THE OFFICIAL PUBLICATION OF THE NEW YORK STATE BAR ASSOCIATION'S COMMITTEE ON ANIMALS AND THE LAW

Laws and Paws Volume 7 Number 1 Winter 2019

From the Chair

Have you ever handled a case that involved:

disability rights; fair housing; air carrier access act; landlord/tenant; co-op/condo; first amendment issues; tort law; criminal law; farming; contracts; sales of goods; intellectual property; wills, trusts, estates; local and municipal laws; neighbor disputes; divorce, separation, family matters; nuisance; nursing homes or rehabilitation facilities; hospitals; insurance?

If you answered yes to any of the above, then you also may have handled a case that involved an animal and have had to research animal law. Animal law is everywhere! I was reminded of this when I was watching the Committee on Animal Law's most recent CLE program, 2019 Legislative Update on Animal Issues, Animal Welfare and Animal Protection (available on demand on NYSBA's website).

And animal law is not just about animal welfare and protection, as we see with domestic relationships and many of the topics mentioned above. Animal law really has to do with people and the animals in their lives. The Committee has offered several CLE programs through the NYSBA on Service Animals and Emotional Support Animals, also available on-demand through NYSBA's website.

The NYSBA Committee on Animals and the Law is comprised of members from all areas of the law: arbitration, domestic relations, housing, legislation, and yes even zoos and aquariums. The Committee's website is packed with information for practitioners and the public who want to know

(Continued on page 2)

Inside this issue:

From the Chair (continued)

more about animal law issues generally. But it's also a great resource for attorneys who may not handle animal law issues on a regular basis but may come across an issue from time to time. https://www.nysba.org/animals

The Committee also hosts animal law related webinars, which are available at no cost, like Integrated Rescue Teams in Disasters, Intro to Animal Law, Exposing the Myth of Trophy Hunting as a Means to Conserve Endangered and Threatened Species, and Meat without the Animal: Plant-Based and Cell-Based Meat.

The Committee on Animals and the Law can be your "go-to" for all things animal that relate to your otherwise non-animal practice.

Enjoy this issue of Laws and Paws which includes amazing articles covering:

- Molly Armus' interview with Jim Gesualdi, former Chair of the Animals and the Law Committee and first recipient of the Committee's Exemplary Service Honor. Molly is the Chair of the Student Writing Competition Subcommittee;

- An article by Jim Gesualdi titled, "Good Practices For Zoological And Other Animal-related Organizations To Handle Concerns And Complaints," and

- Two papers written by the third place winner and runner-up of the Student Writing Competition, titled "Standing For Animals: A Review Of Ninth Circuit, D.C. Circuit and Supreme Court Case Law, Developments in Habeas Corpus, and the Implications for Animal Attorneys" by Sherman McFarland and "Steaks, Syringes and Silence: How Freedom of Speech and Expression Restrictions Keep Animal Abuses Hidden And Stifle Animal Welfare Activism in Europe and the United States" by Mahalia Kahsay.

Amy Pontillo, Chair, Committee on Animals and the Law

Committee on Animals and the Law 2020 Annual Meeting

On January 29, 2020 the Committee on Animals and the Law will hold its annual CLE program. This years program is “From Theory To Practice: The Legalities Of Animal Shelter And Rescue Operations.” The program will be presented by experts in their fields and will offer a practical discussion of laws relating to animals. Topics discussed will include starting a shelter or rescue not-for-profit organization; defining what a true shelter or rescue is under the law; defining and respecting the lawyer’s role as volunteer, counsel, or board member for an animal shelter or rescue; liabilities and insurance needs; essential contracts and agreements every shelter and rescue should have in place; animal adoption policies and best practices; spotting animal abuse and reporting requirements; interstate and international rescues; no-kill shelters; and a variety of other relevant topics.

To register, please visit www.NYSBA.org.

Amy Pontillo, Esq., Committee Chairperson
Ashlee Cartwright, Esq., Committee Co-Chairperson
Kirk Passamonti, Esq., Publications Subcommittee Chairperson
Charis Nick-Torok, Esq., Secretary

NYSBA COMMITTEE ON ANIMALS AND THE LAW
MEMBER SPOTLIGHT: JAMES GESUALDI, ESQ.,

FOUNDING MEMBER AND PAST CHAIR OF THE NYSBA'S COMMITTEE ON ANIMALS AND THE LAW,
RECIPIENT OF THE COMMITTEE'S 2018 EXEMPLARY SERVICE HONOR,
AUTHOR OF THE BOOK "EXCELLENCE BEYOND COMPLIANCE: ENHANCING ANIMAL WELFARE THROUGH THE CONSTRUCTIVE USE OF THE ANIMAL WELFARE ACT."

INTERVIEW BY MOLLY ARMUS, ESQ.

1. Why did animal law interest you and how did you get started?

A week with dolphins and cancer patients and survivors in 1989 changed my life and motivated my interest in Animal Law. I was a "burnt out" young lawyer and the ladies (in our group) dealing with cancer and facing their own mortality with strength, courage, and dignity humbled me and put my "stress" into its proper perspective. My time with a dolphin named Little Bit, the last surviving "Flipper" from the 1960s television series, inspired me.

After that compelling experience, I began by working on Animal Law administrative and regulatory practice-related matters and I am still at it 30 years later. I had studied administrative law, legislative process, environmental law, preservation law, public administration, and similar subjects in preparation for a life in public service, so I had some relevant background before there was much of a sense of Animal Law as a distinct area of legal practice. This provided the basis for dedicating my life to helping animals and people.

2. What would you say most motivates you to do what you do?

We are here to serve. The law is a service profession. I am privileged to serve animals and their interests and well-being every day as well as the people who care for them. Each day, I strive to make a difference for animals and people because we must always account for the human element– the people – to foster change that is positive, sustainable, and lasting.

3. Has there been anyone in the past whose work inspired or influenced you?

Many people and their work have influenced and inspired me throughout the years. Most recently, the young lawyers I have mentored have inspired me with their caring and thoughtful works.

And, there are many from the past that come to mind. Twenty something years ago, I received a note that the late John Prescott had sent to a number of leaders in the zoological world (the National Marine Mammal Stranding Response grants are named in his honor). His note included an article I had written and said something like, "this young man makes some good points." That inspired me then and inspires me today to do that for others. In the mid-1990s, after participating in the Marine Mammal Negotiated Rulemaking, I went up to the Consensus Building Institute and studied Lawrence Susskind's work on the "mutual gains approach," aimed at negotiating better outcomes. Susskind's approach continues to influence my bridge building efforts with Animal Law challenges today.

And, teaching Animal Law at Hofstra Law School with my friend and colleague Professor John DeWitt Gregory taught me so much. Professor Gregory treated the students as if they were practicing lawyers and it made for a much richer experience. He also called the draft

research paper due during the semester (before submitting the final paper at the end of the semester) the “Good Draft” rather than a first or rough draft. A Good Draft means it must be good. Names are powerful motivators.

Some of the many others who have greatly influenced and inspired me are my long-time spiritual director, the late Sister Patty Tippen, IHM; the author Steve Chandler; and Dr. Ron DeHaven for being an innovative leader at USDA APHIS and Animal Care; and our beloved and late black lab Memphis.

4. **What would you say are the biggest challenges in advocating for animals?**

The greatest challenge in advocating for animals is, most importantly, our understanding of people, including ourselves and people with a different perspective. That understanding promotes effectiveness in advocating for animals

As I have noted in talks and writings, encouraging more people to treat animals with greater compassion, dignity, and respect is more likely when we treat each other with greater compassion, dignity, and respect (this is my version of the “Golden Rule”). How we approach challenges matters. Respectfully engaging others matters.

Remember, it is all about serving animals and their interests and well-being. It starts with each one of us: elevating our consciousness, taking responsibility, and promoting constructive action. It makes us and our efforts more effective, reallocates resources towards advancing animal interests and well-being, and creates sustainable change.

5. **What do you feel are the biggest advancements made in animal law in recent years? What factors do you think have been most important in causing those advancements?**

The biggest advancements made in Animal Law in recent years are (1) the recognition and growth of Animal Law as a distinct area of practice (law school courses, bar association committees and sections, and events); and (2) within society, the increased recognition and appreciation of animals as other living beings whose interests and well-being warrant consideration and protection (e.g., in anti-cruelty laws and prosecutions, custody disputes, estate planning, and many other contexts).

These advances have occurred as the public's consciousness about animals has been raised. This heightened consciousness has been brought about by our love for those animals in our homes, which touch our families and hearts (and there are now more households with companion animals than children); scientific advances underscoring animal cognition, emotions, and suffering; the animal rights movement; Animal Law; and a host of other forces (e.g., humane education and, to an extent at least in my case, the good works of enlightened and responsible accredited zoos and aquariums).

6. How do you think New York measures up to the rest of the country in terms of animal protection? Do you think there are areas the state could improve on?

Because most of my work involves the U.S. Animal Welfare Act, my perspective on animal protection in New York State has been greatly influenced by the outstanding work of the New York State Bar Association Committee on Animals and the Law over the course of the Committee's 17-year existence.

Since the Committee's establishment in 2002, it has been encouraging to see the steady and, at times, dramatic increase in animal protection legislation introduced and enacted. Companion animals are afforded greater protection today and New York State seemingly is

among the more (but not necessarily the most) animal-friendly jurisdictions. It is significant that our state Senate now has a Committee on Domestic Animal Welfare chaired by Senator Monica Martinez (D-Brentwood).

Like most, if not all jurisdictions, there is still much New York could do to improve animal protection in our state. There is often a strong push to consolidate animal-related crimes into the Penal Law (from places like the Agriculture and Markets Law), to create new animal-related crimes (and update existing ones), and to make penalties for animal-related crimes commensurate with the underlying offense against another living being. Other measures might be more readily attainable and have an immediate and beneficial impact on animal protection. These include expanded public outreach and humane education about existing animal protection laws and the humane care and treatment of animals, and enhanced and comprehensive animal crime and cruelty-related training for law enforcement and animal care and control officers. Statewide dog encounter training for law enforcement officers would better protect the public, the officers, and animals, especially dogs. It would also reduce potential liabilities and conserve public resources. Lastly, encouraging greater use of mediation to resolve Animal Law-related disputes, such as custody and veterinary malpractice claims, might result in more just outcomes for companion animals (and the people who care about them).

7. What has been your proudest personal accomplishment in this field?

Being active in the Animal Law field for three decades has been very fulfilling – creating a practice and life where I remain as passionate and committed as ever to serving animals and

their interests and well-being. And, I am most proud of working with disparate groups to help improve, protect, and save animals' lives.

I am also quite proud of:

- Participating in a number of significant events like the Marine Mammal Negotiated Rulemaking.
- Helping to launch and lead the New York State Bar Association Committee on Animals and the Law in making a difference for animals and people (in countless ways including establishing the first national Animal Law Student Writing Competition).
- Developing the Excellence Beyond Compliance® approach and publishing the book that asks the unifying (and motivating) question, "What can we do TODAY to improve the well-being of animals?"
- Learning from and working with my friend and colleague Professor John DeWitt Gregory to help our students become better lawyers.
- Mentoring young and young at heart lawyers (and ministering to others) through life's challenges.
- Helping many individuals and organizations transform themselves and their service on behalf of animals, especially in the face of adversity.
- Being asked to develop and write what has become the *Getting Better All the Time* column on continuous improvement in animal welfare for the San Diego Zoo Global Academy e-Newsletter.

- Being recognized by peers for contributions to Animal Law, and service to animals, their interests and well-being.
- Having the opportunity to continue to serve animals and their interests and well-being.

8. What is your response to those who think advocating for animals is unimportant or even silly?

Advocating for animals is a meaningful form of service on behalf of other living beings. Thoughtfully and caringly executed, animal advocacy also factors in the human element, fostering positive, sustainable, and lasting change.

Serving animals and their interests and well-being can come in many forms.

As Pope Francis noted in his encyclical on the environment, "our indifference or cruelty towards fellow creatures of this world sooner or later affects the treatment we mete out to other human beings. We have only one heart, and the same wretchedness which leads us to mistreat an animal will not be long in showing itself in our relationships with other people." Thus, our care and treatment of our fellow living beings, nonhuman or human, is vitally important and that is true beyond the confines of this fleeting portion of our journey together.

9. What do you enjoy doing when you are not working?

When I am not "working," I enjoy musing about the future – the potential ramifications of the issues and challenges before me. As one former assistant once said, "Jim helps his clients solve their problems before they know they have them." Years ago, as a young lawyer, I did not fully appreciate the importance of taking a break from one's "work" until such a respite

changed my life and started my journey in Animal Law – three decades I describe as "lawyering from the heart."

With experience and enlightenment (at least a bit of that I hope), I am grateful for every "moment" at and away from "work." I love taking long (and often prayerful) walks, biking, reading (and sharing books), caring for all the plant life in the yard, and listening to live (and even recorded) music. Since its inception in 2016, being on the annual 80s Cruise has energized, inspired, and revitalized me.

10. What's the best advice you'd give to an attorney interested in entering this field?

When coaching and mentoring law students and young and young at heart lawyers, I underscore that you can do this. You can create a meaningful life in Animal Law. But, you must be certain of what you want and be committed to doing what is necessary to get there. In my experience, many people will gladly help you along the way.

When I started, I had no idea I would be where I am today 30 years later. Through the years, my conscious vision for this practice became clearer and evolved. The constant was a dedication to keep at it, do more than expected or paid, go that extra mile, be creative, build bridges, and attain outcomes that ultimately serve animals and their interests and well-being.

** *

Thank you for the opportunity to reflect on these questions and share my experience.

Good practices for zoological and other animal-related organizations to handle concerns and complaints

By James F. Gesualdi[1]

Being criticized can be a tough thing to handle (even though it sometimes can be very useful to help you grow or improve something you do).

