

FIVE MORE YEARS FOR THE ANIMALS

By
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For Animal Law's twenty-fifth anniversary edition, David S. Favre is back with an update on the state of animal law in the United States. This piece covers the new, the changeless, the good, and the bad of the animal legal landscape in the past five years, since Animal Law last asked Favre to write a review of animal law. An overview of new case law is discussed, as is a summary of newly passed state laws, mostly related to companion animals. Additionally, developments in the ever-expanding field of animal legal education are examined. This article discusses changes in a variety of animal-related areas—from criminal law, to animals in entertainment, to animal rights—in the past five years.

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I. INTRODUCTION

Twenty-five years ago, I wrote the introduction for the first volume of *Animal Law*.¹ Five years ago, I wrote an update for the twentieth volume of the *Journal*.² Even though it has been only five years, enough has happened in the world of animal law to justify another look back. For example, Ringling Bros. and Barnum & Bailey Circus (Ringling Bros.) has shut down and gone out of business.³ While five years ago it was possible to consider that they may have to give up their elephants in the shows, no one in the animal movement was thinking that this circus would disappear. In the past five years, the first major lawsuits to establish legal rights for animals were filed, even if they were not successful.⁴ On the other hand, the federal government's regulation of animals under the federal Animal Welfare Act has not been enhanced and perhaps is moving in the wrong direction.⁵ Assistance animals have come into the public view, as the uses and abuses become more visible. Additionally, the fifty state legislatures have not been sitting still. A number of new laws have been adopted, particularly in the area of companion animals.⁶

II. CHANGING LANDSCAPES

A. *Assistance and Emotional Support Animals*

There have been assistance animals and emotional support animals among us for decades. However, in the past five years it has become an area of contention and confusion, resulting in considerable

¹ David Favre, *Time for a Sharper Legal Focus*, 1 ANIMAL L. 1, 1 (1995).

² David Favre, *Twenty Years and Change*, 20 ANIMAL L. 7, 7 (2013).

³ Sarah Maslin Nir & Nate Schweber, *After 146 Years, Ringling Brothers Circus Takes Its Final Bow*, N.Y. TIMES (May 21, 2017), <https://www.nytimes.com/2017/05/21/nyregion/ringling-brothers-circus-takes-final-bow.html> [<https://perma.cc/58TJ-E6F3>] (accessed Apr. 14, 2019).

⁴ See *infra* Part V (discussing various noteworthy lawsuits brought to achieve legal rights for animals).

⁵ For a fifty-year retrospective on the Animal Welfare Act and how it undermines animal interests, see Justin Marceau, *How the Animal Welfare Act Harms Animals*, 69 HASTINGS L. J. 925, 929 (2018) (“[The Animal Welfare Act] has allowed the public to feel good about itself and its concern for animal welfare, but it has not improved the lives of most animals, and its existence reinforces norms that actually exacerbate animal suffering.”).

⁶ *Companion Animal Issues*, NAT'L ANTI-VIVISECTION SOC'Y, <https://www.navs.org/what-we-do/keep-you-informed/legal-arena/companion-animal-issues/#.XFqRafx7mU0> [<https://perma.cc/2FXQ-Q4HJ>] (accessed Apr. 14, 2019).

press coverage of the issues.⁷ There are three federal laws involved, and sometimes the public knowingly and unknowingly blur the line between the laws. First, there is the Americans with Disabilities Act, the long-standing law that allows service animals to accompany disabled humans in public places.⁸ Second, there is the Fair Housing Act⁹ that requires landlords to accommodate individuals who need the aid of an emotional support animal. Finally, there is the Air Carrier Access Act,¹⁰ which deals with animals and commercial aircraft.

It is important to understand the difference between a service animal and an emotional support animal. A service animal is a dog (or, in rare circumstances, a miniature horse) that has received specific training to do something for a disabled person.¹¹ The federal law does not provide any guidance as to who can or cannot provide the training, or any mechanism for proving the training, or any standards by which to judge the sufficiency of training,¹² or any registry of individuals who have real service animals. There is also no federal law that requires service animals to display or wear anything to denote that they are service animals.¹³ The internet, however, is nonetheless eager to sell assistance and emotional support animal identification materials.¹⁴

The general rule is that a service animal may accompany disabled persons any place open to the public. The owner of an establishment may ask only two questions when someone shows up with a dog: "Is

⁷ See Christopher Mele, *Is That Dog (or Pig) on Your Flight Really a Service Animal?*, N.Y. TIMES (May 1, 2018), <https://nyti.ms/2HEmRQy> [<https://perma.cc/377X-EPW9>] (accessed Apr. 14, 2019) (highlighting how airlines and states are trying to crack down on service animal fraud); John Kelly, *Dogs in Grocery Stores: Therapy for Some, an Annoyance for Others*, WASH. POST (Aug. 1, 2018), https://wapo.st/2Atpz80?tid=ss_tw&utm_term=.ce6361eaf8f6 [<https://perma.cc/Y2XG-ZTAS>] (accessed Apr. 14, 2019) (showing that some people become irritated at service animals in public spaces and do not know how to respond to service animal fraud).

⁸ Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012).

⁹ 42 U.S.C. §§ 3601 et seq. (2012). Assistance animals are not pets according to the U.S. Department of Housing and Urban Development (HUD). Pet Ownership for the Elderly and Persons With Disabilities, 73 Fed. Reg. 63,834, 63,834 (Oct. 27, 2008).

¹⁰ Air Carrier Access Act, 49 U.S.C. § 41705 (2012).

¹¹ *Service Animals*, U.S. DEP'T JUST. (July 2011), https://www.ada.gov/service_animals_2010.htm [<https://perma.cc/6R5T-KKBJ>] (accessed Apr. 14, 2019).

¹² Karin Brulliard, *Company Sold \$25,000 'Service Dogs' That Were Really Just Untrained Puppies, Virginia Says*, WASH. POST (May 8, 2018), https://www.washingtonpost.com/news/animalia/wp/2018/05/08/company-sold-25000-service-dogs-that-were-really-just-untrained-puppies-virginia-says/?utm_term=.e913e696b01d [<https://perma.cc/P77K-QLTU>] (accessed Apr. 14, 2019).

¹³ *Frequently Asked Questions About Service Animals and the ADA*, U.S. DEP'T JUST. (July 20, 2015), https://www.ada.gov/regs2010/service_animal_qa.html [<https://perma.cc/9KSV-XYL4>] (accessed Apr. 14, 2019).

¹⁴ See *Register Your Emotional Support Animal and Receive All the Benefits*, U.S. SERV. ANIMALS, <https://usserviceanimals.org/register/emotional-support-animal> [<https://perma.cc/35EF-2KJ8>] (accessed Apr. 14, 2019) (offering identification cards, vests, collar tags, and leashes to display that an animal is a "registered" emotional support animal).

this a service animal? What is it trained to do?"¹⁵ If the person is not disabled and simply lies about the dog's status, the federal law does not provide a remedy.¹⁶

By contrast, an emotional support animal has no training at all. The animal is present in the house only to provide emotional support. Additionally, this animal has special status only in the area of personal housing, as covered under the Fair Housing Act. Emotional support animals cannot enter a restaurant or other public places, such as grocery stores.¹⁷ The law allows a person needing an emotional support animal to keep the animal where they live.¹⁸ The person seeking this status must have a letter from a medical professional that confirms the presence of a condition and the need for an emotional support animal.¹⁹ The species of an emotional support animal is not limited to dogs.²⁰ As might be imagined, this broad mandate can raise a large number of questions;²¹ however, the U.S. Department of Housing and Urban Development has not adopted any regulations, and there is only one opinion letter on the topic.²²

There are two types of problems. First, some individuals falsely claim to have service animals.²³ Second, individuals with emotional support animal misunderstand the law, thinking that they can take emotional support animals into public places. Air travel has been a

¹⁵ *Frequently Asked Questions About Service Animals and the ADA*, *supra* note 13.

¹⁶ See Amy Edelman, *Collared: New Laws Crack Down on Fake Service Dogs*, NBC NEWS (May 5, 2018, 5:01 AM), <https://www.nbcnews.com/politics/politics-news/collared-new-laws-crack-down-fake-service-dogs-n871541> [<https://perma.cc/M79J-GGSD>] (accessed Apr. 14, 2019) (explaining that more than twenty states have enacted laws to cut down on fake service animals because the ADA, which is a federal law, does not allow business owners to seek documentation to confirm whether a dog is actually a service animal).

¹⁷ *Where Can I Take Emotional Support Animals?*, ESA DOCTORS, <https://esadoctors.com/where-can-i-take-emotional-support-animals/> [<https://perma.cc/VQ9N-TMYK>] (accessed Apr. 14, 2019).

¹⁸ *Id.*

¹⁹ *Housing Rights and Your ESA*, NAT'L SERV. ANIMAL REGISTRY, <https://www.nsarco.com/emotional-support-animal-housing.html> [<https://perma.cc/8JPE-XETH>] (accessed Apr. 14, 2019).

²⁰ *Where Can I Take Emotional Support Animals?*, *supra* note 17.

