at the thought of the flood of anguish that man tried to stem and stop.
>
> No warm, loving, tender, nervous nature could have borne to face it for an hour, and he faced and fought it for a lifetime. His coldness was his armor, and its protection was sorely needed.

Clara Morris, *Riddle of the Nineteenth Century: Mr. Henry Bergh*, *in* 18 MCCLURE 414, 422 (1902).

protection legislation was found in the rapid adoption of the legislation and the creation of animal protection societies around the country. Bergh was the catalyst, but the actions in many other states required the work and support of others outside the political power and influence of Bergh. Beside the drafting of the laws, Bergh's other major contribution was the generation of publicity about the issues. Because of the force of his personality and the visible way in which he ran his campaigns against animal cruelty, he was able to generate a large volume of newspaper coverage, first in New York and then around the country.[95]

Within a few years Massachusetts,[96] Pennsylvania,[97] Illinois,[98] New Hampshire[99] and New Jersey[100] had adopted the same pattern of legislation as in New York with both new criminal laws and the charted creations of state Societies for the Prevention of Cruelty to Animals ("S.P.C.A.").[101] One exception to the pattern was Maryland which did not adopt any statute until 1890 and then adopted a very short provision clearly not based on New York's statute.[102] One legally significant addition to the New York model was a clause used by a number of states which imposed a specific duty on the owner or keeper of an animal and required that the animal be provided with appropriate shelter or protection from the weather.[103] Also, these statutes tended to use slightly different

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95. REPORT 1867, *supra* note 81, at 19, 52. *See* COLEMAN, *supra* note 84, at 48.

96. "An Act for the More Effectual Prevention of Cruelty to Animals." MASS. GEN. L. ch. 344 (1869).

97. XXIV PA. STAT. §§ 7770-7783 (1920).

98. Prevention of Cruelty to Animals Act, 1869 Ill. Laws § 3.

99. 1878 N.H. Laws 281.

100. N.J. REV. STAT. §§ 64-82 (1873).

101. As of 1890, 31 states had some level of organized Society for the Prevention of Cruelty to Animals. AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, 1890 ANNUAL REPORT 36. *See generally*, RICHARD D. RYDER, ANIMAL REVOLUTION 171-75 (1989).

102. 1890 Md. Laws 198.

103. For example, Massachusetts adopted the following language: "[W]hoever having the charge or custody of any animal, either as owner or otherwise, inflicts unnecessary cruelty upon the same, or unnecessarily fails to provide the same with proper food, drink, shelter or protection from the weather . . . ." MASS. GEN. L. ch. 344, § 1 (1869).

terminology. While the New York statute consistently referred to "any living creature" other states used the term "animal" and then went on to define the term animal to include "all brute creatures."[104] Levels of punishment also varied between the states. While New Hampshire and Massachusetts both provided penalties of up to one year in jail and a $250 fine, Michigan provided a maximum of three months in jail and a $100 fine,[105] Illinois had no jail time and a fine of $50 to $100,[106] and Nebraska, whose law protected only domestic animals, had a fine of $5 to $50.[107]

Apparently, the legislation was lost on the wagon trains heading for California. It did not adopt any legislation until 1872 when the California Legislature adopted a law similar to the 1829 New York legislation.[108] It was not until 1900 that California passed the more comprehensive legislation adopted thirty years earlier in New York.[109]

IV. Taking the Laws to Court

First comes the legislation, then the police enforcement and prosecution, but the judges have the final authority to mold and shape a law. Regardless of what the legislature and police say, a criminal conviction can not be obtained unless a judge agrees. The one thing Bergh could not do was get himself appointed as a judge over cruelty cases. The attitude and workings of the courts are harder to discern at this distance of time than that of the legislature. This is true because there are two levels of courts: trial courts and appeals courts. Trial courts, where the evidence is heard and the verdict is given, leave almost no trace of their activities at the distance of one hundred years. Except for the records of the A.S.P.C.A. itself, there are almost no official written records about who was charged with what crime, what evidence was presented, or what result occurred.

