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## TOWARD LEGAL RIGHTS FOR ANIMALS

*By Stephen I. Burr\**

### INTRODUCTION

"Man", Mark Twain said, "is the only animal that blushes. Or needs to."<sup>1</sup> Part of the reason for such blushing could well be man's treatment of other animals. Man has viewed animals as objects which exist for his use. We train animals to do our bidding, and punish them when they are slow to behave as we desire. When we encounter animals we are unable to domesticate, we hunt them for food or sport, or if not suitable for those purposes, we ignore them. This use and abuse of animals has risen to new levels in the modern Western World. Our demand for meat and leather has required the development of more efficient techniques for exploitation of domestic animals.<sup>2</sup> The explosion of scientific research, especially in the life sciences, has created an almost insatiable demand for research animals.<sup>3</sup> By ignoring the needs of animals as we expand our industrialized economy we have abused them in more subtle ways: habitat destruction and pollution have had serious impacts on animal populations.<sup>4</sup>

Arguably, the problem has resulted not so much from the intentional mistreatment of animals, as from the way in which we have ignored animals and their needs. Early law dealing with animals reflected this lack of concern, affording animals almost no protection from man. However, recent events may change our attitudes. The effects of environmental degradation have taught us something about our interdependence with natural systems. This new model of natural interdependence has led scientists for the first time to look on animals as something close to man, something really worthy of study on that account alone. What these scientists have learned has firmly shaken traditional ideas about man's relationship with animals. However, the moral and legal implications of these new concepts have hardly been explored. This article will attempt to provide some insight into the scientific, moral and legal traditions

that have brought us to our present position. It will also attempt to suggest ways in which our legal system could respond to our rapidly changing ideas about animals.

### I. EARLY NON-LEGAL CONCEPTS OF ANIMALS IN WESTERN THOUGHT

Our modern concepts of animals are rooted in the rationalist world of Plato and Aristotle. At a time when many cultures still clung to mythic concepts of man's relationship with the natural world, Plato was defining man in terms of his difference from that world. To him the human soul was the reasoning part of man's nature, somehow removed and above the chaos of the physical world.<sup>5</sup> Aristotle applied this dualism to his studies of nature. He placed living things within a static hierarchy based on the contents of their souls. Plants were lowest, having merely nutritive souls.<sup>6</sup> Animals followed, having both nutritive and sensitive souls.<sup>7</sup> At the apex was man, who possessed a rational soul, as well as nutritive and sensitive souls.<sup>8</sup> To Aristotle man was separate from and above the natural world because he alone possessed the capacity to reason.<sup>9</sup>

Early Judaeo-Christian writings also separated man from the natural world:

So God created man in his own image . . . and God said to them, 'Be fruitful and multiply, and fill the earth and subdue it; and have domain over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth.'<sup>10</sup>

Whether such a mandate, to fill and subdue the earth, is equally suited to a culture whose power to *destroy* that very earth has so vastly grown, is of course a serious question.<sup>11</sup>

While the ancient Greeks and Hebrews merely posited the superiority of man, the Romans made the destructive potential of such a world view a reality. The Roman emperors brought back vast collections of exotic animals from conquered lands to establish personal menageries for their own entertainment. For the masses the sport of animal combat was created, pitting animals against each other or humans.<sup>12</sup> These entertainments were prototypes of some modern methods of animal exploitation, such as zoos and circus acts.<sup>13</sup>

While much of this organized abuse of animals disappeared with the fall of Rome, the rise of the Christian Church had little effect on the firmly imbedded conceptual dichotomy of man and animals. Christian theology, with its anthropocentric world view, reinforced the idea of human superiority. During this period the monotheistic tradition of the Church gradually replaced the widespread animistic

religions of Europe.<sup>14</sup> A key figure in the development of medieval Christian ontology was Thomas Aquinas. He synthesized the dualism inherent in the story of the Creation and the Fall with the explicit dualism of Aristotle, positing a static hierarchy of creation not unlike Aristotle's, but with Christian terminology.<sup>15</sup> Animals, to Aquinas, could not reason and therefore did not possess the equivalent of the human soul. Kindness to animals was something to be encouraged, Aquinas felt, but primarily because kindness to animals might dispose men to exercise kindness toward each other.<sup>16</sup> This approach provided the justification for much of the anti-cruelty legislation that was to follow 600 years after Aquinas. When attacked as unconstitutional takings of property (the right to use an animal) without due process of law, those statutes were upheld as legitimate efforts by state governments to protect public morality.<sup>17</sup> The implication of such an approach is that animals should be protected because allowing men to abuse them corrupts men's morals, not because animals deserve to be protected in their own right. This is consistent with the Aristotelean - Thomistic conception of animals as completely different from and inferior to man.

The Renaissance, Reformation and Scientific Revolution of the 15 - 17th centuries greatly increased man's opinion of himself, but it did not significantly change his opinion of animals. They were viewed as intricate machines, cogs in the bigger machine set in motion by God. The leading exponent of this position was Rene Descartes. Animals, to Descartes, possessed no ability to reason. This assumption led him, as it had Aristotle and Aquinas, to conclude that animals had no equivalent of the human soul.<sup>18</sup> Because the ability to reason was so fundamental to Descartes' approach to the nature of man, he saw the lack of reason as more crippling to animals than even Aristotle had. He was unwilling to concede that animals, in the absence of reason, could even feel pain.<sup>19</sup> It was this view of animals as unthinking, unfeeling beings that provided the moral setting in which an intellectual heir of Descartes could kick his dog to "hear the creaking of the machine."<sup>20</sup>

The philosophy of Descartes and his contemporaries probably represents the nadir of sensitivity toward animals in Western thought. Throughout the 17th and 18th centuries the study of animals as objects, things fit only for classification and dissection, flourished. Linnaeus distinguished and described thousands of species, placing each species in an eternal niche, never changing or developing.<sup>21</sup> Throughout the Scientific Revolution and the Enlightenment, animals remained somewhere between plants and man on the ontological scale, a qualitatively different thing from man.

By the end of the 18th century a reaction to the Enlightenment's atomistic model of creation had begun.<sup>22</sup> A new generation of German and English intellectuals enunciated a romantic view of the world. Their view was idealistic, emphasizing the organic nature of the world.<sup>23</sup> The Romantic reaction downplayed the importance of reason, and heralded a widespread return to orthodox religion. While "Romantics" sang the praises of Nature<sup>24</sup>, they in fact rarely followed the implications of their organic philosophy to their logical conclusions. While professing to see divinity in all creation, Blacks, Indians, women, children and animals were still treated as essentially without rights.<sup>25</sup> However, the positive effect of the Romantic movement was a reawakening of man's awareness of his interdependency with the natural world. This movement had an American equivalent in the transcendentalist movement among New England intellectuals. Men such as Emerson and Thoreau taught that the natural world deserved respect. To them, man's happiness rested largely on his ability to live harmoniously with the rest of Creation.<sup>26</sup> It was against this intellectual background that anti-cruelty statutes began to be passed in this country.<sup>27</sup>

However, it was not until the middle of the 19th century that the traditional view of animals was seriously questioned. The publication of Darwin's work on the interaction and evolution of species was a direct attack on the static hierarchy-of-creation model. To Darwin, animals and man were not created intact at some certain date in the past, and had not existed unchanging into the present. The Darwinian view of nature was of a dynamic, changing, interdependent web of creation,<sup>28</sup> a shattering idea to people accustomed to thinking of themselves as sitting Godlike above the brute forces in the natural world. Darwin's work should have had real impact on our traditional moral and legal concepts of animals. The implication of his work was that animals and man are qualitatively similar, that "whatever was said of men could differ only in degree from what was said of other animals".<sup>29</sup> The ability to reason, to Darwin, was a product of selective pressures which might produce similar abilities in other creatures.<sup>30</sup>

Unfortunately, proponents of human superiority found in Darwin's "survival of the fittest" theory a substitute for Aristotle's rational soul theory of human superiority. Man, by his conquest of nature, had shown himself to be the "fittest" animal. His conquest was morally justified by the "law of the jungle", the need for self-preservation. Man was not only better, or "fitter", than other creatures, but his continued domination was proper, even necessary, to the proper functioning of the natural order.<sup>31</sup>

Either because of such corruptions of Darwin's work, or because our culture was not yet ready to discard the Platonic world view, Darwin's work has not exerted real force in changing our moral and legal concepts of animals. Our early law concerning animals was erected on the moral foundation laid by Aristotle, Aquinas and Descartes. Because we have resisted changing our moral position concerning animals, we have not recognized the insufficiency of our legal conceptions concerning animals. As these ancient legal principles are still dominant, an understanding of them is crucial to an understanding of the position of animals today.

## II. EARLY LEGAL CONCEPTS OF ANIMALS IN THE WESTERN WORLD

### A. *The Common Law*

The common law developed two broad classes of animals, "domitae" or "mansuetae naturae" and "ferae naturae", or domestic and wild animals respectively.<sup>32</sup> Domestic animals are those which have adjusted to life with man, and normally willingly remain under his control.<sup>33</sup> These animals are the property of the owner, and in the absence of statutes controlling use, the owner may treat the animals as he wishes, including disposing of them. Cruelty by the owner to domestic animals is indictable at common law only when it is so publicly performed as to constitute a public nuisance.<sup>34</sup> In addition, animals receive some indirect protection through property law. An individual who does not own animals, and abuses them so that their value as property is lessened, may be liable to their owner for trespass or malicious mischief.<sup>35</sup> However, at common law, animals have no rights in themselves, even to be protected from the infliction of completely unnecessary pain.<sup>36</sup> Although this void has been partially filled today by anti-cruelty statutes, the absence of animal rights at common law is still significant. If a judge interprets a particular fact situation as being outside the reach of the anti-cruelty statute, the animal is literally without protection.

Wild animals are those which are incapable of being completely domesticated.<sup>37</sup> The ownership and control of wild animals present thorny legal questions. A well known property law casebook<sup>38</sup> used by first year law students introduces them to the hoary world of the common law of property with the celebrated case of *Pierson v. Post*.<sup>39</sup> That 1805 decision by the New York Supreme Court turned on a dispute between two hunters in pursuit of a fox. The first hunter was engaged in what is commonly known as a fox hunt. Equipped with horses and hounds he was pursuing a fox on wild uninhabited land. The second hunter, seeing an opportunity, shot

the flushed fox and carried it off. The first hunter brought the action to recover damages for the loss of the fox. After consulting precedents as far back as Justinian's Institutes the court resolved the dispute in favor of the second hunter, feeling that merely flushing an animal does not constitute sufficient control to amount to possession of the animal as property. This case illustrates much about what still is the common law concerning wild animals. In the absence of statutory restriction any person can take wild animals on public land and reduce them to his own possession, thus acquiring a qualified property right in the animal.<sup>40</sup> The right is qualified because if the animal escapes and reverts to its wild state, the property right is extinguished.<sup>41</sup> Owners of land, however, have an exclusive right to take the wild animals on their land, except as that right is limited by the state.<sup>42</sup> Thus, even on his own land an individual may be restricted from taking wild animals where the public interest is asserted by the state. However, the landowner does have the right to prevent others from killing wild animals on his land.<sup>43</sup>

As far back as ancient Athens laws were enacted forbidding the killing of game, although the justification then was apparently that the Athenians enjoyed the chase so much that they were neglecting the mechanical arts.<sup>44</sup> Roman law described wild animals as having no owner, thus belonging to no one, although they could be acquired by reducing them to one's possession.<sup>45</sup> The only restriction recognized in Roman law, as well as the Institutes of Justinian, was the right of the landowner to game on his property.<sup>46</sup> Apparently game was sufficiently common that the government made no attempt to restrict taking.<sup>47</sup>

In feudal Europe the restrictions placed on game-taking became more pervasive, and the scholarly debate more intense. It was argued that God gave dominion over the beasts to man in general, and that this natural relationship could not be infringed upon by particular men.<sup>48</sup> The response was that natural law only *permits* the taking of game by all men, it doesn't *command* it, and things which the natural law only permits can be restricted by the state through civil law.<sup>49</sup> Blackstone notes the existence of similar authority in the English kings, although he seems to limit the king's power to those wild animals known as "game"; that is, those animals worth hunting.<sup>50</sup>

This power of the government to control the use of wild animals was vested in the colonial governments, and passed to the state governments with the revolution.<sup>51</sup> From the earliest days of their authority states passed statutes aimed at controlling the taking of

game. Even in the frontier society of early America, where game was essential to life, the states asserted their authority.<sup>52</sup>

The power of the states to pass laws regulating game was upheld in 1896 by the Supreme Court in *Geer v. Connecticut*.<sup>53</sup> The case involved a Connecticut statute which prohibited the killing of game for the purpose of transporting it beyond state boundaries. The Court reviewed the development of Western law concerning governmental control of wild animals, and concluded that the states had undoubted power to control the taking of game. The source of this power was the joint ownership of all wild animals by the American people as a whole. This common ownership meant that the interest of the group in preserving wild animals surpassed an individual's right to take game. Moreover, this group interest was assertable by the state, acting as the representative of all. This theory of state authority, resting in ownership, is known as the "dominum" theory. In a later decision, *Toomer v. Witsell*,<sup>54</sup> the Court moved away from the "dominum" theory to the "imperium" theory, based on the government's power to regulate. Citing Roscoe Pound, the Court decided that ". . . the whole ownership theory, in fact, is now generally regarded as a fiction expressive in legal shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an important resource."<sup>55</sup> Thus the police power theory has replaced the ownership theory as the justification for state control of wildlife.<sup>56</sup> This change in theoretical basis does not seem to have great practical significance.<sup>57</sup>

Another interesting aspect of the *Geer* decision was the Court's dictum concerning the state's *obligation* to exercise its authority concerning the taking of game for the benefit of all its citizens:

Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good.<sup>58</sup>

The concept expressed by the Court is that of a Public Trust. In administering the trust corpus (wildlife) the state must act to benefit its citizens. This trust might place certain obligations on the states, and grant certain rights to citizen beneficiaries. If the state is seen as the administrator of the trust, arguably it would have "the duty of the trustee to preserve the resource and protect it against



loss, dissipation or diminution and to act with diligence, fairness and faithfulness in doing so."<sup>59</sup> This latter reasoning goes far beyond the Court's holding in *Geer*, which dealt solely with the state's right to control the taking of game, not with its obligations to preserve that game. Given the Court's recent reluctance to adopt a Public Trust type analysis in other areas,<sup>60</sup> it is doubtful that the dictum in *Geer* quoted above has real force today.