²¹ See *Frequently Asked Questions (FAQs)*, MICH. STATE UNIV.: ANIMAL LEGAL & HIST. CTR., www.animallaw.info/site/frequently-asked-questions-faqs (accessed Apr. 14, 2019) (providing state and federal legal answers to various frequently asked questions regarding regulations on emotional support animals and pets).

²² See U.S. Dep't of Hous. & Urban Dev., Off. of Fair Hou. & Equal Opportunity, FHEO-2013-01, *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs* (2013) ("This notice explains certain obligations of housing providers under the Fair Housing Act (FHAct), Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act (ADA) with respect to animals that provide assistance to individuals with disabilities.").

²³ See Sande Buhai, *Preventing the Abuse of Service Animal Regulations*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 771, 793-94 (2016) ("This ambiguity is intended to ensure the privacy of the disabled, but it has the effect of creating a large loophole that pet owners can abuse. If pet owners answer the permitted questions 'correctly,' the manager of a business cannot do anything for the fear of violating the ADA.").

specific source of confusion, as the law and self-regulation by the airlines blurs the two categories, such that emotional support and assistance animals both have access.²⁴ The height of controversy was reached, perhaps, when a woman tried to board a plane with her full-sized peacock as her emotional support animal.²⁵ She was not allowed to board the plane with the animal, and her picture made the news and internet sites across the country.²⁶

States have been adopting laws to support and sort out this area, but they are significantly hampered by the reality that federal law preempts state law. A state might want to establish a registry of those with qualified assistance animals, but the states must follow the federal law, which does not require registration.²⁷ A number of states have made false representation of a service animal into a low-level crime.²⁸ At the legal library website: www.animallaw.info, the information pages about this topic are usually in the top five topics accessed by the public on a daily basis.²⁹ There does not seem to be any movement at the national level to help resolve these issues of human behavior and human need.

B. Criminal Law

1. As Victims

As with all areas of law, in criminal law animals are initially (and historically have been) seen as property. One recent case suggests that the status of animals within the criminal legal system may be moving into a new phase. This deals with a fundamental conceptual view of

²⁴ JACQUIE BRENNAN, ADA NAT'L NETWORK, SERVICE ANIMALS AND EMOTIONAL SUPPORT ANIMALS: WHERE ARE THEY ALLOWED AND UNDER WHAT CONDITIONS? 8-9 (Vinh Nguyen ed., 2014).

²⁵ Daniella Silva, *Emotional Support Peacock Denied Flight by United Airlines*, NBC NEWS (Jan. 30, 2018, 6:04 PM), <https://www.nbcnews.com/storyline/airplane-mode/emotional-support-peacock-denied-flight-united-airlines-n842971> [<https://perma.cc/24FL-DBZC>] (accessed Apr. 14, 2019).

²⁶ *Id.*

²⁷ MARGARET C. JASPER, LEGAL ALMANAC SERIES: THE AMERICANS WITH DISABILITIES ACT § 4:8 (2012), Westlaw (database updated Oct. 2012).

²⁸ In 2018, Indiana enacted a law aimed at cracking down on falsely claimed emotional support animals. Senate Bill 240 amends Indiana's fair housing laws by adding Chapter 7: Emotional Support Animals in Housing. The law outlines which dwellings are exempt from application of the law and defines terms like "health service provider" and "individual with a disability." The law, similar to a federal 2013 notice issued by HUD, states that a person with a disability may seek to keep an emotional support animal as a reasonable accommodation, and the dwelling may request written verification from a health service provider for this request. The new chapter makes it a Class A infraction for a person to do things like misrepresent the need for an emotional support animal, make false statements related to such a request, or outfit an animal with a vest or other sign that would cause a reasonable person to believe the animal is an ESA. S.B. 240, 120th Gen. Assemb., 2d Reg. Sess. (Ind. 2018) (enacted).

²⁹ For the month of November 2018, there were 13,285-page visits to the FAQ about emotional support animals. Animal Legal and Historical Center, Google Analytics (2018) (on file with author).

what an animal is—simple property, or individuals, who are acknowledged as such. If someone breaks into a home and destroys some furniture and perhaps a computer, the personal property is lumped together and would be considered one crime for purposes of sentencing a guilty defendant. In 2018, the Oregon Supreme Court heard the issue in the context of sentencing a defendant, where the state wanted thirteen counts of violation of the cruelty law, one count for each animal that had been harmed by the defendant.³⁰ The defendant claimed the actions merited only one count and therefore she should receive a lesser jail sentence.³¹ The court held that each animal was a victim and therefore the charge of thirteen counts was correct.³² This is but one example of how, in some circumstances, animals are perceived as being worthy of enhanced consideration and protection.

2. Representation

Another new step was taken for dogs and cats caught up in criminal proceedings against human actors. It is customary to provide an opportunity for the human victim of a crime to have a voice in the proceedings, particularly at the sentencing stage.³³ What happens when the victim is an animal? Obviously, the animal cannot speak, but should a human be able to speak on behalf of the animal victim? In Connecticut, dogs and cats are considered members of that special class of companion animals and can now have humans make victim impact statements on their behalves. Under a 2016 law, the court may appoint an attorney or a law student to aid the court in a criminal anti-cruelty proceeding:

- (a) In any prosecution . . . regarding the welfare or custody of a cat or dog, the court may order, upon its own initiative or upon request of a party or counsel for a party, that a separate advocate be appointed to represent the interests of justice. If a court orders that an advocate be appointed to represent the interests of justice, the court shall appoint such advocate from a list provided to the court by the Commissioner of Agriculture . . .³⁴

Law students at the University of Connecticut are actively taking advantage of this power and have been appointed to help in a number of cases. The scope of their authority to act is rather extensive:

³⁰ Oregon v. Crow, 429 P.3d 1053, 1054 (Or. Ct. App. 2018).

³¹ *Id.*

³² *Id.*

³³ See Susan A. Bandes, *What Are Victim-Impact Statements For?*, ATLANTIC (July 23, 2016), <https://www.theatlantic.com/politics/archive/2016/07/what-are-victim-impact-statements-for/492443/> [<https://perma.cc/7JR3-925Q>] (accessed Apr. 14, 2019) (noting that victim impact statements are allowed in all states); see generally TENN. CODE ANN. § 40-38-201 (2018) (allowing a judge to consider a victim impact statement before sentencing).

³⁴ CONN. GEN. STAT. § 54-86n(a) (2018).

- (b) The advocate may: (1) Monitor the case; (2) consult any individual with information that could aid the judge or fact finder and review records relating to the condition of the cat or dog and the defendant's actions, including, but not limited to, records from animal control officers, veterinarians and police officers; (3) attend hearings; and (4) present information or recommendations to the court pertinent to determinations that relate to the interests of justice, provided such information and recommendations shall be based solely upon the duties undertaken pursuant to this subsection.³⁵

3. *Animal Abuser Registry*

Another example of the criminal law providing increasing consideration to the importance of animals is the creation of an Animal Abuser Registry. These state registries parallel the registries for those who have been convicted of sex abuse crimes. For example, this provision is from the Tennessee Animal Abuser Registration Act adopted by Tennessee in 2015:

- (a) Beginning January 1, 2016, the TBI shall post a publicly accessible list on its web site of any person convicted of an animal abuse offense on and after that date.³⁶

4. *FBI Tracking of Crime Data*

The final update is a sign of the increasing visibility of animals in the criminal law area and deals with information collection. Beginning in 2016, the FBI's crime reporting database had a place for crimes against animals in its Uniform Crime Reporting Program.³⁷ However, there was very little information about the nature of the crime in this system. A more robust system is now available—the National Incident-Based Reporting System.³⁸ Information entered there will allow long-term comparative analysis of the crimes against animals and the defendants who commit those crimes.³⁹ The institutions of criminal justice now care enough to collect data about crimes against animals. The FBI does not have a separate category for crimes against property, like tables.

C. *Animals in Entertainment*

The use of elephants by Ringling Bros. has long been in the focus of those seeking to stop the use of live elephants in circuses.⁴⁰ A number of animal welfare organizations supported a lawsuit seeking to

³⁵ *Id.* § 54-86n(b).

³⁶ TENN. CODE ANN. § 40-39-103 (2018).

³⁷ *Tracking Animal Cruelty*, FBI (Feb. 1, 2016), <https://www.fbi.gov/news/stories/tracking-animal-cruelty> [<https://perma.cc/7JR3-925Q>] (accessed Apr. 14, 2019).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *We Never Gave Up: PETA's Triumph Over Ringling Bros.*, PETA, <https://www.peta.org/features/ringling/> [<https://perma.cc/3PH5-P83C>] (accessed Apr. 14, 2019).

hold Ringling Bros. liable for “harm” to its elephants. However, in 2009, the trial court found against the plaintiff for lack of standing.⁴¹ Ringling Bros. filed countersuits and, in one case, reached a \$9.3 million-dollar settlement to the benefit of Ringling Bros.⁴² In 2015, without any change in national law, Ringling Bros. announced that it would phase out the use of elephants.⁴³ A spokesperson noted, “[t]here’s been, on the part of our consumers, a mood shift where they may not want to see elephants transported from city to city.”⁴⁴ But, without the elephants, projected attendance dropped even more. As a result, in 2017, Ringling Bros announced its decision to shut down its entire traveling circus.⁴⁵ Changing social attitudes toward elephant use had significant financial impact well beyond any legal provision.⁴⁶ And, indeed, in 2017 the show closed down. In 2018, the state of New Jersey adopted a law prohibiting wild and exotic animals in circuses.⁴⁷

The documentary *Blackfish* premiered in 2013⁴⁸ and caused considerable public concern about the use of killer whales in SeaWorld’s shows. Attendance dropped, but initially this was denied by the corporation, resulting in a \$5 million fine leveled by the U.S. Securities and Exchange Commission.⁴⁹ The fallout for SeaWorld was slow, taking

⁴¹ Am. Soc’y for Prevention of Cruelty to Animals v. Feld Entm’t, Inc., 677 F. Supp. 2d 55, 89 (D.C. Cir. 2009).

