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## Federal Protection for "Fur-Babies": A Legislative Proposal

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# **Federal Protections for “Fur-Babies”: A Legislative Proposal**

## *Abstract*

*Americans love their animals, but America doesn't protect them. Across the country, animals continue to be classified as mere property, undeserving of any basic rights and unprotected by the animal welfare statutes that do exist, but often remain unenforced. This Article proposes a comprehensive animal protection system that includes the following components: (a) general prohibitions against animal crushing, cruelty, neglect, and abuse; (b) a civil action provision that will allow humane society officers to investigate violations of those prohibitions; (c) a provision establishing animal legal advocates to work alongside the officers and prosecute violations; and (d) an animal-suit provision to grant abused animals standing to sue the convicted abuser for damages to pay for medical costs or other costs of care.*

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## I. INTRODUCTION

In 2017, a concerned neighbor found a victim of abuse starved and severely emaciated, consumed by scabs, lice, infection, and frost bite, and suffering from genital nerve damage and potential paralysis.<sup>1</sup> The victim’s abuser pled guilty to misdemeanor neglect and was sentenced to community service.<sup>2</sup> According to current laws, the abuser is not liable for damages, including medical expenses or other costs of care, and will suffer no other criminal or civil repercussions.<sup>3</sup> Although the victim suffered a traumatic experience and serious medical procedures will exhaust his foreseeable future, he has no legal remedy and will only survive from the kindness and donations of others.<sup>4</sup> The abuser is absolved from serious responsibility because the victim is a horse.<sup>5</sup> The fact that the abuser was convicted and sentenced under an animal protection statute is actually quite an anomaly.<sup>6</sup> Across the United States, the number of animal abuse cases prosecuted is miniscule compared to the number of reported animal abuse instances.<sup>7</sup> The act of abusing an animal is not federally prohibited until the abuse causes severe bodily injury and affects foreign or interstate commerce.<sup>8</sup>

In stark contrast to the nation’s legal treatment of nonhuman animals,<sup>9</sup> Americans are more enthralled with their animal companions than ever before.<sup>10</sup> In 2018 alone, Americans spent more than seventy-two *billion* dollars

1. Complaint at 4–6, *Justice v. Vercher*, No. 18CV17601 (Or. May 1, 2018) [hereinafter *Justice Complaint*].

2. *Oregon v. Vercher*, No. 17CR36590 (Or. Cir. Ct. 2017).

3. See *infra* Section IV.C.

4. *Justice Complaint*, *supra* note 1, at 5–8.

5. See, e.g., *id.* at 9–10.

6. Symposium, *Animal Advocacy and Causes of Action*, 13 ANIMAL L. 87, 118–19 (2006).

7. *Id.* at 119. For example, Massachusetts (as of 2003) only prosecuted about three percent of reported animal abuse cases. See Jennifer H. Rackstraw, *Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes*, 9 ANIMAL L. 243, 246 (2003). According to Prosecutor Sara Swanson (Benzie County, Michigan), animal abuse cases “tend to be handled more out of the court system,” and even if the cases are thoroughly investigated, they are rarely sent to her office for prosecution. Mardi Link, *Animal Cruelty on the Rise*, TRAVERSE CITY REC. EAGLE (Sept. 9, 2018), [https://www.record-eagle.com/news/local\\_news/animal-cruelty-on-the-rise/article\\_73e5ee26-43c7-5673-af11-aba74e892d5a.html](https://www.record-eagle.com/news/local_news/animal-cruelty-on-the-rise/article_73e5ee26-43c7-5673-af11-aba74e892d5a.html).

8. Niraj Chokshi, *There’s No Federal Ban on Animal Cruelty. Lawmakers Want to Change That.*, N.Y. TIMES (Jan. 30, 2019), <https://www.nytimes.com/2019/01/30/us/animal-cruelty-bill-felony.html>; see also *infra* Section IV.A (discussing the newly enacted animal cruelty prevention prohibition).

9. To be concise, this Article refers to nonhuman animals as “animals.”

10. See *infra* notes 36–38 and accompanying text.

on their pets, and that number is estimated to surge.<sup>11</sup> Pet owners are also beginning to show more empathy for companion animals and pay more attention to the animal protection movements that have been working behind the scenes for decades.<sup>12</sup> Animal rights organizations, such as the Nonhuman Rights Project, are vigilantly fighting to change the legal classification of animals from property to legal persons in order to recognize that animals have rights in and of themselves.<sup>13</sup> Animal welfare organizations are more willing to compromise to accept animal-related statutes that do not necessarily recognize animal rights, but do provide immediate necessary protections.<sup>14</sup> One such animal welfare statute, the Endangered Species Act, encourages citizens—through a citizen-suit provision—to compel government enforcement of the protections contained within the Act to further protect animals.<sup>15</sup> Unfortunately, the Supreme Court stripped the intended authority from the citizen-suit provision by requiring that plaintiffs satisfy a strict injury-in-fact test before their case can be heard.<sup>16</sup>

As seen in other areas of law, Congress may grant a private right of action to narrow classes of potential plaintiffs to circumvent the Court’s injury-in-fact test.<sup>17</sup> Before doing so, Congress should look to state animal protection statutes for guidance on building effective federal legislation.<sup>18</sup> To set the stage for a federal legislative proposal, Part II of this Article recounts animal

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11. See Press Release, American Pet Products Association, Americans Are Spending More on Pets Than Ever Before: \$72 Billion (Mar. 21, 2019) <https://www.americanpetproducts.org/press-releasedetail.asp?id=191>; Mickey Meece, *American Families Spent Estimated \$75 Billion on Pets in 2019: Report*, NY POST (Dec. 14, 2019, 11:27 PM), [https://nypost.com/2019/12/14/american-families-spent-estimated-75-billion-on-pets-in-2019-report/?utm\\_campaign=applenews&utm\\_medium=inline&utm\\_source=applenews](https://nypost.com/2019/12/14/american-families-spent-estimated-75-billion-on-pets-in-2019-report/?utm_campaign=applenews&utm_medium=inline&utm_source=applenews); Kerry Lengyel, *American Pet Spending Reaches New High*, VETERINARIAN’S MONEY DIG. (Mar. 24, 2018), <https://www.vmdtoday.com/news/american-pet-spending-reaches-new-high> (discussing the almost seventy billion dollars owners spent on their pets in 2017).

12. See Richard L. Cupp, Jr., *Animals as More than “Mere Things,” but Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm*, 84 U. CIN. L. REV. 1023, 1031 (2016) [hereinafter Cupp, *Mere Things*]; see also Stanley Coren, *Why People Sometimes Care More About Dogs Than Humans*, PSYCHOL. TODAY (Nov. 9, 2017), <https://www.psychologytoday.com/us/blog/canine-corner/201711/why-people-sometimes-care-more-about-dogs-humans>.

13. See *infra* Sections III.A., III.B.1.

14. See *infra* Sections III.A., III.B.2.

15. Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (2012); see *infra* Section III.B.2.

16. See *Lujan v. Def. of Wildlife*, 504 U.S. 555, 572–74 (1992); *Bennett v. Spear*, 520 U.S. 154, 163 (1997); *infra* Section III.B.2.

17. See *infra* Section III.B.2.

18. See *infra* Part IV.

uses throughout history and illustrates America’s evolving attitude toward companion animals.<sup>19</sup> Part III delves deeper into the differences between animal rights arguments and animal welfare proposals and the fights for legal personhood or legal standing for animals.<sup>20</sup> Part IV of this Article introduces a recent federal prohibition and samples animal protections from three states to provide a layout of what may or may not work in a more comprehensive federal system.<sup>21</sup> Part V combines and adjusts the sampled state provisions to propose a four-part approach to potential federal animal cruelty legislation.<sup>22</sup> Lastly, Part VI concludes.<sup>23</sup>

## II. A HISTORY OF ANIMAL USE

Humanity’s use of animals for food, clothing, transportation, etc. stretches back to the beginning of civilization.<sup>24</sup> In the Old Testament, God tells humans to “[r]ule over the fish in the sea and the birds in the sky and over every living creature that moves on the ground.”<sup>25</sup> Over 12,000 years ago, hunter-gatherer societies, true to the name, survived by hunting, fishing, and scavenging.<sup>26</sup> Correspondingly, the classification of animals as human property has origins in ancient legal systems.<sup>27</sup> For instance, in ancient Rome, a person who captured a wild animal simultaneously secured property rights to that animal.<sup>28</sup> Due to the immense value placed upon ownership of an animal

19. See *infra* Part II.

20. See *infra* Part III.

21. See *infra* Part IV. In November 2019, Congress enacted the Preventing Animal Cruelty and Torture Act to prohibit animal crushing. See *infra* Section IV.A. The three sampled states are Connecticut, Pennsylvania, and Oregon. See *infra* Sections IV.B–D. Connecticut allows animal advocates to assist prosecutors in cases concerning the custody or welfare of cats and dogs. See *infra* Section IV.B. Pennsylvania allows humane societies to privately employ officers who have authority to investigate and prosecute animal cruelty cases. See *infra* Section IV.C. Lastly, Oregon courts have determined that an animal can be classified as the victim of a crime. See *infra* Section IV.D.