Henrik Edberg

Introduction

Respected, responsible zoological and other animal-related organizations are committed to serving the animals in their care and have a proactive program for doing just that. One such approach is Excellence Beyond Compliance®, which prioritizes animals' interests and well-being and strives for continuous improvement.[2] Realistically, circumstances, issues and situations may arise that need to be dealt with. This article recommends good practices for zoological and other animal-related organizations to address expressions of concern and complaints regarding the resident animals and their well-being.

Expressions of Concern and Complaints

It isn't the complaint the customer remembers, but the outcome.

Isadore Sharp

The handling of concerns and complaints about an organization's efforts on behalf of the well-being of animals in their care is an important element of outstanding animal welfare and, to the extent applicable, the Animal Welfare Act's (AWA)[3] compliance programs. Expressions of concern and complaints about anorganization can arise from anyone, internally and externally. Good practices for the handling of concerns and complaints can have a significant, positive impact on animals, people and organizations—most importantly when there is found to be a

[1]James F. Gesualdi is an animal welfare attorney in Islip, Long Island, New York, and author of the book Excellence Beyond Compliance: Enhancing Animal Welfare Through the Constructive Use of the Animal Welfare Act, served as a special professor of law at Hofstra University School of Law where he taught Animal Law; a founding member and Chair of the New York State Bar Association Committee on Animals and the Law; founding Co-Chair of the Suffolk County Bar Association Animal Law Committee; a vice-chair of the American Bar Association Tort Trial and Insurance Practice Section Animal Law Committee; and Deputy Managing Editor for the American Bar Association, Section of Administrative Law and Regulatory Practice, Administrative & Regulatory Law News. He was the inaugural recipient in 2018 of the New York State Bar Association Committee on Animals & the Law's Exemplary Service Award and the 2019 recipient of the American Bar Association, Tort Trial and Insurance Practice Section, Animal Law Committee Excellence in the Advancement of Animal Law Award.
[2]James F. Gesualdi, *EXCELLENCE BEYOND COMPLIANCE: Enhancing Animal Welfare Through the Constructive Use of the Animal Welfare Act*, Maurice Bassett (2014).
[3]7 U.S.C. §§ 2131–2159 (2016).

valid basis for the concern or complaint. Even when concerns and complaints are proven unfounded, good practices for handling them provide an opportunity to demonstrate the organization's commitment to the animals. A zoological or other animal-related organization's well-executed action shapes public, regulatory agency and critics' perceptions of its commitment to and trustworthiness in serving animals, their interests and well-being.[4]

** *

For the purposes of this article's clarity, expressions of concern(s) and complaints shall be operationalized as follows:

Concerns

Concerns may be seemingly slight, informal or more serious expressions regarding animal welfare or AWA compliance. These can include off-hand comments or suggestions from a colleague, volunteer, visitor, consultant, inspector or critic. For example, "those animals appear …" or "this seems…" or possibly more detailed and substantive observations referencing specific animal behavior, physical conditions or facility upkeep. A concern could also arise from new advances or developments elsewhere not yet introduced at this zoological or animal-related organization.

Complaints

Complaints are usually more formal and can arise from staff though are perhaps more likely to be critic or public generated. In some cases, the complaint may be made public and be a high-profile matter especially when there may be a former employee or prominent animal protection, or critic group involved and actively publicizing it.

Association of Zoos and Aquariums Standard for Animal Welfare Concerns

The Association of Zoos and Aquariums (AZA) requires its accredited zoological organizations to have "a clear and transparent process for identifying, communicating, and addressing animal welfare concerns from paid or unpaid staff".[5] The exact process is established by each individual zoological organization and provides an additional means of elevating concerns apart from "the normal chain-of-command" when a "complainant believes that the welfare concern has not been adequately addressed …."[6] The reviewing body (which may be an Animal Welfare Committee) must have staff with "the experience and authority necessary to evaluate submitted observations and implement any necessary changes" through the assistance of

[4]James F. Gesualdi, *Humility, Civility, and the Public Trust*, San Diego Zoo Global Academy e-Newsletter ("Getting Better All the Time"), October 2016, (Continuously improving animal welfare and enhancing animal well-being is one key to the sustainability of the zoological community. This is essential to maintain the goodwill of the public and uphold the public trust.)
available at: http://donate.sandiegozoo.org/site/MessageViewer?em_id=48547.0.
[5] Association of Zoos & Aquariums, *the accreditation standards & related policies*,2020 edition, 1.5.8. at 15, available athttps://assets.speakcdn.com/assets/2332/aza-accreditation-standards.pdf.
[6]*Id.* (Emphasis added).

the appropriate staff responsible for such implementation. It is often helpful for the reviewing body to indicate the nature of the changes sought while leaving details and specific actions to the responsible animal care staff. The "complainant" or "person submitting the observation" is to be given timely feedback. It does not appear that the AZA process requires or recommends internal staff updates on concern/complaint resolution or annual reporting of same.[7]

The AZA "animal welfare concern" process requirement encompasses only those matters raised internally by "paid and unpaid staff." Interestingly, though the AZA process relates to "concerns," it refers to the person submitting the concern as a "complainant." Individual zoological organizations may expand the scope of concerns reviewed and addressed.

AZA itself may also play a role if the situation is such that its Accreditation Commission requests information or a report on the matter. Another such way is through "Mid-Cycle [Accreditation] Inspections" for zoological organizations "with a large number of identified concerns; institutions with significantsafety and/or animal welfare concerns."[8]

USDA APHIS Animal Care Review of Complaints Under the Animal Welfare Act

The USDA Animal and Plant Health Inspection Service (APHIS) Animal Care unit has a dedicated webpage and form for filing complaints with the agency about regulated entities including zoological organizations. There is suggested information to be incorporated that includes: "the date of the incident; the type(s) of animal(s) present; the behavior of the animal(s); the condition of the animal(s); the condition of the facility; the actions of the person with the animals; the location of the incident; etc."[9]

The agency reviews and follows up on each complaint, sometimes including a focused (complaint-driven) inspection.[10] The agency form may be submitted anonymously unless the complainant wants the agency to be able to contact them for further information. The agency notes that a Freedom of Information Act request is needed to obtain information on the outcome of any complaint. While anyone can submit a complaint to the agency, any review is generally limited to animals and situations regulated under the AWA (though the agency may refer complaints to other agencies having jurisdiction).

The AZA process is limited to addressing internally-generated "animal welfare concerns." A zoological organization's handling of a USDA review of an animal welfare complaint process will most likely involve responding to an agency inquiry or an inspection (and inspection report) focused on the area or areas noted in the complaint.

** *

[7] *Id.*
[8] *Id.* at 116.
[9] *See*, USDA APHIA Animal Care, Animal Welfare Complaint, available at https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/complaint-form.
[10] USDA Animal Welfare Inspection Guide (Revised August 2019), 3.3.5. Type of Inspection (A complete inspection to follow up on a public complaint involving animal welfare) at 3-23, available at: https://www.aphis.usda.gov/animal_welfare/downloads/Animal-Care-Inspection-Guide.pdf.

Good Practices

Good practices are important for effectively dealing with "animal welfare concerns," a USDA review of "animal welfare complaints," and any other animal-related concerns or complaints—especially when highly publicized. These practices include creating a culture and organization that emphasizes animal welfare, and an environment in which concerns are constructively addressed by appropriately experienced, trained and empowered caregivers and others with additional authority as needed.

The following elements constitute an effective program of good practices for addressing concerns and complaints.

- Awareness and understanding

  Staff (including volunteers and board members) must be made aware of the available means for expressing or submitting concerns and complaints. Some zoological and other animal-related organizations may also want to publicize this as it demonstrates commitment to the animals and transparency in furtherance of upholding the public trust and can also serve as an early warning system for identifying issues.

  Information can be provided during orientation, in manuals, on internal-only areas of the website and perhaps the public portions of the website. Within the organization, reminders about the processes should be posted at least quarterly and that may be accomplished through newsletters and email messages.

- Culture of empowerment

  It must be abundantly clear to everyone, especially staff, that sharing legitimate concerns and complaints is important and appreciated. The review of concerns and complaints can help animals, staff, organizations and even those bringing the concern or complaint. Informal and formal means of expressing concerns and complaints should ensure that people are encouraged, rather than discouraged, from coming forward.

  Relevant staff, such as animal and veterinary care, facilities, and maintenance should be empowered to address concerns and complaints as they arise in conjunction with their team when it is appropriate to do so. When this is done and completed, a note should be made in the proper records for future reference in reviewing items raised and resolved throughout the organization.

- Four pillars

  There are four pillars, including positions and processes, for addressing concerns and complaints.

Organizationally, it should be understood that there are a number of ways to resolve concerns and complaints depending upon the nature of the situation and the source of the concern or complaint.

1. Self-help in conjunction with an existing team when appropriate in terms of authority/responsibility, competence and safety to do so.

2. Raising the concern and/or complaint up the normal "chain of command."

3. Bringing the concern and/or complaint to the organization's Animal Welfare Officer (AWO)[11] (and, if not available, the Animal Welfare Act Compliance Officer) for review and resolution or referral to the Animal Welfare Leadership Group or Animal Welfare Committee. Enlightened organizations should have an executive level AWO responsible for overseeing and addressing all aspects of animal welfare (as well as an AWA Compliance Officer or ACO).

4. Formally submitting the concern or complaint to the Animal Welfare Leadership Group[12] or Animal Welfare Committee for review and resolution.

- <u>Recordkeeping</u>

  Good records are important for documenting and tracking concerns, complaints, follow up reviews and actions through to resolution and even assessment of effectiveness. This fosters responsibility and accountability. It also aids in periodic internal review, perhaps at least once annually, of concerns, complaints, resolutions, impacts and lessons learned. These reviews, when distributed and shared, further accelerate improvements.

- <u>Reporting</u>

  Reporting of concerns and complaints is essential to avoid confusion.

  As internally generated concerns and complaints are addressed and resolved, the person or persons bringing them should be advised of the outcome. In addition, other similar areas or the entire organization should be appraised of resolved concerns and complaints to bring attention to similar circumstances and potential improvements to those areas.

  The resolution of externally generated concerns and complaints should be reported as above and to the individual, organization or agency bringing it. Such transparency ensures the public trust in the organization.

[11]See supra note 2, 4. Animal Welfare Officer.
[12]See supra note 2, 5. Animal Welfare Leadership Group.

- Communications and messaging

  Effective, sincere, open and honest communication ensures that the public understands that the zoological organization at issue is dedicated to its animals and their well-being. This is essential for both good internal and external relations.

  Messaging should remain constructive even when concerns and complaints have been found to be without merit. In cases where a concern or complaint is proven to be unfounded or unwarranted, the enlightened, progressive, zoological or other animal-related organization will still examine the situation for other potential improvements. Such an approach could play out as follows:

  > *We take seriously any concern or complaint regarding the animals in our care. We have carefully reviewed the concern/complaint and found it unsubstantiated. In conducting our review, we have identified several [unrelated] improvements that would benefit our animals' welfare. We have implemented [will undertake] those improvements because our overriding priority, which motivates everything we do, is the well-being of the animals entrusted to our care.*

Conclusion

Good practices for handling of informal and formal concerns and complaints allow for constructive response and resolution appropriate to the situation. It also provides additional awareness about the importance of identifying and improving potentially problematic conditions or situations.

By empowering those with constructive concerns and complaints and by establishing an effective process and an accountable staff position responsible for resolving them, zoological organizations and other animal-related organizations can use expressions of concern and complaints to drive continuous improvement and to demonstrate to the public their steadfast commitment to the animals.

> *Criticism may not be agreeable, but it is necessary. It fulfills the same function as pain in the human body. It calls attention to an unhealthy state of things.*
>
> *Winston Churchill*

STEAKS, SYRINGES, AND SILENCE: HOW FREEDOM OF SPEECH AND EXPRESSION RESTRICTIONS KEEP ANIMAL ABUSES HIDDEN AND STIFLE ANIMAL WELFARE ACTIVISM IN EUROPE AND THE UNITED STATES*

By: Mahalia Kahsay

Primary Publication. This article was published in English in dA. Derecho Animal (Forum of Animal Law Studies) 10/1 (2019), DOI: https://doi.org/10.5565/rev/da.364

I. INTRODUCTION

The agricultural use of animals accounts for the slaughter of over 60 billion land animals annually worldwide.[1] A dramatic increase in animal production in the U.S. parallels a worldwide trend towards mass production. In the U.S. for example, for every one egg producer today, twenty egg producers worked four decades ago; the number of pig farmers declined by ninety-nine percent in the same period.[2] The average consumer in an industrialized country eats over 180 pounds of meat, 450 pounds of dairy, and twenty-five pounds of eggs per year.[3]

To keep up with demand, mass production—fueled by efficiency—is skyrocketing. Crowded conditions, increased automation, a single species per warehouse – these conditions characterize the industrial systems that today produce over half of the world's pork and over two-thirds of its poultry, meat and eggs.[4] These industrial enterprises provide harsh environments and crowded conditions. For example, both meat and egg chickens have personal space the size of a single sheet of paper; pregnant pigs sit confined so tightly they cannot walk one step.[5]

---

[1]SaskiaStucki, *(Certified) Humane Violence? Animal Welfare Labels, the Ambivalence of Humanizing the Inhumane, and What International Humanitarian Law Has to Do with It*, 111 AJIL UNBOUND, 277, 277 (2017); Miyun Park & Peter Singer, *The Globalization of Animal Welfare: More Food Does Not Require More Suffering*, FOREIGN AFFAIRS, Mar./Apr. 2012, at 122.

[2] Peter Singer, *Open the Cages!*, THE NEW YORK REVIEW OF BOOKS (May 12, 2016) (reviewing WAYNE PACELLE, THE HUMANE ECONOMY: HOW INNOVATORS AND ENLIGHTENED CONSUMERS ARE TRANSFORMING THE LIVES OF ANIMALS (2016)), http://www.nybooks.com/articles/2016/05/12/humane-economy-open-the-cages/.