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104. New Hampshire defined animals as "all brute creatures and birds." N.H. Rev. Stat. § 281.31 (1878).
105. Mich. Comp. Laws § 285.1 (1929).
106. Ill. Stat. §§ 5*a*.6-.7 (1869).
107. Neb. Stat. § 67*d* (1887).
108. Cal. Penal Code § 597 (1872).
109. 1900 Cal. Stat. § 154 (amending Cal. Penal Code § 597 (1872)).

Appeals courts leave a better record. Since appeals courts do their work by drafting opinions which are organized and reprinted for future use, these opinions are accessible. In the area of cruelty law, however, because of the limited number of appeals, the window through which we can view the judicial process is very limited. When a person is found innocent at the trial court level, the verdict is almost never appealed by the state. Additionally, given that the offense is a misdemeanor, often only a modest fine is levied. Since most offenders have little money of their own, few guilty defendants are willing to pay a lawyer to appeal the case to the next level. Each state has only a handful of decisions prior to 1900, and some have no reported decisions concerning cruelty laws.

We will move from one state court opinion to another state without pause because the laws are so similar in nature and the issues so fundamental that there is very little variation in judicial outlook around the country. Court opinions give shape and scope to the words of the legislature. They place the issues in the broader social and legal context. Judges, like legislators, usually reflect the attitudes of the times, and bring their personal attitudes and beliefs with them when they make decisions. One judge set forth his attitude in one of the early cases:

> It is not correct to assert that the policy of this kind of legislation, especially that which has for its purpose the prevention of cruelty to brutes, is a regulation of the dominion of the private citizen over his own private property merely. It truly has its origin in the intent to save a just standard of humane feeling from being debased by pernicious effects of bad example—the human heart from being hardened by public and frequent exhibitions of cruelty to dumb creatures, committed to the care and which were created for the beneficial use of man.[110]

One of the functions of the court is to simply confirm the language of the legislature. The courts agreed that the language of the new statutes imposed liability without regard to the issue of ownership, that the provisions apply to one's own

110. Christie v. Bergh, 15 Abb. Pr. (n.s.) 51 (N.Y. 1873) (this case has been referred to as "*The Stage Horse Cases*").

animals, as well as those of other owners, unknown owners, or no owners. In *State v. Bruner*,[111] where a man poured turpentine on a live goose and set it afire, the court clarified that under the statute, "a man may be guilty of cruelty to his own animal, or to an animal without any known owner, or to an animal which has in fact no owner."[112] The court also had to clarify that the list of protected animals was, in fact, as broad as the legislature stated. In *Grise v. State*,[113] the court provided one of the first opinions which discussed the cruelty statute with a view toward assessing the types of animals to be afforded protection by the law: animal statutes "embrace all living creatures" and the "abstract rights in all animal creation . . . from the largest and noblest to the smallest and most insignificant."[114]

Another function of the courts is to provide key definitions of words used in statutes but left undefined by the legislature. An obviously important term is "cruelty." Although used frequently in every day conversation, its definition, particularly for criminal law purposes, is not so obvious.[115] Combining the opinions of a number of cases, one useful definition of cruelty is: (1) human conduct, by act or omission; (2) which inflicts pain and suffering on a nonhuman animal; and (3) which occurs without legally acceptable justifiable conduct (legislative language or socially acceptable custom).[116]

Both at common law and under the statutes adopted, the mere killing of an animal, without more, was not "cruelty." Before the killing of an animal can support a conviction under a cruelty statute, it must be found that the killing was done

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111. 104 N.E. 103 (Ind. 1887).

112. *Bruner*, 104 N.E. at 104.

113. 37 Ark. 456 (1881).

114. *Grise*, 37 Ark. at 458. *See* Freel v. Down, 136 N.Y.S. 440 (1911) (holding sea turtles are animals within the criminal law); State v. Claiborne, 505 P.2d 732 (Kan. 1973) (holding that game cocks are not animals); State *ex rel* Del Monto v. Woodmansee, 72 N.E.2d 789 (Ohio 1956) (holding that chickens are not within the animal slaughter act).

115. *See generally* DAVID FAVRE & MURRAY LORING, ANIMAL LAW ch. 9 (1983).