22. See *infra* Part V.

23. See *infra* Part VI.

24. STEVEN M. WISE, DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS 17–21 (2002) [hereinafter WISE, DRAWING THE LINE].

25. Genesis 1:28 (New Int’l Version).

26. Emma Groeneveld, *Prehistoric Hunter-Gatherer Societies*, ANCIENT HIST. ENCYCLOPEDIA (Dec. 9, 2016), <https://www.ancient.eu/article/991/>.

27. See Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 476–505 (1996) [hereinafter Wise, *The Legal Thinghood*] (explaining the characterization of animals through ancient Mesopotamian, Hebrew, Greek, and Roman civilizations).

28. Richard A. Epstein, *The Modern Uses of Ancient Law*, 48 S.C. L. REV. 243, 245 (1997).

in many ancient societies,<sup>29</sup> legal remedies for destruction or theft of a person’s animal were often intricate and precise, allowing collection of both compensatory and punitive damages.<sup>30</sup> For example, a section of the ancient Mesopotamian Code of Hammurabi<sup>31</sup> explained different compensation schemes depending on whether the animal at issue was the property of an individual or an institution.<sup>32</sup>

Centuries later, modern legal systems continue to classify animals as property although the relationship between many owners and animals has transformed.<sup>33</sup> Similar to the circumstances in ancient civilizations, citizens of developing nations primarily use animals to provide for basic human needs such as food, transportation, or a source of income for impoverished people.<sup>34</sup> Accordingly, the consequences of reclassifying animals in a developing nation are perhaps too dire to consider right now.<sup>35</sup> In America, however, many

29. Cupp, *Mere Things*, *supra* note 12, at 1028 (“[F]or many ancients, animals may have been the most valuable property they owned.”).

30. *Id.* at 1028 n.9 (“If anyone uncovers a pit or digs one and fails to cover it and an ox or a donkey falls into it, the one who opened the pit must pay the owner for the loss and take the dead animal in exchange. If anyone’s bull injures someone else’s bull and it dies, the two parties are to sell the live one and divide both the money and the dead animal equally. However, if it was known that the bull had the habit of goring, yet the owner did not keep it penned up, the owner must pay, animal for animal, and take the dead animal in exchange . . . . Anyone who steals must certainly make restitution, but if they have nothing, they must be sold to pay for their theft. If the stolen animal is found alive in their possession—whether ox or donkey or sheep—they must pay back double.” (quoting *Exodus* 21:33–36; 22:3–4 (New Int’l Version))).

31. The Code of Hammurabi is a set of 282 rules, proclaimed by the Babylonian King Hammurabi, who reigned from 1792 to 1750 B.C.E. *Code of Hammurabi*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/Code-of-Hammurabi> (last visited Oct. 27, 2019). The Code was one of the earliest and most complete written legal codes and included commercial and judicial standards. *Id.*

32. *The Code of Hammurabi*, AVALON PROJECT (L.W. King, trans.), <http://avalon.law.yale.edu/ancient/hamframe.asp> (last visited Oct. 27, 2019) (“If any one steal cattle or sheep, or an ass, or a pig or a goat, if it belong to a god or to the court, the thief shall pay thirtyfold therefor; if they belonged to a freed man of the king he shall pay tenfold; if the thief has nothing with which to pay he shall be put to death.”).

33. See GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? xix (2000) [hereinafter FRANCIONE, INTRO TO ANIMAL RIGHTS] (providing statistics from the 1990s about owners’ attitudes towards their pets); see also Cupp, *Mere Things*, *supra* note 12, at 1029–30 (“Simply calling animals ‘property’ undervalues our evolving sense of their appropriate status . . . . Many of us tend to think of our companion animals as members of our families, and treating companion animals as property akin to a table or a chair would be odious to caring owners.”).

34. Cupp, *Mere Things*, *supra* note 12, at 1028–29.

35. *Id.* at 1029. Richard L. Cupp, Jr. is a Professor of Law at Pepperdine Caruso School of Law. *Id.* at 1023. As seen throughout this Article, Cupp writes and speaks extensively about the legal and moral status of animals and is widely recognized as a leading scholar within the field. *Id.* He argues

domestic animals are generally seen as companions and treated as part of the family, rather than a resource.<sup>36</sup> Increased litigation throughout America seeking non-economic damages—such as punitive or emotional distress damages—for a tortious killing of a companion animal provides evidence that Americans consider their animals to be more than simple property.<sup>37</sup> In addition to requesting recognition from the legal sphere for emotional attachment to their animals, pet owners spend record amounts of money to provide a happy life for their lovingly nicknamed “fur-babies.”<sup>38</sup> In 2018, 79% of millennial, pet-owning homebuyers considered their pet’s needs before buying their home and said they would refuse an otherwise perfect home if the pet’s

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that:

The implications of abandoning the property status of animals would be staggering, not only for fighting diseases and sustaining the economies of First World nations, but also, absent dramatic changes that do not seem likely in the foreseeable future, for the very survival of many people living at subsistence levels in the Third World.

*Id.* at 1029. Perhaps staggering changes in first-world nations are exactly the push needed in order to force market changes toward more sustainable and morally appropriate practices. *See id.* Negative externalities such as global warming, destruction of land, and animal abuse could be curtailed by first reclassifying animals in first-world nations, and only following in third world countries after new, sustainable practices have been developed and executed, thereby minimizing the effect on impoverished people. *Id.*

36. FRANCIONE, INTRO TO ANIMAL RIGHTS, *supra* note 33, at xix; *see also* Richard L. Cupp, Jr., *Focusing on Human Responsibility Rather Than Legal Personhood for Nonhuman Animals*, 33 PACE ENVTL. L. REV. 517, 526 (2016) [hereinafter Cupp, *Human Responsibility*] (“Most of us view the animals in our lives as in terms of affection rather than as financial assets.”); Maneesha Deckha, *Vulnerability, Equality, and Animals*, 27 CAN. J. WOMEN & L. 47, 51 (2015) (“A good number [of individuals who live with animals] might even claim that their relationship with their companion animals is their most meaningful one.”).

37. *See, e.g.*, *Strickland v. Medlen*, 397 S.W.3d 184, 192–93 (Tex. 2013) (rejecting a claim for additional damages above market value of the companion animal); *Kimes v. Grosser*, 126 Cal. Rptr. 3d 581, 582 (Cal. Ct. App. 2011) (allowing an owner to collect punitive damages for intentionally inflicted injury to a companion animal); *see also* Henry Mark Holzer, *Harming Companion Animals: Liability and Damages*, ANIMAL L. COALITION (Aug. 30, 2008), <https://animallawcoalition.com/harming-companion-animals-liability-and-damages/> (“[T]he overwhelming refusal of American civil courts to allow more than market value damages in the cases of veterinary malfeasance [or in cases of intentional harm] presents two main problems. First, there is the *equity*, or *fairness*, issue: whereby human victims of veterinary negligence are not fully compensated for the emotional and financial investments made in their companion animals.” (quoting Christopher Green, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 ANIMAL L. 163, 192 (2004))).

38. Chris Lange, *National Pet Month: Here’s How Much Millennials Spend on Their Pets*, USA TODAY (May 22, 2018, 11:11 AM), <https://www.usatoday.com/story/money/personalfinance/budget-and-spending/2018/05/22/how-much-millennials-spend-on-pets/34900989/>; *see also* Lengyel, *supra* note 11 (detailing the year-on-year increase regarding pet-related spending, which reached almost \$70 billion in 2017); Meece, *supra* note 11 (estimating \$75 billion in pet-related spending during 2019).



needs were not met.<sup>39</sup> In fact, many pet owners are so enthralled with each other’s animals (and their own, of course), that an industry of animal social media influencers is thriving and may even be compared to the influential power of some celebrities.<sup>40</sup>

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39. See Diana Olick, *Millennials Put Pets First When Buying a Home*, CNBC (Aug. 31, 2018, 10:36 AM), <https://www.cnbc.com/2018/08/31/millennials-put-pets-first-when-buying-a-home.html>; see also Hillary Hoffower, *Raising Kids Is So Expensive in America that Millennials Are Prioritizing Their Pets Instead and Dropping Up to \$400 on Designer Dog Clothes*, BUS. INSIDER (Mar. 19, 2019, 9:49 AM), <https://www.businessinsider.com/millennials-buy-high-end-dog-clothes-prioritize-pets-over-kids-2019-3> (recognizing how many millennials are “treating their pets as if they were kids and devoting a growing share of their disposable income to them”); Rachel Lewis, *Millennials Are Buying Homes Because of Their Dogs—Not Their Children or Marriages*, MONEY (July 27, 2017), <http://money.com/money/4876151/millennials-homes-dogs-children-marriages/> (“[A] third of millennials who had already purchased their first home said they were influenced by the need to have space for a dog.”); Jennifer Liu, *More Young People are Buying Homes That Cater To Their Dog’s Lifestyle*, FORBES (Aug. 11, 2017, 8:00 AM), <https://www.forbes.com/sites/learnvest/2017/08/11/young-home-buyers-are-moving-because-of-their-dogs/#716fabcl1575> (“[A]s far as our companions, dogs had more weight in homebuying than any other human counterpart.”).