When the absence of any controls over the administration of wild animals by the state is added to the limited protection afforded domestic animals, it becomes clear that the common law has not provided much protection for animals. Domestic animals are treated as personal property, subject to the owner's whim. Wild animals are treated as common property, available to be exploited by all unless the exploitation is regulated by the state. No animal has the right to life, or even the right to be free from needless suffering, unless the abuse of an animal constitutes a public nuisance or the invasion of another's property right. This total absence of legal protection was too much for many people sensitive to animal suffering, and resulted in the enactment of statutes aimed at preventing the worst of the abuses.

### *B. Early Statutes*

The first anti-cruelty statute in the Western world was enacted by the Puritans of the Massachusetts Bay Colony in 1641. The statute provided that "no man shall exercise any Tirrany or Crueltie towards any brute Creature which are usuallie kept for man's use". [sic]<sup>61</sup> The next anti-cruelty statute in this country came some 190 years later, when in 1828 the New York legislature characterized malicious killing or torture of an animal as a misdemeanor.<sup>62</sup> Other states followed in rapid succession with measures aimed at the worst instances of animal abuse.<sup>63</sup> These statutes marked the first recognition in our legal system that animals are something other than insensate property, and deserve to be protected, even against their owners. As noted above, this radical departure from the common law property right was seen as a constitutionally proper attempt to protect public morality.<sup>64</sup> This is not to say that proponents of these statutes were not motivated by concern for the animals. The problem was that they were dealing with a legal system that did not recognize *any* rights for animals. When only humans have rights, then legislation such as the cruelty statutes, which interfere with human property rights, have to be justified in human terms. A particular kind of legal fiction had to be developed for that purpose.

The cruelty statutes have not always proved effective in protecting animals, and arguably this weakness might be traced back to their initial justification. By implication the statutes require a balancing of human and animal interests to determine whether a particular act constitutes a violation. Not surprisingly, almost any human interest is sufficient to outweigh almost any animal interest. A case in point is the 1953 decision of the New Mexico Supreme Court in *State v. Buford*.<sup>65</sup> The defendant was charged with violating the New Mexico Cruelty to Animals Statute by staging a cockfight. That statute provided that if "any person torture, [or] torment . . . any animal" he would be guilty of a misdemeanor.<sup>66</sup> Among other things, the defendant contended that cockfighting was not proscribed by the statute.<sup>67</sup> In affirming a dismissal of the information, the court was concerned by the broad sweep of the statute, feeling that a literal construction might extend to such socially acceptable activities as baiting hooks with live minnows.<sup>68</sup> The court balanced the human and animal interests involved, noted the generally accepted maxim that penal statutes should be strictly construed, and held that:

While it is true that in the minds of some men, there is nothing more violent, wanton, and cruel, necessarily producing pain and suffering to an animal, than placing a cock in a ring with another cock, both equipped with artificial spurs, to fight to the death, solely for man's amusement and sport, *others consider it an honorable sport mellowed in the crucible of time so as to become an established tradition not unlike calf-roping, steer riding, bull-dogging, and bronco busting . . .* Admittedly the words 'torture' and 'torment', under the prevailing definitions which include pain and suffering 'permitted' would seem to embrace fighting cocks equipped with artificial spurs or gaffs capable of cutting deep wounds and sharp gashes in the cocks, but when looking at the statute as a whole we are not convinced the legislature so intended it to be construed.<sup>69</sup> [emphasis supplied]

Note that the court appears to be weighing the human interest in entertainment against the other *human* interest of not living in a society which inflicts cruelty on animals. It doesn't really discuss what the cock's rights might be, if any. Results such as that reached in this case are, at bottom, tied into our failure to enact statutes granting real rights to animals, as opposed to humans. I will argue below that such rights might be insured in a statutory context.

Apart from the human-centered justification of these statutes, they have many structural weaknesses. They fail to deal adequately with what should be the first crucial definition: What is an animal

within the meaning of this statute? Many of the statutes refer only to "any animal". In scientific terms this could refer to anything from an amoeba to a chimpanzee. Did the legislators really intend that an amoeba and a chimpanzee should have the same rights? Did they intend that amoebae be protected at all? Courts have had to struggle with this lack of legislative definition. In another cock-fighting decision, *State v. Claiborne*,<sup>71</sup> the Kansas Supreme Court was confronted with a statute which provided that cruelty to animals was "Subjecting any animal to cruel mistreatment".<sup>72</sup> The court recognized that all sentient, animate creatures are biologically animals,<sup>73</sup> but noted that "persons of common intelligence" would "consider a chicken a bird, not a hair-bearing animal",<sup>74</sup> and that other Kansas statutes proscribing cruelty to animals were aimed at "four-legged animal[s], especially beasts of the field and beasts of burden."<sup>75</sup> Drawing on this reasoning, they held that game-cocks did not come within the statutory phrase "any animal".<sup>76</sup>

On its face such reasoning seems tortuous, but the fault does not really lie with the courts as much as with the legislatures. There is no anti-cruelty statute in the United States which deals effectively with the distinctions between various animals. Some states have tried to be selective, limiting a statute's scope to certain types of animals. Six statutes apply only to "owned" animals.<sup>77</sup> Four statutes apply only to "domestic" animals.<sup>78</sup> North Carolina limits its act to "useful" animals.<sup>79</sup> Rather than drawing meaningful distinctions, these limitations merely eliminate all protection for non-owned, non-domestic or "non-useful" animals. Such distinctions say very little about how one animal suffers as compared to another. To be effective and enforceable these statutes must come to grips with what animals are, how they suffer, and to what extent different species suffer in different ways. District Court judges in misdemeanor proceedings should not be expected to make meaningful distinctions between animals.

If failure to deal with the word "animal" is the most obvious flaw in these statutes, failure to deal with the word "cruelty" is perhaps the most debilitating. Most state statutes have language similar to that of Mississippi:

If any person shall override, overdrive, overload, torture, torment, unjustifiably injure, deprive of necessary sustenance, food or drink, or cruelly beat or needlessly mutilate . . . any living creature, every such offender shall, for every offense, be guilty of a misdemeanor.<sup>80</sup>

This statute specifically lists some of the more common forms of cruelty: overriding, overdriving, overloading, and depriving of food

or drink. Such specific provisions help courts in deciding whether an act is cruel within the meaning of the statute.<sup>81</sup> The problem is with words like "torture", "torment", "unjustifiably", "cruelly" and "needlessly". These words are susceptible of a great many meanings. Such general terms may be an advantage or a disadvantage. A judge sympathetic to the plight of animals might bend the word "cruelly" much farther than the legislature intended. A different judge might consider very little as really cruel, or may feel that the legislature did not consider most acts as cruel within the meaning of the statute. A prime example of this type of reasoning is the *Buford* case.

There are many other weaknesses in these statutes. Few deal adequately with the question of intent. Although some require a malicious, willful or intentional act, most are unclear on that point. This can raise serious problems of interpretation, particularly where the cruelty alleged results from omission, such as failure to provide food and drink. A California court construed a statute prohibiting the infliction of "needless suffering and unnecessary cruelty" as not requiring proof of criminal intent or criminal negligence.<sup>82</sup> What was required was a showing of negligence to the extent that the defendant "intentionally did an act [or failed to act] from which harm to the animals was *reasonably foreseeable, i.e., foreseeable by a reasonably prudent man caring for horses.*"<sup>83</sup> [The court's emphasis]. Because the question of intent can be critical in these cases, the failure of the statutes to deal with the question is a serious weakness. Additionally, few statutes allow cruelty to be anticipated and prevented before it occurs. Massachusetts attempted to resolve part of this problem by making it illegal to transport an animal in a fashion likely to cause it injury.<sup>84</sup> However, enforcement officers generally have no recourse until the actual injury is inflicted.<sup>85</sup> The penalties provided for in the statutes are normally jail sentences and fines for the offenders, with the fines going to the state, not the animals, or animal organizations. Such penalties, of course, do the animals little good, except perhaps as a deterrent. In sum, the cruelty statutes, largely holdovers from the 19th century, are riddled with weaknesses. They do not, and cannot in their present form, insure the protection of animals adequately.

Traditionally, the only other attempt by the states to protect animals by statute has been to control hunting and fishing. In practice the states have done little to protect wildlife except grant administrative agencies like fish and game commissions the authority to develop and protect game species. In addition, other agencies

have been given the authority to eliminate animals which allegedly pose a health hazard, or are a nuisance to farmers. The result has been a wildlife policy which has seriously distorted the natural interdependence of all animals in the wild, sacrificing "undesirable" species for the benefit of game species, crops, or domestic animals.<sup>86</sup>

The common law, state regulation of hunting and fishing, and the cruelty statutes, were essentially the only protection offered animals as late as twenty years ago, and still remain the backbone of animal protection in most jurisdictions. I have tried to demonstrate that these three methods of animal protection all contain serious weaknesses, weaknesses severe enough to lead one to the conclusion that they in fact provide very little protection. The common law prohibits only public nuisances and invasions of property interests. The cruelty statutes fail when asserted against even casual human interests. The hunting statutes protect some animals at the expense of others, and even then protect them only so that ultimately they may be shot. Only a society which places very little value on animal life could accept such an ineffective system of controls. This system of controls grew out of a scientific and moral tradition which would not accept animals as qualitatively similar to man. However, this tradition has been seriously undermined by recent scientific research. This research, plus a growing concern for the protection and preservation of all life in the face of our ever-expanding industrial society, has forced a number of philosophers, psychologists, physical scientists, and others who deal with animals, to seriously question our treatment of animals.

### III. MODERN NON-LEGAL CONCEPTS OF ANIMALS IN WESTERN THOUGHT

The direction of modern science, both in physics and in biology, appears to be away from concepts of a static world, the world of Newton and Linnaeus. This trend is nowhere more evident than in the new approaches to studying animals. These new approaches have grown out of an 1879 study by Darwin entitled *EXPRESSION OF THE EMOTIONS IN MAN AND ANIMALS*.<sup>87</sup> This work expressed an idea that was revolutionary in its time: that man's behavior might have biological origins and therefore that animals might exhibit correlatives of human behavior.<sup>88</sup> The converse is of course that humans might exhibit correlatives of animal behavior. Out of this early work men like Niko Tinbergen and Konrad Lorenz developed a new discipline, ethology, the study of the biology of behavior.<sup>89</sup> It has its roots in studies of animal reactions and learning capabilities in laboratory

situations, studies undertaken by men such as Ivan Pavlov and B.F. Skinner.<sup>90</sup> The results of those studies were to demonstrate that animals have a behavior, patterns of activity, worth studying. Ethologists, however, have gone beyond the laboratories in making their behavioral studies. Lorenz and Tinbergen have studied animals in their natural state, observing their interactions both with their environment and with their community of fellow animals.<sup>91</sup> The relations between ethologists and behaviorists like Skinner have not always been smooth, paralleling the modern scientific struggle between those who try to learn about man by dissection, and those who look to his environment.<sup>92</sup> However, for our purposes it is sufficient that both schools have approached animal behavior as something worthy of study, something which could shed light on human behavior.