116. *Down*, 136 N.Y.S. 440. (Is pain inflicted during transportation process justifiable?) "What constitutes cruelty is a question of fact on all the evidence in a prosecution for cruelty to animals." *Id.* at 446.

in a cruel manner.[117] The court in *Horton v. State*[118] held: "[T]he mere act of killing an animal, without more, is not cruelty, otherwise one could not slaughter a pig or ox for the market, and man could eat no more meat."[119] Thus, the shooting and almost instant killing of a dog was not a violation of the statute making it an offense to cruelly kill any domestic animal.[120] The court said that the purpose of the statute was not to punish for an offense against property but to prevent cruelty to animals.[121] To them, the word "cruelly," when considered with other offenses proscribed by the statute—as torturing, tormenting, mutilating, or cruelly beating—"as well as . . . the manifest purpose of the statute, evidently mean[t] something more than to kill."[122] Likewise, the court in *State v. Neal*[123] defined cruelty to "include every act etc., whereby unjustifiable physical pain, suffering, or death is caused."[124]

One of Bergh's cases in New York brought him face-to-face with the definition of cruelty. In the case where the sea turtles were being shipped on their backs, the court and much of the public did not believe the law had been violated because they did not believe that sea turtles could feel pain or suffer from lack of food and water.[125] Without proof of suffering the court dismissed the action.[126] But, forty years later a court did sustain a cruelty conviction concerning the shipment of sea turtles.[127]

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117. *See* Horton v. State, 27 So. 468 (Ala. 1900); State v. Neal, 27 S.E. 81 (N.C. 1897).
118. 27 So. 468 (Ala. 1900).
119. *Horton*, 27 So. at 468.
120. *Id.*
121. *Id.*
122. *Id.*
123. 27 S.E. 81 (N.C. 1897).
124. *Neal*, 27 S.E. at 85.
125. Allegedly, the Magistrate who dismissed the action stated "No greater pain was inflicted than by the bite of a mosquito." AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, 1867 ANNUAL REPORT 48 (1867) [hereinafter REPORT 1867].
126. *Neal*, 27 S.E. at 81.
127. Freel v. Downs, 136 N.Y.S. 440 (1911), involved a trial of a master of a steamship and the consignee of a shipment of 65 green turtles, commonly used for food, on charges of cruelty to animals. It was charged that both defendants,

Courts have construed "cruelty" to include beating horses;[128] burning a goose;[129] pouring acid on hooves;[130] overworking;[131] starving or depriving a horse of proper shelter;[132] freeing a captive fox in the presence of a pack of hounds and allowing the hounds to tear the fox apart;[133] and passively permitting a dog to attack or kill other dogs.[134] In most criminal cases, the actions or inactions of the human are a given. The question then becomes whether the act violated the existing standard of cruelty. It is also the case that, generally, the courts accept that the animal experiences pain or suffering. Many cases revolve around the third part of the definition, whether or not the action is justifiable. Under certain circumstances, cruelty and even torture, are not considered "cruelty" in the legal sense because the activity is "necessary" or "useful."

It is generally recognized that, in addition to the need to obtain food or the need for medical experimentation, there are certain other situations in which the infliction of discomfort may, as a practical matter, be accepted by the courts as "necessary." Thus, for example, it may be "necessary" to inflict pain to discipline an animal, or to train it. Discipline and training are proper and lawful ends. Therefore, the infliction of pain or suffering which can be categorized as either of these will usually be excused. *State v. Avery*[135] held that if the beating of young horses was for the purpose of training,

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by carrying or causing the turtles to be carried from Cuba to New York on their backs upon the deck of the ship with their fins or flippers—which contain muscles, blood vessels, and nerves—perforated and tied together on each side by means of a rope passing through the perforations, violated the statute making it an offense to transport any living creature "in a cruel or inhuman manner." *Freel*, 136 N.Y.S. at 443. The court found that the manner in which the turtles were transported caused them some pain and suffering, that as he accepted the shipment for the purpose of carrying them to New York, he must have been deemed to be one who carried or caused to be carried animals in a cruel and inhuman manner. Thus, there was sufficient cause to believe that he was probably guilty of causing or permitting unjustifiable physical pain and suffering by the turtles. *Id.* 451-52.