40. See Paula Froelich, *Adoring Crowds Pounce on Celebrity Pets at PetCon in NYC*, NY POST (Dec. 14, 2019, 4:54 PM) <https://nypost.com/2019/12/14/adoring-crowds-pounce-on-celebrity-pets-at-petcon-in-nyc/>; Chavie Lieber, *How to Make Your Dog Instagram-Famous, According to a Manager for “Pet Influencers,”* VOX (Nov. 6, 2018, 10:09 AM), <https://www.vox.com/the-goods/2018/11/6/18066056/dog-instagram-famous-pet-influencers>; Nicole Spector, *Social Media Users Post About Their Dogs Six Times Per Week*, NBC NEWS (Jan. 19, 2017, 5:08 AM), <https://www.nbcnews.com/tech/social-media/social-media-users-post-about-their-dogs-six-times-week-n708751>. Many animal influencers use their vast followings to promote brands, sell their own products, or even land publishing deals for books or calendars. *The Top 15 Pet Influencers Whose Instagram Followings Speak for Themselves*, MEDIKIX, <http://mediakix.com/2018/11/top-pet-influencers-instagram-best-popular/#gs.lukkh2> (last visited Oct. 27, 2019). One such influencer, Doug the Pug (@itsdougthepug), caters to close to ten million followers across Instagram, Facebook, Twitter, and Snapchat and has a net worth of over \$500,000. *Doug the Pug*, ECELEBRITYFACTS (Aug. 15, 2017, 12:49 PM), <https://ecelebrityfacts.com/doug-the-pug-net-worth/>; Becky Hughes, *Go Behind-the-Scenes at Doug the Pug’s Nashville Home*, PARADE (July 5, 2017, 1:00 PM), <https://parade.com/583847/beckyhughes/at-home-with-doug-the-pug/>. Some pet owners and animal shelters work with “foster parents” who use social media accounts to bring awareness and raise money for shelter animals or animals that they are currently trying to find homes for. See, e.g., The Misfits (and Candice) (@roofusandkilo), INSTAGRAM, <https://www.instagram.com/roofusandkilo/> (last visited Oct. 27, 2019); Noelani (@noelaniig), INSTAGRAM, <https://www.instagram.com/noelaniig/> (last visited Oct. 27, 2019). For other fun or silly animal Instagram accounts, see Hamlet the Piggy (@hamlet\_the\_piggy), INSTAGRAM, [https://www.instagram.com/hamlet\\_the\\_piggy/](https://www.instagram.com/hamlet_the_piggy/) (last visited Oct. 27, 2019); Jill the Squirrel (@this\_girl\_is\_a\_squirrel), INSTAGRAM, [https://instagram.com/this\\_girl\\_is\\_a\\_squirrel/](https://instagram.com/this_girl_is_a_squirrel/) (last visited Oct. 27, 2019); Juniper the Fox (@juniperfoxx), INSTAGRAM, <https://www.instagram.com/juniperfoxx/> (last visited Oct. 27, 2019); Leo (@leothegoldendoodle), INSTAGRAM, <https://www.instagram.com/leothegoldendoodle/> (last visited Oct. 27, 2019); Lionel the Hedgehog (@LionelTheHog), INSTAGRAM, <https://www.instagram.com/lionelthegog/> (last visited Oct. 27, 2019); and Milo Minderbinder (@milotheminderbinder), INSTAGRAM, <https://www.instagram.com/milotheminderbinder/> (last visited Oct. 27, 2019).

Although the American population’s perspective regarding animals has changed, federal law has remained relatively stagnant.<sup>41</sup> As of 2014, all fifty states have passed felony animal cruelty statutes for serious violations.<sup>42</sup> However, every state continues to classify animals as mere property, similar to a table or a chair.<sup>43</sup> Until 2019, federal law prohibited *recording* acts of severe animal cruelty on video, but did not prohibit the acts themselves.<sup>44</sup> Animal advocates, in one way or another,<sup>45</sup> are leading the movement to reclassify animals or enact greater protections for America’s beloved companions.<sup>46</sup>

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41. Chokshi, *supra* note 8. According to a 2015 Gallup poll, 32% of Americans believe that animals should be given the same rights as people. Rebecca Riffkin, *In U.S., More Say Animals Should Have Same Rights as People*, GALLUP (May 18, 2015), <https://news.gallup.com/poll/183275/say-animals-rights-people.aspx>. This is an increase from the 25% of Americans who responded this way in 2008. *Id.*

42. See Chris Berry, *All 50 States Now Have Felony Animal Cruelty Provisions*, ANIMAL LEGAL DEF. FUND. (Mar. 14, 2014), <https://www.all-creatures.org/articles/ar-all-50-states-cruelty.html>.

43. Wise, *The Legal Thinghood*, *supra* note 27, at 538 n.442.

44. Animal Crush Video Prohibition Act of 2010, 18 U.S.C. § 48 (2018). In January 2019, Florida representative Ted Deutch introduced the Preventing Animal Cruelty and Torture Act to impose a federal ban on animal crushing; the Act became law on November 25, 2019. See *infra* Section IV.A; see also Chokshi, *supra* note 8.

45. Although most advocates fight for animals for the sake of the animals, the movement has grown to incorporate a fight to protect humans. See Olivia S. Garber, *Animal Abuse and Domestic Violence: Why the Connection Justifies Increased Protection*, 47 U. MEM. L. REV. 359, 361–62 (2016). Many recent studies suggest that organized animal cruelty is generally a precursor or connected to other crimes, such as corruption, domestic violence, and child abuse. See *Animal Cruelty Facts and Stats*, HUMANE SOC’Y U.S., <https://www.humanesociety.org/resources/animal-cruelty-facts-and-stats> (last visited Oct. 27, 2019). One survey reports that 71% of domestic abusers target pets as well. *Id.* Another study reported a finding of pet abuse in 88% of homes under supervision for child abuse. *Id.* In 2016, the FBI began tracking animal cruelty crimes—along with everything else in their expansive criminal database—because animal cruelty is probably a precursor to more significant crimes. *Tracking Animal Cruelty*, FED. BUREAU OF INVESTIGATION (Feb. 1, 2016), <https://www.fbi.gov/news/stories/tracking-animal-cruelty>. According to John Thompson, deputy executive director of the National Sheriff’s Association, “[i]f somebody is harming an animal, there is a good chance they also are hurting a human.” *Id.* A National Sheriff’s Association report included the following statistics: (a) animal abusers are five times more likely to commit violent crimes against people, (b) animal abusers are four times more likely to commit property crimes, and (c) animal abusers are three times more likely to have drug or disorderly conduct offenses. *Deputy and Court Officer*, NAT’L SHERIFF’S ASS’N 1, 26 (2014) (citing Arnold Arluke, Jack Levin, Carter Luke & Frank Ascione, *The Relationship of Animal Abuse to Violence and Other Forms of Antisocial Behavior*, 14:9 J. INTERPERSONAL VIOLENCE 963, 963–975 (1999)). Therefore, protecting animals with more effective animal cruelty statutes that apply throughout the United States could ultimately protect potential human victims as well. See, e.g., Charles Siebert, *The Animal-Cruelty Syndrome*, N.Y. TIMES MAG. (June 11, 2010), <https://www.nytimes.com/2010/06/13/magazine/13dogfighting-t.html>.

46. See *infra* Part III.

## III. ANIMAL ADVOCATES DIVIDED

Animal advocates generally derive from one of two denominations—animal rights theorists or animal welfare advocates.<sup>47</sup> Although both types of animal defenders believe in reforming the legal structure concerning animals, the two parties disagree about fundamental aspects of how reform should manifest.<sup>48</sup> Animal rights theorists argue that it is *necessary* to reclassify animals and grant animals “legal personhood”<sup>49</sup> to protect their interests.<sup>50</sup> Welfare theorists continue to believe in the “paternalistic solution of regulating [human] use of animals” and balancing human interests against appropriate animal treatment.<sup>51</sup>

A. *Animal Rights v. Animal Welfare*

Animal rights theory demands that animals be respected as valuable in and of themselves, rather than as a means to an end.<sup>52</sup> These scholars argue that an animal welfare system—which requires balancing human interests against animal treatment—can almost never weigh in favor of the animal due to the animal’s status as human property.<sup>53</sup> Because American legal systems traditionally aim to maximize and protect an individual’s property rights, a human’s property interest will almost always prevail over the interests of the property itself, which has no rights.<sup>54</sup> Thus, recognizing that animals have rights, as animal rights theorists propose, is merely an instrument to protect animal interests.<sup>55</sup>

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47. Daniel Davison-Vecchione & Kate Pambos, *Steven M. Wise and the Common Law Case for Animal Rights: Full Steam Ahead*, 30 CAN. J.L. & JURIS. 287, 290 (2017).