[3]PARK & SINGER, *supra* note 1, at 124.

[4]*Id.* at 126.

[5]*Id.*

The public cannot support agricultural animal welfare reforms without information about the state of animal welfare inside industrial enterprises. Unsurprisingly, an increase in public interest has been met with resistance from the agricultural industry, especially in the United States. Under the guise of protecting private property and the food industry, the U.S. federal government passed an anti-terrorism act targeting animal rights activists. Many states went one step further, criminalizing photography or video filming inside animal enterprises without the consent of the owner. These laws are commonly referred to as "ag-gag laws."

In Europe, attempts to expose abuses inside animal enterprises meet a different challenge: videos exposing animal welfare conditions are blocked from broadcast on television and general dissemination. Under Article 10 of the European Convention on Human Rights, all individuals under the jurisdiction of any Council of Europe member state have "the right to freedom of expression," notwithstanding certain exceptions. Animal activists in Europe challenge applicable member state criminal and civil code regulations as illegal restrictions on their right to freedom of expression. The European Court of Human Rights adjudicates these claims, weighing the function of the expression against member states' duty to protect, speech, privacy, and safety.[6]

I. FREEDOM OF EXPRESSION IN THE EUROPEAN HUMAN RIGHTS REGIME

The Council of Europe ("Council") self-identifies as Europe's leading human rights organization.[7] Founded on May 5, 1949 to promote democracy, the Council currently boasts forty-seven member states, including all twenty-eight EU member states.[8] Operating

[6]JACOBS, WHITE, & OVEY: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 17, 484 (Bernadette Rainey et. al. eds., Oxford Univ. Press 7th ed. 2017).
[7]COUNCIL OF EUROPE, https://www.coe.int/en/web/about-us/who-we-are (last visited Dec. 12, 2017).
[8]OUR MEMBER STATES, https://www.coe.int/en/web/about-us/who-we-are (last visited May 21, 2018).

independently from the EU, the Council focuses on human rights, rule of law, and democracy. Council member states ratified the European Convention on Human Rights ("Convention").[9]

a. The Object And Purpose Of The European Convention On Human Rights.

The Convention entered into force in 1953.[10] Inspired by the Universal Declaration of Human Rights, the Convention aimed to achieve unity, prevent a second Holocaust atrocity, and protect states from communism.[11] As a result, drafters focused on rights within "the sphere of freedom of the individual vis-á-vis the [g]overnment," whose implementation established a duty of governments to refrain from interfering with their exercise.[12] The Convention's Preamble recognizes the delicate balance between the democratic nature of member state governance, and common observance of human rights in the Convention.[13] It affirms the "like-mindedness" of European nations, whose shared tradition allows them to work together "for the collective enforcement" of the rights."[14] All member states must secure to all individuals in their territorial jurisdiction, the rights and freedoms guaranteed under the Convention.[15]

To ensure member states' compliance, the Convention established the permanent European Court of Human Rights ("Court").[16] The Court's jurisdiction applies to "all matters concerning the interpretation and application of the Convention" and subsequent protocols.[17] Final judgments by the Court bind member states; the Committee of Ministers supervise their

[9] European Convention on Human Rights, Nov. 4, 1950 (entered into force Sept. 3, 1953).
[10]THE EUROPEAN COURT OF HUMAN RIGHTS, http://www.echr.coe.int/pages/home.aspx?p=basictexts (last visited Dec. 12, 2017).
[11]RAINEY et. al., *supra* note 6, at 3-4.
[12]THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS6 (Pieter van Dijk et al. eds., Intersentia: Antwerpen - Oxford 4th ed. 2006).
[13]European Convention on Human Rights,pmbl (broadly affirming the drafting parties and subsequent member states' belief in "those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and the observance of the Human Rights upon which they depend").
[14]*Id*.
[15]RAINEY et. al., *supra* note 6 at 6, 17; *See also* Section 1 of the European Convention on Human Rights, arts. 1-18.
[16]*Id*. art. 19 "Establishment of the Court"; *See also* RAINEY et. al. *supra* note 6, at 17 (having the largest territorial jurisdiction in the world, the Court covers over 47 member states and over 800 million people).
[17] European Convention on Human Rights, art 32.

execution.[18] Importantly, non-compliant states may be brought back to the Court for failing to implement a judgment.[19]

b. Freedom Of Expression Under The European Convention On Human Rights.

The Convention protects the "right to freedom of expression" under Article 10:

> Everyone has a right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…[20]

The freedom of expression protects both the content of the expression and the communication itself, covering anyone involved in the making of the protected communication.[21] While the text of Article 10 protects opinion expression, the Court's caselaw protects the communication of facts unconditionally, even untrue facts.[22] As a result, many forms of expression, including books, film, video-recordings, information pamphlets, and the internet, are protected.[23] Because the Convention allows states to limit expression via restrictions "prescribed by law" and "necessary in a democratic society,"[24] questions of necessity and proportionality underlie the Court's assessment of states' domestic restrictions.

II. THE FREE SPEECH REGIME IN THE UNITED STATES

Individual rights have played a central role in U.S. constitutional culture since U.S. independence.[25] A lack of explicit free speech protections in the U.S. Constitution pushed many

[18] European Convention on Human Rights, art 46; RAINEYet. al., *supra* note 6, at 5.
[19]*See Case of VereinGegenTierfabrikenSchweiz (VgT) v. Switzerland*, No. 32772/02, Eur. Ct. H.R. (June 30, 2009) (holding that Switzerland "failed to comply with their positive obligation under Article 10" after the Swiss Federal Court failed to order the commercial's broadcast after the Court's initial judgment).
[20]European Convention on Human Rights, art.10 § 1.
[21]CHRISTOPHGRABENWARTER, EUROPEAN CONVENTION ON HUMAN RIGHTS COMMENTARY 253 (C.H. Beck 2014).
[22]*Id*.
[23]RAINEYet. al., *supra* note 6, at 484.
[24]European Convention on Human Rights, art. 10.
[25]MARK TUSHNET, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: A CONTEXTUAL ANALYSIS 187 (Oxford: Hart Publishing 2nd ed. 2015) (noting the very first amendments to the U.S. Constitution were explicitly "described as a Bill of Rights").

framers to advocate for the inclusion of a freedom of speech clause in the Bill of Rights.[26] Thomas Jefferson warned against the "tyranny of the legislatures"[27] and many scholars believe the First Amendment sought to limit speech restricting laws, like those from England prohibiting "seditious libel" to punish dissent in the colonies, on future U.S. soil.[28]

a. The Context And History Of The First Amendment.

These concerns led Congress to word the First Amendment as an explicit limit on the federal government.[29] Rather than frame the freedom of speech as a positive individual right, a limit commences the Bill of Rights. The First Amendment of the U.S. Constitution guarantees:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[30]

The U.S. Supreme Court has since recognized that in the United States exists a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[31] Justice Brennan's famous statement clarifies that this commitment goes so far as to include "…vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[32]As a result, speech is special, well-loved, and vehemently protected.

b. Free Speech Jurisprudence Under The First Amendment.

---

[26]FLOYD ABRAMS, THE SOUL OF THE FIRST AMENDMENT 6 (Yale Univ. Press 2017).
[27]THOMAS I. HABER & DAVID EMERSON, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES: A COLLECTION OF LEGAL AND RELATED MATERIALS 4 (Dennis & Co., 2nd ed. 1952).
[28]ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES, AND POLICIES 968 (Wolters Kluwer 5th ed. 2015) (clarifying, however, that many of the Constitution's drafters helped adopt the Alien and Sedition Acts of 1798 to punish "false, scandalous, and malicious writing or writings against the government of the United States…").
[29]*Id.* at 9.
[30]U.S. CONST.amend. I.
[31]*New York Times v. Sullivan*, 376 U.S. 254, 270 (U.S. 1964).
[32]*Id.*

The U.S. Supreme Court has long held that the First Amendment "does not confer an absolute right to speak…whatever one may choose."[33] The core of the First Amendment forbids the government's regulation of speech based on its content or message.[34] A content-based limitation imposes a legal restriction dependent on the words said, whereas a content-neutral restriction limits speech based on the time, place, or manner of speech.[35] U.S. courts apply a formal categorical approach; once the right to free speech is implicated, it weighs heavily.[36]

Accordingly, U.S. Supreme Court calls for the strictest scrutiny for restrictions that "suppress, disadvantage, or impose differential burdens upon speech because its content."[37] Simply because the court finds a content-based restriction, however, does not automatically render the restriction unconstitutional. Rather, the government may justify the restriction as necessary to avoid undesirable consequences of the speech.[38] Therefore, state government restrictions that prohibit or limit speech, while authorizing criminal punishments for violations, must pass a strict scrutiny test.[39]

The U.S. Supreme Court affirms the need to maintain open and free political discussion to ensure the government can respond to the peoples' will.[40] "Silence coerced by law," the court declared, is "the argument of force in its worst form."[41] As a result of these competing interests, the U.S. Supreme Court developed complex jurisprudence balancing government interests and speech protections.

---

[33]*Gitlow v.New York*, 268 U.S. 652, 666 (U.S. 1925).
[34]CHEMERINSKY *supra* note 28, at 976.
[35] Richard A. Epstein, *The Fundamentals of Freedom of Speech*, 10 HARVARD J. OF L. AND PUBLIC POLICY 53, 53 (1987).
[36] Daniel Halberstam, *Desperately Seeking Europe: On Comparative Methodology and the Conception of Rights*, 5 INT'L J. CONST. L. 166, 168 (2007).
[37]CHEMERINSKY, *supra* note 28, at 977 (quoting *Turner Broad. Sys.v. FCC*, 512 U.S. 622, 641 (U.S. 1994)).
[38]*Id*. at 983 (explaining that such a justification also requires the consequences be uniquely connected to the suppressed speech, and not also a consequence of the allowed free speech).
[39]*Id.* at 1015.
[40]*New York Times*, 376 U.S. 254 at 269 (citing *Stromberg v. California*, 283 U.S. 359, 369 (U.S. 1931)).
[41]*Id*. at 283.

CASE LAW ANALYSIS

I. EUROPE

Animals used in agriculture in Europe benefit from more widespread and uniform anti-cruelty measures than animals in the United States. For example, veal crates, pregnant sow crates, and laying hen battery crates—often considered the most cruel forms of confinement—are all illegal in the European Union.[42] On the other hand, free speech restrictions found in many European countries exceed those in the United States. These restrictions include criminal liability for defamation in Germany, a prohibition on paid political advertising in the UK, and a federal constitutional provision in Switzerland guaranteeing the impartiality of radio and television together with a legislative prohibition on religious and political advertisements.[43]

a. Analyzing Member State Violations Under Article 10 Of The Convention.

The Court's case law affirms the special role "freedom of expression" plays in both in protecting democracy and other Convention rights.[44] With these purposes in mind, the Court developed principles to ascertain whether member state restrictions on the freedom of expression are permissible under the *restrictions clause* of Article 10.[45] In addition to the requirement that each restriction be "prescribed by law," "necessary in a democratic society," and satisfy one of

[42]Council Directive 2008/119, of Dec. 18, 2008, *Laying down minimum standards for the protection of calves*, 2008 O.J. (L 10) (EC); Council Directive 2008/120, of Dec. 18, 2008 *Laying down minimum standards for the protection of pigs*, 2008O.J. (L 47) (EC); Council Directive 1999/74, of July 19, 1999, *Laying down minimum standards for the protection of laying hens*, 1999 O.J. (L 203) (EC).

[43]*Case of Tierbefreier E.V. v. Germany*, No. 45192/09, Eur. Ct. H.R. ¶ 30 (Jan. 16, 2014); *Case of Animal Def. Int'l v. The United Kingdom*, No. 48876/08, Eur. Ct. H.R. ¶ 3 (Apr. 11, 2013); *VgtVereinGegenTierfabriken*, Eur. Ct. H.R. ¶¶ 24, 28, 30; *See* STRAFGESETZBUCH [GERMAN CRIMINAL CODE] § 187; *See* COMMUNICATIONS ACT 2003 (U.K.); *See also* SCHWEIZERISCHESBUNDESGESETZÜBER RADIO UND FERNSEHEN [FEDERAL ACT ON RADIO AND TELEVISION] Mar. 24, 2006 (Switz.).

[44]RAINEYet. al., *supra* note 6, at 486.

[45]European Convention on Human Rights, art. 10 § 2: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

the listed interests, the Court requires they be strictly construed and convincingly established.[46] Such construction "implies the existence of a 'pressing social need.'"[47]

When examining a restriction, the Court assesses the proportionality of the restriction to the alleged pressing social need with the whole case in mind, balancing the restriction and "the legitimate aims pursued" in their proper contexts.[48] In applying a margin of appreciation and recognizing that "the essence of democracy [requires] diverse political programmes to be proposed and debated…"[49] the Court acknowledges member state diversity. But, the deference granted to member states has its limits. For example, the Court has held "there is little scope under Article 10 § 2 for restrictions on debates on questions of public interest."[50] Finally, even a necessary, pressing, and legitimate interference must be construed strictly and established convincingly, in particular "when the nature of the speech is political rather than commercial."[51]

b. Freedom of Expression For Animal Rights Activists And Organizations.