128. State v. Allison, 90 N.C. 734 (1884).
129. State v. Bruner, 104 N.E. 103 (Ind. 1887).
130. Commonwealth v. Brown, 66 Pa. Super. 519 (1917).
131. State v. Browning, 50 S.E. 185 (S.C. 1905) (hiring out unfit mules).
132. Griffith v. State, 43 S.E. 251 (Ga. 1903).
133. Commonwealth v. Turner, 14 N.E. 130 (Mass. 1887).
134. Commonwealth v. Thorton, 113 Mass. 457 (1873).
135. 44 N.H. 393 (1862).

however severe it might be, it would not be considered malicious and would be no offense under the statute. However, if the beating was aggravated by the influence of any evil motive, cruel disposition, violent passions, spirit of revenge, or reckless indifference to the sufferings, the excess pain and suffering caused would be deemed malicious.[136]

Where the defense is necessity, the defendant bears the burden of proving the necessity. Defense of one's self, or of other persons, would appear to excuse at least some degree of assault upon the offending animal, and there are a multitude of statutes and cases which justify shooting or killing animals, especially dogs, which are attacking the defendant's livestock. *Hodge v. State*[137] held that a cruelty statute was not intended to deprive a man of the right to protect himself, his premises, and property against the intrusions of worthless, mischievous, or vicious animals by such means as are reasonably necessary for that purpose.[138] In addition, the object of the statute was to protect animals from cruelty and not from the incidental pain or suffering that may be casually or incidentally inflicted by the use of lawful means of protection against them.

As in Henry Bergh's New York statute, sometimes a legislature provides specific exemptions. The first annual report of the A.S.P.C.A. considered in some detail the pain and suffering of dogs and other animals in medical teaching facilities.[139] But for the most part, Bergh was unable to do much about this because of the specific exemption given such facilities in section 10 of the New York statute.[140] This kind of blanket exemption continues in a few of today's anti-cruelty statutes.[141]

Beside the term "cruelty," the courts have had to decide the meaning of many other terms. The words "overdrive," "override," or "overload," reflect a historical concern for those animals most closely associated with humans (beasts of burden) during a period when motorized transportation was unavailable. No standard was given to dètermine a violation.

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136. *Avery*, 44 N.H. 393.
137. 79 Tenn. 528 (1883).
138. *Hodge*, 79 Tenn. 528.
139. REPORT 1867, *supra* note 125, at 19-22.
140. *See* Appendix: The 1867 New York Anti Cruelty Law, at § 10.
141. *See* Favre, *supra* note 115, at 139-40.

The number of possible variables, such as age, strength, and health of the animal, duration of load, degree of effort or weight of load, etc., made it impossible to be more precise in legislation. The riding, driving, or loading became cruel when more was being demanded of the animal than could reasonably be expected under all circumstances.[142]

Another group of terms the court has had to define was "torture" and "torment." Again the focus was not on the pain of the animal, but on the justification for the infliction of the pain. In *State v. Allison*,[143] the court found the defendant had unlawfully tortured or tormented a cow by beating her and twisting off her tail.[144] Sometimes the act itself suggested no possible justification. In one court, the pouring of turpentine on a goose and then burning it was found to be an unjustifiable act of torture.[145] In *Commonwealth v. Brown*,[146] the defendant applied a solution of nitric and sulfuric acid to the hoofs of two horses. This was found to be a violation of the law.[147]

The third area of activity by the courts was placing the specifics of the anti-cruelty law into the general context of criminal law. Only the problem of criminal intent will be mentioned in this short history.[148] As a broad statement, a person cannot be found guilty of a crime unless he intended to commit the crime. Thus, if a cat climbs into the motor compartment of a sitting car, without the knowledge of the owner of the car, and later the owner starts the car and maims the cat, it is not a criminal act since the individual did not understand that his actions would cause harm to the cat. The problem with this requirement in the context of animal treat-

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142. *See* State v. Browning, 50 S.E. 185 (S.C. 1905) (defendant's mule, with defendant's knowledge and permission, was cruelly worked when it was unfit for labor). The enforcement of this part of the cruelty law was particularly important to Mr. Bergh in the City of New York. Henry Bergh himself would stand on street corners and examine the condition of horses and mules. When Bergh judged a violation, he would warn or arrest the person in charge. SYDNEY H. COLEMAN, HUMANE SOCIETY LEADERS IN AMERICA 44 (1924).