48. *Id.*

49. Legal personhood refers to the concept of animals being granted certain fundamental legal rights such as bodily integrity or the right to be free from slavery. See *infra* notes 79–91 and accompanying text.

50. Davison-Vecchione & Pambos, *supra* note 47, at 290.

51. *Id.*

52. GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 7 (1995) [hereinafter FRANCIONE, ANIMALS, PROPERTY, AND THE LAW].

53. *Id.* at 4, 93 (analogizing animals to humans: “If one human is a resource of another, then that other human gets to value the interests of the resource in not suffering, and this valuation may be based solely on what will benefit the valuer and with absolutely no regard for what will benefit the valued.”).

54. *Id.* at 4–5.

55. FRANCIONE, INTRO TO ANIMAL RIGHTS, *supra* note 33, at 93 (“To say that my interest is protected by a right is to say that it is protected against being abrogated merely because such abrogation produces beneficial consequences for someone else.”).

Animal rights theorists generally analogize the use of animals with human slavery.<sup>56</sup> Simplified for the analogy, animal rights theorists propose the following premises: (1) every human has the most basic right to not be enslaved, because every human has an interest in avoiding suffering from being used as a means to another’s end—i.e. used as human property;<sup>57</sup> and (2) all animals also have an interest in avoiding pain and suffering from being used as a means to another’s end—i.e. used as human property—and therefore, every animal should also have the most basic right to not be enslaved.<sup>58</sup>

Animal rights theorists apply the philosophical principle of equal consideration, which requires treating similar interests similarly, unless there is a morally sound reason for divergence.<sup>59</sup> At the most basic level—where humans and animals are similarly sentient beings with similar interests in avoiding pain and suffering—the difference in species is not a sufficient morally sound reason to recognize the fundamental rights of one, but not the other.<sup>60</sup> Therefore, according to animal rights theorists and the principle of equal consideration, if American society recognizes human fundamental rights, it should equally recognize animal fundamental rights.<sup>61</sup> However, most animal rights theorists agree that respecting an animal’s right to not be property does not mean that animals must be treated the same as humans for all purposes, or, for instance, that animals should be granted the right to vote or to attend school.<sup>62</sup> Animal rights theorists argue that treating an animal as a legal person does not mean that the animal is equivalent to a human, rather that the

56. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, *supra* note 52, at 110–12 (“There were laws that protected slaves and that ostensibly gave ‘rights’ to those persons, but the laws were seldom, if ever, enforced or at all meaningful to the slave. Although slaves were obviously people, the law treated them as ‘chattels,’ or as the personal property of their owners, rather than as persons.”).

57. FRANCIONE, INTRO TO ANIMAL RIGHTS, *supra* note 33, at 89, 92 (“The laws of almost every nation in the world prohibit chattel slavery, and the international community condemns slavery as a violation of basic human rights. . . . [W]e must, at the very least, recognize that all sentient humans have an interest in not suffering *at all* as the result of their use as the resource[] of others.”).

58. *Id.* at xxviii, 81.

59. *Id.* at 82–84, 86–90. The principle of equal consideration is found throughout moral theories and requires that moral judgments be universal, rather than based upon self-interest or the interests of a special group. *Id.* at 82–83. However, the principle does not require treating every creature the same *for all purposes*. *Id.*

60. *Id.* at 99–100.

61. FRANCIONE, INTRO TO ANIMAL RIGHTS, *supra* note 33, at 100–02.

62. *Id.* at xxxi, 101 (“No one argues that we should extend to animals the right to vote or to drive a car or to own property or to attend a university, or many other rights that we reserve to competent human beings.”).

animal has morally significant interests and should not be treated as merely a resource.<sup>63</sup>

Animal welfare advocates, on the other hand, assert that animals should be protected against cruelty and maltreatment,<sup>64</sup> but that such protections should be based on weighing human interests (in using animals) against animal interests (in avoiding suffering).<sup>65</sup> According to the World Organisation for Animal Health (OIE),<sup>66</sup> “[g]ood animal welfare requires disease prevention and appropriate veterinary care, shelter, management and nutrition, a stimulating and safe environment, humane handling and humane slaughter or killing.”<sup>67</sup> This agenda prohibits *unnecessary* suffering, but allows humans to use animals as resources so long as the animals are treated humanely.<sup>68</sup> In the United States, the Animal Welfare Act<sup>69</sup>—which sets minimum standards of animal treatment in research, commercial use, and entertainment—is a prime example of the responsibility granted to humans to ensure proper treatment of animals, even when they are classified as property.<sup>70</sup>

Animal welfare advocates are further divided into two subgroups: those who believe that expanding regulation is a necessary step toward eventually ending animal exploitation, and those who believe that animals do not have rights.<sup>71</sup> Animal rights theorists argue that progress within the realm of animal welfare cannot lead to real animal protection, because equal consideration of interests is impossible to achieve when animals are classified as property.<sup>72</sup>

63. *Id.* at 100.

64. Ralph A. DeMeo, *Defining Animal Rights and Animal Welfare: A Lawyer’s Guide*, 91 FLA. B.J. 42, 42 (2017).

65. FRANZIONE, INTRO TO ANIMAL RIGHTS, *supra* note 33, at 85.

66. On January 25, 1924, twenty-eight countries signed an international agreement to create the OIE, an intergovernmental organization. *What is the OIE?*, WORLD ORGANISATION FOR ANIMAL HEALTH, <http://www.oie.int/about-us/director-general-office/what-is-the-oie/> (last visited Oct. 27, 2019). The OIE currently consists of 182 members, including the United States. *The 182 OIE Members*, WORLD ORGANISATION FOR ANIMAL HEALTH, <http://www.oie.int/about-us/our-members/member-countries/> (last visited Oct. 27, 2019).

67. Terrestrial Animal Health Code, ch. 7.1, art. 7.1.1 (2019), [http://www.oie.int/fileadmin/Home/eng/Health\\_standards/tahc/current/chapitre\\_aw\\_introduction.pdf](http://www.oie.int/fileadmin/Home/eng/Health_standards/tahc/current/chapitre_aw_introduction.pdf).

68. DeMeo, *supra* note 64, at 44.

69. Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2012).

70. DeMeo, *supra* note 64, at 44.

71. Davison-Vecchione & Pambos, *supra* note 47, at 290.

72. Robert Garner, *Animal Welfare: A Political Defense*, 1 J. ANIMAL L. & ETHICS 161, 168 (2006); *see also* FRANZIONE, INTRO TO ANIMAL RIGHTS, *supra* note 33, at xxxi (“There is . . . no empirical evidence that the regulation of animal exploitation leads to the abolition of exploitation.”).

Although animal welfare advocates in both subgroups<sup>73</sup> recognize the philosophical flaws in the argument for animal welfare (rather than animal rights), they view the fight for animal welfare as the more realistic battle at the moment.<sup>74</sup> While it may be true that an animal’s property status is incompatible with a theory of animal rights, this incompatibility does not prevent animal welfare advocates from enacting basic protections for animals *now*.<sup>75</sup> According to animal welfare advocates, it is imperative to remember that the law is generally a reflection of society, and a law-maker cannot stretch a policy much further than public opinion allows.<sup>76</sup> Therefore, an animal welfare argument recognizes the need to negotiate with the government and encourage the legislature to provide immediate protection for animals through compromises.<sup>77</sup> In addition to compromising for meaningful protections right now, animal welfare advocates campaign to expand the definition of *unnecessary* suffering, while strengthening the societal shift in perception needed to enact future, more expansive animal protections.<sup>78</sup>

### B. *Legal Personhood v. Legal Standing*

Animal rights theorists generally advocate for reclassifying animals as legal persons—or perhaps into a separate category of a “living property”—in order to recognize that animals have inalienable *rights* and potentially bear duties within society.<sup>79</sup> Animal welfare advocates are generally more willing to negotiate and compromise by accepting an animal welfare law that includes

73. The advocates who believe in taking smaller, more manageable steps toward animal rights rely heavily on the philosophical arguments within the animal rights movement, because their goal ultimately aligns with the animal rights theorists. See, e.g., Davison-Vecchione & Pambos, *supra* note 47, at 290. Advocates who do not believe that animals have rights still subscribe to the notion that animals should not be subjected to unnecessary suffering. *Id.* However, they do not believe that animal welfare laws should be used as steps in a larger movement toward granting animals rights. *Id.* at 289–90. For those advocates, enacting the animal welfare laws to prevent unnecessary suffering is the ultimate goal. *Id.*

74. Garner, *supra* note 72, at 173–74 (“To others, including this author, it represents a realistic appraisal of what can be achieved now and in the short term, given the present vulnerable and arrogant state of the human condition.”).

75. *Id.* at 168.

76. *Id.* at 172.

77. *Id.* (providing an English example: “[T]he 1986 Animals (Scientific Procedures) Act offered better protection for animals than it might have otherwise done because a group of animal advocates . . . were prepared to negotiate with government.”).

78. *Id.* at 169–70.