⁴² Dan McCue, *Ringling Brothers Nets \$9.3 Million Settlement*, COURTHOUSE NEWS SERV. (Dec. 28, 2012), <https://www.courthousenews.com/ringling-brothers-nets9-3-million-settlement/> [<https://perma.cc/2BG3-9P2Y>] (accessed Apr. 14, 2019).

⁴³ *Ringling Bros Circus Says It Will Stop Using Elephants*, BBC (Mar. 5, 2015), <https://www.bbc.com/news/world-us-canada-31740032> [<https://perma.cc/QD3H-79VP>] (accessed Apr. 14, 2019).

⁴⁴ Richard Pérez-Peña, *Elephants to Retire from Ringling Brothers Stage*, N.Y. TIMES (Mar. 5, 2015), <https://www.nytimes.com/2015/03/06/us/ringling-brothers-circus-dropping-elephants-from-act.html> [<https://perma.cc/2PHQ-E7HC>] (accessed Apr. 14, 2019).

⁴⁵ Christopher Mele, *Ringling Bros. and Barnum & Bailey Circus to End Its 146-Year Run*, N.Y. TIMES (Jan. 14, 2017), <https://www.nytimes.com/2017/01/14/us/ringling-bros-and-barnum-bailey-circus-closing-may.html> [<https://perma.cc/R6R8-CWAY>] (accessed Apr. 14, 2019).

⁴⁶ *Id.*

⁴⁷ N.J. STAT. ANN. § 23:2A-16(b) (2018).

⁴⁸ *About Page*, BLACKFISH MOVIE, <http://www.blackfishmovie.com/about> (accessed Apr. 14, 2019) (“Blackfish tells the story of Tilikum, a performing killer whale that killed several people while in captivity. Along the way, director-producer Gabriela Cowperthwaite compiles shocking footage and emotional interviews to explore the creature’s extraordinary nature, the species’ cruel treatment in captivity, the lives and losses of the trainers and the pressures brought to bear by the multi-billion-dollar sea-park industry.”).

⁴⁹ Jade Scipioni, *SeaWorld and Former CEO Fined \$5 Million for ‘Blackfish’ Fallout*, FOX BUS. (Sept. 18, 2018), <https://www.foxbusiness.com/features/seaworld-and-former-ceo-fined-5-million-for-blackfish-fallout> [<https://perma.cc/P3PU-C3WZ>] (accessed Apr. 14, 2019).

several years.⁵⁰ In 2016, the company announced it would no longer breed killer whales and would phase out their use in shows.⁵¹

In both of the above cases, the animal activities were lawful. The significant changes occurred without any change of law at the national level, but economic, socially-driven concern created pressure for change. While these highly visible, lawful activities realized change, it must be noted that dog fighting, a longtime illegal activity, continues to exist as entertainment, with local and federal authorities continuing to expend time and resources to break up dog fighting rings.⁵²

III. ENTRENCHED LANDSCAPES

A. Industrial Food Animals

As industrial food animals are not regulated by the USDA under the Animal Welfare Act,⁵³ and there has been no change in other national laws concerning animals used for food, national law has not been helpful for enhancing their welfare. Indeed, the production and consumption of these animals has continued to increase.⁵⁴ In 2017, the possibility of regulatory oversight arose under federal labeling law and regulations that define the term “organic.”⁵⁵ A proposed regulation expanded the definition to include standards on the welfare conditions of the animals in an identified organic product.⁵⁶ But President Trump’s administration withdrew the proposed regulations.⁵⁷ This will con-

⁵⁰ Chris Haslam, *Thomas Cook Calls Time on Whale Shows at SeaWorld and Loro Parque*, *TIMES* (July 29, 2018, 12:01 AM), <https://www.thetimes.co.uk/article/thomas-cook-calls-time-on-whale-shows-at-seaworld-and-loro-parque-j7klknhwn> [<https://perma.cc/J7WU-M3DW>] (accessed Apr. 14, 2019) (indicating that major travel agency, Cook Travel, announced in 2018 it would no longer sell SeaWorld tickets due to concerns of animal cruelty).

⁵¹ J. Freedom du Lac & Lindsey Bever, *SeaWorld Ends Captive Breeding Program, Says Current Batch of Killer Whales Will be The Last*, *WASH. POST* (Mar. 17, 2016), https://www.washington-post.com/news/morning-mix/wp/2016/03/17/seaworld-says-its-current-generation-of-killer-whales-will-be-the-last/?utm_term=.91191b252c1f [<https://perma.cc/NHC6-MCU2>] (accessed Apr. 14, 2019).

⁵² *Federal Agents Seize 63 Dogs from Suspected Dog Fighting Ring*, U.S. DEP’T. OF JUSTICE (Mar. 30, 2018), <https://www.justice.gov/opa/pr/federal-agents-seize-63-dogs-suspected-dog-fighting-ring> [<https://perma.cc/S94P-DUMC>] (accessed Apr. 14, 2019).

⁵³ See 7 U.S.C. § 2132 (2016) (defining “animal” as “any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal . . . but such term excludes . . . farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber”).

⁵⁴ Mildred Haley, *Livestock, Dairy, and Poultry Outlook*, U.S. DEP’T OF AGRIC.: ECON. RES. SERV. (Jan. 19, 2018), <https://www.ers.usda.gov/webdocs/publications/86849/ldp-m-283.pdf?v=0> [<https://perma.cc/96NX-TAZB>] (accessed Apr. 14, 2019).

⁵⁵ National Organic Program; Organic Livestock and Poultry Practices, 83 Fed. Reg. 10,775, 10,775–76. (Mar. 13, 2018).

⁵⁶ National Organic Program; Organic Livestock and Poultry Practices, 81 Fed. Reg. 21,955, 21,956 (proposed Apr. 13, 2016) (to be codified at 7 C.F.R. pt. 205).

⁵⁷ National Organic Program (NOP), 83 Fed. Reg. at 10,775.

tinue consumer confusion, as many individual consumers assume that good welfare conditions exist for animals used in products labeled organic.

1. *A First Amendment Battle*

Over a decade ago, a movement began at the state government level to adopt new laws which sought to punish undercover investigations of industrial agriculture.

In 2008, a Humane Society of the United States (HSUS) undercover investigation into the Hallmark-Westland Meatpacking Company in California revealed widespread abuse of dairy cows and public health violations The investigation led to the largest beef recall in U.S. history, and to the demise of Hallmark-Westland. The company declared bankruptcy in 2008 after the video went public, and four years later, it was ordered to pay a judgement of \$497 million in a lawsuit filed by HSUS. Though the judgement was symbolic (because the company was bankrupt) this was a precedent setting case, sending a strong message that farmed animal abuse is unacceptable. If an ag-gag law had been in place, however, the investigators would likely have been prosecuted instead of Hallmark-Westland.⁵⁸

“Ag-gag” laws restrict undercover or covert recording of animal operations at agricultural facilities.⁵⁹ In 2014, the Animal Legal Defense Fund (ALDF) and a number of other plaintiffs sued the state of Idaho, challenging their ag-gag law.⁶⁰ The district court ruled in favor of ALDF, and an appeal by the state followed.⁶¹ The Ninth Circuit Court of Appeals, in affirming the lower court’s decision with respect to the unconstitutionality of the law,⁶² found the law particularly problematic because lawmakers intended to “shield the agricultural industry from undercover investigators.” The court observed that trespassing was already illegal in the state. In addition, the court found the law was “staggeringly overbroad” since it also criminalized innocent behavior. The adoption of these laws at the state level have stopped at this time, but many remain on the statute books.⁶³

2. *State Ballot Initiatives*

Positive legal changes for agricultural animals have occurred primarily through the state initiative process. Two prime examples are Massachusetts and California. In 2018, California adopted Proposition

⁵⁸ Alicia Prygoski, *Detailed Discussion of Ag-Gag Laws*, MICH. STATE UNIV.: ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/article/detailed-discussion-ag-gag-laws> [<https://perma.cc/A3BC-H5JR>] (accessed Apr. 14, 2019).

⁵⁹ *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1189 (9th Cir. 2018).

⁶⁰ *Id.* at 1184.

⁶¹ *Id.* at 1184–85.

⁶² *Id.* at 1191.