In the following cases, the Court specifically assessed restrictions which allegedly violated Article 10 by suppressing activists' ability to express pro-animal views. These cases highlight how the Court assesses whether the government sponsored restriction, prescribed by law, can withstand scrutiny as a legitimate exception under section 2 of Article 10. In this way, the Court's analysis follows the object and purpose of the Convention itself, balancing the need for member states to manage an effective political democracy against the Convention's aim to protect the very human rights on which member state democracies depend.[52]

---

[46]VAN DIJK et al., *supra* note 12, at 774.
[47]GRABENWARTER, *supra* note 21, at 262.
[48]VAN DIJK et al., *supra* note 12, at 775.
[49]*Case of CentroEuropa 7 S.R.L. & Di Stefano v. Italy*, Eur. Ct. H.R. ¶ 129 (June 7, 2012).
[50]*Animal Def. Int'l*, Eur. Ct. H.R. ¶ 102 (citing *Wingrove v. The United Kingdom*, Eur. Ct. H.R. ¶ 58 (Nov. 25, 1996).
[51]*VgtVereinGegenTierfabriken*, Eur. Ct. H.R. ¶ 66.
[52]*See* European Convention on Human Rights, pmbl.

i. When animal welfare ad campaigns become political: molding democratic visions through political advertisement restrictions in *Case of Animal Defenders International v. The United Kingdom.*

In *Case of Animal Defenders International v. The United Kingdom,* Animal Defenders International ("NGO") alleged the UK violated Article 10 after the British Broadcast Advertising Clearance Centre ("Centre") categorized their advertisement as political and accordingly prohibited its broadcast.[53] The applicant NGO organized campaigns against the use of animals for science and leisure.[54] These campaigns sought to change the law and influence UK parliamentary opinion and public policy; one such campaign titled "my mate's a primate," involved the advertisement at issue.[55] The advertisement featured a girl in chains emerging from a cage, while messages about the mental capacity and genetic makeup of chimps appeared in writing on a blank screen.[56] The advertisement ended urging viewers help stop this use of animals; at the end, the chimp replaced the girl in chains in the cage.[57]

The Court found the restriction resulted from "the culmination of an exceptional examination by parliamentary bodies," all of which "found the prohibition to have been a necessary interference."[58] The Court also found the restriction proportionate and "specifically circumscribed to address the precise risk of distortion the State sought to avoid."[59] The prohibition, part of a greater regulatory framework involving the public interest, resulted from "the culmination of an exceptional examination by parliamentary bodies."[60] Thus, Court found prohibition a necessary interference – the UK *had not* violated Article 10.[61]

[53]*Animal Def. Int'l*, Eur. Ct. H.R. ¶¶ 1, 10.
[54]*Id*. ¶ 8.
[55]*Id*. ¶ ¶ 8, 9.
[56]*Id*.
[57]*Id*.
[58]*Id*. ¶ 114.
[59]*Id*. ¶ 117.
[60]*Id*. ¶ 114.
[61]*Id*. ¶¶ 114, 123.

ii. Protecting reputations in *Tierbefreier v. Germany*: when freedom of expression threatens to harm a company's image.

In *Tierbefreier E.V. v. Germany*, applicants argued a civil injunction against the distribution of video footage from an undercover animal research facility investigation violated their freedom of expression under Article 10 of the Convention.[62] One of the applicants, a journalist, began work a research facility that bred monkeys and conducted animal experiments.[63] The journalist secretly filmed animals inside the facility, collecting over forty hours of footage.[64] The journalist made one short film with the footage, criticizing the company's treatment of animals, and multiple German broadcast companies aired this film.[65] The applicant association used much of the same footage to make a second, longer film, which claimed the company "systematically flouted" applicable laws and alleged staff treated animals cruelly.[66]

The Court first acknowledged that both parties accepted that the civil injunction interfered with the applicants' freedom of expression. Next, the Court concluded that the civil injunction against the footage qualified as an interference "prescribed by law."[67] This interference also pursued a legitimate aim under section 2 of Article 10: "the protection of the reputation or rights of others."[68] The Court acknowledged the need to provide special protection to questions of public interest,[69] but nevertheless found compelling the applicants' use of unfair means in their so-called "battle of ideas" against the company.[70] Ultimately, the Court approved of the injunction.[71] Besides, as the German courts had already stated, the applicants were free to

[62]*Case of Tierbefreier E.V. v. Germany*, No. 45192/09, Eur. Ct. H.R. ¶¶ 7, 12, 21 (Jan. 16, 2014).
[63]*Id*. ¶ 5.
[64]*Id*. ¶¶ 5-6.
[65]*Id*. ¶ 6.
[66]*Id*. ¶ 7.
[67]*Id*. ¶ 48.
[68]*Id*. ¶ 49; *See* European Convention on Human Rights, art.10 § 2.
[69]*Id*. ¶ 52.
[70]*Id*. ¶ 54, 56.
[71]*Id*. ¶ 59.

criticize animal experiments in other ways.[72] The Court found Germany *had not* violated Article 10 under the Convention.[73]

II. UNITED STATES

Live animals and agricultural products, including live cows, pigs, and chickens, used in animal agricultural operations in the United States lack legal treatment protections under federal law.[74] U.S. federal law defines animal agricultural operations to include "the production and marketing of agricultural commodities and livestock;"[75] agricultural products include commodities "whether raw or processed…derived from livestock that is marketed in the U.S. for human or livestock consumption."[76]

Agricultural animals fare no better under state law, as many exempt "livestock," "production animals," or "poultry" from their animal cruelty statutes.[77] As a result, the public must voice their animal welfare concerns with its wallet. If treating animals humanely becomes economically profitable, industries will respond accordingly. Unfortunately, consumers yield little power because several obstacles prevent consumers from making informed decisions.

First, a lack of federal and state protections welfare protections for agriculture animals leaves consumers without regulated humane alternatives. Next, consumers must rely on whistleblower information about animal cruelty in agricultural production. This reliance makes the new wave of so called "ag-gag laws"—laws criminalizing undercover investigation activities

---

[72] *Id*.
[73] *Id*. ¶ 60.
[74] *See* ANIMAL WELFARE ACT OF 1970, 91 P.L. 579 (1970); *See also* DOGS, CATS, AND OTHER ANIMALS: RESEARCH OR EXPERIMENTAL USE, 89 P.L. 544 (1966).
[75] INFORMATION GATHERING, 7 U.S.C. § 8791(b)(1) (2017).
[76] Food, Conservation, and Trade Act of 1990 § 2103 (1) Reporter 104 Stat. 3359.
[77] *E.g.*,UTAH CODE ANN. § 76-9-301(b)(ii)(C) (2017) (defining "animal" to exclude "livestock, if… the conduct toward the creature, and the care provided to the creature, is in accordance with accepted animal husbandry practices." Such accepted animal husbandry practices are not further defined.); *Cf.* IDAHO CODE § 25-3501A(3)(2)(b) (forbidding law enforcement from removing a production animal despite a violation without first obtaining written permission from a department investigator); *See also* MO. REV. STAT. § 578.182(1)(3) and FLA. STAT. § 828.125(5).

in industrial animal agricultural complexes—all the more devastating. State governments' active support of the animal agriculture industry threatens consumers' access to information. When legislators respond to industry fears of exposure by reducing transparency, animals lose.

a. Federal Protections For Agricultural Animals In The United States.

Few federal statutes address animal welfare. The Animal Welfare Act of 1966 ("Welfare Act") and subsequent amendments regulate the sale, handling, and transport of dogs, cats, and research animals; later amendments regulate dog fighting and pet stores.[78] The Welfare Act explicitly excludes agricultural animals.[79] The Humane Slaughter Act of 1958 attempted to create a baseline standard for all animal slaughter in the U.S, by mandating that "no method of slaughtering or handling in connection with slaughtering shall be deemed to comply with the public policy of the U.S. *unless it is humane*."[80] It defines two slaughter methods as humane: one requires certain livestock be "rendered insensible to pain" before being "thrown, cast or cut,"[81] while the other grants a religious exception to any faith slaughtering via "simultaneous and instantaneous severance of the carotid arteries with a sharp instrument."[82] Importantly, any requirements for humane treatment throughout the animal's life are absent.

b. "Ag-Gag Laws" in the United States.

Undercover investigations in slaughterhouses and animal facilities in the U.S. have an infamous history. In the early 20th Century, Upton Sinclair's exposé of Chicago's meatpacking industry in *The Jungle* produced public outcry and prompted Congress to regulate animal

[78] ANIMAL WELFARE ACT OF 1970, 91 P.L. 579 (1970).
[79] 7 U.S.C. § 2132(g) (2017) (by defining the term "animal" to exclude "other farm animals, such as, but not limited to livestock or poultry," the act does not cover any agricultural production animals).
[80] HUMANE METHODS, 7 U.S.C. § 1902 (2017).
[81] *Id.* § 1902(a).
[82] *Id*. § 1902(b).

products and slaughterhouse conditions.[83] Beginning in the 1990s, animal rights groups like Mercy for Animals, People for the Ethical Treatment of Animals ("PETA"), and the Animal Legal Defense Fund ("ALDF"), aided by new camera technology, began posing as employees to conduct undercover investigations in animal facilities.[84] These groups conducted over 100 investigations in the last fifteen years alone, collecting hours of graphic footage.[85]

The video footage shocked viewers.[86] Recordings showed workers dragging sick cows on cement floors, beating pigs with sledgehammers, and stomping chickens to death.[87] Public outrage swiftly led to serious consequences. In 2012, a meat-packing company in California bankrupted and McDonalds refused to buy pork from producers who used gestation crates.[88]

The footage obtained through these investigations outraged not only consumers, but also producers. Panicked industry leaders rushed to their state legislatures for help in stopping what they compared to "terrorism… used by enemies for centuries to destroy the ability to produce food and the confidence in the food's safety."[89] In 1990, Kansas became the first state to criminalize investigatory acts inside animal facilities: anyone who entered the facility "to take pictures by photograph, video camera, or by any other means… without the effective consent of the owner and with the intent to damage the enterprise…" faces a class A nonperson misdemeanor.[90] Since 1990, eight states passed similar civil or criminal legislation.

---

[83] Ted Genoways, *Close to the Bone: The Fight Over Transparency in the Meat Industry*, NEW YORK TIMES MAGAZINE, Oct. 5, 2016.
[84] Christopher Berry, Staff Attorney, Animal Legal Defense Fund, Guest Speaker at the University of Michigan's Student Animal Legal Defense Fund Lunch Talk on Ag-Gag Law (Nov. 2, 2017).
[85] *Id*.
[86] *Id*.
[87] New York Times Editorial Board, *No More Exposés in North Carolina*, THE NEW YORK TIMES, Feb. 1, 2016.
[88] Christopher Berry, Staff Attorney, Animal Legal Defense Fund, Guest Speaker at the University of Michigan's Student Animal Legal Defense Fund Lunch Talk on Ag-Gag Law (Nov. 2, 2017); *See also* Genoways, *supra* note 146.
[89] *Animal Legal Defense Fund v. Otter*, 118 F.Supp.3d 1195, 1200 (D.Idaho 2015).
[90] KAN ANN. STAT. § 47-1827 (2017).

A statute passed in Utah in 2012 criminalized "obtaining access to an agricultural operation under false pretenses" as a class B misdemeanor.[91] In North Dakota, a law passed in 1991 allowed persons damaged by video recordings inside animal facilities to file a civil suit "to recover an amount equal to three times all actual and consequential damages."[92] Arkansas, Iowa, Missouri, and Montana all passed similar laws over the last two and a half decades.[93] Together, these statutes effectively banned investigatory activities by criminalizing unauthorized entry, entry by misrepresentation, film or photography inside facilities, and interference with animal production.

i. Speech restrictions aimed at chilling activism in Utah overturned in *Animal Legal Defense Fund v. Herbert.*

In 2012, a Utah state legislator introduced a bill he declared "motivated by a trend nationally of some propaganda groups… with a stated objective of undoing animal agriculture in the U.S."[94] Successful undercover investigations in California and Iowa resulted in both intense public backlash and legislative action, scaring the agriculture industry across the U.S.[95] Utah's ag-gag bill passed, containing four key provisions: the criminalization of obtaining "access to an agricultural operation under false pretenses," and bans on different filming methods—bugging, filming after applying for a job with the intent to film, and filming while trespassing.[96]

In *Animal Legal Defense Fund v. Herbert,* a federal district court in Utah concluded that all three plaintiffs had standing under the "chilling effects" standard[97] and granted their motion

[91] UTAH CODE ANN. §§ 76-6-112 (2017).
[92] N.D. CENT.CODE §§ 12.1-21.1-01, 12.1-21.1-05 (2017).
[93] ANIMAL LEGAL DEFENSE FUND, Taking Ag-Gag to Court, http://aldf.org/cases-campaigns/features/taking-ag-gag-to-court/ (last visited Dec. 26, 2017).
[94] *Animal Legal Def. Fund v. Herbert*, 263 F. Supp.3d 1193, 1198 (D. Utah 2017).
[95] *Id*.
[96] *Id*.; *See* UTAH CODE ANN. § 76-6-112 (2017).
[97] The "chilling effect" standard refers to the Tenth Circuit Court's three part test to assess standing for plaintiffs who allege injury based on a "chilling effect" of a restriction. *Animal Legal Def. Fund v. Herbert*, 263 F. Supp.3d 1193, 1199 (D. Utah 2017) (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089-88 (10th Cir.

for summary judgment.[98] The court found the First Amendment applied to the ag-gag law in question because the First Amendment protects lies that "do not cause legally cognizable harm," and "at least some of the lies criminalized by the [statute] retain *First Amendment* protection."[99] Next, restrictions on the creation of speech "are treated similarly to restrictions on speech itself" because "the consensus among courts is that the act of recording is protectable *First Amendment* speech."[100] The court also found both the lying and recording provisions restricted content-based speech because both provisions require a prosecutor examine either the words or the video footage itself.[101]

Therefore, strict scrutiny applied, and the ag-gag law failed to withstand strict scrutiny.[102] The state argued the law protected animals from diseases brought by outsiders, protected workers from exposure to animal diseases, and protected both animals and workers from injuries at the hands of unqualified workers.[103] Unconvinced, the court referred to the legislative history and determined "it is not clear that these were the actual reasons motivating the [law]."[104] Even if the state's rationale were legitimate, the state failed to provide proper evidence; narrowly tailored restrictions must be "actually necessary" and neither over- nor under-inclusive to achieve the state's interests.[105] Instead, the court found the restriction "perfectly tailored" to prevent undercover investigators from sharing animal abuses with the public.[106] Accordingly the court

---

2006)); The court also found one plaintiff had standing because Utah had prosecuted her under the ag-gag law before later dropping the case. *Herbert*, 263 F. Supp.3d at 1200.
[98]*Herbert*, 263 F. Supp.3d at 1213.
[99]*Id.* at 1202-03.
[100]*Id.* at 1208.
[101]*Herbert*, 263 F. Supp.3d at 1210-11.
[102]*Id.* at 1213.
[103]*Id.* at 1211.
[104]*Id.* at 1212.
[105]*Id.* at 1212-13.
[106]*Id.* at 1213.

found Utah's ag-gag law unconstitutional.[107] The Utah Attorney General's Office has stated it will not appeal the decision.[108]

ii. Protecting free speech but not misrepresentation in *Animal Legal Defense Fund v. Otter* and *Animal Legal Defense v. Wasden*.