79. See *Animal Advocacy and Causes of Action*, *supra* note 6, at 95.

legal standing for animals in narrowly defined situations, which can protect animals now while society’s perception continues to evolve.<sup>80</sup>

### 1. Current State of the Law: Legal Personhood

Black’s Law Dictionary defines a legal person as “[a]n entity, such as a corporation, created by law and given certain legal rights and duties of a human being; a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being.”<sup>81</sup> The concept of legal personhood can be divided into two categories: natural persons and artificial persons.<sup>82</sup> A natural person refers only to human beings, who obtain legal rights upon birth<sup>83</sup> and are entitled to maximum legal protections.<sup>84</sup> An artificial person<sup>85</sup> adheres to the dictionary definition, and refers to an entity that is granted *some* legal rights and protections similar to natural persons.<sup>86</sup> Prominent examples of artificial persons are corporations and government organizations, however this category includes many other entities.<sup>87</sup>

80. See Garner, *supra* note 72, at 163.

81. *Legal Person*, BLACK’S LAW DICTIONARY (10th ed. 2014). Neither the Constitution nor the Supreme Court provides a definition of “person.” See Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L.J. 369, 371 (2007).

82. Alexis Dyschkant, *Legal Personhood: How We Are Getting It Wrong*, 2015 U. ILL. L. REV. 2075, 2079 (2015) (“The U.S. Constitution draws a principled distinction between natural persons and other legal persons, securing some rights for natural persons alone.”).

83. In *Roe v. Wade*, the Supreme Court rejected the notion that the Fourteenth Amendment protection of “persons” extends to a viable or nonviable fetus. 410 U.S. 113 (1973). However, the Court did not preclude states from classifying a fetus as a “person” so long as it was outside of the context of the Fourteenth Amendment’s protections. See Jeffrey A. Parness, *Social Commentary: Values and Legal Personhood*, 83 W. VA. L. REV. 487, 491 (1981). The Court also recognizes that when states do enact protections for pre-birth forms of human life, it is generally contingent upon live birth. *Id.* at 493 (“[T]hat is, live birth triggers the retroactive vesting of rights upon the unborn.”). Therefore, similar to animal welfare laws, which provide protection without granting legal rights for animals, state statutes generally protect pre-life forms, but do not grant them legal rights equivalent to a natural person. *Id.*

84. Berg, *supra* note 81, at 373.

85. Also known as juridical or fictitious persons. See *id.*

86. *Id.* There are legal rights that are exclusive to natural persons. See Dyschkant, *supra* note 82, at 2079 (“The Privileges and Immunities clause is limited to natural persons because they have ‘a more robust set of rights than all persons generally.’” (quoting Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334, 341 (2005))).

87. See, e.g., 1 U.S.C. § 1 (2018) (defining “person” to include “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals”); Lawrence B.

Generally, a legal person is characterized as a bearer of both rights *and* duties,<sup>88</sup> but the particular bundle of rights and duties that applies will vary depending on whether the person is natural or artificial and other factors within each category.<sup>89</sup> Because of that variation, the concept of legal personhood is more of a spectrum than a bright line characterization.<sup>90</sup> In a theoretical hierarchy, natural persons would have precedence over artificial legal persons.<sup>91</sup>

Animals rights theorists propose a plethora of arguments focused on this spectrum theory of legal personhood to find a place on the spectrum for animals.<sup>92</sup> For example, one argument challenges the fact that a human who can bear neither rights nor duties, such as an infant or permanently comatose individual, is on the legal person spectrum, while an animal continues to be precluded from the characterization.<sup>93</sup> Another argument contends that a legal person need not bear rights *and* duties, but instead the definition should require merely a bearer of rights *or* duties.<sup>94</sup>

Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. REV. 1231, 1239 (1992) (“In admiralty, a ship itself becomes the subject of a proceeding in rem and can be found ‘guilty.’”).

88. Dyschkant, *supra* note 82, at 2076 (“[T]he key element of legal personhood seems to be the ability to bear rights and duties.”); *see also* JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 27 (1909) (“[T]he technical legal meaning of a ‘person’ is a subject of legal rights and duties.”).

89. *See* Solum, *supra* note 87, at 1239. A legal person usually has the capacity to own property, be a party to a contract, or to sue and be sued. *Id.*

90. Carter Dillard, *Empathy with Animals: A Litmus Test for Legal Personhood?*, 19 ANIMAL L. 1, 4 (2012) (“[L]egal personhood is a matter of degree depending on which rights and duties one has—one can be more or less a legal person according to whether one is a prisoner, minor, parolee, probationer, future person, intending immigrant, corporation, animal, etcetera . . . .”); *see also* Dyschkant, *supra* note 82, at 2081 (“The law recognizes that children cannot be held as legally responsible as adults, and thus limits their rights and duties.”).

91. Berg, *supra* note 81, at 374 (“Our society was developed by and for natural persons, and thus legal rights focus on this group.”).

92. Dyschkant, *supra* note 82, at 2108 (“We may benefit from remembering that being capable of having rights and duties is not always a zero sum game, and sometimes more like a spectrum . . . . It seems plausible that animals could also exist on this spectrum . . . .”).

93. *See, e.g.*, Richard L. Cupp, Jr., *Litigating Nonhuman Animal Legal Personhood*, 50 TEX. TECH L. REV. 573, 578 (2018) [hereinafter Cupp, *Litigating Legal Personhood*]. Cupp refers to this as an “argument from marginal cases” and strongly opposes any argument that will compare a “marginal” human to an “intelligent” animal because of the negative consequences that could materialize from such a comparison. *Id.* But Alexis Dyschkant notes that this argument is relevant because it is evidence of our illogical impulse to equate legal personhood with humanity. Dyschkant, *supra* note 82, at 2080 (“[T]he tendency to equate legal personhood with humanity is so strong that it can lead lawmakers to declare humans to be persons that are incapable of exercising rights or owing duties and refuse to declare nonhumans to be persons that are capable of exercising rights and owing duties.”).

94. Steven Tudor, *Some Implications for Legal Personhood of Extending Legal Rights to Non-*



According to a leading animal rights advocate, Steven Wise, “[o]nly legal persons count in courtrooms, or can be legally seen, for only they exist in law for their own benefits.”<sup>95</sup> In contrast, Wise explains a legal thing can “exist in law solely for the sakes of legal persons.”<sup>96</sup> Wise created an “Animal Rights Pyramid” to demonstrate the importance of obtaining legal personhood for animals.<sup>97</sup> The base of the pyramid (level one) emphasizes the foundational quality of the concept of legal personhood, which merely recognizes an animal’s capacity to possess any legal right.<sup>98</sup> Level two then consists of the actual “legal rights possessed” by the animal, which may or may not include the right to sue or have its rights represented by a third party.<sup>99</sup> If the animal has the capacity to possess a legal right (recognized in level one when an animal is granted legal personhood), and actually possesses a legal right and a system of asserting that right, the third level asks if the animal “possess[es] a private right of action bestowed by statute, constitution, treaty, or common law.”<sup>100</sup> According to Wise, an animal can only have standing in a judicial proceeding after the requirements of levels one through three are satisfied.<sup>101</sup> Because Wise believes that standing cannot be obtained without achieving legal person status, his foundation, the Nonhuman Rights Project, focuses on reclassifying animals as legal persons.<sup>102</sup>

The Nonhuman Rights Project has filed a series of cases attempting to expand the definition of legal personhood to include animals, even if it means placing animals lower on the hierarchy than natural or artificial persons.<sup>103</sup>

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*Human Animals*, 35 AUSTL. J. LEGAL PHIL. 134, 137 (2010) (advocating for a status of “quasi” legal person for a creature that bears only rights without duties).

95. Steven M. Wise, *Legal Personhood and the Nonhuman Rights Project*, 17 ANIMAL L. 1, 1 (2010) [hereinafter Wise, *Legal Personhood*].

96. *Id.*

97. *Id.* at 2 fig.1.

98. *Id.* at 2 fig.1, 5.

99. *Id.* at 2 fig.1. An animal may possess a legal right “with regards to bodily integrity or bodily liberty” even if the animal does not have the cognitive ability to understand or pursue a legal claim. *Id.* at 3.

100. *Id.* For example, the Animal Welfare Act does not include any private right of action for violations, however the Endangered Species Act creates a private right of action for “any person [to] commence a civil suit on his own behalf” for violations of the Act. See Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2018); Endangered Species Act, 16 U.S.C. § 1540(g)(1) (2018).

101. Wise, *Legal Personhood*, *supra* note 95, at 4.

102. *Id.* at 8–9.