Recent studies have gone even further in suggesting that the supposedly vast gulf between the mental capabilities of men and those of animals may not be so vast. Most significant of all, they put mental ability in the evolutionary model. They suggest that man may not be the only animal conscious of himself, able to reason and express creative thoughts. No one is saying that dolphins or chimps are intellectually as sophisticated as humans, but what is important is that some scientists are now saying that these animals have mental capacities similar in kind to humans, if not in degree.<sup>93</sup> Our whole moral and legal tradition is founded on the assumption that there is an unbridgeable gap between men and animals, giving us the right to own and exploit them without reference to their best interests. If our scientists now tell us that animals are different from us only in degree, then our exploitation carries far more serious implications than we have been willing to admit.

One such study of animals is the recent work of Jane Goodall in Africa with wild chimpanzees. Her book, *IN THE SHADOW OF MAN*,<sup>94</sup> presents impressive evidence of chimpanzee behavior patterns quite similar to those of humans. When frightened, chimps touch or embrace their fellows; subordinate chimps go to great lengths to ingratiate themselves with their superiors. When receiving a pleasant surprise they embrace and kiss.<sup>95</sup> Perhaps the most important evidence of the existence of complex and sophisticated behavior patterns that she uncovered was their use of tools. Taking a part of the natural world and using it to exploit another part of the natural world has been traditionally thought of as a uniquely human trait. Goodall observed chimps using long grass stems to fish termites out of a termite nest.<sup>96</sup> Subsequently she noted many other types of tool-

using and tool-making behavior, behavior that indicates that wild chimpanzees are quite adept at manipulating their surroundings.<sup>97</sup>

If tool-making has been considered one mark of human-like intelligence, another is language. The ability of man to use symbols to express ideas and to designate objects has long been considered unique. Now even this conceptual barrier raised between man and the animals is being torn down. At the Institute for Primate Studies in Norman, Oklahoma, Dr. Roger Fouts and his colleagues are continuing work begun by R. Allen and Beatrice Gardner in Nevada, teaching chimpanzees to communicate with humans, and with each other, using the hand signals of the American Sign Language.<sup>98</sup> It was thought that this visual approach might be most successful, as chimps had proved unable to mimic human sounds because of the nature of their vocal apparatus.<sup>99</sup> The chimps have demonstrated "verbal" ability beyond mere identification. They can form signs into requests and questions.<sup>100</sup> They express value judgments, referring to people or other animals with which they are displeased as "dirty", or "black bugs".<sup>101</sup> They have even described emotions. One chimp, seeing its human foster mother drive off signed "me cry".<sup>102</sup> They are able to group things by common attributes, for instance grouping citrus fruits as "smell fruits".<sup>103</sup> In short, the chimpanzees have demonstrated a startling facility for using sign language.<sup>104</sup> The implication of this is that the measure most often used to separate man from other animals conceptually, the ability to communicate via language, is no longer completely valid. Although admittedly at a much more primitive level than man, chimps nevertheless can "speak".

The moral implications of such studies have received very little attention in America. Admittedly, a great deal has been written recently by ecologists and naturalists about respect for life in the sense of saving it from destruction by man. However, the ecologist does not address the *right* of living creatures to life; he just points to the wisdom, in terms of man's physical and aesthetic well-being, of letting them live. What the new discoveries about animals demand is not more justification for protecting animals because of the benefits they provide man. Instead, a recognition is needed that animals have a right to live regardless of their usefulness. We have recognized in our legal system that individual human lives have value. We may not vivisect one mongoloid to save ten "normal" humans. However, although we may feel emotionally that animals' lives have value to them, we have not granted those lives any real protection in our anthropocentric legal system. Perhaps such a posi-

tion might be justified in a world where animals are seen as equivalent to trees and flowers, just another part of the non-human world. However, in a world where we must recognize that both men and the other creatures are animals, that we are essentially alike, there is no logical justification for granting absolute value to human life, and absolutely none to animal life. It must be noted that concern for animals' lives does not mean allowing cattle to breed and roam free, competing with man for food, and eventually starving, as in India. We are rapidly developing the ability to control animal births without mass slaughter. Giving animals' lives some value in our legal system is not the same as giving them the absolute value of human lives. Animals are not human, but they are more than rocks, and they should be so treated.

If the first impact on modern thought of our new perspective toward animals is that their lives have value, the second must be that animals feel pain, both physically and emotionally, and deserve to be protected from that pain as a matter of right. There is no evidence that pain and fear are any less terrible to at least the higher animals than they are to humans. In fact, it has been argued that the lack of cognitive activity in animals allows their whole consciousness to be filled with sensation, making pain and fear far more horrible to them than to us.<sup>105</sup>

Those who seek to protect animals must recognize that occasionally there will be a legitimate conflict between human interests and animal interests. The first problem in such a situation will be to convince humans that the animals should be considered at all, much less be given serious consideration in any balancing of interests. Assuming that this problem can be overcome by education and moral leadership, before any balancing can begin it must first be determined that the human interests involved are legitimate, not frivolous, and that there is no alternative available which would involve a lesser invasion of rights. We must then apply a consistent set of moral principles so that the balancing has some rational basis. Partrick Corbett, Professor of Philosophy at the University of Sussex, has suggested such a moral framework. He posits four principles of choice between competing lives:

That we should give precedence to the relatively complex forms of life over the relatively simple, and in particular to those forms of life which possess special complexities in sentience and intelligence over those which do not; that we should give precedence to those lives with a greater over those with a lesser potentiality for growth and development—for example the young over the old; that we should give preced-



ence to those who would otherwise suffer relatively serious as opposed to relatively superficial deprivation, so that one creature should not be maimed in order to give another a momentary thrill; and that we should give precedence to species that are threatened with extinction over those that are not.<sup>106</sup>

It is this kind of seriously considered, consistent approach to the morality of our treatment of animals that is suggested by an awakening perception that we are not qualitatively different from them. To some extent our legal system has responded to this challenge, but has it responded sufficiently?

#### IV. MODERN LEGAL TREATMENT OF ANIMALS IN AMERICA

It has been noted above that the common law concerning animals is of ancient origin, and has changed very little. This rigidity prompted the legislative response embodied in the anti-cruelty statutes. In modern times, the forum for developing new laws concerning animals has shifted significantly to the federal government. Reflecting the concern of many that man's contacts with animals have become increasingly destructive, Congress has acted to minimize some of the worst instances of abuse. One such response resulted from the development of the beef cattle industry in the Far West. The vast expanse of range land required long distance transportation of animals for slaughter. When animals were destined for slaughter they were likely to be subjected to cruel treatment because they were going to be killed anyway. Animals were driven into cattle cars with sharp spiked prods, twenty cattle into a thirty foot car. Calves, sheep and pigs were driven into the same cars under the cattle, and all were then transported for days, often in great heat, without food, water, or even the possibility of lying down.<sup>107</sup> As a result, many animals arrived dead, or with painful injuries.<sup>108</sup> After initial legislative responses failed to change the situation,<sup>109</sup> Congress enacted the Twenty Eight Hour Law.<sup>110</sup> This Act required the maintenance of way stations where animals could be rested during transport. The Twenty Eight Hour Law remains the only federal law protecting domestic animals in transit. Although the Department of Agriculture inspects the way stations, and prosecutes offenders on a regular basis,<sup>111</sup> the Law is no longer adequate in its present form. Because it was passed prior to the advent of motor transportation, it contains no provisions for protecting animals transported by truck. Efforts to have the law amended to include trucking have failed, so today domestic animals carried by trucks are not protected by federal law.<sup>112</sup> This leaves protection of these animals

dependent on the state anti-cruelty laws, which are difficult to enforce in these situations because of the rapid movement of the trucks through the various states.

Another more recent example of humane legislation at the federal level is the Humane Slaughter Act,<sup>113</sup> enacted by Congress in 1958. This Act declared it to be the public policy of the United States that humane methods be used to prevent needless suffering in slaughterhouses.<sup>114</sup> To effect this policy, agencies of the federal government were forbidden to purchase meat from slaughterhouses which killed animals inhumanely.<sup>115</sup> This approach has forced the larger packers who deal with the federal government to comply with the humane standards set forth in the Act. Unfortunately, these large packers account for only eighty percent of our meat.<sup>116</sup> The smaller packing houses that supply the remaining twenty percent are subject only to state regulation. Less than one half of the states have Humane Slaughter Acts, and a number of those are quite weak.<sup>117</sup>

Another difficulty with the federal Humane Slaughter Act is its treatment of ritual, or kosher, slaughter. The actual method of kosher slaughter is not generally thought to be inhumane.<sup>118</sup> The animal's throat is cut, draining it of blood so that it relatively quickly loses consciousness.<sup>119</sup> The Humane Slaughter Act specifically provides that such ritual slaughter is humane.<sup>120</sup> The problem is in the pre-slaughter handling of the animals. Because of an unfortunate conjunction of Department of Agriculture sanitary regulations which prohibit contact of the animal's cut neck with the packing house floor, and kosher slaughter traditions which require that the animal be uninjured, (unstunned), prior to cutting, the animals must be hoisted by a shackle attached to one leg, often breaking the leg or pelvis, or causing the animal to fall to the floor, all while the animal is still conscious.<sup>121</sup> It was because of this extremely painful pre-slaughter technique that people interested in animal protection recently challenged the Humane Slaughter Act's treatment of ritual slaughter. In *Jones v. Butz*,<sup>122</sup> argued before a three-judge panel in the Southern District of New York, the plaintiffs urged that kosher slaughter, taking into account the whole procedure, is inhumane, and would have been prohibited under the Humane Slaughter Act except for legislative accommodation of a religious group.<sup>123</sup> The court declined to question the legislative judgment that kosher slaughter is humane.<sup>124</sup> It went further, however, adding that even if Congress had found the method to be inhumane, such an accommodation to religious interests was not outside the scope of Congressional discretion.<sup>125</sup> The court pointed to other instances of religious

accommodation not considered prohibited establishments of religion under the First Amendment, such as Sunday closing laws or draft exemptions for conscientious objectors.<sup>126</sup> The court felt that an accommodation for religious dietary restrictions, such as was involved here, was comparable to these earlier valid accommodations.<sup>127</sup> On appeal the United States Supreme Court affirmed the District Court decision in a *per curiam* opinion,<sup>128</sup> thus ending the attack on the kosher slaughter exemption through the courts. The fight against present techniques of kosher slaughter is hardly over, however. Animal protection groups are lobbying to have the exemption removed, and working with livestock experts seeking to develop a less painful method of pre-slaughter treatment.

The only other major federal effort in the area of domestic animal protection is the Animal Welfare Act of 1970.<sup>129</sup> This Act is aimed at conditions under which animals are kept in pet shops, zoos and laboratories. It, and its predecessor, the Laboratory Animal Welfare Act of 1966,<sup>130</sup> grew out of increasing public alarm over the theft of privately owned animals for resale to scientific institutions, and the conditions under which animals were kept by animal dealers and in laboratories.<sup>131</sup> The Animal Welfare Act provides protection for most warm blooded animals<sup>132</sup> by requiring that research facilities, exhibitors and wholesale pet dealers be licensed by the Secretary of Agriculture,<sup>133</sup> and meet certain standards regarding the conditions under which the animals are kept.<sup>134</sup> It established by law:

the humane ethic that animals should be accorded the basic creature comforts of adequate housing, ample food and water, reasonable handling, decent sanitation, sufficient ventilation, shelter from extremes of weather and temperatures, and adequate veterinary care including the appropriate use of pain-killing drugs.<sup>135</sup>

What the Act gave with one hand, however, it took away partially with the other:

At the same time this ethic is embraced, the bill recognizes the responsibility and specifically preserves the necessary domain of the medical community. The bill in no manner authorizes the disruption or interference with scientific research or experimentation. Under this bill the research scientist still holds the key to the laboratory door.<sup>136</sup>

The above language, from the House Report on the bill which became the Animal Welfare Act,<sup>137</sup> indicates a strong Congressional policy that what a scientist does inside his laboratory should be beyond public scrutiny. The problem with such a policy is that it prevents a moral evaluation of experimental techniques by any par-

ties but the scientists themselves.

Some of the original versions of the Animal Welfare Act would have given the Secretary of Health, Education and Welfare some authority over experimental design.<sup>138</sup> The strong lobbying effort of research interests resulted in the present compromise: control before and after experimentation, but not over the experiment itself.<sup>139</sup> This strong opposition apparently stems from a feeling on the part of researchers that any control over experimental design is equivalent to or will result in absolute prohibition of experiments on live animals. As the president of the National Society for Medical Research put it after the 1970 Act was passed:

In the future only antivivisectionists will attempt to introduce additional legislation. This is not to say that such legislation will not be introduced. There are many antivivisectionists in American society. However, now that housing and care, including veterinary care, of all warm blooded animals throughout their stay in scientific laboratories are subject to federal inspection and regulations, *any attempt to legislate control of scientific design and execution of experiments would have to be made as straightforward antivivisection legislation.*<sup>140</sup> [emphasis supplied].