In 2014, Mercy for Animals captured a video of workers dragging a sick cow by its neck with a chain across an Idaho dairy facility.[109] Negative publicity ensued, and the Idaho Dairymen's Association sponsored a bill to create a new crime of "interference with agricultural production."[110] Some legislators commenting on the bill labeled undercover activists as "extremist groups" and "terrorists," while others supported the bill because they believed in the "need to protect members of the dairy industry from undercover investigators."[111] The bill criminalized the act of obtaining employment in an agricultural facility by misrepresentation, as well as making video recordings of conduct in production facilities.[112]

In *Animal Legal Defense Fund v. Otter*, a federal district court found that Idaho Code § 18-7042 "seeks to limit and punish those who speak out" about animal agriculture issues; the statute suppressed speech involving public interest topics.[113] The too-broad statute created "a particularly serious threat to whistleblowers' free speech rights" and "criminalize[d] recordings even when made by a person who is otherwise lawfully permitted to be there."[114] Because content-based speech restrictions are unconstitutional "*unless* they are narrowly tailored to a

[107]*Id*.
[108]ASSOCIATED PRESS, Utah Won't Appeal Undercover Farm Filming Decision, https://www.usnews.com/news/best-states/utah/articles/2017-09-08/utah-wont-appeal-undercover-farm-filming-decision (last visited June 15, 2018).
[109]*Animal Legal Defense Fund v.Otter*, 118 F. Supp.3d at 1199.
[110]*Id.*
[111]*Id*. at 1200.
[112]IDAHO CODE § 18-7042 (2017).
[113]*Otter*, 118 F. Supp.3d at 1201.
[114]*Id*. at 1208-09.

compelling state interest," and the court failed to find proper narrow tailoring, the court declared Idaho Code section 18-7042 unconstitutional.[115]

In *Animal Legal Defense Fund v. Wasden*, the Ninth Circuit Court of Appeals reversed in-part the lower court's decision. The court held that while the audio and video recording of facility operations, and misrepresentation to enter a facility, are protected speech under the First Amendment, misrepresentation to obtain records or employment are not so protected.[116] The court upheld the permanent injunction against the overly broad entry by misrepresentation provision, which criminalized innocent behavior and targeted specifically "falsity and nothing more."[117] The court also affirmed the unconstitutionality of the recording provision, defining it as a "classic example of a content-based restriction" under the strict scrutiny test.[118] Oppositely, the court found the provision banning misrepresentation to obtain records targeted behavior "long prohibited in Idaho,"[119] and the provision on employment only criminalized misrepresentation to obtain employment by individuals with intent to cause injury to the facility.[120] The court concluded that neither of these two misrepresentation provisions targeted behavior protected by the First Amendment.[121]

ANALYSIS

I. FOUNDATION OF A DEMOCRATIC SOCIETY: SPEECH IS SPECIAL

The right to express opinions and speak freely without government intervention is a critical component of a functioning democracy. Censorship allows governments to restrict information, propagate a tainted agenda, and misinform the masses. Many revolutionary

[115]*Id.* at 1207 (quoting *Turner Broadcasting System Inc. v. F.C.C.*, 512 U.S. 622, 680 (U.S. 1994)).
[116]*Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1190 (9th Cir. 2018).
[117]*Id.* at 1195-96 (quoting *United States v. Alvarez*, 567 U.S. 709, 719 (2012)).
[118]*Id.* at 1203.
[119]*Id.* at 1199.
[120]*Id.* at 1201.
[121]*Id.* at 1205.

constitutions abolished censorship and extended free speech and expression rights to the media; this suggests free speech encompasses "the right of all citizens to be informed."[122]

The European Court of Human Rights labeled the freedom of expression under Article 10 as "one of the essential foundations of a democratic society."[123] Justice Brandeis of the U.S. Supreme Court argued the "safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."[124] Brandeis' solution involved "more speech, not enforced silence."[125] Unsurprisingly, free speech in the United States under the First Amendment is popularly, although incorrectly, viewed in absolutist terms: free speech seemingly reigns above all else.[126]

Surprisingly, republican state legislators in Idaho and Utah, popularly known for touting small government ideals, passed sweeping legislation to restrict speech—lying and video recording—in animal production facilities. In these cases, private property and food industry interests easily trumped free speech concerns, at least according to state legislators. Only in court, when out-of-state animal welfare organizations challenged these restrictions did free speech concerns take a central role in the debate. In New York City, investigative reports and op-eds sounded the alarm on states' attempts to stifle speech, warning these ag-gag laws violated free speech rights and threatened transparency in the animal agricultural industry.[127] The welfare of animals mattered now that Americans' cherished free speech rights were threatened.

In Europe, popular belief assumes Europeans accept greater free speech restrictions. The European Convention on Human Rights ("Convention") itself explicitly allows states to restrict

---

[122]NORMAN DORSEN, MICHEL ROSENFELD, ANDRÁSSAJÓ, & SUSANNE BAER, COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 847 (Thompson Reuters 2nd ed. 2010).
[123]RAINEY et. al., *supra* note 6, at 483 (quoting *Handyside v. UK*, No. 5493/72, 1 EHRR 737 ¶ 48 (Dec 7 1976)).
[124]DORSEN et. al., *supra* note 122, at 851 (quoting *Whitney v. CA*, 274 U.S. 357, 375 (U.S. 1927)).
[125]*Id.* at 852.
[126]*Id.* at 854.
[127]*See* Ted Genoways, *Close to the Bone: The Fight Over Transparency in the Meat Industry*, NEW YORK TIMES MAGAZINE, Oct. 5, 2016; *See* New York Times Editorial Board, *No More Exposés in North Carolina*, THE NEW YORK TIMES, Feb. 1, 2016.

expression, despite the central role the freedom of expression plays in protecting other Convention rights.[128] Restrictions are allowed so long as they are clearly prescribed by law, necessary in a democratic society, and satisfy one of many specific objectives, including public safety, the protection of the rights of others, or national security.[129]

Procedural, historical, and contextual differences between Europe and the United States help explain the differences between freedom of speech and expression challenges by animal activists at home and abroad.

II. FREEDOM OF EXPRESSION VERSUS FREE SPEECH CHALLENGES

a. Procedural Differences Between The European Court Of Human Rights And U.S. District Courts.

Several procedural aspects differentiate "freedom of speech" challenges in the United States from the "right to freedom of expression" jurisprudence of the European Court of Human Rights ("European Court"). First, once jurisdiction is established, U.S. federal district courts examine ag-gag laws as first instance courts. The European Court, however, may only hear cases once the applicant has exhausted all domestic remedies in the state which allegedly violated their rights.[130] This allows member states the chance to remedy an alleged breach, reaffirming the states' role as part of the "machinery of protection" to guard rights under the Convention.[131]

Both systems lack jurisdiction to review a national law upon request. In the United States, plaintiffs need standing, either an actual injury or threat of injury, and in Europe persons who bring applications must have been "directly affected by an alleged violation" and may not

[128]RAINEY et. al., *supra* note 6, at 486.
[129] David Pannick, *Article 10 of the European Convention on Human Rights*, 4 K.C.L.J. 44-45 (1993-94).
[130]Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) art. 35, Nov. 4, 1950 (entered into force Sept. 3, 1953).
[131]RAINEY et. al., *supra* note 6, at 34.

"complain[] generally of certain legislation."[132] If admissibility is established, U.S. courts use a categorical approach[133] to assess free speech restrictions, while the European Court assesses the proportionality of government interests against free expression rights.

b. Historical Background And Current Application: U.S. Categorical Approach Versus Proportionality In Europe.

The proportionality principle originated in Germany, under Prussian administrative court judges, as a means to limit government action to "only those measures that were necessary for achieving its legitimate goals."[134] With individual rights not explicitly protected by a constitution, a formalist means and ends analysis introduced the idea of rights into German law to protect "natural rights," while making the administration of law more efficient and rigorous.[135] Historical struggles, including social reform sought through the French Revolution and the atrocities of World War II led to a conception of positive rights, explicitly spelled out in the Convention, which require government action to protect.[136]

On the other hand, the U.S. Bill of Rights protected rights by first limiting the federal government, and later the states.[137] Thus, the Fourteenth Amendment protects speech from unconstitutional state restrictions,[138] placing the courts in a defensive role of retroactively overturning unconstitutional state speech restrictions. While both the Convention and U.S. Constitution can limit government lawmaking, the European Court and U.S. federal district courts view their roles in remedying violations differently.

---

[132]*PETA*, 259 F. Supp.3d at 374; RAINEY et. al., *supra* note 6, at 29 (explaining Art 34, allowing "any person, non-government organization, or group of individuals claiming to be the victim of a violation" includes both corporate or unincorporated bodies).
[133]DORSEN et. al., *supra* note 122, at 855.
[134] Moshe Cohen-Eliya&IddoPorat, *American Balancing and German Proportionality: The Historical Origins*, 8 INT'L J. CONST. L. 263, 272 (2010).
[135]*Id.* at 273, 276.
[136]*See* Halberstam, *supra* note 36, at 167, 171.
[137]*SeeGitlow*, 268 U.S. at 666 (U.S. 1925) (incorporating the First Amendment against the states, the court found the First Amendment "among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States").
[138]ESSAYS IN CONSTITUTIONAL LAW, 275 (Robert G. McCloskey ed., Knopf 1957).

In the United States, a categorical approach to free speech restrictions developed in a system with strong textual rights protections. Over ninety years of free speech jurisprudence and a distrust of judicial discretion led the U.S. Supreme Court to create many rules, tests, and presumptions to assess speech restrictions.[139] This categorical approach applies a sort of "wholesale balancing at the level of defining general categories," where the court balances the free speech right against other involved rights depending on the category of protected speech.[140] In Utah for example, the court in *Herbert* found the government's rationale insufficient under a strict scrutiny test, after finding a content-based restriction.[141] This approach allows government limits on certain categories of speech for public interest reasons, if proper justification is provided.[142]

The European Court applies the principle of proportionality to ensure a member state's restriction is reasonable. This requires the means by which a state hopes to achieve an objective be proportional to the means used to achieve it. In Europe, this ensures rights remain protected despite failures by member states to pass proper domestic legal protections, whereas the balancing test in the United States limits a possibly limitless reading of the First Amendment.[143]

The framework of the Convention gives member states the responsibility to protect individual rights.[144] The European Court simply examines whether a right is involved, and if so, balances the government interest against the protected right as defined in the Convention.[145] Therefore, when applying a margin of appreciation, the European Court considers local

[139]Halberstam, *supra* note 36, at 168.
[140]*Id*. at 177.
[141]*Herbert*, 263 F. Supp.3d at 1212.
[142] Cohen-Eliya&Porat, *supra note* 134, at 284.
[143]*Id*. at 266.
[144]RAINEY et. al., *supra* note 6, at 486.
[145]Halberstam, *supra* note 36, at 168.

conditions and circumstances.[146] As a result, considerations may vary greatly, depending on the purpose of the member state's restriction and the type of expression being restricted.[147]

c. How Context Shapes Outcomes, Despite Similar Restrictions, At The European Court of Human Rights And U.S. Federal District Courts.

U.S. federal district courts and the European Court place great weight on context, examining closely legislative intent and the social/political power of the involved parties. In *Animal Defenders*, the European Court unjustifiably upheld a UK regulation after failing to focus on the individual facts of the case and yielding instead to the state's general reasoning for the ban. Rather than question whether calls for improved animal welfare regulations qualified as political, the Court assessed the general rationale for the ban, easily accepting the UK's labeling of the commercial as political and subsequent right to regulate. A well-spoken legislature, properly researched ban, and lack of consensus in other European countries swayed the European Court; the ban was upheld.

In Idaho and Utah, the context in which the state restriction passed also played a decisive role. The district court judges relied heavily on legislators' motivations for passing the ag-gag laws, and used their own statements against them to disprove the government's post-hoc rationale for the laws. These judges in both Idaho and Utah pointed to the detrimental effects of previous undercover investigations, including lost profits, poor public image, and public outcry against the animal facility operators. Neither judge pretended as though the ag-gag laws suddenly appeared to enhance safety and hygiene measures. Because neither Utah nor Idaho could convince the court of their claimed intentions, the true motive—ending undercover investigations—made for relatively straightforward First Amendment violations. In Idaho, the

[146] Mathew Saul, *The European Court of Human Rights Margin of Appreciation and the Process of National Parliaments*, 15 HUM. RTS. L. REV. 745, 749 (2015); *See also* Case of VgtVereinGegenTierfabriken v. Switzerland, No. 24699/94, Eur. Ct. H.R. ¶ 69 (June 28, 2001).
[147] RAINEY et. al., *supra* note 6, at 486.

appellate court later found the federal district court had gone too far, but preserved its injunction against half of the ag-gag law provisions.