⁶³ See *Ag-Gag Laws*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/issue/ag-gag/> [<https://perma.cc/NG99-FCQZ>] (accessed Apr. 14, 2019) (showing that over five states have ag-gag laws).

12 with a 63% positive vote.⁶⁴ This measure requires a specific amount of square feet be provided for animals such as baby cows, pigs, and chickens.⁶⁵ For egg-laying chickens, the requirement is a cage-free environment by 2022.⁶⁶ No state legislature has been willing to take this step. There was a significant split among the animal groups over the support for this measure. HSUS was a primary supporter of the measure, while People for the Ethical Treatment of Animals (PETA) was opposed.⁶⁷ PETA's position is that there should be no egg-laying chickens, everyone should be vegan.⁶⁸

In 2016, the voters of Massachusetts adopted Question 3 with a 78% positive vote.⁶⁹ It paralleled other ballot efforts that required farm animals have enough space to engage in normal posture movements.⁷⁰ There were only a few commercial egg producers in the state, but the effect of the language imposed this condition on anyone who sold eggs in the state, thus reaching egg producers across the country.⁷¹ This raises an interesting interstate commerce question: Is the restriction adopted in Massachusetts an unlawful interference of interstate commerce? This question has not yet been resolved by the courts.⁷² U.S. Representative from Iowa, Steve King, sought to insert a provision into the 2018 Farm Bill that would prohibit states from im-

⁶⁴ *California Proposition 12, Farm Animal Confinement Initiative (2018)*, BALLOTEDIA, https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative (2018) [<https://perma.cc/D6SV-D4AN>] (accessed Apr. 14, 2019).

⁶⁵ *Id.*

⁶⁶ Beginning in 2022, egg-laying chickens must be in "areas other than indoor or outdoor cage-free housing systems based on the United Egg Producers' 2017 cage-free guidelines, which define cage-free housing as areas that provide 1.0 to 1.5 square feet of usable floor space per hen and allow hens to move around inside the area." *Id.*

⁶⁷ *Id.*

⁶⁸ *See Why We Oppose California's Farmed-Animal Initiative and You Should, Too*, PETA (Nov. 21, 2017), <https://www.peta.org/blog/why-we-oppose-californias-farmed-animal-initiative-and-you-should-too/> [<https://perma.cc/MX2S-ZNTV>] (accessed Apr. 14, 2019) (explaining that as an "abolitionist organization," PETA cannot support a ballot initiative that would expand the practice of farming hens while possibly leading consumers to believe they were raised "humanely").

⁶⁹ *Massachusetts Minimum Size Requirements for Farm Animal Confinement, Question 3 (2016)*, BALLOTEDIA, https://ballotpedia.org/Massachusetts_Minimum_Size_Requirements_for_Farm_Animal_Containment,_Question_3 (2016) [<https://perma.cc/VH7P-2SV2>] (accessed Apr. 14, 2019).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Motion for Leave to File Bill of Complaint Denied at 1, *Indiana v. Massachusetts*, 139 S.Ct. 859 (2019), (No. 220149), 2019 WL 113058; *see also* Rebecca Beitsch, *Cage-Free Egg Laws Spur Cage Match Between States*, PEW CHARITABLE TR.: STATELINE (Apr. 23, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/04/23/cagefree-egg-laws-spur-cage-match-between-states> [<https://perma.cc/9RTS-GJHC>] (accessed Apr. 14, 2019) (discussing the effect of cage-free egg laws on states that export a high volume of eggs as well as some of the legal challenges these states have made to such laws).

posing animal-condition requirements on other states.⁷³ This amendment was not adopted into the Farm Bill.⁷⁴

B. Recovery of Damages for Harm to Companion Animals

Although laws are evolving in connection with changing societal norms and practices, the law still lags in fully effectuating society's views. The present state of the law regarding financial recovery for harm to or the death of companion animals does not, for example, satisfactorily reflect the public perception of the value of companion animals.⁷⁵ Plaintiffs often file lawsuits to seek financial recovery for negligent or intentional injury or death of a companion animal.⁷⁶ In these legal actions, most courts hesitate to impose financial penalties more extensive than the repayment of the market value of a companion animal. For example, under criminal law, the intentional killing of a neighbor's cat may result in a felony conviction and serious jail time, but in a large majority of jurisdictions, the cat's killer would only be liable to the owner for the market value of the cat in a tort action under civil law.⁷⁷

The last five years have seen no real change on the limited ability to recover damages for harm to a companion animal.⁷⁸ State supreme courts have remained firm in not expanding the basis for recovery:⁷⁹ “[L]ike courts in the overwhelming majority of other states, the Restatement of the Law of Torts, and the other Texas courts of appeals

⁷³ Protect Interstate Commerce Act of 2018, H.R. 4879, 115th Cong. (2018).

⁷⁴ Rachel Krantz, *Victory! King Amendment Not Included in the 2018 Farm Bill*, MERCY FOR ANIMALS (Dec. 11, 2018), <https://mercyforanimals.org/victory-king-amendment-not-included-in-the> [<https://perma.cc/AG6W-8XZB>] (accessed Apr. 14, 2019).

⁷⁵ Monica Akhtar, *Property or Priceless: What is the Value of a Pet?*, WASH. POST (Mar. 13, 2016), <http://wapo.st/1TPjiFz> (accessed Apr. 14, 2019).

⁷⁶ Sabrina DeFabritiis, *Barking Up the Wrong Tree: Companion Animals, Emotional Damages and the Judiciary's Failure to Keep Pace*, 32 N. ILL. U. L. REV. 237, 245–46 (2012).

⁷⁷ See David Favre & Thomas Dickinson, *Animal Consortium*, 84 TENN. L. REV. 893, 893–94 (2017) (arguing for a new category of recovery rather than fair market value); Marcella S. Roukas, *Determining the Value of Companion Animals in Wrongful Harm or Death Claims: A Survey of U.S. Decisions and an Argument for the Authorization to Recover for Loss of Companionship in Such Cases*, MICH. STATE UNIV.: ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/article/determining-value-companion-animals-wrongful-harm-or-death-claims-survey-us-decisions-and> [<https://perma.cc/CLQ9-F773>] (accessed Apr. 14, 2019) (discussing the prevalence of fair market value as the amount of recovery for companion animals in tort suits).

⁷⁸ Zachary Paterick, Timothy Paterick, & Sandy Sanbar, *A Stepping Stone Toward Companion Animal Protection Through Compensation*, 22 ANIMAL L. 79, 88–89 (2015).

⁷⁹ See *Barking Hound Village, LLC v. Monyak*, 787 S.E.2d 191, 198 (Ga. 2016) (declining to consider emotional value as part of damages that could be awarded for a companion animal); *McDougall v. Lamm*, 48 A.3d 312, 314 (N.J. 2012) (affirming that pet owners cannot recover for emotional distress when they witness the death of their pet because animals “do not rise to the level of a close familial relationship or intimate, marital-like bond”); *Strickland v. Medlen*, 397 S.W.3d 184, 185–86 (Tex. 2013) (barring recovery of non-economic damages for a companion animal while acknowledging that animals are not “fungible” property).

that have considered this question, we reject emotion-based liability and prohibit recovery for loss of the human-animal bond.”⁸⁰

C. Wills & Trusts

Another topic that has not changed in the past five years is that of animals within wills and trusts. In this case, no change is for the better. It is now accepted in all the states that pet trusts can be created for the benefit of a living companion animal.⁸¹ There have been no appellate case opinions on these issues, so this suggests the concept has been accepted without major dispute.

D. Science & Testing

The use of animals in scientific research and testing is governed by provisions of the federal Animal Welfare Act.⁸² The states are preempted from adopting their own laws.⁸³ There has been no real change in the federal law since the 1985 Amendments. While there has been a long hope for the ending of new product testing on animals, the change has not arrived in the United States.⁸⁴ The European Union did adopt a regulation to minimize whole-animal testing whenever possible and instead use *in vitro* test methods, while also banning animal testing of cosmetics.⁸⁵

However, a recent trend at the state level seeks better outcomes for dogs and cats that have been used in research and survived.⁸⁶ According to one article, almost 19,000 cats and 61,000 dogs were used by research laboratories in 2016.⁸⁷ In 2018, Maryland became the seventh state to pass a “Beagle Freedom Law.”⁸⁸ This law requires certain research facilities to take steps to offer dogs and cats for adoption after they no longer are needed for research purposes.⁸⁹ These research fa-

⁸⁰ *Strickland*, 397 S.W.3d at 191–92.

⁸¹ UNIF. TRUST CODE § 408, (UNIF. LAW COMM’N 2000).

⁸² Courtney G. Lee, *The Animal Welfare Act at Fifty: Problems and Possibilities in Animal Testing Regulation*, 95 NEB. L. REV. 194, 194 (2016).

⁸³ *How the Law Affects Animals in Research*, NAT’L ANTI-VIVISECTION SOC’Y, <https://www.navs.org/what-we-do/keep-you-informed/legal-arena/general-introduction/how-the-law-affects-animals-in-research/#.XFYdsM9KgWo> [<https://perma.cc/ZUT7-UX2N>] (accessed Apr. 14, 2019).