By definition, an antivivisectionist is opposed to all experimentation on living animals. Surely there is a middle ground between a position which advocates no control over animal experimentation, and one which advocates a complete prohibition of such experimentation. At the very least this middle ground would demand that higher forms of animal life be treated with more consideration than lower forms, that painful experiments be replaced, where possible, with less painful alternatives, and that experiments be allowed only when aimed at providing some new and useful information. It was this type of compromise that was not struck by the Animal Welfare Act, and that I have tried to provide in the Model Act set forth *infra*.

The Animal Welfare Act, the Humane Slaughter Act, and the Twenty Eight Hour Law, are the only major pieces of federal legislation aimed exclusively at ensuring humane treatment for animals.<sup>141</sup> Each of these three statutes is limited in scope, and thus provides only a partial solution to the problem each was intended to address. The Animal Welfare Act leaves animals at the laboratory door. The Humane Slaughter Act does not reach slaughterhouses which do not contract with the federal government, and allows arguably inhumane kosher slaughter techniques. The Twenty Eight Hour Law does not reach domestic animals transported by truck. Each of these

statutes needs reconsideration and revision if they are to fulfill the humane ideals that led to their passage.

Although federal attempts to provide humane treatment have been less than a success, efforts in the area of species protection have been somewhat better. Over the last ten years Congress has become increasingly aware that whole species of animals are declining and disappearing as a result of man's incursions and pollution. This growing awareness has been a part of a more general movement to preserve and protect all of the natural world. Since animals, as well as men, depend on a reasonably clean environment, the wave of recent federal legislation aimed at environmental protection should benefit them.<sup>142</sup> In addition, there is an increasing amount of legislation on the federal level which seeks to deal directly with the problems of wildlife.<sup>143</sup> Congress had traditionally been reluctant to address wildlife questions, at least in part because it was felt that such decisions were reserved to the states. In *Geer v. Connecticut*<sup>144</sup> the Supreme Court left the impression that it was the States' responsibility to control the taking of wildlife, not the federal government's.<sup>145</sup> Since that decision writers have attacked the idea of exclusive state control, indicating at least two bases for federal action: the territorial power and the power to regulate interstate commerce.<sup>146</sup> The development of these arguments is beyond the scope of this article, but they have been accepted, at least by Congress. The federal government has become increasingly involved in wildlife protection, and its new role has not been seriously questioned. It seems likely that this role will continue to increase, hopefully with more attempts to coordinate wildlife policy between the state and federal governments. The federal government, then, has been active in recent years in attempting to protect animals, both from inhumane treatment and from species depletion. This new legislative concern has also been expressed on the state level, although to a lesser extent.

As noted above, the focus of state animal protection is still the anti-cruelty statute. In many states these statutes have undergone considerable expansion. In New York, for instance, there are now nineteen separate sections of the Animal Laws which detail specific types of prohibited acts.<sup>147</sup> Examples are: instigating fights between animals,<sup>148</sup> failing to provide proper food and drink,<sup>149</sup> carrying an animal in a cruel manner,<sup>150</sup> dog stealing,<sup>151</sup> and selling or offering to sell a diseased animal.<sup>152</sup> Such specific standards have the advantage of being easy to understand and easier to enforce than more general provisions. The reason for their enactment was apparently

to make it clear that certain activities are prohibited. There has been little method in their enactment however, as they were passed as "boiler plate" and not as part of a comprehensive animal protection plan. This lack of good statutory form has disturbed some recent law revisors. In states such as New York<sup>153</sup> and Massachusetts,<sup>154</sup> recent proposed revisions of the criminal laws have suggested a return to a more general anti-cruelty law. Such proposals, concerned with statutory form, fail to take into account the problems of enforcement that purely general anti-cruelty provisions present. Consider the proposed revision to the anti-cruelty statute in Massachusetts:

**§ 11 Cruelty to Animals:**

(a) A person is guilty of cruelty to animals, a class B misdemeanor, if he wilfully:

- (1) Subjects any animal to cruel mistreatment;
- (2) Subjects any animal in his custody to cruel neglect; or
- (3) Kills or injures any animal belonging to another person without legal privilege or the consent of the owner.

(b) As used in this section 'cruel mistreatment' includes cutting the bone, muscles or tendons of the tail of a horse for the purpose of docking or setting up the tail, or cropping or cutting off the ear of a dog, in whole or in part, unless done by a veterinarian registered under chapter one hundred and twelve.

(c) Paragraph (a)(1) and (a)(2) shall not apply to accepted veterinary practices or to activities carried on for purposes of scientific research.<sup>155</sup>

There are a number of objectionable factors in this statute, such as exemption of all cruelty practiced in the context of scientific research, and making cruelty *to the animal* depend on *consent of the owner*. The greatest weakness however is the return to a broad general phrase, "cruel mistreatment", to reach all instances of cruelty. There is no attempt to define the term "cruel" or the term "animal". Such broad undefined terms are difficult to understand and even more difficult to enforce. As a whole, the proposed revision is considerably weaker than the existing statute.<sup>156</sup>

This is not to say that the current trend at the state level is away from animal protection. Proposed revisions such as the one for Massachusetts have been successfully opposed by animal interest groups.<sup>157</sup> In addition, there are good examples of state protection statutes designed to fill gaps in the anti-cruelty laws. One such example is a recent Massachusetts statute aimed at eliminating impulse buying of exotic pets.<sup>158</sup> Animals which need special care, or which should not be kept as pets at all, are too often bought as

novelties and then neglected and left to die. This statute prohibits a pet shop from stocking such animals unless it has a licensed buyer waiting for a particular animal. It is this sort of anticipation of cruelty that is difficult to build into a traditional anti-cruelty criminal statute, and is therefore well-suited for specific legislative treatment.

The states are also beginning to move into the environmental protection area. A number of states have enacted general environmental protection statutes.<sup>159</sup> These statutes have two important aspects: they grant private citizens or public interest groups access to the courts, and they proclaim a state policy aimed at protecting and preserving the natural world.<sup>160</sup> However, this general concern for the environment has not been followed by specific wildlife protection statutes as on the federal level. Hopefully, this new mandate provided by the environmental protection statutes will spur both the enactment of statutes aimed at protecting and developing all wildlife, and the movement of state fish and game commissions away from their traditional preoccupation with hunting and fishing stock to a more integrated approach.<sup>161</sup>

Progress on the state level, then, is less evident than on the federal level. The anti-cruelty statutes remain the basic animal protection laws. While these statutes have added some specific provisions, their basic format has not changed. They are not designed to anticipate and thereby prevent cruelty. They come into play only after the animal suffers, and then act only to punish the human offender. Many of these statutes do not provide techniques for removing the afflicted animal from its tormentor with any rapidity. Fines recovered from offenders normally go into the General Fund. As a result, they do not serve to make the animal whole, or even to fund animal protection activities of the state. The statutes still fail to define the crucial terms "animal" and "cruelty". In short, the anti-cruelty statutes are still inadequate. This inadequacy is crucial because these statutes are the real heart of animal protection in this country. As we have seen, federal efforts at insuring humane treatment are limited in scope, and even within those limitations have weaknesses. Although there are many things that could be done on the federal level, such as setting standards for research under government grant or contract or strengthening the humane transportation laws, the real focus of animal protection is likely to remain at the state level. Even in those areas in which the federal government purports to act, an effective state backup is essential to fill loopholes in the federal plan, and to provide a supplement to federal enforce-

ment capabilities.

I have argued that our changing ideas about animals mandate a change in the treatment that our legal system accords them. Although some progress has been made, it seems clear that the modern legislative response, particularly at the state level, has been inadequate. Because effective animal protection at the state level is the key to better treatment of animals, the most pressing concern of animal interest groups is to develop a locally-oriented, enforceable, animal protection plan.

## V. TOWARD LEGAL RIGHTS FOR ANIMALS

### A. *The Nature of a Legal Right*

In a society such as ours, where formal interhuman and human-governmental relationships are controlled by laws, the amount of protection one receives is a function of the legal rights one holds. Fundamentally, a legal right involves the assurance by society that when another person acts inconsistently with a right that you hold, an authoritative public body will give some amount of consideration to your protest.<sup>162</sup> However, more than this authoritative review must be present before one can really be said to be protected by a legal right. Christopher Stone, Professor of Law at the University of Southern California, has argued that before one can be said to be a holder of legal rights, three other criteria must be satisfied:

. . . first, that the thing can institute legal actions *at its behest*; second, that in determining the granting of legal relief, the court must take *injury to it* into account; and, third, that relief must run to the *benefit of it*.<sup>163</sup> [his emphasis].

Stone then gives us an example of just what these criteria imply:

To illustrate, even as between two societies that condone slavery there is a fundamental difference between  $S^1$ , in which a master can (if he chooses), go to court and collect reduced chattel value damages from someone who has beaten his slave, and  $S^2$ , in which the slave can institute proceedings *himself*, for his own recovery, damages being measured by, say, *his* pain and suffering. Notice that neither society is so structured as to leave wholly unprotected the slave's interests in not being beaten. But in  $S^2$  as opposed to  $S^1$ , there are three operationally significant advantages that the slave has, and these make the slave in  $S^2$ , albeit a slave, a holder of rights<sup>164</sup> [his emphasis].

The three operationally significant advantages are that slave  $S^2$  can institute proceedings in his own behalf, and not have to depend on his master to defend him; that once in court, the court will look to



his injuries, what he rather than his master has suffered; and that whatever relief is given will run to his benefit, not his owner's.

Real protection in our legal system, then, involves more than protection as mere property. It involves the right to be heard, the right to be treated as having a unique worth. Such protection has not been limited exclusively to humans. Corporations, ships and governmental entities all are granted legal identity.<sup>165</sup> Obviously these non-human parties could not appear in court to seek remedy for injuries unless human spokesmen were allowed to argue in their behalf. Yet we have been willing to confer on them the status of rights-holders because we have made the judgment that they are sufficiently unique and valuable to deserve protection in and of themselves. Similarly, humans who are incompetent to assert their own rights are still granted full protection. Children and the mentally ill or retarded may argue for their own interests before our courts through guardians.<sup>166</sup>

Should animals have the right to be represented in court? To receive damages for injuries inflicted? I have tried to argue that animals, as sentient living creatures, are more than inanimate objects, that they are occasionally startlingly close to humans in mental capacity, and in the way they suffer. I have also detailed our present legal concepts of animals. The common law regards animals as property, with no rights of their own. Our statutory scheme, although it has grown considerably in recent years, is still based on two assumptions: that cruelty to animals should be prevented, if at all, because it corrupts human morality, and that species should be saved from extinction because animals are an important natural resource. Neither of these assumptions gives much consideration to the unique value of individual animal lives. As a result we punish mistreatment of animals, but we neither anticipate mistreatment nor remedy it by making the animal whole, as opposed to the owner.

This is *not* to argue that animals should be treated as humans in our courts. Humans have an almost absolute protection against death and injury, because we recognize individual human lives as having great worth. The present argument is that animals' lives have value to them, and in that sense they are closer to us than they are to rocks. We should recognize this value, and give animals at least a qualified right to protect themselves. Within a limited area they should have access to courts through legal guardians to assert their interests. The courts, when weighing those interests, should look to the injury suffered by the animal, and to a remedy which would best protect the animal or make it whole.

What is needed to make animals holders of legal rights, and therefore truly protected, is a legal system which gives those who would protect them access to the full range of judicial remedies available to humans when threatened with death or injury. The question, of course, is how to obtain this access.

### *B. Equitable Enforcement of Criminal Statutes*

Proceeding on the assumption that it is generally easier to work within an existing system of laws than to create a new one, it first must be asked if the present animal protection statutes can be used more productively. Generally speaking, these statutes are criminal statutes, enforceable by law enforcement officers, and providing criminal penalties for offenders. Such statutes neither provide for suits on behalf of animals, nor provide remedies that run to their benefit. Yet these statutes do provide a legislative statement of the duty of care owed to animals. In some similar situations courts of equity have been willing to listen to plaintiffs, both public and private, who have argued that a statement of a duty in a criminal statute should provide the basis for injunctive relief.<sup>167</sup> The argument of these plaintiffs has rested on the rationale that the remedy at law is inadequate.<sup>168</sup> This requires a rather large step by the court, in that it must find that the legislature did not intend the remedy provided in the criminal statute to be exclusive.<sup>169</sup> An example of how a court handles this kind of problem was provided by the New York Court of Appeals in *People ex rel. Bennett v. Laman*.<sup>170</sup> In that case the attorney general sought an injunction against violations of a state criminal statute which prohibited practicing medicine without a license. The attorney general alleged that his remedy at law was inadequate because juries refused, apparently because of sympathy, to convict the defendant. The court treated the case as essentially a public nuisance action:

That a court of equity will not undertake the enforcement of the criminal law, and will not enjoin the commission of a crime is a principle of equity jurisprudence that is settled beyond any question. There can equally be no doubt that the criminal nature of an act will not deprive equity of the jurisdiction that would otherwise attach . . . Whether or not the act sought to be enjoined is a crime, is immaterial. Equity does not seek to enjoin it simply because it is a crime; it seeks to protect some proper interest . . . Equity does not pretend to punish the perpetrator for the act; it attempts to protect the right of the party (here the People) seeking relief, and to prevent the performance of the act or acts, which here may injure many.<sup>171</sup>

The court found that the defendant's practice of medicine without a license was a threat to public health, and enjoined further violations.<sup>172</sup> However, it appears unlikely that this type of action holds much promise for protecting animals. Equitable enforcement of criminal statutes has hardly won widespread acceptance.<sup>173</sup> Another problem is that because these actions are characterized as public nuisance-type suits, it is difficult for anyone except the representative of the people, the attorney general, to obtain standing.<sup>174</sup> In most cases of brutality to animals, it is only the animals themselves that suffer special damages. Thus access to the courts would not be significantly different than it is now; *i. e.*, limited to the state.