103. See *Litigation: Confronting the Core Issue of Nonhuman Animals’ Legal Thinghood*, NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/litigation/> (last visited Oct. 27,

Many of these cases involve an animal, owned by a private party, confined in detrimental or harmful conditions.<sup>104</sup> The Nonhuman Rights Project regularly attempts to file habeas corpus writs on behalf of confined animals, but courts consistently reject these claims and decline to consider animals legal persons.<sup>105</sup> Other organizations have abandoned Wise’s pyramid and instead advocate for legal standing in lower courts to remedy an animal’s harm, garnering mixed results.<sup>106</sup>

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2019). For examples of cases in which the Nonhuman Rights Project seeks a writ of habeas corpus on behalf of animals held in inappropriate conditions by private owners, see Nonhuman Rights Project, Inc. *ex rel.* Beulah v. R.W. Commerford & Sons, Inc., No. LLICV175009822S, 2017 WL 7053738 (Conn. Super. Ct. Dec. 26, 2017); Nonhuman Rights Project, Inc. *ex rel.* Tommy v. Lavery (*Lavery II*), 54 N.Y.S.3d 392 (App. Div. 2017); Nonhuman Rights Project, Inc. *ex rel.* Kiko v. Presti, 999 N.Y.S.2d 652 (App. Div. 2015); People *ex rel.* Nonhuman Rights Project, Inc. v. Lavery (*Lavery I*), 998 N.Y.S.2d 248 (App. Div. 2014). In *Lavery II*, the Nonhuman Rights Project argued that “if humans bereft of autonomy, self-determination, sentience, consciousness, even a brain, are entitled to personhood and legal rights, then this Court must either recognize [the animal’s] just equality claim to bodily liberty or reject equality entirely.” Petitioners’ Memorandum of Law in Support of Order to Show Cause & Writ of Habeas Corpus and Order Granting the Immediate Release of Tommy at 73, *Lavery II*, 54 N.Y.S.3d 392 (No. 3648); *see also* Brief of Petitioner-Appellant at 49, *Lavery II*, 54 N.Y.S.3d 392 (No. 3648).

104. *See, e.g.*, cases cited *supra* note 103. For example, *Lavery I* and *Lavery II* involve a chimpanzee, Tommy, who is held alone in a cage, in a shed, on a used trailer lot along a highway in New York. *Lavery II*, 54 N.Y.S.3d at 394; *Lavery I*, 998 N.Y.S.2d at 248. *Beulah* revolves around three elephants who are routinely paraded around in a circus/fair by owners who have been cited for Animal Welfare Act violations (for failing to adhere to minimum standards of care) more than fifty times. *Beulah*, 2017 WL 7053738, at \*1. *Presti* is a case about Kiko, a chimpanzee held in a cage in a cement storefront in a residential area of Niagara Falls, New York. 999 N.Y.S.2d at 652.

105. *See, e.g.*, cases cited *supra* note 103. In both *Lavery I* and *Lavery II*, the court based its decision on the theories of reciprocity and community membership. *Lavery II*, 54 N.Y.S.3d 392; *Lavery I*, 998 N.Y.S.2d 248. The theory of reciprocity requires an individual to have the ability to both enjoy rights and possess legal duties in order to be characterized as a legal person. *Lavery I*, 998 N.Y.S.2d at 250. The requirement of community membership states that the enjoyment of rights arises from membership in a political society. *See Lavery II*, 54 N.Y.S.3d at 395–96; *Lavery I*, 998 N.Y.S.2d at 251; Davison-Vecchione & Pambos, *supra* note 47, at 297–98. However, the *Lavery I* court noted that although they would not accept an animal rights argument, the animals were not left defenseless because animal cruelty statutes prevent animals from being mistreated. *Lavery I*, 998 N.Y.S.2d at 251.

106. *See, e.g.*, *Marbeled Murrelet v. Pac. Lumber Co.*, 880 F. Supp. 1343, 1346 (N.D. Cal. 1995) (allowing standing for a bird), *aff’d sub nom.* *Marbeled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996); *Loggerhead Turtle v. Cty. Council*, 896 F. Supp. 1170, 1177 (M.D. Fla. 1995) (allowing standing for a turtle); *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993) (denying standing for a dolphin); *Hawaiian Crow (‘Alala) v. Lujan*, 906 F. Supp. 549, 551–52 (D. Haw. 1991) (denying standing to a bird).

## 2. Current State of the Law: Legal Standing

The standing doctrine is rooted in Article III of the United States Constitution<sup>107</sup> and is used to promote separation of powers by granting courts the power to hear only “cases” and “controversies” rather than general social problems.<sup>108</sup> Although the standing requirement is derived from the Constitution, the doctrine “embraces several judicially self-imposed limits on the exercise of federal jurisdiction.”<sup>109</sup> One such prudential requirement applicable here is the Supreme Court’s “zone of interest” test, which restricts standing to only those interests that are “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>110</sup>

In the 1990s, the Supreme Court decided two important standing cases that reflected a narrower approach to the standing doctrine and, in turn, greatly limited animals’ legal protections.<sup>111</sup> Both cases involved the Endangered Species Act (ESA), which is an animal welfare act that provides protection from human activity for members of endangered or threatened species and their habitats.<sup>112</sup> In accordance with animal welfare advocates’ paternalistic approach,<sup>113</sup> the Act encourages citizen participation to compel enforcement

107. U.S. CONST. art III, § 2.

108. See Kurt S. Kusiak, *Standing to Sue: A Brief Review of Current Standing Doctrine*, 71 B.U. L. REV. 667, 668 (1991); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983).

109. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

110. *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (citing *Ass’n of Data Processing Serv. Org. v. Camp*, 387 U.S. 150, 153 (1970)). Other self-imposed limits include “the general prohibition on a litigant’s raising another person’s legal rights [and] the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches.” *Allen*, 468 U.S. at 751.

111. *Lujan v. Def. of Wildlife*, 504 U.S. 555 (1992); *Bennett*, 520 U.S. at 154. Justice Scalia delivered the opinion of the Court in both *Lujan* and *Bennett*. *Lujan*, 504 U.S. 555 (1992); *Bennett*, 520 U.S. at 154. Prior to his appointment to the Supreme Court, then-Judge Scalia expressed distaste for the Court’s expansive approach to standing, especially in environmental cases. Scalia, *supra* note 108, at 886–90. Specifically, Judge Scalia argued that a *beneficiary* (an individual whose interests are furthered by the statute) of a statute’s protections must qualify for standing, under a stricter injury-in-fact test rather than the test imposed upon the *object* (an individual who is regulated by the statute) of a statute’s regulations. *Id.* at 895–96; see also Katherine A. Burke, *Can We Stand for It? Amending the Endangered Species Act with an Animal-Suit Provision*, 75 U. COLO. L. REV. 633, 645–46 (2004) (discussing Justice Scalia’s approach in more detail). Justice Scalia used *Lujan* as an opportunity to invoke the new stricter injury-in-fact test, and then upheld it in *Bennett*. See *infra* notes 116–29 and accompanying text.

112. Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2018); Burke, *supra* note 111, at 640.

113. See *supra* Section III.A.

through the following citizen-suit provision:

[A]ny person may commence a civil suit on his own behalf—(A) to enjoin any person, including the United States . . . who is alleged to be in violation of any provision . . . or (B) to compel the Secretary to apply . . . the prohibitions . . . of this title with respect to the taking of any resident endangered species or threatened species . . . or (C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty.<sup>114</sup>

However, as the following Supreme Court decisions demonstrate, the ESA’s citizen-suit provision was not formed adequately enough to achieve its desired goal.<sup>115</sup>

First, in *Lujan v. Defenders of Wildlife*, respondents attempted to invoke the citizen-suit provision to compel application of the ESA to federally-funded projects abroad that may have threatened protected species.<sup>116</sup> Justice Scalia, writing for the Court,<sup>117</sup> introduced a new, stricter injury-in-fact test for statutory beneficiaries<sup>118</sup>—as opposed to statutory objects, who must merely satisfy the previous “zone of interests” test.<sup>119</sup> The Court held that an injury-in-fact must be:

114. Burke, *supra* note 111, at 641 (quoting 16 U.S.C. § 540(g)(1) (2018)). Despite the holdings discussed in the following paragraphs, the Supreme Court itself acknowledged that the ESA “encouraged” citizen involvement in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180–81 (1978). *Id.*

115. Burke, *supra* note 111, at 638.

116. *Lujan*, 504 U.S. at 558–59.

117. Justice Scalia delivered the opinion of the Court with respect to Parts I, II, III-A, and IV, in which Chief Justice Rehnquist, and Justices White, Kennedy, Souter, and Thomas joined, and an opinion with respect to Part III-B, in which Chief Justice Rehnquist and Justices White and Thomas joined. *Id.* at 557. Justice Kennedy wrote an opinion concurring in part and concurring in the judgment and was joined by Justice Souter. *Id.* at 579. Justice Stevens filed a concurring opinion. *Id.* at 581. Justice Blackmun was joined by Justice O’Connor in a dissenting opinion. *Id.* at 589.

118. See *Lujan*, 504 U.S. at 562 (“Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.”); Burke, *supra* note 111, at 646.

119. *Lujan*, 504 U.S. at 561. In announcing the stricter injury-in-fact test, Justice Scalia also rejected three other creative theories of injury: (1) “‘animal nexus’ approach whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing”; (2) “ecosystem nexus,” which “propose[d] that any person who uses *any part* of a ‘contiguous ecosystem’ adversely affected [on the globe] . . . has standing”; and (3) “‘vocational nexus’ approach, under which anyone with a professional interest in such animals can sue.” *Id.* at 565–66.