⁸⁴ *See generally Animal Testing & Cosmetics*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/cosmetics/scienceresearch/producttesting/ucm072268.htm> [<https://perma.cc/CU82-HWL2>] (accessed Apr. 14, 2019) (“[P]rior to the use of animals, consideration should be given to the use of scientifically valid alternative methods to whole-animal testing.”).

⁸⁵ Lee, *supra* note 82, at 230–31.

⁸⁶ Michael Ollove, *Fido Survived the Research Lab. Now What?*, HUFFINGTON POST (May 4, 2018), https://www.huffingtonpost.com/entry/fido-survived-the-research-lab-now-what_us_5aec7514-e4b066cd764091c6 [<https://perma.cc/W4T4-WGBW>] (accessed Apr. 14, 2019).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ MD. CODE ANN., AGRIC. § 15-101 (West 2018).

cilities may enter into cooperative agreements with animal rescue organizations to place these animals in new homes.⁹⁰

IV. LANDSCAPES IN FERMENT

The most active and positive arena for legal change is in the state legislatures, with a particular focus on the enhanced status of companion animals within the intimate family. There have been many laws adopted throughout the fifty states that provide both additional visibility and protections for four-legged family members.⁹¹ The following is a sampling and is not meant to be a comprehensive survey. Note how companion animals are moving closer to the status of young human children. A 2018 survey found that animal welfare was the number one issue the public was interested in supporting.⁹² That courts and legislatures are considering the well-being of companion animals in divorce, trust, restraining orders, and other legal areas suggests the degree to which the law is coming to reflect the social change that has already occurred.⁹³

A. Companion Animals in Hot Cars

In 2018, Louisiana enacted a law that grants immunity to good Samaritans who forcibly enter vehicles to save minors (children) or dogs and cats in distress.⁹⁴ Under Louisiana law, a person is not liable for property damage or trespass to a motor vehicle if the damage was caused while the person was rescuing a minor or an animal in distress.⁹⁵ The immunity applies only if the person complies with several aspects of the law, such as, making a good-faith attempt to locate the owner prior to entering the vehicle, contacting law enforcement or other first responders, confirming the vehicle is locked and the animal is in imminent danger, placing a notice on the vehicle, and staying with the animal until responders arrive.⁹⁶ Note that nearly identical statutory language is used for both human children and dogs and cats.⁹⁷

A number of other states (Arizona, California, Colorado, Florida, Indiana, Kansas, Massachusetts, Ohio, Oregon, Tennessee, Vermont,

⁹⁰ *Id.*

⁹¹ See Favre & Dickinson, *supra* note 77, at 920–26 (finding that state courts and legislatures are expanding companion animal protections “in small steps all over the country”).

⁹² *Animal Welfare, Children’s Education, Hunger Are Top Three Causes Americans Care About in 2018*, KETCHUM (Apr. 19, 2018), <https://www.ketchum.com/research-reports/animal-welfare-childrens-education-hunger-are-top-three-causes-americans-care-about-in-2018/> [<https://perma.cc/5TVP-PTHT>] (accessed Apr. 14, 2019).

⁹³ Favre & Dickinson, *supra* note 77, at 920–24.

⁹⁴ LA. STAT. ANN. §§ 37:1738–1738.1 (2018).

⁹⁵ *Id.* §§ 37:1738(B)–1738.1(B).

⁹⁶ *Id.* § 37:1738.1(B).

⁹⁷ *Id.* §§ 37:1738–1738.1.

and Wisconsin)⁹⁸ have also enacted laws giving civil immunity to individuals who break-in to vehicles to remove pets (or vulnerable persons like children) in imminent danger.

B. Restraining Orders

Another area where companion animals have legal visibility is when the courts grant personal restraining orders. In the fall of 2016, Alaska modified existing divorce law to allow victims of domestic violence to seek an order for protection of property, including “a pet, regardless of . . . ownership. . . .”⁹⁹ The general definition of “pet” is rather sweeping: “‘pet’ means a vertebrate living creature maintained for companionship or pleasure”¹⁰⁰ The new provisions also allow a court, in the context of a protection-order request, to order the payment of funds by the named party for not only support of the adult victim and minor children, but also for pets in the care of the petitioner.¹⁰¹ In this context, a companion animal is provided protections similar to those of a child. As of 2017, thirty-two states had protective order provisions that included animals.¹⁰²

Relatedly, if protection orders fail and a woman with a companion animal seeks out a shelter and only finds one that does not accept pets, she may request a third-party safe haven for the animal. A difficult question arises if the woman leaves the shelter to return to the home and wants to take the animal with her. Is there a duty to decide whether such a return is in the best interest of the companion animal?¹⁰³

C. Divorce

Until 2017, in all states, divorce laws did not distinguish a dog or cat from other personal property in judicial divisions of property. In that year, Alaska was the first state to adopt a new provision for com-

⁹⁸ See Rebecca F. Wisch, *Table of State Laws That Protect Animals Left in Parked Vehicles*, MICH. STATE UNIV.: ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/topic/table-state-laws-protect-animals-left-parked-vehicles> [<https://perma.cc/NST8-VN6N>] (accessed Apr. 14, 2019) (summarizing laws in a comparative table that lists the state, citation, animals covered, prohibitions, penalties, and rescue/immunity provisions).

⁹⁹ ALASKA STAT. § 18.66.100(c)(10) (2017).

¹⁰⁰ ALASKA STAT. § 18.65.590(2) (2017).

¹⁰¹ ALASKA STAT. § 18.66.100(c)(12).

¹⁰² Rebecca F. Wisch, *Domestic Violence and Pets: List of States That Include Pets in Protection Orders*, MICH. STATE UNIV.: ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/article/domestic-violence-and-pets-list-states-include-pets-protection-orders> [<https://perma.cc/DTX6-9GWW>] (accessed Apr. 14, 2019).

¹⁰³ See Joan MacLeod Heminway & Patricia Graves Lenaghan, *Safe Haven Conundrum: The Use of Special Bailments to Keep Pets Out of Violent Households*, 12 TENN. J.L. & POL'Y 79, 80–81 (2017) (exploring efforts to keep pets out of violent households alongside human victims).

panion animals,¹⁰⁴ followed shortly by Illinois and California.¹⁰⁵ The Alaska law allows the relevant court to make specific provisions in a final divorce judgment: “for the ownership or joint ownership of the animal, taking into consideration *the well-being of the animal*.”¹⁰⁶ This statute clearly acknowledges that animals have interests independent of those of the spouses and that those interests deserve consideration by the legal system when a divorce proceeding impacts the animal. The statute acknowledges that animals within a family are in a conceptual position, more like children than property. Courts have an independent duty to consider the best outcome for the animal, along with the parties’ wishes or claims of property ownership.¹⁰⁷

D. Removal of an Animal from a Home

Another parallel between the legal protection of companion animals and children manifests when the state seeks the removal of the animal from the household to protect it from risk of future harm. If the owner of an animal has been charged with a criminal violation of a state anti-cruelty law (such as beating an animal or failing to provide adequate care for an animal), then even before the criminal charges are decided, the state may seek the removal of the animal from the defendant’s control with a forfeiture action. For example, in Michigan:

[T]he prosecuting attorney has the burden of establishing by a preponderance of the evidence that a violation of this section or section 50b occurred. If the court finds that the prosecuting attorney has met this burden, the court shall order immediate forfeiture of the animal to the animal control shelter or animal protection shelter. . . .¹⁰⁸

The state is worried that there is risk of new harm to the animal and seeks to protect the animal from this risk. This type of protection is similar to the state’s ability to remove children from a family when

¹⁰⁴ Nicole Pallotta, *Alaska Legislature Becomes First to Require Consideration of Animals’ Interests in Custody Cases*, ANIMAL LEGAL DEF. FUND (Jan. 20, 2017), <https://aldf.org/article/alaska-legislature-becomes-first-to-require-consideration-of-animals-interests-in-custody-cases/> [<https://perma.cc/2ZSB-D43V>] (accessed Apr. 14, 2019).

¹⁰⁵ Nicole Pallotta, *California’s New “Pet Custody” Law Differentiates Companion Animals From Other Types of Property*, ANIMAL LEGAL DEF. FUND (Nov. 5, 2018), <https://aldf.org/article/california-new-pet-custody-law-differentiates-companion-animals-from-other-types-of-property/> [<https://perma.cc/D437-5BRT>] (accessed Apr. 14, 2019).

¹⁰⁶ ALASKA STAT. § 25.24.160(a)(5) (2017) (emphasis added). See also 750 ILL. COMP. STAT. 5/501–503 (2018) (explaining how the court will consider the future well-being of companion animals when determining the outcome of petitions for sole or joint possession); CAL. FAM. CODE § 2605 (West 2018) (explaining how the court can require a party to care for any companion animals during the duration of court proceedings and how the companion animals’ future quality of care will be taken into consideration when assigning ownership).

¹⁰⁷ Adam Bulger, *Divorce Courts Are Starting to See Dogs as More Than Furry Toasters*, FATHERLY (Jan. 30, 2018, 6:37 PM), <https://www.fatherly.com/love-money/when-pets-become-part-of-the-divorce/> [<https://perma.cc/ZAM9-F9L2>] (accessed Apr. 14, 2019).