However, if equitable actions on behalf of animals were allowed, a more substantial change in the law would occur in the area of remedies. Prevention, or forbidding continuation, of violations would be far preferable with respect to the animal than merely invoking criminal sanctions against the offender. It is this type of equitable relief that is essential to achieve adequate protection for animals. Yet in weighing whether to grant relief, the court would still have to look to the vague standards set forth in the present anti-cruelty statutes. On balance, then, it seems unlikely that attempts to enforce present anti-cruelty statutes through equitable actions would substantially improve the position of animals.

### *C. Creation of a New Tort at Common Law*

A second approach to achieving real legal protection for animals might be to attempt to convince a court to change the common law in its jurisdiction by creating a new tort. This is not without precedent. At the end of the last century Samuel Warren and Louis Brandeis, in a famous law review article,<sup>175</sup> were responsible for the general acceptance of a new tort, the invasion of privacy. Although the explosion of legislative activity has removed the common law from center stage, it still plays an important role in determining the rights of litigants in private actions. It has often been, and should remain, a creative and dynamic adjunct to the legislative process. Assuming that a court could be convinced to listen to such arguments, it could be argued that the common law should recognize animals as holders of legal rights, both because animals deserve to be protected, and because animals are not protected adequately by present criminal statutes. If a court would go this far, then it would be necessary to frame the boundaries of the new right. The guardian of the animal would have to establish that the defendant caused the animal significant observable pain or suffering not expressly ex-

empted by statute (as in the case of hunting, slaughtering, etc.). Defenses might be that the pain inflicted was necessary to prevent injury or death to other animals or humans, or to ease the animal's suffering. All the normally available civil and equitable remedies would be available to protect the animal, or make it whole.

Of course the problem with all of this is that it is extremely doubtful that any court would venture this far off the beaten path. Even in recognizing the tort of invasion of privacy the courts were merely granting a new right to previous rights-holders, that is, human beings. To develop a tort of infliction of pain on an animal, courts would have to bestow rights on a previously right-less class, a job normally reserved to the legislature. Courts would have to struggle with difficult questions of fact, such as what types of animals feel pain in what ways. They would also be faced with policy questions, involving a balancing of human and animal interests, without legislative guidance. Courts, when faced with the prospect of such broad problems, are loathe to enter new ground. This caution is exemplified by the history of the tort of infliction of wrongful death. Early English decisions held that a tort dies with the victim, thus giving the victim's heirs no cause of action against the tortfeasor.<sup>176</sup> The feeling was that a tort is a personal wrong, non-transferrable at death.<sup>177</sup> Although this worked great hardship on survivors, the courts remained unbending in their unwillingness to venture into what they felt was a completely foreign area for tort law. Ultimately the legislatures were forced to fill the void by specifically granting a right of action in tort to a class (survivors), which had no right of action in tort previously.<sup>178</sup>

As with equitable enforcement of existing criminal statutes, it appears unlikely that attempts to win acceptance of a new tort would measurably aid the position of animals. Although, if accepted, the tort remedy would provide access to the full range of judicial remedies needed, it is too much to expect that a court would adopt such a scheme on its own motion.

#### *D. Revising Present Statutes—A Model Statute*

It appears that if animals are going to win the right to be represented in court, the right to have their, as opposed to the state's or their owner's injuries considered, and the right to have the court's remedy flow to their benefit, the impetus will have to come from the legislature. Nothing less than a complete reconsideration and revision of existing animal protection statutes is required. Others have suggested changes to existing statutes, or proposed completely new

legislative schemes<sup>179</sup>—for example, the set of Model State Animal Protection Statutes proposed by the Committee for Humane Legislation.<sup>180</sup> The focal point of the Committee's Model Statutes is the creation of a Department of Animal Protection, charged with administering all of the state's animal programs.<sup>181</sup> This Department would be completely funded by fees generated from licenses required of all animal activities, defined as all activities, profit or non-profit, which involve keeping, selling or exhibiting animals.<sup>182</sup> Such a broad licensing program would be a vital part of any animal protection program. It would insure that all facilities must meet minimum standards before being allowed to operate, and it would provide the state with information concerning the number and type of animal activities in the state. Through revocation of license procedures it would also provide a convenient method of dealing with offenders. The Committee for Humane Legislation's Model Act would provide an excellent administrative framework for dealing with animal protection problems. Sections of the Model Statute proposed *infra* which would fit in well with the Committee's approach are specifically marked. The Committee, however, did not undertake a thorough re-analysis of anti-cruelty statutes, and without such a reformulation of the standard of care owed animals, the creation of a new administrative framework would likely be merely cosmetic. I have attempted to show that the present legislative formulation of the standard of care is confusing, often unenforceable, and generally inadequate. Before animals will be effectively protected, the anti-cruelty statutes must be revised or replaced. In an effort to stimulate this revision, and to set forth some of the changes that I feel are necessary, the following Model Act is proposed.

#### AN ACT ESTABLISHING STANDARDS OF CARE OWED CERTAIN TYPES OF ANIMALS

<i>Section</i>	<i>Subject</i>
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### **101 Statement of Public Policy:**

The legislature finds that certain animals can and do experience pain and suffering as a result of their contact with human beings. On occasion this suffering may result from an intentionally inhumane act. On other occasions it may result from simple failure on the part of the animal's custodian to exercise a reasonable degree of care in his contact with the animal. While in rare situations this suffering may be justified by important human needs, most often it is the result of unnecessary human activities. The legislature finds that the infliction of unjustifiable pain on animals is a corrupting influence on public morality, and an outrage against living, sentient creatures which deserve to be treated with respect.

Therefore, it is the policy of this State that certain animals be protected from the infliction of pain and suffering caused, either intentionally or by neglect, except in certain specifically exempted instances. The provisions of this Act are to be liberally construed to insure the realization of the policy expressed in this section.

COMMENT: This section is intended to declare a strong public policy that certain animals should be protected against all but specifically exempted cruelty. It sets forth as a basis for the Act not merely the corrupting influence of cruelty, but the wrong that cruelty constitutes to the animal itself. Most importantly, it gives to the judiciary a mandate that the Act should be liberally construed, hopefully foreclosing judicial whittling away at the Act, such as occurred in the *Buford* case.

### **102 Definitions:**

As used in this Act:

- (a) "Class A animal" means any chimpanzee, gorilla, or dolphin: wild, in captivity, or domesticated.

- (b) "Class B animal" means any mammal: wild, in captivity, or domesticated, except those mammals included within Class A.
- (c) "Class C animal" means any vertebrate: wild, in captivity, or domesticated, except those vertebrates included within Class A or Class B.
- (d) "Significant observable pain or suffering" means any unpleasant or distressing sensation sufficient to cause more than brief discomfort, observable to a person exercising a reasonable degree of care.
- (e) "Animal control facility" means any activity licensed by the State or a political subdivision thereof to receive and dispose of stray, unwanted or abandoned animals.
- (f) "Causing" means acting or omitting to act where such act or omission is a substantial factor in bringing about the violation. It includes, but is not limited to, arranging, promoting, organizing, managing, advertising, producing, conducting or participating in any contest, exhibition, or other private or public use of animals, wherein it is reasonable to expect that a violation will occur.
- (g) "Animal under one's control" means:
- (1) An animal which one owns, or
  - (2) A wild or stray animal which one has restrained from leaving one's presence in any way, for any period of time.

COMMENT: This section is of vital importance to the overall effectiveness of the Act, because it provides specific standards to be used in interpreting the statutory language. The first three subsections set out the specific types of animals protected. The definition of animal classes is tied to the relative advancement of the animal on the evolutionary scale, and reflects a presumption that the closer the animal is to man, the more deserving it is of protection. Subsection (d) is an attempt to set forth an understandable standard as to what degree of pain or suffering triggers a violation. Subsection (f) sets forth a common standard of proximate causation,<sup>183</sup> as well as extending that standard specifically to promoters and others indirectly responsible for the animals' plight, if not the direct cause of it.<sup>184</sup> Finally, subsection (g) defines when an animal is under one's control.

### 103 Persons Who May Enforce This Act:

- (a) Criminal Provisions: The criminal provisions of this Act may be enforced by any duly appointed law enforcement officer of this State or a political subdivision thereof, including any special officers appointed for the sole purpose of enforcing this Act.

(b) **Civil Provisions:** The attorney general, any political subdivision of the State, any instrumentality or agency of the State, any natural person, partnership, corporation, association, organization, charitable or educational institution or other legal entity may maintain an action in the [Superior Court] for the county wherein the alleged violation occurred, or wherein the defendant is located, resides or conducts business, on behalf of any animal protected by this Act. Such action will be in the name of the animal, and may seek declaratory or injunctive relief, as well as civil damages or forfeitures, against the State, any political subdivision of the state, any instrumentality or agency of the State, any natural person, partnership, corporation, association, organization, charitable or educational institution or other legal entity, acting alone or in combination with others, for any violation of the provisions of this Act. Sovereign immunity shall not be asserted as a defense to any civil action brought pursuant to the provisions of this Act. Liability in the case of joint tortfeasors shall be joint and several.

**COMMENT:** This section provides one of the most important changes from the traditional anti-cruelty laws. It retains the traditional enforcement power over criminal statutes in the state, including special enforcement officers such as might be created under a Department of Animal Protection, or are now authorized to enforce the anti-cruelty statutes, such as SPCA officers. However, in addition the statute extends to the state, legal entities, and natural persons the right to institute civil actions on behalf of afflicted animals. It should be emphasized that the civil action would be on behalf of the animal, not the party bringing the suit. The animal's injury must be considered, and available remedies should run first to the animal. The effect of this section is to extend the full range of legal and equitable protection to animals, and similarly to extend the full range of criminal, legal and equitable sanctions against violators.

#### **104 Cruelty to Class A Animals:**

Cruelty to Class A Animals is:

- (a) Causing a Class A Animal significant observable pain or suffering, unless such pain or suffering is specifically exempted under this section or other provisions of this Act.
- (b) Causing the death of a Class A Animal by any means, unless such infliction of death:
  - (1) Is necessary to protect the health or safety of humans or other animals, or



(2) Is necessary to relieve the animal of pain or suffering caused by injury or disease, if such pain or suffering cannot be relieved by medical attention in the opinion of a duly licensed veterinarian, or

(3) Is performed at an animal control facility after the animal has remained unclaimed or abandoned, and reasonable attempts to obtain adoption have proved unsuccessful for a period of not less than 14 days from the day on which the animal is received by such facility.

When death may be inflicted under one of the above provisions, the manner of causing death must not involve significantly more pain or suffering to the animal than would result from any other method of inflicting death which is a reasonable alternative economically, and in terms of health and safety.

(c) Abandoning a Class A Animal in any environment which is not natural to it, or in which it is no longer capable of surviving, after it has been under one's control.

(d) Failure to provide care for a Class A Animal under one's control, including, but not limited to, failure to provide:

(1) Sanitary conditions

(2) Nutrition

(3) Shelter

(4) Medical care

(5) Opportunity for exercise

(6) Periods of rest sufficient to maintain the animal in good health, and to prevent the occurrence of significant observable pain or suffering in the animal.

(e) Performing a scientific experiment on a Class A Animal which involves the infliction of significant observable pain or suffering, unless such experiment:

[1. - Optional] [Is conducted in a research facility licensed by the State, and]

[1 or 2] Involves less pain or suffering than would result from any other experimental design which would provide equivalent information, and would be economically feasible, and

[2 or 3] Is limited solely to attempts to gain information about the cause, prevention, treatment or cure of human or animal disease, injury or mental disorder.