(a) concrete and particularized and (b) “actual or imminent, not conjectural or hypothetical”[;] . . . there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court”[;] . . . [and] it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”<sup>120</sup>

The Court also rejected an argument of “procedural injury” specifically regarding the citizen-suit provision of the ESA because “a generally available grievance about government” is not sufficient to state an Article III case or controversy.<sup>121</sup> Therefore, the citizen-suit provision was insufficient to overcome the concrete injury required of statutory beneficiaries.<sup>122</sup>

Justice Scalia solidified this distinction between statutory beneficiaries and statutory objects in *Bennett v. Spear* when the Court recognized the plaintiffs’ standing with minimal requirements.<sup>123</sup> In *Bennett*, the plaintiffs filed complaints after the Fish and Wildlife Service, in accordance with the ESA, implemented measures to protect two species of endangered fish and their habitats.<sup>124</sup> Plaintiffs claimed that the protections, if implemented, would “irreparably damage[]” their use of the waterways in question for irrigation and aesthetics.<sup>125</sup> The lower courts aptly applied the “zone of interests” test and held that plaintiffs did not have standing because their “recreational, aesthetic, and commercial interests . . . [did] not fall within the zone of interests sought

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120. *Id.* at 560–61 (alteration in original).

121. *Id.* at 573–75.

122. *Id.* at 574–75.

123. *Bennett v. Spear*, 520 U.S. 154, 164 (1997). Here, the Court merely required that the plaintiffs satisfy the “zone of interests” test, rather than the injury-in-fact test applied in *Lujan*. *Id.*; see also *Burke*, *supra* note 111, at 646–47 (“When ‘the plaintiff is complaining of an agency’s unlawful *failure* to impose a requirement or prohibition upon *someone else*,’ that plaintiff asserts ‘majoritarian’ concerns, which belong in the political sphere. In order to overcome that presumption against standing and obtain judicial redress, a statutory beneficiary must meet a very stringent injury-in-fact test . . . . In marked contrast to judicial skepticism about the standing of statutory beneficiaries, ‘[w]hen an individual who is the very *object* of a law’s requirement or prohibition seeks to challenge it,’ this party should always have standing to sue.” (alteration in original) (footnote omitted) (quoting Scalia, *supra* note 108, at 894)).

124. *Bennett*, 520 U.S. at 158–59.

125. *Id.* at 160.

to be protected by the ESA.<sup>126</sup> The Supreme Court reversed, holding that Congress expressly negated<sup>127</sup> the “zone of interests” test by including the citizen-suit provision in the ESA.<sup>128</sup> Therefore, the Court determined that the “zone of interests” test did not apply to the plaintiffs’ case, and the plaintiffs’ alleged injury was sufficient to grant standing.<sup>129</sup>

The effect of Justice Scalia’s contrasting opinions—and the current state of Congress’s attempt to protect animals—is confounding.<sup>130</sup> The *Lujan* and *Bennett* decisions make it increasingly difficult for Congress to confer standing upon the groups it seeks to protect.<sup>131</sup> After *Bennett*, a plaintiff may invoke the ESA’s citizen-suit provision to inhibit animal protections and advance human interests, but according to *Lujan* a plaintiff may not invoke the same provision to encourage animal protections.<sup>132</sup>

Fortunately, the Court’s holdings in *Lujan* and *Bennett* are not required by the Constitution, but rather by the Court’s own prudence.<sup>133</sup> Contrary to a constitutional requirement, the Court’s self-imposed prudential requirements may “be modified or abrogated by Congress.”<sup>134</sup> Congress has the ability to grant a private right of action to a group of individuals to circumvent the Court’s prudential standing requirements.<sup>135</sup> Congress has generally used this power to explicitly grant private rights of action to injured individuals who need protection and lack other remedies.<sup>136</sup> For example, the Americans with Disabilities Act grants disabled individuals the right to bring their own causes of action against employers, government entities, and public accommodations who violate the statute.<sup>137</sup> The Court has also honored implied private rights

126. *Id.* at 160–61 (citing *Bennett v. Plenart*, 63 F.3d 915, 919 (9th Cir. 1995)).

127. Contrary to *Lujan*, in *Bennett* the citizen-suit provision was sufficient to negate the Court’s other self-imposed, prudential requirements. *Bennett*, 520 U.S. at 163.

128. *Id.* at 164.

129. *Id.*

130. Burke, *supra* note 111, at 648–49.

131. *Id.* at 642.

132. *Id.* at 646–48.

133. See, e.g., Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine’s Dirty Little Secret*, 107 NW. U. L. REV. 169, 170–74 (2012).

134. *Bennett*, 520 U.S. at 162; see also *Warth v. Seldin*, 422 U.S. 490, 500–01 (1975) (“In some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power . . .”).

135. Burke, *supra* note 111, at 650.

136. See, e.g., Susan J. Stabile, *Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861 (1996).

137. See Private Suits, 28 C.F.R. § 36.501 (2018).

of action in the Securities Exchange Act of 1934<sup>138</sup> and Titles VI and IX of the Civil Rights Act.<sup>139</sup> For a private right of action to be upheld, Congress must clearly and narrowly define both the potential plaintiff and the injury to be protected against.<sup>140</sup> Congress must also “adequately link the defined injuries to the defined class of plaintiffs now empowered to sue.”<sup>141</sup>

Although Congress’s attempt at a citizen-suit provision in the ESA was ultimately unsuccessful, lawmakers retain the ability to try again.<sup>142</sup> To execute a proper citizen-suit provision, Congress should tailor any further animal protection legislation to comply with the Court’s clearly demonstrated requirements.<sup>143</sup>

#### IV. A SAMPLING OF STATUTES

Animal cruelty is a criminal offense in every state, but definitions and punishments vary across states and statutes.<sup>144</sup> States often do not have ade-

138. See *J.I. Case Co. v. Borak*, 377 U.S. 426, 432–35 (1964) (finding a private right of action exists under Section 14(a) of the Securities Exchange Act of 1934, despite other remedies available to plaintiff); *Securities Exchange Act of 1934: Private Investor Has Private Right of Action Under Section 14(a)*, 1962 DUKE L.J. 151 (1962).

139. See Rebecca D. Graves, *An Implied Private Right of Action Under Title VI*, 37 WASH. & LEE L. REV. 297 (1980). Although the Supreme Court has not expressly decided whether a private right of action is implied under Title VI, the Court has allowed two separate, private plaintiffs to recover directly under the statute. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Lau v. Nichols*, 414 U.S. 563 (1974). The Court did expressly hold in *Cannon v. University of Chicago* that a private right of action exists under Title IX. 441 U.S. 677 (1979). The Court’s holding in *Cannon* “was based on the legislative history indicating that Congress intended Title IX to be enforced like Title VI, and that Congress believed Title VI to encompass a private right of action.” Graves, *supra* note 139, at 304.

140. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 580 (1992).

141. Burke, *supra* note 111, at 657 (citing *Lujan*, 504 U.S. at 580).

142. *Id.* at 651; see also Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1361 (2000) (noting that nothing in the Constitution prevents Congress from granting standing to animals).

143. See *infra* Part V; see also Burke, *supra* note 111, at 658–60 (analyzing Congressional power to enact an animal-suit provision within the Endangered Species Act according to the Supreme Court’s standing requirements).

144. See, e.g., 2018 U.S. Animal Protection Laws State Rankings, ANIMAL LEGAL DEF. FUND, <https://aldf.org/project/2018-us-state-rankings/> (last visited Nov. 1, 2019). Despite the differences, state laws generally protect domestic or companion animals and some states protect wildlife. *Laws That Protect Animals*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/article/laws-that-protect-animals/> (last visited Nov. 1, 2019). State protections regularly exclude farmed and laboratory animals. *Id.*

quate resources to expend on animals, and many states do not prioritize enforcement of animal cruelty protections.<sup>145</sup> This Part introduces the newly-enacted federal animal cruelty statute as a building block and samples three states’ provisions—Connecticut, Pennsylvania, and Oregon—for inspiration for an even more comprehensive federal solution to animal cruelty.<sup>146</sup>

#### A. *The Preventing Animal Cruelty and Torture Act*

In November 2019, Congress enacted the Preventing Animal Cruelty and Torture Act (PACT) to prohibit animal crushing as well as the creation or distribution of animal crush videos.<sup>147</sup> As defined in PACT, animal crushing refers to “conduct in which one or more living non-human mammals, birds, reptiles, or amphibians is purposefully crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury.”<sup>148</sup> Serious bodily injury includes “bodily injury which involves (a) a substantial risk of death, (b) extreme physical pain, (c) protracted and obvious disfigurement, or (d) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”<sup>149</sup> PACT is rooted in the commerce clause of the Constitution, which means the law only applies to animal crushing that is related to interstate commerce or takes place on federal land.<sup>150</sup> For example, a dog

145. See *Animal Advocacy and Causes of Action*, *supra* note 6; see also Katie Galanes, *The Contradiction: Animal Abuse—Alive and Well*, 44 J. MARSHALL L. REV. 209, 221 (2010) (“The most significant issue in dealing with animal cruelty, animal abuse, and dogfighting cases is an overall lack of enforcement.”).