¹⁰⁸ MICH. COMP. LAWS § 750.50(3) (2016).

the children are at a risk of harm. For example, in Tennessee, parents charged with aggravated child abuse can have their children removed from their custody and control by state courts.¹⁰⁹ In rough parallel, Tennessee makes aggravated cruelty to an animal a crime and allows the court to remove an animal from a defendant's control, as well as prohibit a defendant's future ownership of animals.¹¹⁰ Admittedly, the removal of a child is a much more complex matter, but the state's desire to protect those in the family unit who cannot protect themselves is evident in both types of removal proceedings.

E. Extra Protection for Companion Animals

The legal system has long provided protection to animals against intentional acts of cruelty and the unnecessary infliction of pain and suffering. The first broad-based protective law was the 1867 New York anti-cruelty law.¹¹¹ This law represented a paradigm shift, as it protected all living creatures, not just commercially valuable ones.¹¹² In the past twenty years, as state laws continue to be modified by legislatures—with legislative proposals often drafted by suburban and urban humane societies—the special status of companion animals has been increasingly politically accepted.

The introduction of aggravated animal cruelty legislation is among the more significant recent changes. The state of Illinois, for instance, adopted a special provision under the title “aggravated cruelty” as follows: “No person may intentionally commit an act that causes a companion animal to suffer serious injury or death.”¹¹³ A first offense is a class four felony and may result in a court-ordered psychological or psychiatric evaluation, among other things.¹¹⁴ Liability under general animal cruelty law provisions is qualified by or conditioned on various factors such as “unnecessarily,” “knowingly,” and “cruelly.”¹¹⁵ The language from the Illinois statute, however, is without qualification. Therefore, if while driving a car in Illinois, a person intentionally runs over a cat, or alternatively, a raccoon, either act

¹⁰⁹ See *In re Jayden R.*, No. M2016-02336-COA-R3-PT, slip op. at *1,*4,*5,*8 (Tenn. Ct. App. Aug. 11, 2017) (terminating the parental rights of the parents' three children because it “is in the best interests of the child[ren]” due to aggravated child neglect convictions).

¹¹⁰ TENN. CODE ANN. § 39-14-212 (2018).

¹¹¹ David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1993 DET. C.L. REV. 1, 18 (1993).

¹¹² *Id.* at 16.

¹¹³ 510 ILL. COMP. STAT. 70/3.02(a) (2018).

¹¹⁴ 510 ILL. COMP. STAT. 70/3.02(c).

¹¹⁵ See 4 R.I. GEN. LAWS § 4-1-3(a) (2019) (“Every owner, possessor, or person having the charge or custody of any animal, who cruelly drives or works that animal when unfit for labor, or cruelly abandons that animal, . . . or willfully, intentionally . . . and/or knowingly authorizes or permits that animal to be subjected to unnecessary torture, suffering, or cruelty of any kind . . . shall be punished for each offense . . .”).

would be a crime. However, hitting the cat would be a much more serious crime.¹¹⁶

Additionally, as discussed above, in 2016, Connecticut became the first state to permit a court to order the appointment of a separate advocate for dogs and cats who represents the interests of justice in criminal abuse, welfare, or custody matters.¹¹⁷

F. Sale of Companion Animals

For a number of years, two issues have been very visible: the overpopulation of companion animals, resulting in large numbers of deaths at animal shelters, and the sale of mill animals at retail pet stores. Recently, a few states have combined these two issues and adopted laws that prohibit the general sale of companion animals in the retail setting, unless they come from an animal shelter. In effect, these laws close down both good and bad commercial breeders.

In 2017, California became the first state to enact a ban on the sale of non-rescue companion animals at pet stores.¹¹⁸ Under this new law, it is illegal to sell any companion animal in a retail store unless it was obtained from a public animal control agency, shelter, or rescue group.¹¹⁹ It also requires “each pet store to maintain records sufficient to document the source of each dog, cat, or rabbit the pet store sells . . . for at least one year and to post, in a conspicuous location on the cage or enclosure, . . . a sign listing the name of the entity from which each [animal] was obtained. . . .”¹²⁰ Violators of any provision of this law are subject to a \$500 civil penalty.¹²¹

Maryland became the second state to ban the sale of dogs and cats at retail pet stores through the “No More Puppy—and Kitten—Mills Act of 2018.”¹²² State legislators passed this piece of legislation in April 2018.¹²³ The law revamps Subtitle 7 on Retail Pet Stores of the

¹¹⁶ See 510 ILL. COMP. STAT. 70/3.02(a) (stating that aggravated cruelty toward a companion animal may result in a felony). See also TENN. CODE ANN. § 39-14-212(a) (“A person commits aggravated cruelty to animals when, with aggravated cruelty and with no justifiable purpose, the person intentionally kills or intentionally causes serious physical injury to a companion animal.”).

¹¹⁷ CONN. GEN. STAT. ANN. § 54-86n(a) (West 2016); see *supra* Section II.B.2 (discussing this topic in more detail).

¹¹⁸ Nicole Pallotta, *California Becomes First State to Ban Retail Sale of Companion Animals*, ANIMAL LEGAL DEF. FUND (Dec. 7, 2017), <https://aldf.org/article/california-becomes-first-state-ban-retail-sale-companion-animals/> [<https://perma.cc/23TF-ENCC>] (accessed Apr. 14, 2019).

¹¹⁹ *Id.*

¹²⁰ CAL. HEALTH & SAFETY 105 § 122354.5(c) (West 2018).

¹²¹ *Id.* § 122354.5(i).

¹²² Rachel Chason, *Gov. Hogan Signed a Law Banning Maryland Pet Stores from Using ‘Puppy Mills.’ Store Owners are Pushing Back*, WASH. POST (Apr. 24, 2018), https://www.washingtonpost.com/local/md-politics/maryland-to-become-second-state-to-ban-sale-of-puppies-in-stores-but-the-store-owners-are-pushing-back/2018/04/23/330ec5a2-4356-11e8-bba2-0976a82b05a2_story.html?utm_term=.e409d10fb3ce [<https://perma.cc/A9E6-34ZS>] (accessed Apr. 14, 2019).

¹²³ *Id.*

Business Regulation Code. Previously, this subtitle tried to curb the sale of dogs from puppy mills by requiring stores to disclose the source of the dog and providing consumers with more health information, but now there is a full ban on the sales.¹²⁴

G. *Joining the Family on a Dinner Night Out*

In 2018, Ohio joined about ten other states that have laws allowing restaurants to maintain “dog friendly” patios.¹²⁵ The new law provides a “retail food establishment or food service operation” the ability to allow dogs in outdoor dining areas provided some requirements are met.¹²⁶ Among other things, the law requires that food service establishments adopt policies requiring patrons to control their dogs; imposes proper vaccination for visiting dogs, and mandates that no dogs enter the restaurant through the indoor dining areas.¹²⁷ These laws suggest, again, that the public is increasingly accepting that companion animals are part of the intimate family and that they should be extended the privilege of joining their family when the humans are eating at restaurants.

H. *Support Animals in Court*

The Louisiana Legislature passed a law that will require courts to allow witnesses who are either under the age of eighteen or developmentally disabled to be accompanied by a facility dog while testifying.¹²⁸ Courts will be permitted to allow such facility dogs for any other witnesses as well. The law establishes procedures defining facility dogs and their presence in the courtroom.¹²⁹ The law was approved 91–0 by the House and 31–0 by the Senate and was signed into law on May 23, 2018, taking effect August 1.¹³⁰ In 2018, the Michigan Legislature approved House Bill 5645, which allows witnesses of child abuse, child sexual abuse, and elder abuse to be accompanied by a trained and evaluated “courtroom support dog.”¹³¹ The bill passed by a vote of 107–1 in the House and 36–0 in the Senate and is scheduled to take effect immediately.¹³²

¹²⁴ MD. CODE ANN., BUS. REG. § 19-703 (LexisNexis 2015).

¹²⁵ OHIO REV. CODE ANN. § 3717.14 (LexisNexis 2018); see Rebecca F. Wisch, *FAQ: Dogs in Restaurants*, MICH. STATE UNIV.: ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/article/faq-dogs-restaurants> [<https://perma.cc/T2X5-E9T6>] (accessed Apr. 14, 2019) (discussing state laws that allow dogs in outdoor dining areas).

¹²⁶ OHIO REV. CODE ANN. § 3717.14(A)(1).

¹²⁷ *Id.* § 3717.14(B)–(C).

¹²⁸ LA. STAT. ANN. § 15:284(A) (2018).

¹²⁹ *Id.* § 15:284.

¹³⁰ *Louisiana House Bill 292*, LEGISCAN (2018), <https://legiscan.com/LA/bill/HB292/2018> [<https://perma.cc/D835-7HTN>] (accessed Apr. 14, 2019).

¹³¹ H.B. 5645, 99th Leg., Reg. Sess. (Mich. 2018).

¹³² *House Bill 5645*, MICH. LEG. (2018), <http://legislature.mi.gov/doc.aspx?2018-HB-5645> [<https://perma.cc/E2XJ-C2CD>] (accessed Apr. 14, 2019).