COMMENT: This section attempts to blend general and specific

provisions prohibiting infliction of pain by action or omission. The section reflects a high concern for the lives of Class A animals by forbidding the infliction of death even by humane means except in certain limited circumstances (§ 104(b)(1-3)). Scientific experimentation is limited to the most humane feasible design, and to the search for information about human or animal health only (§ 104(e)(2-3)). Attempts to learn about the animals' behavior patterns by infliction of pain are not allowed unless such research is justified by health-related reasons. Similarly, experiments associated with weapons research would generally not be allowed, unless directly related to counteracting the health effects of such weapons. An optional section (§ 104(e)(1)) would tie in to a State Animal Activities licensing plan such as proposed by the Committee for Humane Legislation. In addition, the section sets forth affirmative duties owed an animal after it has been brought under one's control (§ 104(c)-(d)).<sup>185</sup>

### **105 Cruelty to Class B Animals:**

Cruelty to Class B Animals is:

- (a) Causing a Class B Animal significant observable pain or suffering, unless such pain or suffering is specifically exempted under this section or other provisions of this Act.
- (b) Causing the death of a Class B Animal in an inhumane manner. For the purposes of this subsection causing death in an inhumane manner means using any method which involves significantly more pain or suffering than would result from any other method which is a reasonable alternative, economically, and in terms of health and safety. This subsection applies to both private and commercial slaughter, as well as all other instances of death infliction unless specifically exempted.
- (c) Abandoning a Class B Animal in any environment which is not natural to it, or in which it is no longer capable of surviving, after it has been under one's control.
- (d) Failing to provide care for a Class B Animal under one's control, including, but not limited to, failure to provide:
  - (1) Sanitary conditions
  - (2) Nutrition
  - (3) Shelter
  - (4) Medical care
  - (5) Opportunity for exercise
  - (6) Periods of rest sufficient to maintain the animal in good health, and to prevent the occurrence of significant observable pain or suffering in the animal.

(e) Performing a scientific experiment on a Class B Animal which involves the infliction of significant observable pain or suffering, unless such experiment:

[1. - Optional] [Is conducted in a research facility licensed by the State, and]

[1 or 2] Involves less pain or suffering than would result from any other experimental design which would provide equivalent information, and would be economically feasible, and

[2 or 3] Is limited solely to attempts to gain information about the cause, prevention, treatment or cure of human or animal disease, injury, mental disorder, or behavior.

COMMENT: This section repeats the protections afforded by subsections 104(a), (c) and (d). It recognizes, however, a general right to end a Class B animal's life, as long as death is caused by the most painless method feasible (§ 105(g)). Subsection 105(b) also specifically extends to commercial slaughtering activities. This subsection, coupled with Section 114 *infra*, dealing with Regulations, would provide the foundation for establishing humane slaughtering practices in all commercial slaughterhouses. This subsection would not allow kosher slaughter to the extent that inhumane pre-slaughter handling is practiced. Subsection 105(e) is essentially the same as subsection 104(e), except that research solely for the study of behavior is allowed.

#### **106 Cruelty to Class C Animals:**

Cruelty to Class C Animals is:

(a) Causing a Class C Animal significant observable pain or suffering, unless such pain or suffering is specifically exempted under this section or other provisions of this Act.

(b) Causing the death of a Class C Animal in an inhumane manner. For the purposes of this subsection causing death in an inhumane manner means prolonging the consciousness of the animal longer than is required during the killing process.

(c) Abandoning a Class C Animal in any environment which is not natural to it, or in which it is no longer capable of surviving, after it has been under one's control.

(d) Failing to provide care for a Class C Animal under one's control, including, but not limited to, failure to provide:

- (1) Sanitary conditions
- (2) Nutrition
- (3) Shelter
- (4) Medical care

- (5) Opportunity for exercise
- (6) Periods of rest sufficient to maintain the animal in good health, and to prevent the occurrence of significant observable pain or suffering in the animal.
- (e) Performing a scientific experiment on a Class C Animal which involves the infliction of significant observable pain or suffering, unless such experiment:
  - [1. - Optional][Is conducted in a research facility licensed by the State, and]
  - [1 or 2] Involves less pain or suffering than would result from any other experimental design which would provide equivalent information, and would be economically feasible.

COMMENT: This section repeats the protection afforded by subsections 104-105(a), (c) and (d). As in subsection 105(b), the right to inflict death is retained. However, under subsection 106(b) there is no requirement that the most humane method be selected, just that the animal's consciousness not be unnecessarily prolonged. Subsection 106(e) does not require that the experiment be for a specific approved purpose, but it does retain the requirement that the most humane technique be used.

#### **107 Exemptions:**

The infliction of pain or death on animals as the result of hunting, fishing, or treatment by a duly licensed veterinarian, is not proscribed by the provisions of this Act. The infliction of pain or death on animals as a result of any other human act, activity or omission is specifically included within the provisions of this Act.

COMMENT: This section recognizes the political impossibility of attempting to include hunting and fishing practices within a general anti-cruelty statute. However, this does not mean that state legislatures should ignore the more inhumane of these practices. It reflects merely that they are more easily dealt with in the context of fish and game statutes. The section also makes it clear that activities not specifically excluded should be considered included. One such activity not excluded which may create controversy is trapping. Trapping would be allowed under this statute only to the extent that it conforms to the standards set forth in subsections 104(b), 105(b) and 106(b), standards which would be difficult to meet given current trapping technology.

#### **108 Criminal Penalties:**

- (a) Intentional violation of the provisions of section 104 is a

misdeemeanor punishable by a fine of not less than \$500, or incarceration in [ ] for a period of not less than six months, or both, for each violation.

(b) Intentional violation of the provisions of section 105 is a misdemeanor punishable by a fine of not less than \$300, or incarceration in [ ] for a period of not less than three months, or both, for each violation.

(c) Intentional violation of the provisions of section 106 is a misdemeanor punishable by a fine of not less than \$100, or incarceration in [ ] for a period of not less than one month, or both, for each violation.

COMMENT: This section limits prosecution for criminal violations to intentional acts or omissions. It also establishes penalties of decreasing severity for the various animal classes. The actual amount of the fine or sentence is tailorable to the jurisdiction enacting this section, but the penalties should be significant, and minimum penalties should be set forth.

#### **109 Civil Damages, Civil Forfeitures, Equitable Relief, Attorney's Fees:**

(a) In any civil action brought on behalf of an animal under the provisions of this Act, the Plaintiff shall have the burden of showing that the violation complained of was the result of Defendant's failure to exercise the degree of care which would have been expected of a reasonable person in the Defendant's position.

(b) Civil Damages: The measure of damages for civil violations of this Act will be the amount required to relieve the animal of its pain or suffering, including any expenses incurred by the state in impounding, caring for, and disposing of the animal.

(c) Civil Forfeitures: Where the animal has died or been permanently injured as a result of the violation of this Act, in addition to civil damages the Court shall direct the Defendant to pay a Civil Forfeiture of not less than \$100 for each violation.

(d) Equitable Relief: The Court may grant any and all forms of equitable relief, including, but not limited to, preliminary and permanent injunctions, where violations of this Act are threatened.

(e) Attorney's Fees and Costs: Where natural persons or legal entities other than the State or its political subdivisions bring actions on behalf of animals under this Act, as a part of any award the Court shall grant to such persons or entities reasonable attorney's fees together with the costs of suit incurred by such persons or entities.

COMMENT: This section sets forth a standard of negligence for civil violations of sections 104-106 (§ 109(a)). It also provides civil relief designed to protect the animal by anticipating or stopping cruelty (§ 109(d)), and designed to make the animal whole (§ 109(b)). In those instances where permanent damage has been done to the animal, the section provides for civil forfeitures (§ 109(b)). This subsection applies particularly to situations where the animal has been killed, thus making damages inappropriate. Finally, the section provides for the award of reasonable attorney's fees and costs to animal advocates (§ 109(e)). This is a recognition that the plaintiffs will be animals, and thus unable to compensate their advocates. Such a section should enable interested attorneys to devote more time to advocacy for animals.

### **110 Impounding Animals:**

When any duly appointed law enforcement officer, or officer appointed specifically to enforce this Act, observes animals which are being mistreated in violation of this Act by any person, including their owner, and has probable cause to believe that if the animal is not removed further violations will occur, that officer may take charge of the animal, and after notifying the owner, if present, and providing him with a receipt, may remove the animal from the person's control. If the owner is not present the officer must leave a receipt at the owner's principal residence or place of business, if known.

COMMENT: This section reflects a salutary modern trend in a number of states toward insuring protection of the animal first.<sup>186</sup> Quick removal of an abused animal from the violator's control is often essential to preventing further abuse.

### **111 Lien for Expense:**

Any expense incurred in an impoundment of an animal under this Act becomes a lien on the animal impounded and must be discharged before the animal may be released from the officer's custody. If the animal is not claimed by its owner and all impoundment costs satisfied within seven days, it may be sold at public or private sale for adequate consideration to a person capable of providing care consistent with this Act. The proceeds of such a sale shall be applied first to discharge the lien, and any balance shall then be paid over to the owner. If no purchaser is found, the animal may be offered for adoption, or disposed of in a manner not inconsistent with this Act. In those situations where no buyer is found, or the consideration paid does not cover expen-

ses, a civil action may be brought under sections 103 and 109 of this Act to recover damages.

COMMENT: This section, taken with section 110, provides an effective means of recovering the expenses of animal control facilities when they are forced to take charge of animals.<sup>187</sup>

### **112 Disposition of Fines and Civil Forfeitures:**

All criminal fines and civil forfeitures paid for violations of this Act shall be turned over to [appropriate State agency or quasi-public organization charged with enforcement of the animal protection laws] to be used to supplement the enforcement capability of that [department, agency, or organization].

COMMENT: This section seeks to overcome the traditional underfunding of animal protection activities. All fines and forfeitures would go to furthering enforcement of the Act.

### **113 Maintaining Public Records:**

(a) Any natural person or legal entity, including the State and charitable and educational institutions, who keeps animals protected under this Act for any reason, except solely as personal pets, or farm animals, must maintain a daily record of the following information:

- (1) Number and type of animals retained;
- (2) Conditions under which the animals are kept, consisting of a brief description of type and size of cages, provisions for sanitation, and frequency and nature of feeding;
- (3) Reason for retention of animals. In the case of animals kept for purposes of scientific research a brief description of the design and purpose of the experiment is required.

(b) The information required by subsection (a) of this section shall be contained in a yearly record book. Such book must be retained for three years following the last day of the year for which it was kept. This book shall be available to any law enforcement officer for review, on the premises of the person or entity keeping animals, during normal business hours.

(c) Failure to maintain a record, or falsification of a record, required by this section is a misdemeanor punishable by:

- (1) For failure to maintain, a fine of \$50 for each day omitted, not to exceed a total of \$1000.
- (2) For falsification, a fine of \$200 for each entry falsified, not to exceed \$3000.

COMMENT: This section is a response to perhaps the most difficult problem in protecting animals, discovering the cruelty. Animals are unable to voice complaints, and cruelty is rarely practiced in public. The section requires that people who use animals must maintain certain minimal information concerning the conditions under which the animals are kept. By requiring that this information be available to law enforcement officers, cruel conditions may be more easily detected. Admittedly this section would require a fair amount of paperwork, but refinements of exactly what information is required might be worked out under regulations issued pursuant to section 114. It is important that those who keep animals recognize that they are undertaking a responsibility to the animals, and this section would reinforce that recognition of responsibility. This section is also adaptable to a general licensing inspection program of the type suggested by the Committee for Humane Legislation.

#### **114 Regulations:**

The [Department charged with administration of this Act] shall have the power to issue regulations establishing standards and procedures necessary for the effective enforcement of this Act.

COMMENT: This section gives the state agency charged with administration of this Act the authority to adapt specific standards and procedures to various types of animal use within the general provisions of the Act. Such regulations may be important, for instance, to establish proper standards of care for specific animals under subsections 104(d), 105(d) and 106(d).

#### **115 Limitation of Actions by Time:**

All actions, civil or criminal, under this Act, must be commenced within three years of the date the alleged cruelty occurred. For the purposes of this section, an action is commenced on the filing of the original complaint.

COMMENT: This section establishes a time limitation on commencement of actions.

#### *E. General Comments on the Proposed Model Act*

Obviously, the Act does not purport to solve all of the problems confronting animals today. Species depletion and animal population control are only two of the specific problems which would not be reached under this Act.<sup>188</sup> A complete animal protection program requires statutes dealing with many areas of human-animal contact,



as well as effective administration, and effective enforcement.<sup>189</sup> At the heart of any animal protection plan, however, must be a clear legislative statement of the standard of care owed to animals, and the means available for enforcing that standard. In these days of financial crisis in state government, upgrading the administration and enforcement of animal protection laws may be extremely difficult. One response is to provide continuing revenue for those enforcing the animal laws from licensing fees and fines.<sup>190</sup> Another approach, often adopted in the environmental enforcement area, has been to rely increasingly on interested individuals and groups as "private attorney generals."<sup>191</sup> Although concern was expressed, when such access was granted in the environmental enforcement area that spurious actions would clog the courts, there is now evidence that these "citizen suit" provisions have not been abused.<sup>192</sup> The Model Act proposed above is an attempt to combine these two approaches with a clearer statement of the standard of care that is owed to specific types of animals. As such, this Act should provide a focal point around which an effective animal protection plan can be constructed.