143. 90 N.C. 733 (1884).

144. *Allison*, 90 N.C. 733.

145. State v. Bruner, 104 N.E. 103 (Ind. 1887).

146. 66 Pa. Super. 519 (1917).

147. *Brown*, 66 Pa. Super. 519.

148. *See* Favre, *supra* note 115, at § 9.6.

ment is that the primary motivation for human conduct is often other than to harm an animal, even though it is foreseeable that there is a risk of harm to that animal.

In *People v. Tinsdale*,[149] a New York court pondered the effect of a defendant's intent in a cruelty prosecution and predicated their decision upon whether the intent or lack of intent was evident from the facts. *Tinsdale* involved a charge of cruelty to animals made against the driver and the conductor of a horse-drawn railroad car for overloading, overdriving, torturing, and tormenting two horses who were unable to draw a carload of passengers over portions of the route.[150] The conductor was in charge of admission of passengers to the car and the driver was in charge of driving the horses pulling the car. Both defendants were employees of the company who owned the cars and horses.[151] It is important to note that both claimed and may, in fact, have been acting under orders of their superiors and employers. Thus, their primary intent was not to inflict pain and suffering on the animals, but to fill the cars with passengers so as to make a profit. Yet, the suffering which occurred was a foreseeable by-product of their conduct. The judge charged the jury "[n]o company can compel their conductor or other employee to do an act which is against the law."[152]

Although the mental state of both men may not have been that of seeking to abuse their animal charges, the judge stated that both the conductor and the driver responsible could nevertheless be liable for the overloading of the car and driving the horses while the car was in that overloaded state. The *Tinsdale* court thus faced the issue of intent squarely. If a person intentionally does or does not do an act and the risk to an animal is foreseeable, then the individual is criminally liable when his action or inaction in fact inflicts pain or suffering on an animal.[153] The reasoning in *Tinsdale* is consistent

149. 10 Abb. Pr. (n.s.) 374 (N.Y. 1886).
150. *Tinsdale*, 10 Abb. Pr. (n.s.) at 374. The general statute at the time was section 1 of the New York Laws of 1867.
151. *Tinsdale*, 10 Abb. Pr. (n.s.) at 376.
152. *Id.*
153. Favre, *supra* note 115, at § 9.6.

with the majority of opinions in the country today concerning this important issue of criminal intent.[154]

Negligent or accidental infliction of suffering is usually not criminally actionable.[155] In a prosecution for cruelly overdriving a horse, there was evidence that defendants rented a horse for an afternoon drive and later informed the livery keeper that the animal was sick.[156] It was actually found to be "suffering from pulmonary congestion, which is usually caused by overexertion . . . the horse died shortly afterward. . . ."[157] The livery keeper testified that, in his opinion, the horse had been overdriven, and defendants contended that they drove the animal "for a reasonable distance at a moderate gait, and that the animal was sick when they hired it."[158] The court held that a conviction was not warranted, for although the evidence tended to establish that the horse had been overdriven, it was not inconsistent with an accidental overdriving and in no way negated the conclusion that the horse may have overexerted itself, although the defendants were evidently careful.[159] The court said that "overdriving, alone, is not a statutory crime, [since] it must be willful as distinguished from accidental."[160]

V. A Voice of Concern

Twenty years after Bergh started his efforts in New York, Judge Arnold in far away Mississippi provided eloquent words for how the legal system now viewed animals, after a century of significant change.

> This statute is for the benefit of animals, as creatures capable of feeling and suffering, and it was intended to protect them from cruelty, without reference to their being property, or to the damages which might thereby be occasioned to their owners . . . .
> . . . .