I. *Animal Consortium*

The law may head in a direction that will support the legal integration of companion animals into the intimate family. Common law describes the legal concept of “consortium,”¹³³ or the right to have associations and companionship among family members. This cause of action in the U.S. allows a member of a family to sue a third party for loss of consortium for harm done to a different member of the intimate family. New Mexico has expanded the availability of this legal action to include individuals not normally considered within the traditional intimate family, such as grandparents.¹³⁴ In so doing, they have developed a test to help discern who is legally relevant within the core of a family. The potential factors to be considered include:

[D]uration of the relationship; mutual dependence; common contributions to a life together; shared experience; living in the same household; financial support and dependence; emotional reliance on each other; qualities of their day to day relationship; and the manner in which they related to each other in attending to life’s mundane requirements.¹³⁵

A number of these criteria are satisfied in many homes where two-legged and four-legged beings live together. As the above material suggests, states are increasingly viewing companion animals as members of a family. However, no state has yet formally extended family status to a companion animal, allowing a recovery of damages by humans if a companion animal is harmed. If states take this path, the law will provide an alternative basis for awarding damages, other than the current “harm to property” basis.

V. ANIMAL RIGHTS

In the last five years, courts have asked to establish legal rights for animals by acknowledging particular animals as ‘persons’ within the law.¹³⁶ The issue is receiving increasing visibility.¹³⁷ It has even

¹³³ See generally Favre & Dickinson, *supra* note 77, at 894 (providing an overview of the legal definition and consequences of the term “consortium”).

¹³⁴ *Fernandez v. Walgreen Hastings Co.*, 968 P.2d 774, 784 (N.M. 1998).

¹³⁵ *Fitzjerrell v. City of Gallup*, 79 P.3d 836, 840 (N.M. Ct. App. 2003).

¹³⁶ See Richard L. Cupp, Jr., *Litigating Nonhuman Animal Legal Personhood*, 50 TEX. TECH L. REV. 573, 574 (2018) (detailing several litigated cases attempting to obtain legal personhood status for chimpanzees).

¹³⁷ Boston University’s alumni magazine had the picture of a standing chimpanzee on the cover and a substantial article about the efforts of Steven Wise to obtain legal rights for chimpanzees. Rich Barlow, *Nonhuman Rights: Is it Time to Unlock the Cage?*, BOSTONIA, <http://www.bu.edu/bostonia/summer17/nonhuman-rights-project/> [<https://perma.cc/329T-FYQL>] (accessed Apr. 14, 2019). *Harvard Magazine* published an article with pictures about the activities and ideas emanating from the Animal Law and Policy Center at Harvard Law School. Cara Feinberg, *Are Animals “Things?”*, HARV. MAG. (Mar.–Apr. 2016), <http://harvardmagazine.com/2016/03/are-animals-things> [<https://perma.cc/5FDK-HRH4>] (accessed Apr. 14, 2019). The magazine for the American Bar Association had a picture of an attorney with her assistance dog on the cover of the September, 2017 *ABA Journal*. *Legal Rebels: Pattern of Progress*, A.B.A. J. (Sept. 2017), <http://>

come to the notice of the global business-focused magazine *The Economist*.¹³⁸

The most detailed and comprehensive effort in the courts has been led by Steven Wise and the Nonhuman Rights Project (NhRP).¹³⁹ The story is rather long and filled with legal detail.¹⁴⁰ A fair rendering of the initial story is provided in the documentary *Unlocking the Cage*.¹⁴¹ The issue is simple but elegant: Is a chimpanzee a legal person, so as to be able to take advantage of the common law doctrine of habeas corpus and question the conditions under which they are being kept by their owners? In 2014, one lower court finally provided an opinion on the merits of the question. The court said: no, a chimpanzee is not a legal person.¹⁴² The court rejected this claim, reasoning that the ability to assume legal obligations is necessary to have legal rights.

Needless to say, unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights—such as the fundamental right to liberty protected by the writ of habeas corpus—that have been afforded to human beings.¹⁴³

This is but a thin reed upon which to rest the answer to such a critical question. After a series of appeals, a higher court decided not to hear one of the cases.¹⁴⁴ However, a concurring opinion set the stage very nicely for future efforts.

I write to underscore that denial of leave to appeal is not a decision on the merits of petitioner's claims. The question will have to be addressed eventually. Can a nonhuman animal be entitled to release from confinement through the writ of habeas corpus? Should such a being be treated as a person or as property, in essence a thing? . . . The Appellate Division's conclusion that a chimpanzee cannot be considered a "person" and is not entitled to habeas relief is in fact based on nothing more than the premise that a chimpanzee is not a member of the human species The better ap-

www.abajournal.com/magazine/issue/2017/09/ [<https://perma.cc/S3W2-DFYT>] (accessed Apr. 14, 2019).

¹³⁸ *Gradually, Nervously, Courts Are Granting Rights to Animals*, ECONOMIST (Dec. 18, 2018), <https://www.economist.com/international/2018/12/22/gradually-nervously-courts-are-granting-rights-to-animals> [<https://perma.cc/635S-EABU>] (accessed Apr. 14, 2019). The title to the article is misleading in that no rights have been granted.

¹³⁹ See *Who We Are*, NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/who-we-are> [<https://perma.cc/K9TF-C8DF>] (accessed Apr. 14, 2019) (detailing the commitment the Nonhuman Rights Project (NhRP) has to advocating for the legal status of nonhuman animals).

¹⁴⁰ See Barlow, *supra* note 137 (giving details on the legal proceedings initiated by the NhRP to gain legal personhood for chimpanzees).

¹⁴¹ UNLOCKING THE CAGE (Pennebaker Hegedus Films 2016).

¹⁴² *People ex rel. Nonhuman Rights Project, Inc., v. Lavery*, 998 N.Y.S.2d 248, 251 (N.Y. App. Div. 2014).

¹⁴³ *Id.*

¹⁴⁴ *People ex rel. Nonhuman Rights Project, Inc., v. Lavery*, 26 N.Y.3d 902 (N.Y. 2015), *appeal denied*.

proach in my view is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus. That question, one of precise moral and legal status, is the one that matters here. Moreover, the answer to that question will depend on our assessment of the intrinsic nature of chimpanzees as a species The reliance on a paradigm that determines entitlement to a court decision based on whether the party is considered a “person” or relegated to the category of a “thing” amounts to a refusal to confront a manifest injustice. Whether a being has the right to seek freedom from confinement through the writ of habeas corpus should not be treated as a simple either/or proposition. The evolving nature of life makes clear that chimpanzees and humans exist on a continuum of living beings. Chimpanzees share at least 96% of their DNA with humans. They are autonomous, intelligent creatures. To solve this dilemma, we have to recognize its complexity and confront it.¹⁴⁵

While some litigation may remain in New York, in 2018, the NhRP initiated litigation in Connecticut with elephants as the focus of the habeas corpus action.¹⁴⁶

Dec. 3, 2018, Hartford, CT—The Nonhuman Rights Project (NhRP) has filed a Motion in the Supreme Court of Connecticut seeking transfer to that court of its appeal on behalf of NhRP elephant clients Beulah, Karen, and Minnie.¹⁴⁷

In 2015, the animal rights group, PETA, filed its own legal action seeking to establish personhood for an animal, this time in federal court, on behalf of a macaque named Naruto.¹⁴⁸

Naruto was a seven-year-old crested macaque that lived—and may still live—in a reserve on the island of Sulawesi, Indonesia. In 2011, a wildlife photographer, David Slater, left his camera unattended in the reserve. Naruto allegedly took several photographs of himself (known as the “Monkey Selfies”) with Slater’s camera.¹⁴⁹

The question before the court was whether a macaque could be considered a legal person under the Copyright Act¹⁵⁰ and whether Naruto could receive the protections of the Act for pictures he took but were commercially used by the owner of the camera. However, there was an initial difficulty as the court rejected the assertion that PETA was acting as a next friend of Naruto.¹⁵¹

¹⁴⁵ *Matter of Nonhuman Rights Project, Inc., v. Lavery*, 31 N.Y.3d 1054, 1056–59 (N.Y. 2018) (Fahey, J., concurring) (citations omitted).

¹⁴⁶ *Nonhuman Rights Project, Inc., ex rel. Beulah v. R.W. Commerford & Sons, Inc.*, No. LLICV175009822S, 2018 WL 3014069, at *1 (Conn. Super. Ct. May 23, 2018).

¹⁴⁷ Lauren Choplin, *NhRP Seeks Transfer of Connecticut Elephant Rights Case to State’s Highest Court*, NONHUMAN RIGHTS BLOG (Dec. 3, 2018), <https://www.nonhumanrights.org/blog/motion-to-transfer-connecticut/> [https://perma.cc/U22N-TKBR] (accessed Apr. 14, 2019).

¹⁴⁸ *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018).

¹⁴⁹ *Id.* at 420.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 437.