The social and political power of the parties involved also played a role in both the United States and Europe. In *Tierbefreier*, the opinion reads as though the European Court viewed the issue through the lens of a personal dispute between two parties, rather than a public debate involving information sharing and transparency. For example, the European Court outlined in detail the domestic courts' rationale in upholding the civil injunction against the short film's dissemination. Rather than discussing the need for open public debate, European Court characterized the case as an intellectual battle of ideas. As a result, German defamation laws applied. In the United States, federal district courts in Utah and Idaho sided against the powerful agricultural lobby and state government legislatures working in concert. In comparison, the European Court viewed the private German research company on equal footing as the animal welfare organization.

Intended effects also matter. In the UK, the NGO created the commercial as a part of its campaign to change legislation and public policy regarding the use of animals. In Germany, the sensationalist accusations against the animal experiment company were found to increase the chances of criminality against the company. Alternatively, in Utah and Idaho, the applicants/plaintiffs merely sought to educate the public about animal abuses, and the courts accordingly found the effects of the speech restriction themselves more compelling.

CONCLUSION

The European Court of Human Rights recognizes its powerful role and treads cautiously in full recognition of member states' responsibility to protect legitimate interests through democratically created regulations. As a result, the European Court questionably accepted the

UK's rationale, because the UK properly and proportionately regulated a legitimate interest. Should this holding create cause for concern in the United States? The current, hastily written and overbroad ag-gag laws make for simple cases, but will U.S. courts be able to rule against future, more subtly and strategically crafted ag-gag laws?

Under Professor Halberstam's conception of U.S. rights, likely not. Halberstam argues the dominant conception of rights in the United States is a "motivational one."[148] Under this view, rights involve freedom from government intervention "motivated by a particular set of excluded reasons."[149] As a result, the right to free speech is not absolute, but simply the right to speak without government interference "*for bad reasons*."[150] Regardless of how the current U.S. approach to free speech jurisprudence is labeled, the complex combination of categorical analysis, balancing considerations, and examining government motivations provides a powerful buffer against unconstitutional infringements when the government acts *for bad reason*.

The First Amendment, created against the historical backdrop of newfound independence and drafted as a negative right restricting the government, will withstand even carefully crafted legislation. Any future ag-gag laws, passed under the familiar guise of public health and safety, will have been created *for bad reason*—to silence speech and reduce transparency in the animal agricultural industry. The tried and tested First Amendment will continue to withstand attempts, made *for bad reason*, to quell free speech.

[148]Halberstam, *supra* note 36, at 178.
[149]*Id.*
[150]*Id.*

Standing For Animals: A Review of Ninth Circuit, D.C. Circuit, and Supreme Court Case Law, Developments in Habeas Corpus, and the Implications for Animal Attorneys

Sherman McFarland
University of California
Davis School of Law
Class of 2020

INTRODUCTION

When a student takes Constitutional Law and is introduced to the concept of standing, he or she learns that, in order for a federal court to lawfully exercise its Article III power to hear a case or controversy brought before it[1], the plaintiff or petitioner must satisfy three separate requirements: 1) Injury; 2) Causation; 3) and Redress.[2] Regarding the first element, the injury must be imminent or actual.[3] If the injury is actual—that is, it has already occurred—it must also be an injury that is concrete and particularized.[4] For causation, the injury suffered must be fairly traceable to the conduct of the defendant.[5] In other words, the party that caused the injury must also be the party being sued. Finally, the injury must be one that is likely to be redressed by judicial action.[6] Although, constitutional standing, or Article III standing, undoubtedly applies to *Homo sapiens*, it is less clear how standing applies to non-humans, that is, animals. This paper will examine case law from the Supreme Court, D.C Circuit Court of Appeals, and primarily the Ninth Circuit Court of Appeals, and how each of those jurisdictions has addressed constitutional and statutory standing as they apply to animals. In addition, two recent state court decisions regarding habeas corpus petitions brought by the Nonhuman Rights Project will be analyzed to establish an understanding of the relationship between standing and habeas corpus. Although the case law discussed in the paper is by no means representative of all jurisdictions, it provides for an interesting insight into how some jurisdictions, both federal and state, perceive animals and their legal status. Finally, this paper may be helpful to young animal law attorneys interested in constitutional law, or in extending constitutional protections to their non-human clients.

---

[1] *Allen v. Wright*, 468 U.S. 737, 750 (1984).
[2] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, 45, 9TH ED. 2017
[3] *Id.*
[4] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).
[5] *Id.*
[6] *Id.*at 561.

A Guiding Light: *Lujan v. Defenders of Wildlife*

In 1992, the Supreme Court ruled that two women, each of whom had an interest in observing endangered species, failed to satisfy the injury requirement for standing in their lawsuit against the Secretary of the Interior.[7] The petitioners alleged that the Agency for International Development's (AID) projects in Egypt and Sri Lanka would threaten the endangered species in which said petitioners had an interest, and that the Secretary of the Interior, pursuant to the Endangered Species Act, should have required AID to consult with the Secretary before initiating the projects.[8]

In the majority opinion, Justice Scalia argued that, for the purposes of constitutional standing, injury "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."[9] In other words, plaintiffs must demonstrate how the injury to the animals injured themselves as well.[10] It is important to remember that, in spite of the plaintiffs' interests in preventing further endangerment of certain species, the question in this case ultimately deals with whether *human* plaintiffs have established standing. This begs the question: if the plaintiffs were concerned about the welfare and viability of the animals they wished to observe, could they not have argued that the animals had standing themselves? Or may an animal only achieve standing vicariously through a human, who must satisfy the three standing requirements for herself? The answer to those questions is both Yes and No.

[7] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 558, 563, 566 (1992).
[8] *Id.* at 558, 568-69.
[9] *Id.* at 563.
[10] *Id.*

May Animals Establish Constitutional Standing?

Obviously, an animal cannot vocalize that it has suffered an injury, identify the proper defendant necessary to establish causation, or argue that a court can redress the injury sustained. However, the status of being an animal does not automatically disqualify one from satisfying the elements of constitutional standing.[11] Moreover, it would be strange not to allow animals to establish constitutional standing given that it is available for a number of other entities such as trusts, corporations, juveniles, the mentally handicapped, cities, and ships.[12] Through the help of a human attorney to represent him, her, or it, any animal is capable of presenting a justiciable case provided that the human attorney can establish the three requirements needed for constitutional standing. Again, no case law suggests that only certain species may qualify for standing. This leaves the door open for potentially every living creature that has suffered an injury. Yet, it is not quite that simple for non-humans. For they must clear a second hurdle via statutory standing, and the generosity of the case law to animals in that regard is antithetical to that of constitutional standing.

Statutory Standing as a Roadblock and an Opportunity

Simply put, a plaintiff establishes statutory standing when a federal statute created by Congress permits said plaintiff to sue under that specific statute.[13] Constitutional standing lays the groundwork for an animal to sue in federal court, but statutory standing acts as a gatekeeper, allowing only those who qualify as a "person" under the statute to argue his or her case. Currently, neither the Marine Mammal Protection Act (MMPA), Endangered Species Act (ESA),

[11] *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175
[12] *Id.* at 1176.
[13] *Id.*

or National Environmental Protection Act (NEPA) provide standing to animals.[14] For example, the ESA permits "persons" to sue under the law, but non-human persons are not included in that definition.[15] Interestingly, the ESA considers any of the following entities to be "persons" for purposes of statutory standing: "an individual, corporation, partnership, trust, association, or any other private entity."[16] The ESA also includes federal government, state government, and foreign government officials and employees on its list of "persons".[17]

The MMPA features nearly identical language, which limits persons to "any private person or entity."[18] What a "private person" is, however, is uncertain, and it appears that this ambiguity could be exploited by attorneys representing animals that have been injured as a result of MMPA violations. Nevertheless, the Court of Appeals for the Ninth Circuit interpreted the language in the MMPA, along with that in NEPA, to exclude animals from their definitions of what a "person" entitled to statutory standing is.[19] The court concluded that congressional silence in the ESA, MMPA, and NEPA regarding statutory standing for animals is to be construed as ineligibility for statutory standing.[20] As the court in *Citizens to End Animal Suffering & Exploitation v. New England Aquarium* put it, "If Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly."[21] It is important to note that the environmental laws above do

[14]Cass R. Sunstein, *A Tribute to Kenneth L. Karst: Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L.Rev. 1333, 1359 (2000) (discussing the lack of statutory standing for animals).
[15] Cetacean Cmty. v. Bush, 386 F.3d 1169, 1178 (9th Cir. 2004).
[16]16 USCS § 1532 (2018).
[17]*Id.*
[18]16 USCS § 1362 (2018).
[19]Cetacean Cmty. v. Bush, 386 F.3d 1169, 1178-79 (9th Cir. 2004).
[20]*Id.* at 1179 (citing *Citizens to End Animal Suffering & Exploitation v. New England Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993)).
[21]836 F. Supp. 45 (D. Mass. 1993).

not merely reflect how the majority of statutes address statutory standing for animals. In fact, there are currently no federal statutes that grant statutory standing to animals.

Statutory Standing for Humans: A Workaround?

Statutory standing is not the end of the line for animals. However, at this juncture, a human must substitute himself or herself as the plaintiff, and demonstrate the he or she has suffered an injury under the statute, in order to continue to advocate for the injured animal. This the human may do through the Administrative Procedure Act (APA).[22] To eschew any confusion at the moment, it should be noted that an animal would be incapable of establishing statutory standing under the APA as well, because that law uses the same definition of "person" as the ESA, MMPA, and NEPA do.[23] Additionally, causation and redress are not needed for statutory standing, although injury alone is insufficient, as the paper will demonstrate later on.

To put the APA into context, we should recall the Court's holding in *Lujan*, which established that a speculative visit to observe endangered species did not satisfy the 'concrete' or 'particularized' criteria for the injury requirement of standing. Now, if the tentative visit became a *planned* visit with an established date, the Court suggests that the plaintiffs *then* would have suffered an injury.[24] The logical conclusion is that the government-funded projects challenged by the plaintiffs would threaten the endangered species that the plaintiffs wanted and planned to observe, thereby particularly and concretely harming the plaintiffs' interest in observing said species. It is the APA that allows human plaintiffs to establish such injuries and, consequently,

[22]*Id.* at 1176.
[23]*Id.* at 1178.
[24]*Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992).

opens the door for them to obtain standing for the purpose of protecting an animal or a group of animals.

Under the APA, "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[25] Put otherwise, for the purposes of this paper, if a human seeks to protect an animal from harm, the human must demonstrate that *he* or *she* has suffered an injury due to an agency's failure to regulate under and enforce the statute, for which said agency is responsible. To demonstrate that he or she has suffered an injury, the human plaintiff must prove that the interest he or she seeks to protect is among the interests protected by the statute that the agency allegedly failed to uphold or properly enforce.[26] Fortunately, for the human plaintiff, the Supreme Court alleviates some of this burden by allowing plaintiffs to seek protection for aesthetic, recreational, or conservational interests.[27] However, those interests must still be protected by the statute under which the plaintiff is suing. Simply asserting an aesthetic, recreational, or conservational interest does not eliminate the plaintiff's obligation to demonstrate how either of those interests are protected by the statute.

However, in cases where an environmental statute is available, one should scrutinize the law for language that either directly protects the animal (conservation), or protects the interests of a human (aesthetics, recreation), who can, in turn, obtain statutory standing under the APA to intervene on the animal's behalf. Therefore, one might view the APA as statutory standing by proxy, since statutory standing for animals is wholly unavailable. The ability to assert recreational, aesthetic, and conservational interests also expands the plaintiff pool in a significant

[25]5 USCS § 702 (2018).
[26]*Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).
[27]*Id.* at 154.

way. For not only can scientists or researchers who handle and come into contact with animals as part of their employment obtain statutory standing under the APA, but individuals like the plaintiffs in *Lujan* with an interest in studying or observing species can also establish statutory standing. Two cases illustrate the opportunities that citizens have to obtain statutory standing.

In 1986, the Supreme Court held that members of the American Cetacean Society (ACS) suffered an injury when the United States Secretary of Commerce and the Japanese government agreed to allow Japanese whalers to continue their whaling operations, despite the fact that the permitted whaling would lead Japan to exceed its quota under the International Convention for the Regulation of Whaling (ICRW).[28] The Court found that an injury existed because the ACS's members had an interest in whale watching, which additional Japanese whaling would jeopardize.[29] The agency action responsible for the injury was the United States Commerce Secretary's failure to certify to the President of the United States that "nationals of a foreign country, directly or indirectly … conduct[ed] fishing operations in a manner or under circumstances which diminish[ed] the effectiveness of an international fishery conservation program."[30] The diminished fishery conservation program referred to was the ICRW, and the failure of the Secretary of Commerce to certify Japan to the United States President violated the Pelly Amendment to the Fisherman's Protective Act.[31] Under the APA, the Court found that the ACS's interest in whale watching fell within the zone of interests protected by the Pelly Amendment.[32]

---

[28]*Japan Whaling Ass'n v. Am. Cetacean Soc'y*,478 U.S. 221, 223-24, 227-28, footnote 4 (1986).
[29]*Id.* at footnote 4.
[30]*Id.* at 225.
[31]*Id.*
[32]*Id*. at footnote 4.

Japan Whaling Ass'n exemplifies how a citizen's, or a group of citizens', recreational interest may receive protection under a federal statute, such that the protection afforded to the interest allowed ACS members to establish an injury for statutory standing. Again, using the APA simply allows a human to achieve statutory standing, and does not confer standing upon an animal. While the Supreme Court found whale watching to be a legitimate recreational interest, the Court of Appeals for the D.C. Circuit found that an even broader interest was protected by a different statute.