#### CONCLUSION

Perhaps because of the great human problems we face, the plight of animals often goes unnoticed. We are isolated from learning what really happens to animals. We do not see beakless chickens in tiny cages on factory farms allowed to do nothing but eat. Slaughterhouses are removed from residential areas, and are avoided by the general public.<sup>193</sup> Meat is attractively packaged and labeled in neutral terms like "beef", "ham" or "mutton". Animals are portrayed in advertisements as anxious to taste good. We simply do not think about, and do not allow ourselves to be shown, how animals are really treated. In addition, we have retained our traditional concepts of animals as inferior creatures, qualitatively different from ourselves. An example of this continuing prejudice is our use of the word "animal" as an expletive for the lowest, most depraved human.<sup>194</sup>

Perhaps worst of all, people who defend animals from exploitation are too often seen as fuzzy-thinking sentimentalists. One would hope that, given the choice of being sentimental or being cruel, most people would choose to be sentimental.<sup>195</sup> Modern scientific discoveries about animals require more sophisticated approaches than this "sentimental-cruel" dichotomy, however. Scientists, moralists, lawyers, we must all now pause to consider just what animals are, and

what place they occupy in a world that is theirs as well as ours. This consideration is required by stronger reasons than sentimentality, or even self-interest. In a world which recognizes animals as qualitatively similar to man, such consideration is a moral obligation.



## FOOTNOTES

\*Staff Member, ENVIRONMENTAL AFFAIRS.

<sup>1</sup> M. Twain, FOLLOWING THE EQUATOR, Ch. 27 (1897).

<sup>2</sup> J. Harris, *Killing for Food*, ANIMALS, MEN AND MORALS 98 (1971).

<sup>3</sup> G. Carson, MEN, BEASTS AND GODS 192-202 (1972).

<sup>4</sup> J. Dorst, BEFORE NATURE DIES (Amer. ed. 1970).

<sup>5</sup> E. Linden, APES, MEN, AND LANGUAGE 218-219 (1974).

<sup>6</sup> W.T. Stace, A CRITICAL HISTORY OF GREEK PHILOSOPHY 297 (1934).

<sup>7</sup> *Id.*

<sup>8</sup> Aristotle, ETHICS 279 (J.A.K. Thomson transl. 1953).

<sup>9</sup> H.R. Hays, BIRDS, BEASTS, AND MEN 23 (1972).

<sup>10</sup> THE HOLY BIBLE, *Genesis*, Ch. 1 v. 27-28 (rev. std. 1952).

<sup>11</sup> This command to "fill the earth and subdue it" might have been important in the part of the world where it was written at the time it was written. It has been pointed out that the ancient Hebrews lived in a demanding physical environment, and that the kind of language quoted above might have grown out of that hostile world, as well as early attempts to encourage agriculture and herding among a nomadic people. E. Linden, APES, MEN, AND LANGUAGE 278 (1974).

<sup>12</sup> H.R. Hays, BIRDS, BEASTS, AND MEN 35 (1972).

<sup>13</sup> This period also saw the beginnings of another form of animal use, dissection. Galen, a man more Greek perhaps than Roman, provided much of the foundation for modern medical research by his anatomical work on apes. *Id.* at 36-37.

<sup>14</sup> The primitive animistic religions, which saw magic and divinity in all the living things around man, were incompatible with the Christian concept of a single man-like god removed spatially from the earth. *Id.* at 40.

<sup>15</sup> F.C. Copleston, AQUINAS 159 (1955).

<sup>16</sup> G. Carson, MEN, BEASTS AND GODS 16 (1972).

<sup>17</sup> Commonwealth v. Higgins, 277 Mass. 191, 194, 178 N.E. 536, 537 (1931).

<sup>18</sup> Witness Descartes' own words:

“For it is a very remarkable thing that there are no men, not even the insane, so dull and stupid that they cannot put words together in a manner to convey their thoughts . . . And this proves not merely that animals have less reason than men, but that they have none at all, for we see that very little is needed in order to talk . . . It is therefore unbelievable that a monkey or a parrot which was one of the best of its species should not be equal in this matter of one of the most stupid children, or at least of a child of infirm mind, if their soul were not of a wholly different nature from ours.”

R. Descartes, *DISCOURSE ON METHOD*, Part V, 42-43 (Liberal Arts Press 1960).

<sup>19</sup> G. Carson, *MEN, BEASTS AND GODS* 38 (1972).

<sup>20</sup> *Id.*

<sup>21</sup> H.R. Hays, *BIRDS, BEASTS AND MEN* 137 (1972).

<sup>22</sup> C. Brinton, *THE SHAPING OF MODERN THOUGHT* 148 (1950).

<sup>23</sup> *Id.*

<sup>24</sup> The Romantic movement spawned great works of music and art, works which drew their inspiration from Nature. Perhaps most representative of this new world-view was the work of the Romantic poets. Wordsworth, for example:

. . . Knowing that Nature never did betray  
The heart that loved her; 'tis her privilege,  
Through all the years of this our life, to lead  
From joy to joy; for she can so inform  
The mind that is within us, so impress  
With quietness and beauty, and so feed  
With lofty thoughts, that neither evil tongues,  
Rash judgments, nor the sneers of selfish men,  
Nor greetings where no kindness is, nor all  
The dreary intercourse of daily life,  
Shall e'er prevail against us, or disturb  
Our cheerful faith, that all which we behold  
Is full of blessings . . .

W. Wordsworth, “Lines composed a Few Miles Above Tintern Abbey,” ll. 122-34, 2 *MAJOR BRITISH WRITERS* 41 (G.B. Harrison ed., 1954).

<sup>25</sup> C. Stone, *SHOULD TREES HAVE STANDING?* 8 (1974). Also printed in 45 *S. CAL. L. REV.* 450 (1972).

<sup>26</sup> R.W. Emerson, *Nature*, 1 *THE COMPLETE WRITINGS OF RALPH WALDO EMERSON*, 288-89 (Wm. H. Wise, 2nd ed., 1929). While Thoreau was, strictly speaking, neither a transcendentalist nor an intellectual, he was a friend of Emerson and his Concord group, and is of course best remembered for his attempt to learn to live at peace with himself by forsaking city life for the natural harmony of Wal-

den Pond: "I went to the woods because I wished to live deliberately, to front only the essential facts of life, and see if I could not learn what it had to teach, and not, when I came to die, discover that I had not lived." H.D. Thoreau, *WALDEN* 81 (Mod. Lib. ed. 1950).

<sup>27</sup> Some of the early states to pass statutes were: New York (1828), Massachusetts (1835), Connecticut (1838), Wisconsin (1838), New Hampshire (1842), Missouri (1845), and Virginia (1848). E.S. Leavitt, *et al*, *ANIMALS AND THEIR LEGAL RIGHTS* 17 (2nd ed. 1970).

<sup>28</sup> H.R. Hays, *BIRDS, BEASTS AND MEN* 257 (1972).

<sup>29</sup> *Animal Soul*, 1 *THE ENCYCLOPEDIA OF PHILOSOPHY* 124 (Paul Edwards, ed. 1967).

<sup>30</sup> E. Linden, *APES, MEN AND LANGUAGE* 221 (1974).

<sup>31</sup> M. Duffy, *Beasts for Pleasure*, *ANIMALS, MEN AND MORALS* 111 (1971).

<sup>32</sup> *Coakley v. Dairy Cattle Congress*, 228 Iowa 1130, 1135, 293 N.W. 457, 459 (1940).

<sup>33</sup> 4 *AM. JUR.* 2d *Animals* § 2.

<sup>34</sup> 3A *C.J.S. Animals* § 99.

<sup>35</sup> *Id.*

<sup>36</sup> *State v. Bruner*, 111 Ind. 98, 99, 12 N.E. 103, 104 (1887).

<sup>37</sup> 4 *AM. JUR.* 2d *Animals* § 2.

<sup>38</sup> A.J. Casner, W.B. Leach, *CASES AND TEXT ON PROPERTY* (1969).

<sup>39</sup> *Pierson v. Post*, 3 *Caines* 175 (N.Y. Sup. Ct. 1805).

<sup>40</sup> 4 *AM. JUR.* 2d *Animals* § 19.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at § 18.

<sup>43</sup> *Id.*

<sup>44</sup> *Geer v. Connecticut*, 161 U.S. 519, 522 (1896).

<sup>45</sup> *Id.* at 522-523.

<sup>46</sup> *Id.* at 523.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 524.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 527.

<sup>51</sup> *Id.* at 528.

<sup>52</sup> *Id.*

<sup>53</sup> *Geer v. Connecticut*, 161 U.S. 519 (1896).

<sup>54</sup> *Toomer v. Witsell*, 334 U.S. 385 (1948).

<sup>55</sup> *Id.* at 402.

<sup>56</sup> V.J. Yannacone, B.S. Cohen, S.G. Davison, 1 *ENVIRONMENTAL RIGHTS AND REMEDIES* 32 (1972).

<sup>57</sup> *Id.*

<sup>58</sup> *Geer v. Connecticut*, 161 U.S. 519, 529 (1896).

<sup>59</sup> V.J. Yannacone, B.S. Cohen, S.G. Davison, 1 ENVIRONMENTAL RIGHTS AND REMEDIES 14 (1972).

<sup>60</sup> *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972).

<sup>61</sup> G. Carson, MEN, BEASTS AND GODS 71 (1972).

<sup>62</sup> E.S. Leavitt, *et al*, ANIMALS AND THEIR LEGAL RIGHTS 15 (2d ed. 1970).

<sup>63</sup> *Id.* at 17.

<sup>64</sup> *Commonwealth v. Turner*, 145 Mass. 296, 300, 14 N.E. 130, 132 (1887).

<sup>65</sup> *State v. Buford*, 65 N.M. 51, 331 P.2d 1110 (1958).

<sup>66</sup> *Id.* at 65 N.M. 51-52, 331 P.2d 1110.

<sup>67</sup> *Id.* at 65 N.M. 51, 331 P.2d 1110.

<sup>68</sup> *Id.* at 65 N.M. 58, 331 P.2d 1115.

<sup>69</sup> *Id.* at 65 N.M. 57-58, 331 P.2d 1114-5.

<sup>70</sup> E.S. Leavitt, *et al*, ANIMALS AND THEIR LEGAL RIGHTS 22 (2d ed. 1970). Forty states use this phrase.

<sup>71</sup> *State v. Claiborne*, 211 Kan. 264, 505 P.2d 732 (1973).

<sup>72</sup> *Id.* at 211 Kan. 265, 505 P.2d 733.

<sup>73</sup> *Id.* at 211 Kan. 267, 505 P.2d 735.

<sup>74</sup> *Id.* at 211 Kan. 267-68, 505 P.2d 735.

<sup>75</sup> *Id.* at 211 Kan. 268, 505 P.2d 735.

<sup>76</sup> *Id.*

<sup>77</sup> E.S. Leavitt, *et al*, ANIMALS AND THEIR LEGAL RIGHTS 22 (2d ed. 1970).

<sup>78</sup> *Id.*

<sup>79</sup> N.C. GEN. STATS. ch. 14 § 360 (1881).

<sup>80</sup> MISS. STAT. Title 11 Ch. 1 § 2067 (1880).

<sup>81</sup> Although it is open to disagreement as to when an animal has been overridden, it is helpful that the statute at least indicates that overriding is cruel.

<sup>82</sup> *People v. Farley*, 33 Cal. App.3d Supp. 1, 10, Super. 109 Cal. Rptr. 59, 64 (1973).

<sup>83</sup> *Id.*

<sup>84</sup> MASS. GEN. LAWS Ch. 272 § 77 (1972).

<sup>85</sup> An example of the frustrations of working within a legal system that only reacts is provided by a story related to me by a man active in animal law enforcement for many years. During the Vietnam War era a group of students at a State University announced a demonstration against the use of napalm in Vietnam. A part of this

demonstration was to be the dousing of a dog with gasoline, then burning him alive, to show the horrors of death by fire. One might wonder about the ends-means ethic involved in such plans, but the point was that the animal law enforcement officers *could do nothing until the dog was set on fire*. The only thing they could do was to be present with a gun to put the dog out of its misery after it was set on fire, and then arrest the perpetrators. In fact the incident never came off, perhaps because of last minute twinges of conscience. However, the helpless position of the enforcement officers points out that our present system really does not so much protect animals as punish offenders.

<sup>86</sup> See, J. Olsen, *SLAUGHTER THE ANIMALS, POISON THE EARTH* (1971) and C. Amory, *MANKIND? OUR INCREDIBLE WAR ON WILDLIFE* (1974).

<sup>87</sup> C. Darwin, *THE EXPRESSION OF THE EMOTIONS IN MAN AND ANIMALS* (1879).