We gravely doubt that PETA can validly assert “next friend” status to represent claims made for the monkey both (1) because PETA has failed to allege any facts to establish the required significant relationship between a next friend and a real party in interest and (2) because an animal cannot be represented, under our laws, by a “next friend.”¹⁵²

In this case, the court assumes, for purposes of analysis, that an animal is capable of having a legal right, but only if the law specifically grants it to them.¹⁵³ The court found that nonhumans were not given any rights under the text of the Copyright Act, and therefore *Naruto* has no standing under the law in question.¹⁵⁴

The court in *Cetacean* did not rely on the fact that the statutes at issue in that case referred to “persons” or “individuals.” Instead, the court crafted a simple rule of statutory interpretation: if an Act of Congress plainly states that animals have statutory standing, then animals have statutory standing. If the statute does not so plainly state, then animals do not have statutory standing. The Copyright Act does not expressly authorize animals to file copyright infringement suits under the statute. Therefore, based on this court’s precedent in *Cetacean*, *Naruto* lacks statutory standing to sue under the Copyright Act.¹⁵⁵

A different approach to animal rights, at least for wildlife, is proposed in Professor Karen Bradshaw’s law review article, *Animal Property Rights*.¹⁵⁶ The article suggests that wildlife should receive legal rights as the beneficiaries of land trusts and provides a comprehensive argument for why land trusts are needed and how they will operate.¹⁵⁷

VI. LEGAL INSTITUTIONS - LAW SCHOOLS

As the reader might be aware, law schools around the country have been dealing with declining enrollment for more than five years.¹⁵⁸ One consequence of this reality is that the operational budgets for many, if not most, law schools have been shrinking. Funds for new and ‘fringe’ areas of law are simply not available. Only a few law schools have been able to expand their animal law programs over the past five years, and that is often with external funding.¹⁵⁹ When Pro-

¹⁵² *Id.* at 421. For more details on this point, *see id.* at n.3 (“We feel compelled to note that PETA’s deficiencies in this regard go far beyond its failure to plead a significant relationship with *Naruto*. Indeed, if any such relationship exists, PETA appears to have failed to live up to the title of ‘friend.’”).

¹⁵³ *Naruto*, 888 F.3d at 422.

¹⁵⁴ *Id.* at 420.

¹⁵⁵ *Id.* at 425–26 (citations omitted). The court here references *Cetacean Cmty v. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004).

¹⁵⁶ Karen Bradshaw, *Animal Property Rights*, 89 U. COLO. L. REV. 809, 809 (2018).

¹⁵⁷ *Id.* at 833–34.

¹⁵⁸ Elizabeth Olson & David Segal, *A Steep Slide in Law School Enrollment Accelerates*, N.Y. TIMES: DEALBOOK (Dec. 17, 2014), <https://dealbook.nytimes.com/2014/12/17/law-school-enrollment-falls-to-lowest-level-since-1987/> [<https://perma.cc/A2Q7-QGDZ>] (accessed Apr. 14, 2019).

¹⁵⁹ *See Bob Barker’s Donations to Law Schools*, NAT’L ASS’N FOR BIOMEDICAL RES.: ANIMAL L., <http://www.nabranimallaw.org/law-schools/bob-barkers-donations-to-law->

fessor Kristen Stilt arrived at Harvard, she was able to create a robust Animal Law and Policy Program, which hosts conferences and visiting scholars.¹⁶⁰ Lewis & Clark Law School has continued its long-standing program, the Center for Animal Law Studies (CALs), under the direction of Associate Dean and Executive Director Pamela Frasch.¹⁶¹ In recent years, CALs has added an LL.M. degree in Animal Law to its repertory, the only such program in the world.¹⁶² At Michigan State University (MSU), the Animal Legal and Historical Center, a web-based animal law library, has continued to grow, attracting as many as 10,000 visitors in a day.¹⁶³ Recent additional outside funding provided to MSU College of Law has allowed for the creation of a new animal welfare clinic.¹⁶⁴ These are three major animal law programs in the United States. In 2018, they came together to support a global conference of academics and activists in Hong Kong.¹⁶⁵

Three other law schools have created new programs in the past five years. Assistant Clinical Professor of Law and Director Jessica Rubin of the University of Connecticut School of Law has created an animal law clinic that takes advantage of the recent Connecticut law that allows the appointment of law students to help with criminal cases¹⁶⁶ dealing with animal cruelty prosecutions.¹⁶⁷ Associate Dean Elizabeth Dennis is heading up the new Animal Law Clinic at the South Texas College of Law Houston.¹⁶⁸ Another new program is under the leadership of Professor Taimie Bryant at UCLA School of Law.¹⁶⁹ UCLA's Animal Law and Policy Small Grants Program sup-

schools/ [https://perma.cc/88VU-SWQN] (accessed Apr. 14, 2019) (indicating Bob Barker has donated millions of dollars to law schools to implement animal law programs); *Animal Legal Defense Fund Collaborations*, ANIMAL LEGAL DEF. FUND, https://aldf.org/about-us/animal-legal-defense-fund-collaborations/ [https://perma.cc/TE3D-4A8B] (accessed Apr. 14, 2019) (showing that Animal Legal Defense Fund financially supports Lewis & Clark Law School's Center for Animal Law Studies).

¹⁶⁰ *History: Establishment of the Animal Law & Policy Program at Harvard Law School*, HARVARD LAW SCH.: ANIMAL LAW & POLICY PROGRAM, http://animal.law.harvard.edu/ [https://perma.cc/QJ32-FXBV] (accessed Apr. 14, 2019).

¹⁶¹ *About Us*, LEWIS & CLARK LAW SCH.: CTR. FOR ANIMAL LAW STUDIES, https://law.lclark.edu/cen-ters/animal_law_studies/about_us/ [https://perma.cc/SF67-5UZY] (accessed Apr. 14, 2019).

¹⁶² *Id.*

¹⁶³ Animal Legal and Historical Center, Google Analytics (2018) (on file with author).

¹⁶⁴ *Animal Welfare Clinic*, MICH. STATE U. C. L., http://www.law.msu.edu/clinics/animal.html [https://perma.cc/7GBM-MTS8] (accessed Apr. 14, 2019).

¹⁶⁵ *Sponsor List*, Global Animal Law Conference III: H.K. 2018, https://animallaw-conference.law.hku.hk/sponsor-list/ [https://perma.cc/63FL-QGES] (accessed Apr. 14, 2019).

¹⁶⁶ *Jessica Rubin*, UNIV. CONN. SCH. OF LAW, https://www.law.uconn.edu/faculty/profiles/jessica-rubin [https://perma.cc/23UZ-DD3W] (accessed Apr. 14, 2019).

¹⁶⁷ CONN. GEN. STAT. § 54-86n.

¹⁶⁸ *Animal Law Clinic*, S. TEX. C. L. HOU., http://www.stcl.edu/academics/legal-clinics/animal-law-clinic/ [https://perma.cc/8XQF-R5JL] (accessed Apr. 14, 2019).

¹⁶⁹ *Animal Law and Policy Small Grants Program*, UCLA SCH. L., https://law.ucla.edu/centers/social-policy/animal-law-grants-program/about/ [https://perma.cc/5ZW9-WCQ2] (accessed Apr. 14, 2019).

ports legal and non-legal empirical scholarship to advance animal law and policy reform.¹⁷⁰

VII. THE FUTURE

As society (and in particular, those individuals with substantial financial resources) becomes more concerned about different categories of animals, positive things will happen for the welfare and well-being of animals. The expansion of law school projects with an animal focus should increase modestly. Continued funding for animal rights litigation should assure that the filing of lawsuits by the NhRP and others will continue. However, new steps in the development of animal rights will occur only with the evolution of legal theory and perspective within the judiciary, and it is not known if this will happen in the next five years.

The visibility and protections for companion animals will continue to increase. The next five years should see the amending of additional state divorce laws allowing analysis of the best interests of animals by judges. More law school clinics may be able to represent animal interests in criminal proceedings, as now happens at the University of Connecticut School of Law. Animal consortium may be considered by some states as a more relevant cause of action for humans to recover damages due to harm to a companion animal.

The category of industrial farm animals, or factory farming, will continue to be a difficult area to obtain real change for animals. The primary hope for real change is that a commercially acceptable plant-based meat substitute shakes up the market place.¹⁷¹ No major change to benefit farm animals is expected at the national legal level. State-based citizen initiatives are the only real hope for change for farm animals.

What will be most exciting for the future is what cannot be seen now but will arise out of some unforeseen trigger. Stay tuned for another five-year wild ride.

¹⁷⁰ *Id.*

¹⁷¹ See Susan Milius, *Can Science Build a Better Burger?*, SCI. NEWS (Sept. 20, 2018, 12:30 PM), <https://www.sciencenews.org/article/can-science-build-better-burger> [<https://perma.cc/9S72-P9GP>] (accessed Apr. 14, 2019) (describing the many reasons why scientists are creating “clean meat,” including helping the environment and people’s health); see also Tim Carman, *Burger King’s Impossible Whopper Tastes Even Better than the Real Thing*, WASH. POST (Apr. 15, 2019), https://www.washingtonpost.com/news/voraciously/wp/2019/04/15/burger-kings-impossible-whopper-tastes-even-better-than-the-real-thing/?noredirect=on&utm_term=.f6023bf93c3b (accessed Apr. 16, 2019) (explaining the success of a plant-based burger).