In 1998, the Court of Appeals for the D.C. Circuit held that a visitor to a particular zoo suffered an aesthetic injury when he witnessed animals being confined under inhumane conditions.[33] During its analysis of statutory standing, the court found that the visitor-plaintiff's interest in observing animals under humane conditions was protected by the Animal Welfare Act's 1985 Amendments.[34] The agency action responsible for the injury, which, again, must be demonstrated by the plaintiff under the APA, was the failure of the United States Department of Agriculture (USDA) to develop humane living standards for animals dwelling in exhibits and zoos by which animal keepers were required to comply.[35] Instead, the USDA delegated its rule-making authority to animal exhibitioners and zookeepers themselves, who were directed to comport the animals' living arrangements with accepted industry standards.[36]

As the Court of Appeal for the Ninth Circuit held in 1985, "A party has standing to protest an action taken by someone else if he or she can show two things—'injury in fact' arising from the action and injury 'arguably within the zone of interests to be protected' by a violated

[33]*Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 431 (1998).
[34]*Id.* at 444-45.
[35]*Id.* at 430.
[36]*Id.*

statute."[37] As mentioned above, a plaintiff need not demonstrate causation or redress to establish statutory standing. However, one must remember that acquiring statutory standing only represents one half of the battle for standing. Constitutional standing must first be satisfied. Thus, an organization or an individual who sues in federal court to challenge governmental or individual activity that negatively affects an animal, or group of animals, cannot proceed without both constitutional and statutory standing. Since an animal has the potential to obtain constitutional standing in any jurisdiction (again, no case law exists to contradict such a claim, and the Ninth Circuit affirmatively allows constitutional standing for animals—see *Naruto* below), but not statutory standing, it would be futile to name the animal as the plaintiff to the case, since the animal would always lose on the issue of statutory standing. Therefore, as a practical matter, a human must serve as the named plaintiff throughout the duration of the case in order to act as the legal proxy for an animal or group of animals.

But how can a human establish injury, causation, and redress when the animal is the one experiencing the personalized, physical injury? What are the odds that a human can satisfy all the requirements of constitutional standing and statutory standing when his or her injury is less physical and concrete than the injury to the animal? It is true that the injuries suffered by the animal and the human will be different, but the cause of the harm will be the same defendant, and redress is simply a question of whether a court can *probably* remedy or halt the injury. Although the plaintiff has only one chance to name the proper defendant for causation and successfully demonstrate redress before a judge or justice, the plaintiff has more room to be creative when it comes to the injury. Since various types of injuries are available to the plaintiff

[37]*Animal Lovers Volunteer Asso. (A.L.V.A.) v. Weinberger*, 765 F.2d 937, 938 (9th Cir. 1985).

and the path toward standing cannot begin without first establishing an injury, the primary focus of attorneys seeking to intervene on behalf of an injured animal should be the injury requirement.

Humans Harmed by Harm to Non-Humans?

The case law overwhelmingly suggests that ordinary citizens can bring lawsuits for physical harm suffered by animals. In *Glickman*, the Court of Appeals for the D.C. Circuit discussed the plaintiff's professional and volunteer experience with animals, his numerous visits to the zoo, and his interest in observing the zoo animals under humane conditions.[38] The court found that the plaintiff's aesthetic interest in observing the animals under humane conditions was concrete and particularized for the purposes of constitutional standing.[39] Was the injury dependent on the fact that the plaintiff had experience working with animals, or that he was a frequent visitor of the zoological exhibits? Environmental and animal case law indicate that a plaintiff must have some type of a relationship with the animals he seeks to protect, which we will explore very shortly.

To return briefly to the question of whether a human suing on behalf of an injured animal can establish an injury for himself or herself when that injury is non-physical and less concrete than the animal's, the Supreme Court might have provided an affirmative answer when it wrote the following in *United States v. Students Challenging Regulatory Agency Procedures*: "[D]eny[ing] standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."[40] Although that language was used in a case involving injuries to

[38]*Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 429, 431-32 (1998).
[39]*Id.* at 432 (1998).
[40]*United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688 (1973).

multiple human persons, could it not also be applied to injuries suffered by humans and non-humans, regardless of the character of their injuries? That is, regardless of whether the animal experiences a physical injury, and the human experiences an emotional injury, would it be wrong to deny standing to an emotionally injured human because his or her injury is derivative of, and attenuated from, the animal's direct, physical injuries suffered at the hands of the same defendant? The case law tells us that it would be wrong, since emotional injuries—like physical injuries—can also be concrete and particularized.

In *Glickman*, the Court of Appeals for the D.C. Circuit Court wrote that injuries of an aesthetic nature have consistently been considered legitimate injuries for the purposes of constitutional standing, and cited the Court in *Lujan*, which held that the mere act of observing an animal represents a cognizable interest.[41] However, in *Lujan*, the Supreme Court stressed that an injury to a cognizable interest is insufficient for constitutional standing.[42] The injury must also be concrete and particularized and experienced by the plaintiff.[43] The court in *Glickman* addresses these factors by noting that the plaintiff suffered an aesthetic injury when he witnessed the exhibited animals being confined under inhumane conditions.[44] Therefore, it would appear that an injury incurred through visual perception is sufficient to constitute "concrete and particularized."

Additionally, in *Beck v. United States Dep't of Commerce*, four animal welfare and environmental organizations were held to have established an injury when they intervened on behalf of the United States government in a suit brought by an Aleut woman whose hand-made goods produced from the pelts of sea otters were confiscated by U.S. Fish and Wildlife agents

[41]*Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 432 (1998).
[42]*Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563 (1992).
[43]*Id.* at 560, 563.
[44]*Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 433 (1998).

under the MMPA.[45] The Court of Appeals for the Ninth Circuit held that the members of one of the litigating organizations, Friends of the Sea Otter (FSO), had an interest in studying and observing, and therefore, protecting sea otters.[46] Those members would suffer an injury to their interest if the United States government permitted Aleuts to use sea otters to make hand-made goods because doing so would encourage the growth of a market for sea-otter products, thereby encouraging individuals seeking to profit from the market to illegally take sea otters under the MMPA and deplete sea otter populations.[47] The court also considered the members' interest in sea otters to be greater than that of the average individual based on the fact that multiple members of FSO listed nine different sites in Alaska wherein they enjoyed studying and observing sea otters in the FSO's motion to intervene.[48] Plus, unlike the plaintiffs in *Lujan*, the plaintiffs in *Beck* lived near and often visited the sites where they exercised their interest.[49]

It is an established principle that, to have statutory standing, one must demonstrate how his or her interest in a certain activity or species, for instance, is greater than that of the general public.[50] Furthermore, as the Ninth Circuit Court suggests in *Beck* and *Idaho Conservation League*, the geographical proximity of the petitioner to the alleged injury site may be taken into consideration to determine whether that party has indeed suffered an injury.[51] And in cases where a project or development is expected to result in negative environmental consequences, a

[45]982 F.2d 1332, 1334-35 (9th Cir. 1992).
[46]*Id.* at 1340-41.
[47]*Id.* at 1341.
[48]*Id.*
[49]*Id.* at 1341.
[50]*Animal Lovers Volunteer Asso. (A.L.V.A.) v. Weinberger*, 765 F.2d 937, 939 (9th Cir. 1985) citing *Sierra Club v. Morton*, 405 U.S. 727, 736-41.
[51]*Beck v. United States Dep't of Commerce*, 982 F.2d 1332, 1341 (9th Cir. 1992); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1517 (9th Cir. 1992).

plaintiff need not prove that said consequences will *certainly* occur to establish an injury.[52] Rather, he or she can establish his or her injury if expert opinion and sufficient factual allegations raise substantial questions about the character of the consequences.[53] Logically, there is no reason to doubt that the latter rule can be applied to cases involving animals, since negative environmental consequences often implicate wildlife or endangered species.

When Is Statutory Standing Unavailable?

It is necessary to include a contrasting case to help us understand when a human cannot establish standing for the purpose of protecting an animal, group of animals, or an entire species. After all, organizations and individuals pursuing a legal cause of action are less likely to succeed if they do not know how to be *unsuccessful*, since that knowledge facilitates an understanding of failed arguments and how to avoid them.

In *Animal Lovers Volunteer Asso. (A.L.V.A.) v. Weinberger*, the Court of Appeals for the Ninth Circuit held that the plaintiff organization, ALVA, failed to demonstrate an injury for the purpose of constitutional standing during its challenge of the United States Navy's efforts to eliminate a group of wild goats on San Clemente Island in California.[54] The failure to establish an injury was attributable to ALVA's inability to demonstrate how their interest in the wild goats exceeded that of the general public.[55] In that regard, the court noted two things: (1) ALVA was not a longstanding organization; (2) ALVA had not adequately drawn attention to its distinct animal welfare efforts, or "indicia of commitment to preventing inhumane behavior."[56] Even

[52]*Davis v. Coleman*, 521 F.2d 661, 670-671 (9th Cir. 1975).
[53]*Id.*
[54]765 F.2d 937, 938-39 (9th Cir. 1985)
[55]*Id.* at 939.
[56]*Id.*

though the length of an organization's existence and its popularity are not determinative for the purposes of standing, the court found that those factors were important to ALVA because it had neither a long existence nor any degree of publicity.[57] Thus, the organization was incapable of distinguishing its own interests, or those of its members, from those of the general public.[58]

Furthermore, even though ALVA sued under NEPA to protest the Navy's method of killing the goats—gunfire from helicopters—the court argued that NEPA did not protect psychological interests.[59] If we recall, the APA allows for aesthetic, recreational, or conservational injuries, but not psychological ones. The court did, however, suggest that ALVA's psychological injury might have satisfied statutory standing if the injury arose out of a "direct sensory impact of a change in the plaintiffs' physical environment."[60] Thus, in order for ALVA to have established a psychological injury for statutory standing, San Clemente Island must have been part of its surrounding physical environment, or the surrounding physical environment of its members, which it was not.[61]

The physicality requirement in *ALVA* is congruent with the D.C. Circuit Court of Appeals' opinion regarding the plaintiff's injury in *Glickman*, in that, the zoo, which kept animals under inhumane conditions, was part of the plaintiff's physical environment. Naturally, observing zoo animals close enough to recognize that they are being housed improperly and inadequately requires the observer to be within the surrounding physical environment of the zoo. Based on the language in *ALVA* and *Glickman*, members of ALVA likely would have had a permissible psychological or aesthetic injury if they had witnessed naval gunfire wounding and

[57] *Id.*
[58] *Id.*
[59] *Animal Lovers Volunteer Asso. (A.L.V.A.) v. Weinberger*, 765 F.2d 937, 938-39 (9th Cir. 1985).
[60] *Id.*
[61] *Id.* at 938-39.

killing the wild goats, since those direct observations would have necessarily placed them within the surrounding physical environment of San Clemente Island. Since members of ALVA did not witness the goat killings, however, the organization needed to demonstrate that its members' interest in the wild goats exceeded that of the average person, as in *Beck*, and that ALVA members lived or worked in close proximity to San Clemente Island, as in *Idaho Conservation League*. Unfortunately for the organization, ALVA members did not satisfy either of those additional factors.[62]

Similar to *ALVA* on facts, but different in outcome, the Court of Appeals for the Ninth Circuit held that an organization successfully established an injury when its members witnessed bison in Yellowstone Park being shot to death as part of a bison management plan proposed by the National Park Service.[63] The court cited the "direct sensory impact" language from *ALVA*, which the plaintiff organization, Fund for Animals, satisfied since its members witnessed the bison deaths transpire.[64] Just as the court had intimated in *ALVA*, the interest of an organization's members was deemed protected under NEPA in *Fund for Animals*, because the psychological injury arose out of a direct sensory impact of a change in the plaintiff's environment.[65] Therefore, statutory standing was available to the organization.

Although this case was published before the Supreme Court rendered its decision in *Lujan*, it is likely that the injury suffered by Fund for Animals members satisfied the threshold of 'concrete and particularized' for an Article III/constitutional injury since the members experienced their injury via direct visual observation. Recall that the court in *Glickman* found that the zoo-visiting plaintiff's visual perception of zoo animals under inhumane conditions fell

[62]*Id.* at 938-39.
[63]*Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1394-97 (9th Cir. 1992).
[64]*Id.* at 1396.
[65]*Id*. at 1396.

within the parameters of "concrete and particularized" as well.[66] After all, what could be more concrete and particularized than direct sensory perception?

Now, one more item is in need of clarification before we review a recent case published last year. The cases cited in this paper do not clearly distinguish constitutional injuries from statutory injuries, and this is likely because an injured aesthetic, recreational, or conservational interest is highly likely to pass the 'concrete and particularized' test for constitutional standing. In *Glickman* and *Fund for Animals*, the visual perception of harm caused to an animal or group of animals amounted to an aesthetic, statutory injury, provided of course, that the plaintiffs could demonstrate a greater interest in the animals than the average person. As long as the aesthetic injuries are concrete and particularized, which they are likely to be, given that personal observations are concrete and particular to the individual making them, those injuries will be sufficient for the purposes of establishing constitutional standing. And provided that aesthetic interests are protected by the statute under which a plaintiff is suing, statutory standing will follow as well. The point is that while an injury for statutory standing can be the same injury for constitutional standing, assuming that said injury is concrete and particularized, the reverse is not always true. An injury for constitutional standing does not automatically become an injury for statutory standing because of the need to demonstrate that the injured interest is protected by the statute invoked by the plaintiff.

[66]*Animal Legal Def. Fund v. Glickman*, 154 F.3d 426 (1998).

A Recent Case from the Ninth Circuit

Affirming what has heretofore been discussed regarding the application of standing to animal law, the Court of Appeals for the Ninth Circuit published a decision in April 2018 about a monkey bringing a copyright infringement lawsuit. In *Naruto v. Slater*, a macaque named Naruto took photos of himself using the camera of photographer David Slater. When Slater published the photos in a book, he identified himself, but not Naruto, as one of the copyright owners of the material.[67] However, Slater did attribute the photos to the work of Naruto, after which the People for the Ethical Treatment of Animals (PETA) brought a copyright claim against Slater.[68]

Like *Cetacean*, the plaintiff in this case was not an organization acting on behalf of an animal, but the injured animal itself.[69] During its discussion of standing, the court cited *Cetacean* and found that Naruto established the three requirements necessary for constitutional standing.[70] Naruto suffered a concrete and particularized injury when Slater claimed copyright ownership of Naruto's photos, and the court determined that it could redress the injury by declaring Naruto the true owner[71]. Although a causation analysis was not included, it is clear from the facts that the copyright injury to Naruto was, at the very least, fairly traceable to Slater.