<sup>88</sup> E. Linden, *APES, MEN, AND LANGUAGE* 228 (1974).

<sup>89</sup> H.R. Hays, *BIRDS, BEASTS, AND MEN* 334 (1972).

<sup>90</sup> *Id.* at 328.

<sup>91</sup> *Id.* at 334.

<sup>92</sup> E. Linden, *APES, MEN, AND LANGUAGE* 236 (1974).

<sup>93</sup> This is still a highly controversial subject in scientific circles. Some scientists are unwilling to equate a mental ability in an animal to, say, that of a human child of a certain age. For a discussion of the controversy over animal language ability as compared to the language ability of children, see E. Linden, *APES, MEN, AND LANGUAGE* 30-48 (1974).

<sup>94</sup> J. van Lawick-Goodall, *IN THE SHADOW OF MAN* (1971).

<sup>95</sup> *Id.* at 241-3.

<sup>96</sup> *Id.* at 35.

<sup>97</sup> *Id.* at 240.

<sup>98</sup> E. Linden, *APES, MEN, AND LANGUAGE* 4-5 (1974).

<sup>99</sup> *Id.* at 13-17.

<sup>100</sup> *Id.* at 90-135.

<sup>101</sup> *Id.* at 8, 49-50.

<sup>102</sup> *Id.* at 111.

<sup>103</sup> *Id.* at 106.

<sup>104</sup> One of the most striking examples of this linguistic ability is related by Eugene Linden in his book about Fouts and the chimps entitled: *APES, MEN, AND LANGUAGE*. Linden and Fouts were with a young chimp named Lucy at the time:

Roger had noted that Lucy consistently used the correct order in such

three-word combinations as 'Roger tickle Lucy'. After watching Lucy request several such tickles, I began to wonder what would happen if Roger said 'Lucky tickle Roger'. I asked Roger if he had ever done this.

He said no, and then after thinking a moment about the possibility of unfortunate consequences from saying such a thing, he turned to Lucy and said, 'Lucy tickle Roger'. Lucy was sitting beside Roger on the living room couch. She sat back for an instant confused. Almost testingly she said, 'No, Roger tickle Lucy'. Roger again said, 'No, Lucy tickle Roger'. This time I could see comprehension brighten Lucy's eyes. Excited she jumped onto his lap and began tickling him . . . .

E. Linden, *APES, MEN, AND LANGUAGE* 106 (1974).

<sup>105</sup> J. Harris, *Killing for Food*, *ANIMALS, MEN AND MORALS* 103 (1971). Brigid Brophy, the English authoress, has pointed out that it might be kinder to place a man in a cage at a zoo than an animal. All the animal can feel is fear and frustration. The man could read a book, reason and reflect upon his misfortune, and write to the Home Secretary about it. Quoted by G. Carson in *MEN, BEASTS AND GODS* 143 (1972).

<sup>106</sup> P. Corbett, *Postscript*, *ANIMALS, MEN AND MORALS* 234 (1971).

<sup>107</sup> E.S. Leavitt, *et al*, *ANIMALS AND THEIR LEGAL RIGHTS* 29-30 (2d ed. 1970).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> The Twenty Eight Hour Law, 45 U.S.C. § § 71-74 (1906).

<sup>111</sup> E.S. Leavitt, *et al*, *ANIMALS AND THEIR LEGAL RIGHTS* 31 (2d ed. 1970).

<sup>112</sup> *Id.*

<sup>113</sup> Humane Slaughter Act, 48 U.S.C. § § 1901-6 (1958).

<sup>114</sup> 48 U.S.C. § 1901 (1958).

<sup>115</sup> 48 U.S.C. § 1903 (1958).

<sup>116</sup> E.S. Leavitt, *et al*, *ANIMALS AND THEIR LEGAL RIGHTS* 38 (2d ed. 1970).

<sup>117</sup> *Id.* at 41-43.

<sup>118</sup> Jones v. Butz, 374 F. Supp. 1284, 1289 (S.D.N.Y. 1974).

<sup>119</sup> *Id.* at 1289-90.

<sup>120</sup> 7 U.S.C. § 1902 (1958).

<sup>121</sup> E.S. Leavitt, *et al*, *ANIMALS AND THEIR LEGAL RIGHTS* 39-40 (2d ed. 1970).

<sup>122</sup> Jones v. Butz, 374 F. Supp. 1284 (S.D.N.Y. 1974).

<sup>123</sup> *Id.* at 1290.

<sup>124</sup> *Id.* at 1291.

<sup>125</sup> *Id.* at 1292.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Jones v. Butz*, \_\_\_ U.S. \_\_\_, 95 Sup. Ct. 22 (1974).

<sup>129</sup> Animal Welfare Act, 7 U.S.C. § 2131 *et seq.* (1970).

<sup>130</sup> Laboratory Animal Welfare Act, Pub. L. No. 89-544, 80 Stat. 350 (1966).

<sup>131</sup> S. REP. NO. 1281, 89th Cong., 2d Sess. (1966).

<sup>132</sup> 7 U.S.C. § 2132 (1970).

<sup>133</sup> 7 U.S.C. § 2133 (1970).

<sup>134</sup> 7 U.S.C. § 2143 (1970).

<sup>135</sup> H. REP. NO. 91-1651, 91st Cong., 2d Sess. (1970).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> The Animal Welfare Act of 1970, 172 SCIENCE 917 (1971).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> More limited in scope are: The Horse Protection Act, 15 U.S.C. § 1821 *et seq.* (1970), aimed at practices in the showhorse industry, and an act aimed at preventing aerial harassment of animals, 16 U.S.C. § 742 j-1 (1972). In addition, considerable controversy has been generated recently over dog-fighting, and it appears likely that a federal law on that subject might be produced during the coming session. See, Senator Williams' remarks in 120 CONG. REC. S21329 (daily ed. Dec. 13, 1974).

<sup>142</sup> Some of these general environmental protection statutes are: The National Environmental Policy Act, 42 U.S.C. § § 4321 *et seq.* (1969); The Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § § 1251 *et seq.* (1972); and The Clean Air Act, 42 U.S.C. § § 1857 *et seq.* (1963).

<sup>143</sup> Some of these wildlife protection statutes are: The Fish and Wildlife Coordination Act, 16 U.S.C. § § 661 *et seq.* (1958), which requires that wildlife conservation receive equal consideration with other features of water resource development programs; The Marine Mammal Protection Act, 16 U.S.C. § § 1361 *et seq.* (1972), aimed at preserving certain species of marine mammals and insuring their humane treatment; The Endangered Species Act, 16 U.S.C. § § 1531 *et seq.* (1973), which encourages Federal-State cooperation in protecting endangered species and provides stiff penalties for violations; and The Wild Horses and Burros Act, 16 U.S.C. § § 1331 *et seq.* (1971), which seeks to protect wild horses from capture, branding, harassment or death. For a more complete discussion of the Endangered Species Act see Palmer, *Endangered Species Protection: A History of Congressional Action*, in this issue of



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- <sup>144</sup> *Geer v. Connecticut*, 161 U.S. 519 (1896).
- <sup>145</sup> *Boyd, Federal Protection of Endangered Wildlife Species*, 22 STAN. L. REV. 1289, 1302 (1970).
- <sup>146</sup> *Id.* at 1295.
- <sup>147</sup> N.Y. AG. AND MKT. LAW § 350 *et seq.* (McKinney 1965).
- <sup>148</sup> N.Y. AG. AND MKT. LAW § 352 (McKinney (1965)).
- <sup>149</sup> N.Y. AG. AND MKT. LAW § 356 (McKinney (1965)).
- <sup>150</sup> N.Y. AG. AND MKT. LAW § 359 (McKinney 1965).
- <sup>151</sup> N.Y. AG. AND MKT. LAW § 366 (McKinney 1965).
- <sup>152</sup> N.Y. AG. AND MKT. LAW § 357 (McKinney 1965).
- <sup>153</sup> E.S. Leavitt, *et al*, ANIMALS AND THEIR LEGAL RIGHTS 28 (2d ed. 1970).
- <sup>154</sup> Mass. Criminal Law Revision Commission, *Proposed Criminal Code of Massachusetts* (1972).
- <sup>155</sup> *Id.* at Ch. 269 § 11 (1972).
- <sup>156</sup> MASS. GEN. LAWS Ch. 272 § 77 (1972).
- <sup>157</sup> E.S. Leavitt, *et al*, ANIMALS AND THEIR LEGAL RIGHTS 28 (2d ed. 1970).
- <sup>158</sup> MASS. GEN. LAWS ANN. Ch. 131 § 19A (1974).
- <sup>159</sup> Many States have such statutes now. For an example *see*, MINN. GEN. LAWS § 116B.01 *et seq.* (1971).
- <sup>160</sup> *See* n. 159 *supra*, MINN. GEN. LAWS § § 116B.01 and 116B.03 (1971).
- <sup>161</sup> *See* C. Amory, MANKIND? OUR INCREDIBLE WAR ON WILDLIFE (1974) and J. Olsen, SLAUGHTER THE ANIMALS, POISON THE EARTH (1971).
- <sup>162</sup> C. Stone, SHOULD TREES HAVE STANDING? 11 (1974).
- <sup>163</sup> *Id.*
- <sup>164</sup> *Id.* at 11-12.
- <sup>165</sup> *Id.* at 17.
- <sup>166</sup> *Id.*
- <sup>167</sup> W. DeFuniak, HANDBOOK OF MODERN EQUITY 73 (1950).
- <sup>168</sup> *See*, Z. Chafee and E. Re, CASES AND MATERIALS ON EQUITY 935-63 (5th ed. 1967).
- <sup>169</sup> *Id.*
- <sup>170</sup> *People ex rel. Bennett v. Laman*, 277 N.Y. 368, 14 N.E.2d 439 (1938).
- <sup>171</sup> 277 N.Y. 376, 14 N.E.2d 442.
- <sup>172</sup> 277 N.Y. 384, 14 N.E.2d 446.
- <sup>173</sup> W. DeFuniak, HANDBOOK OF MODERN EQUITY 73 (1950).
- <sup>174</sup> W. Prosser, HANDBOOK OF THE LAW OF TORTS 583-91 (4th ed. 1971).

<sup>175</sup> S. Warren, L. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>176</sup> W. Prosser, HANDBOOK OF THE LAW OF TORTS 901-914 (4th ed. 1971).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> See, Committee For Humane Legislation, Inc., MODEL STATE ANIMAL PROTECTION STATUTES (undated). Copies are available from the Committee for Humane Legislation, Inc., 11 West 60 Street, New York, N.Y. 10023.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 1-14.

<sup>182</sup> *Id.* at 1.

<sup>183</sup> W. Prosser, HANDBOOK OF THE LAW OF TORTS 248 (4th ed. 1971).

<sup>184</sup> Some of the language in § 102f is drawn from § 2b of the Committee for Humane Legislation's model anti-cruelty statute in MODEL STATE ANIMAL PROTECTION STATUTES 21 (undated).

<sup>185</sup> Some of the language in § 104d is drawn from § 127 of the Committee for Humane Legislation's model Act Establishing A Department of Animal Protection in MODEL STATE ANIMAL PROTECTION STATUTES 12 (undated).

<sup>186</sup> A number of States now have provisions similar to this. See, TEX. CIV. STATS. Title 7, Art. 184 (1913). See also, MODEL STATE ANIMAL PROTECTION STATUTES, An Act Establishing A Department of Animal Protection § 127 (undated).

<sup>187</sup> Some of the language in § 110 is drawn from ILL. ANN. STATS. Ch. 8, § 712 (1973).

<sup>188</sup> Animal population control is clearly one of the most pressing problems facing animal advocates and local governments. It is estimated that 25 million unwanted puppies and kittens are killed each year. The need for effective *and humane* population controls looms large. G. Carson, MEN, BEASTS AND GODS 150 (1972).

<sup>189</sup> It seems clear that trained, professional officers are as important to effective animal law enforcement as a well-drawn statute. D. Lambert, "A Humane Law Is Only As Effective As Its Enforcement", *A.H.A. Shoptalk* 6 (Nov. 1974).

<sup>190</sup> See, Committee for Humane Legislation, Act Establishing A Department of Animal Protection § § 131, 133, MODEL STATE ANIMAL PROTECTION STATUTES 14 (undated).

<sup>191</sup> Consumer Interests Foundation, DO CITIZEN SUITS OVERBURDEN OUR COURTS? (1973).

<sup>192</sup> *Id.*

- <sup>193</sup> D. Wood, *Strategies*, ANIMALS, MEN AND MORALS 197 (1971).
- <sup>194</sup> C. Amory, MANKIND? OUR INCREDIBLE WAR ON WILDLIFE ix-xi (1974).
- <sup>195</sup> B. Brophy, *In Pursuit of a Fantasy*, ANIMALS, MEN AND MORALS 130 (1971).