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154. *Id.*
155. The 1866 N.Y. Act had made the negligent maiming, etc., illegal. But since the word was modified with "maliciously" it was meaningless. In the 1867 Act, "negligent" does not appear.
156. State v. Roche, 37 Mo. App. 480, 481 (1889).
157. *Roche*, 37 Mo. App. at 481.
158. *Id.*
159. *Id.* at 482.
160. *Id.*

> . . . [L]aws, and the enforcement or observance of laws for the protection of dumb brutes from cruelty, are, in my judgment, among the best evidences of the justice and benevolence of men. Such statutes were not intended to interfere, and do not interfere, with the necessary discipline and government of such animals, or place any unreasonable restriction on their use or the enjoyment to be derived from their possession. The common law recognized no rights in such animals, and punished no cruelty to them, except in so far as it affected the right of individuals to such property. Such statutes remedy this defect . . . . To disregard the rights and feelings of equals, is unjust and ungenerous, but to willfully or wantonly injure or oppress the weak and helpless is mean and cowardly. Human beings have at least some means of protecting themselves against the inhumanity of man,—that inhumanity which 'makes countless thousands mourn,'—but dumb brutes have none. Cruelty to them manifests a vicious and degraded nature, and it tends inevitably to cruelty to men. Animals whose lives are devoted to our use and pleasure, and which are capable, perhaps, of feeling as great physical pain or pleasure as ourselves, deserve, for these considerations alone, kindly treatment. The dominion of man over them, if not a moral trust, has a better significance than the development of malignant passions and cruel instincts. Often their beauty, gentleness and fidelity suggest the reflection that it may have been one of the purposes of their creation and subordination to enlarge the sympathies and expand the better feelings of our race. But, however this may be, human beings should be kind and just to dumb brutes; if for no other reason than to learn how to be kind and just to each other.[161]

CONCLUSION

Henry Bergh's efforts in New York established a foundation that was to define the accepted legal relationship between humans and the animals around them over the next century. Discussion in the courts today are comfortably within the framework established by the end of the nineteenth century. The actions in the legislatures today may be more protective of the interests of animals, but are not of a different kind and still reflect the philosophical attitude of Judge Arnold quoted above.[162]

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161. Stephens v. State, 3 So. 458-59 (Miss. 1887).

162. A survey of current state cruelty laws can be found in ANIMAL WELFARE INSTITUTE, ANIMALS AND THEIR LEGAL RIGHTS 7-47 (4th ed. 1990).

This area of the law reflects extraordinary stability or stagnation depending on one's view. The legal system evolves as the needs and attitudes of its members change. Few would suggest that the powers and rights of husbands regarding their wives as property as existed in the 1880's should be used today. Or, that the rights of children within the legal system should remain unchanged for over a century. Yet, laws made for the protection of animals have remained stagnate for a hundred years.

The social stirring of the animal rights movement may change the laws as the next century approaches, but only if it is able to convince the members of this society that a new perspective is justified.[163] Until such time, the legal rights won for animals in the 1860's and 1870's remain the base for today's attitude about and concerning man's legal relationship with animals.

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163. *See* David Favre, *Wildlife Rights: The Ever-Widening Circle*, 9 ENVT'L L. 241 (1979); TOM REGAN, ALL THAT DWELL THEREIN 148-64 (1982); JOEL FEINBERG, *Can Animals Have Rights, in* ANIMAL RIGHTS AND HUMANS OBLIGATIONS 190-96 (Tom Regan & Peter Singer eds. 1976); Joyce S. Tischler, Comment, *Rights for Nonhuman Animals: A Guardianship Model for Dogs and Cats*, 14 SAN DIEGO L. REV. 484 (1977); Roger W. Galvin, *What Rights for Animals? A Modest Proposal*, 2 PACE ENVTL. L. REV. 245 (1985); Susan L. Goodkin, *The Evolution of Animal Rights*, 18 COL. HUM. RIGHTS L. REV. 259 (1987). An argument for whales' rights in the international context can be found in Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21 (1991).

Appendix A: The 1867 New York Anti-Cruelty Law

Section 1. PENALTY FOR OVERDRIVING, CRUELLY TREATING ANIMALS, ETC.

> If any person shall overdrive, overload, torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or needlessly mutilate or kill, or cause or procure to be overdriven, overloaded, tortured, tormented or deprived of necessary sustenance, or to be unnecessarily or cruelly beaten, or needlessly mutilated, or killed as aforesaid any living creature, every such offender shall, for every such offence, be guilty of a misdemeanor.