When the court analyzed statutory standing for Naruto, it came to the same conclusion as *Cetacean*: Animals are not persons for the purposes of statutory standing absent explicit language to the contrary.[72] Since the Copyright Act does not explicitly permit animals to sue under the statute, Naruto could not obtain statutory standing.[73]

---

[67]888 F.3d 418, 420 (9th Cir. 2018).
[68]*Id.*
[69]*Id.* at 423-24.
[70]*Id.* at 424.
[71]*Id.*
[72]*Id.* at 425-26.
[73]*Id.* at 426.

Lastly, the court also examined the issue of "next-friend" standing. PETA attempted to represent Naruto by establishing next-friend standing, which requires the "next friend" to demonstrate "(1) that the petitioner is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability; and (2) the next friend has some significant relationship with, and is truly dedicated to the best interests of, the petitioner."[74] In *Naruto*, PETA did not have a prior relationship with the macaque-plaintiff, let alone a significant one. Additionally, the Supreme Court has held that "the scope of any federal doctrine of 'next friend' standing is no broader than what is permitted by the . . . statute."[75] And since Congress has only permitted next-friend standing for petitions for writs of habeas corpus, and for minors or incompetent people, PETA's attempt to represent Naruto failed.[76]

Other Forms of Standing

In addition to the discussion of next-friend standing, it is worth pointing out that PETA is unlikely to have been successful had it attempted to assert organizational or representational standing instead. In regard to the former, organizational standing is present where the actions of a defendant frustrate the ability of the plaintiff to engage in organizational activities such that the plaintiff organization expends significant resources to counteract the defendant's actions.[77] The Ninth Circuit Court of Appeals adopted this rule, but changed the language regarding injury. Instead of the injury affecting the organization's "activities," there must be an injury to the organization's "mission."[78]

---

[74]*Id.* at 421 (citing *Coalition of Clergy v. Bush*, 310 F.3d 1153, 1159-60 (9th Cir. 2002)).
[75]*Id.* at 422 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 164-165 (1990)).
[76]*Id.*
[77]*Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).
[78]*Fair Hous. v. Combs*, 285 F.3d 899, 905(9th Cir. 2002).

In 2009, the Humane Society of the United States (HSUS) successfully established an injury via organizational standing following the rule established in *Havens Realty Corp* when it sued the United States Postal Service for distributing *The Feathered Warrior*, a publication that contained advertisements for animal fights, animal fighting equipment, fighting animals themselves, and fighting venues.[79] The District Court for the District of Columbia held that although HSUS spends hundreds of thousands of dollars to combat animal fighting of its own volition, any increase in expenditures made by the HSUS for rescuing or treating injured fighting animals caused by the Postal Service's distribution of *The Feathered Warrior* would qualify as an injury to the organization.[80]

Despite the fact that this case does not have binding authority, it is an interesting example of how organizational standing can be applied to an animal law case. Of particular interest and importance is the fact that the court held that any increase in expenditures to rescue fighting animals would create an organizational injury, despite the fact that *Haven Realty Corp* requires a "significant" increase in expenditures to counteract the defendant's actions. It seems here that the significance of the cost already existed since HSUS already dedicated hundreds of thousands of dollars to combating animal fighting. Thus, any increase to the already great amount spent by the organization, would be considered significant.

It is unclear whether organizational standing would have helped PETA in *Naruto*, especially since that case was brought before the Ninth Circuit: the same court that requires the plaintiff organization to demonstrate that its *mission* had been frustrated. It would be unlikely for a court to agree with the proposition that HSUS' mission involves affording intellectual property

[79] *Humane Soc'y of the United States v. United States Postal Serv.*, 609 F. Supp. 2d 85, 89 (D.D.C. 2009).
[80] *Id.* at 89-91.

rights to animals. Similarly, if ALVA tried to assert organizational standing it would have failed as well, because (a) ALVA did not allege that it had spent any resources to save the San Clemente Island goats, and (b) ALVA's relative anonymity as an organization and its failure to highlight prior efforts to protect animals would not give the court any guidance as to an organizational mission.

One final, viable opportunity for animal attorneys is associational standing. The Supreme Court held that an association has standing to sue on behalf of association members where "(a) [the] members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[81] As an association, ALVA could have opted for this form of standing while attempting to protect the goats of San Clemente Island. However, ALVA would have failed in this effort as well.

Even if the Ninth Circuit Court were to grant that neither the claim asserted nor the relief requested required participation of the individual ALVA members, the court already held that neither the group nor its members had statutory standing to sue since no change to the physical environment of either had occurred to give rise to a psychological injury. Moreover, it is unlikely for the court to have found that ALVA's interests in protecting the goats was germane to its organizational purpose, since the court argued that ALVA's short history and lack of publicity precluded the organization from demonstrating how its interest was greater than that of the public's. The point here is that if the Ninth Circuit already determined that ALVA had not drawn sufficient attention to prior work, activities, or efforts demonstrative of a distinct interest in protecting animals from harm, then the court would also be unlikely to understand ALVA's

[81] *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

purpose as an organization. Put otherwise, if you've never heard of an organization or its work, how can you know its purpose?

Before moving on to habeas corpus, one item regarding associational standing must be clarified. While *Hunt* serves as the guiding case on the topic, the litigating association therein was a trade association. It is therefore unclear whether associational standing is available to associations of all kinds, or merely to trade associations.

Developments Regarding Habeas Corpus and Animals

Since next-friend standing is available for writs of habeas corpus, could a human file such a writ petition on behalf of an animal? The Nonhuman Rights Project has tried to do so for confined animals on numerous occasions in an attempt to establish personhood rights for the animals, and transfer said animals to sanctuaries.[82] However, the organization has yet to achieve success in that regard.[83] In two separate cases, two different courts refused to accept the Nonhuman Rights Project's writ of habeas corpus on behalf of captive animals. In 2017, the New York Supreme Court, Appellate Division, First Judicial Department affirmed an earlier judgment of the Supreme Court, New York County declining the Nonhuman Rights Project's writ of habeas corpus on behalf of two chimpanzees kept in cages; one of which is located in a warehouse in Gloversville, New York, and the other in a cement storefront in Niagara Falls, New York.[84] The decision made by the Appellate Division, First Judicial Department to affirm the

[82]Nonhuman Rights, *Second Petition Filed on Behalf of Captive Elephants in Connecticut*, Nonhuman Rights Blog (July 11, 2018, 11:17 PM), https://www.nonhumanrights.org/blog/second-petition-connecticut/
[83]*Matter of Nonhuman Rights Project, Inc. v. Lavery*, No. 150149/16 162358/15, slip op. 04574 (App. Div. June 8, 2017).
[84]*Id.*at 1-3.

judgment was based on the petitioner's failure to introduce new information not already contained within the four prior petitions.[85]

In addition, the Appellate Division, First Judicial Department justified its denial of the habeas corpus petition by agreeing that chimpanzees are incapable of "bear[ing] any legal duties, submit[ting] to societal responsibilities or be[ing] held legally accountable for their actions."[86] Finally, even though the court admitted that the definition of a "person" for purposes of habeas corpus in New York is ambiguous, it held that the Nonhuman Rights Project needed to indicate legislative intent that the definition of "person" should include animals, and emphasized the absence of any such inclusion from any and all case law.[87] Thus, the Appellate Division, First Judicial Department and the Court of Appeals for the Ninth Circuit take the same approach to statutory interpretation, as both courts construe the absence of animals from a legislature's definition of "person" to mean that animals have been purposefully disregarded, and that only explicit language to the contrary will change that interpretation.

Most recently, the Superior Court of Connecticut denied a writ of habeas corpus filed by the Nonhuman Rights Project on behalf of three elephants kept at a zoo in Goshen, Connecticut.[88] One the reasons the court denied the petition was the Nonhuman Rights Project's lack of next-friend standing to file its habeas corpus petition, since it was unable to demonstrate a significant relationship with the three elephants.[89] Furthermore, the court rejected the petition

---

[85]*Id.* at 3-4.
[86]*Id*. at 4 (citing *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 148, 152, slip op. 08531 (App. Div. Dec. 4, 2014).
[87]*Id.* at 5.
[88]*Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, No. LLICV175009822S, 2017 Conn. Super. LEXIS 5181 (Super. Ct. Dec. 26, 2017).

[89]*Id.* at 7-11.

for being frivolous.[90] According to the court, the frivolity of a habeas corpus petition is contingent upon the probability of the petitioner achieving a successful result.[91] The court stated that the Nonhuman Rights Project had not cited any legal authority to support its assertion that habeas corpus should extend to animals, thereby making it improbable for the petitioner to earn a grant of habeas corpus from the court.[92]

CONCLUSION

So, what does this all mean? As mentioned earlier in the introduction, this paper is by no means an exhaustive survey of case law regarding constitutional and statutory standing for animals across all jurisdictions. However, for budding animal law attorneys that practice law in any of the states whereby the Ninth Circuit Court of Appeals or D.C. Circuit Court of Appeals serve as binding authority, this paper may be a useful primer on what to expect when handling a case in which the issue of standing arises. We know that animals can establish constitutional standing (explicitly in the Ninth Circuit, and implicitly everywhere else) provided that they satisfy the necessary elements of injury, causation, and redress. However, nowhere in the District of Columbia, nor in any of the jurisdictions bound by the authority of the Court of Appeals for the Ninth Circuit is it possible for an animal to establish statutory standing. A human is required to assert an interest that is protected by the federal statute under which he or she is suing. And the injury to that interest must be attributable to an act by the federal agency responsible for the enforcement of said statute. The interest for which the petitioner seeks protection may be aesthetic, recreational, or conservational. It may not, however, be psychological, unless the

[90] *Id.* at 11.
[91] *Id.* at 13-15.
[92] *Id.* at 14-15.

injury arose out of a direct sensory impact of a change to the petitioner's surrounding physical environment. The plaintiff must also demonstrate that his or her interest in the injured animal or group of animals is greater than that of the general public, which can be done by making numerous visits or trips to observe those animals. By subsequently demonstrating that he or she either lives or works in close proximity to the site where an alleged injury occurred, a plaintiff can increase his or her odds of establishing an injury to that interest.

But what is there to do about the lack of statutory standing for *animals*? We know that in jurisdictions whereby the Court of Appeals for the Ninth Circuit is binding authority, along with New York and Connecticut, that the courts take the same approach to statutory interpretation. Only explicit language drafted by Congress or state legislatures can allow animals to establish statutory standing or attain recognition as persons in habeas corpus petitions. So long as legislative bodies are silent, animals will continue to be excluded from the definition of "person." Additionally, the requirements of next-friend standing make it difficult to bestow personhood rights upon animals, since the petitioner is required to have a significant relationship with the animal he or she is representing. This creates a substantial obstacle to the legal teams of animal rights and animal welfare organizations that advocate on behalf of various species. Indeed, it is simply unrealistic to expect a national organization with multiple campaigns to have established a relationship with all of its potential animal clients, let alone a significant one. Then again, organizations can always opt for a human plaintiff, which is an easier road to travel considering the opportunity to allege different injuries for the purposes of statutory standing.

In closing, it should be understood that change in the legal landscape of standing for animals lies within the power of legislative bodies. As commendable and necessary the work of animal attorneys and organizations is for protecting those who cannot speak for themselves,

perhaps what is needed in the future is a greater number of lawmakers and lobbyists who are sympathetic to the cause of animal welfare and animal rights. For it is those individuals who have the best chance of changing the way the legal system in the United States perceives, categorizes, and defines animals.

BIBLIOGRAPHY

5 USCS § 702 (2018).

16 USCS § 1532 (2018).

Animal Legal Def. Fund v. Glickman, 332 U.S. App. D.C. 104, 154 F.3d 426 (1998).

Animal Lovers Volunteer Asso. (A.L.V.A.) v. Weinberger, 765 F.2d 937 (9th Cir. 1985).

Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970).

Cetacean Cmty. v. Bush, 386 F.3d 1169 (9th Cir. 2004).

Erwin Chemerinsky, Constitutional Law, 5th Ed. 2017

Citizens to End Animal Suffering & Exploitation v. New England Aquarium, 836 F. Supp. 45 (D. Mass. 1993).

Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975).

Fair Hous. v. Combs, 285 F.3d 899 (9th Cir. 2002).

Fund for Animals, Inc. v. Lujan, 962 F.2d 1391 (9th Cir. 1992).

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333 (1977).

Idaho Conservation League v. Mumma, 956 F.2d 1508, 1517 (9th Cir. 1992).

Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 106 S. Ct. 2860 (1986).

Lujan v. Defs. of Wildlife, 504 U.S. 555, 112 S. Ct. 2130 (1992).

Matter of Nonhuman Rights Project, Inc. v. Lavery, No. 150149/16 162358/15, slip op. 04574 (App. Div. June 8, 2017).

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

Nonhuman Rights, *Second Petition Filed on Behalf of Captive Elephants in Connecticut*, Nonhuman Rights Blog (July 11, 2016, 11:17 PM), https://www.nonhumanrights.org/blog/second-petition-connecticut/

Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc., No. LLICV175009822S, 2017 Conn. Super. LEXIS 5181 (Super. Ct. Dec. 26, 2017).

Cass R. Sunstein, *A Tribute to Kenneth L. Karst: Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L.Rev. 1333 (2000).

United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 93 S. Ct. 2405 (1973).

Find us on the web at:

nysba.org/animals