Section 2. FOR KEEPING A PLACE FOR COCK FIGHTING, BULL BAITING, DOG FIGHTING, ETC.

> Any person who shall keep or use, or in any way be connected with, or interested in the management of, or shall receive money for the admission of any person to any place kept or used for the purpose of fighting or baiting any bull, bear, dog, cock, or other creature, and every person who shall encourage, aid or assist therein, or who shall permit or suffer any place to be so kept or used, shall, upon conviction thereof, be adjudged guilty of a misdemeanor.

Section 3. FOR IMPOUNDING ANIMALS WITHOUT GIVING SUFFICIENT FOOD AND WATER

> Any person who shall impound, or cause to be impounded in any pound, any creature, shall supply to the same, during such confinement, a sufficient quantity of good and wholesome food and water, and in default thereof, shall, upon conviction, be adjudged guilty of a misdemeanor.

Section 4. IN WHAT CASE ANY PERSON MAY FEED, ETC. IMPOUNDED ANIMAL

> In case any creature shall be at any time impounded as aforesaid, and shall continue to be without necessary food and water for more than twelve successive hours, it shall be lawful for any person, from time to time, and as often as it shall be necessary, to enter into and upon any pound in which any such creature shall be so confined, and to supply it with necessary food and water, so long as it shall remain so confined; such person shall not be liable to any action for such entry, and the reasonable cost of such food and water may be collected by him of the owner of such creature, and the said creature shall not be exempt from levy and sale upon execution issued upon judgment therefor.

Section 5. PENALTY FOR CARRYING ANIMALS IN A CRUEL MANNER

If any person shall carry, or cause to be carried, in or upon any vehicle or otherwise, any creature, in a cruel or inhuman manner, he shall be guilty of a misdemeanor, and whenever he shall be taken into custody and therefor by any officer, such officer may take charge of such vehicle and its contents, and deposit the same in some safe place of custody; and any necessary expenses which may be incurred for taking charge of and keeping and sustaining the same, shall be a lien thereon, to be paid before the same can lawfully be recovered. Or the said expenses or any part thereof remaining unpaid, may be recovered by the person incurring the same, of the owner of said creature, in any action therefor.

Section 6. LICENSE FOR USING DOGS BEFORE VEHICLES

Every person who shall hereafter use any dog or dogs, for the purpose of drawing or helping to draw any cart, carriage, truck, barrow, or other vehicle, in any city or incorporated village, for business purposes, shall be required to take out a license for that purpose, from the mayor or president thereof, respectively, and shall have the number of said license and the residence of the owner distinctly painted thereon; and for each violation of this section shall forfeit and pay a fine of one dollar for the first offence, and a fine of ten dollars for each subsequent offence.

Section 7. PENALTY FOR ABANDONING INFIRM ANIMALS IN PUBLIC PLACE

If any maimed, sick, infirm or disabled creature shall be abandoned to die, by any person, in any public place, such person shall be guilty of a misdemeanor, and it shall be lawful for any magistrate or captain of police in this state, to appoint suitable persons to destroy such creature if unfit for further use.

Section 8. WHEN AGENT OF SOCIETY MAY ARREST FOR VIOLATIONS OF THIS ACT

Any agent of the American Society for the Prevention of Cruelty to Animals, upon being designated thereto by the sheriff of any county in this state, may, within such county, make arrests and bring before any court or magistrate thereof, having jurisdiction, offenders found violating the provisions of this act, and all fines imposed and collected in any such county, under the provisions of this act, shall inure to said society, in aid of the benevolent objects for which it was incorporated.

Section 9. WHO SHALL PUBLISH THIS ACT, AND WHEN SHALL IT BE PUBLISHED.

This act shall take effect on the first day of May next. And the said American Society for the Prevention of Cruelty to Animals shall cause the same to be published once in each week for three weeks, in four daily papers published in New York City, or in default thereof shall forfeit the right to receive the penalties and fines as provided.

Section 10. PROVISO.

Nothing in this act contained shall be construed to prohibit or interfere with any properly conducted scientific experiments or investigations, which experiments shall be performed only under the authority of the faculty of some regularly incorporated medical college or university of the state of New York.