146. See *infra* Part V, which analyzes the pertinent provisions and combines those provisions into a federal Proposed Animal Protection Bill.

147. Preventing Animal Cruelty and Torture Act, Pub. L. No. 116-72, 133 Stat. 1151 (2019) (to be codified at 18 U.S.C. § 48). Representative Theodore E. Deutch introduced the bill to the House of Representatives on January 23, 2019 to replace the previous animal crushing statute that was deemed unconstitutional in *United States v. Stevens*, 559 U.S. 460 (2010), on the grounds that it was too broad and could have prohibited activities protected by the First Amendment. See Animal Crush Video Prohibition Act of 1999, Pub. L. No. 106-152, 113 Stat. 1732 (1999) (previously codified at 18 U.S.C. § 48). The PACT passed in the House of Representatives on October 22, 2019 and in the Senate on November 5, 2019. H.R. Rep. No. 116-724 (2019). President Trump signed the PACT into public law, effective immediately, on November 25, 2019. *Id.*

148. Preventing Animal Cruelty and Torture Act, Pub. L. No. 116-72, 133 Stat. 1151, 1152 (2019) (to be codified at 18 U.S.C. § 48(f)(1)).

149. 18 U.S.C. § 1365(h)(3).

150. Preventing Animal Cruelty and Torture Act, Pub. L. No. 116-72, 133 Stat. 1151, 1151 (2019) (to be codified at 18 U.S.C. § 48(a)(1)) (“It shall be unlawful for any person to purposefully engage in animal crushing in or affecting interstate or foreign commerce . . . .” (emphasis added)). According to the Commerce Clause, Congress has the enumerated power “to regulate commerce with foreign



breeder who sells his puppies across state lines is engaged in interstate commerce and therefore would be prohibited by PACT from engaging in any animal crushing behavior.<sup>151</sup>

The PACT should be applauded as a genuine step forward for animal protections, but it may also be too narrowly tailored to make a significant difference.<sup>152</sup> States are still left to manage the overwhelming workload of investigating and prosecuting animal cruelty cases that do not cross state lines and even in cases where the PACT applies, the federal government may not prioritize animal welfare when resources are limited.<sup>153</sup> Of course, the actual effects of PACT are yet to be determined and the animal welfare community remains optimistic that this new law can bring about much-needed assistance from the federal government.<sup>154</sup>

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nations, and among the several states.” U.S. CONST. art. I, § 8, cl. 3.

151. See Danny Prater, *Animal Abuse Now a Federal Offense After Passage of PACT Act*, PETA (Nov. 27, 2019), <https://www.peta.org/blog/pact-act-signed-into-law/>.

152. *Id.*; see also *Preventing Animal Cruelty and Torture (PACT) Act*, ANIMAL WELFARE INST., <https://awionline.org/content/preventing-animal-cruelty-and-torture-pact-act> (last visited Dec. 31, 2019); *Preventing Animal Cruelty and Torture (PACT) Act (Federal)*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/project/preventing-animal-cruelty-and-torture-pact-act/> (last visited Dec. 31, 2019); Joshua Bote, *House Unanimously Passes Bipartisan Bill to Make Animal Cruelty a Federal Crime*, USA TODAY (Oct. 24, 2019, 4:57 PM), <https://www.usatoday.com/story/news/nation/2019/10/23/house-passes-bipartisan-bill-make-animal-cruelty-federal-crime/4076657002/> (containing a statement from the ASPCA in support of the PACT Act).

153. See *supra* note 7 and accompanying text; *infra* note 169.

154. See Gabrielle Wast, *The PACT Act: A Step in the Right Direction on the Path to Animal Welfare*, JURIST (Dec. 1, 2019, 8:55:43 PM), <https://www.jurist.org/commentary/2019/12/courtney-lee-pact-act/>.

*B. Connecticut’s Animal Advocate Provision*

Connecticut animal protection statutes include liability for (a) intentionally killing or injuring a companion animal,<sup>155</sup> (b) general cruelty to animals,<sup>156</sup> (c) malicious and intentional injury or killing,<sup>157</sup> and (d) special statutes for injury or killing of service or law enforcement animals.<sup>158</sup> Various animal fighting activities and sexual assault of an animal are also prohibited.<sup>159</sup> Animal protection statutes generally exempt veterinary practice, research animals, wildlife, and accepted farm animal husbandry practices.<sup>160</sup>

In 2016, Connecticut enacted a statute (the Advocate Act) allowing a court to appoint an advocate in proceedings regarding the welfare or custody of a cat or dog.<sup>161</sup> When the court deems it necessary or upon request of a party, a court may appoint an advocate—from a list of advocates<sup>162</sup> maintained

155. CONN. GEN. STAT. § 22-351 (2019). A first offense is generally classified as a misdemeanor, with a sentence of six months imprisonment and/or \$1,000 fine. *Id.* A second offense is a class E felony. *Id.*

156. CONN. GEN. STAT. § 53-247(a) (2019). A first offense is generally classified as a misdemeanor, with a sentence of up to one-year imprisonment and/or a fine of up to \$1,000. *Id.* A second offense is a class D felony. *Id.*

157. *Id.* § 53-247(b). A first offense is a class D felony and a second offense is a class C felony. *Id.*

158. *Id.* § 53-247(d)–(e). Intentional injury of a service or law enforcement animal is a class D felony. *Id.* § 53-247(d). Intentional killing of a law enforcement animal is a felony and carries a sentence of up to ten years imprisonment and/or a fine of up to \$10,000. *Id.* § 53-247(e).

159. *Id.* § 53-247(c) (prohibiting animal fighting activities); CONN. GEN. STAT. § 53a-73a (2018) (classifying sexual assault of an animal as a class A misdemeanor).

160. CONN. GEN. STAT. § 53-247(b) (2019).

161. CONN. GEN. STAT. § 54-86n (2019). Connecticut is the first to enact a law of this kind; however, officials in other states such as New Jersey, New York, and Maine have shown interest in enacting similar provisions. Michelle Tuccitto Sullo, *Animal Advocates Help to Bring Justice for Abused Cats and Dogs*, NEW HAVEN REGISTER, <https://www.nhregister.com/news/article/Animal-advocates-help-to-bring-justice-for-abused-13565197.php> (last updated Jan. 27, 2019, 1:23 PM). California and a federal district court in Virginia have also used comparable provisions in the past. *See* CAL. PROB. CODE §§ 1003, 15212 (2016). California allows appointment of a *guardian ad litem* to advocate for the interests of an animal when that animal is the beneficiary of a trust. *Id.* § 1003(a). The United States District Court in the Eastern District of Virginia also appointed a guardian, Rebecca J. Huss, for the animal victims in the Michael Vick dogfighting case. *See* Nicole Pallotta, *Unique Connecticut Law Allows Court-Appointed Advocates to Represent Animals*, ANIMAL LEGAL DEF. FUND <https://aldf.org/article/unique-connecticut-law-allows-court-appointed-advocates-to-represent-animals/> (last visited Nov. 1, 2019); *see, e.g.*, Rebecca J. Huss, *Lessons Learned: Acting as Guardian/Special Master in the Bad Newz Kennels Case*, 15 ANIMAL L. 69 (2008).

162. CONN. GEN. STAT. § 54-86n(c) (2019). Advocates are generally lawyers working pro-bono or approved law students. *Id.*

by the Department of Agriculture—“to represent the interests of justice.”<sup>163</sup> Once appointed:

The advocate may: (1) Monitor the case; (2) consult any individual with information that could aid the judge or fact finder and review records relating to the condition of the cat or dog and the defendant’s actions, including, but not limited to, records from animal control officers, veterinarians and police officers; (3) attend hearings; and (4) present information or recommendations to the court pertinent to determinations that relate to the interests of justice, provided such information and recommendations shall be based solely upon the duties undertaken pursuant to this subsection.<sup>164</sup>

According to the statute’s summary, the Advocate Act’s purpose is “[t]o permit the use of animal advocates in certain legal proceedings relating to neglected or cruelly treated animals.”<sup>165</sup> Unlike Connecticut’s other animal protections, the Advocate Act is narrowly defined to only include cats and dogs and specifically requires advocates to act in the interests of justice, rather than the best interests of the animal (although the two interests hopefully coincide).<sup>166</sup> Advocates should not be compared to a child’s guardian<sup>167</sup> in welfare or custody cases, but the animal advocates handle much of the work that overwhelmed prosecutors may not have time or resources for, such as conducting research and interviews, preparing evidence for trial, or even making recommendations to the judge.<sup>168</sup> From October 2016 to January 2019, Connecticut courts appointed animal advocates in forty-eight animal abuse cases and the state has seen a significant increase in punishments and fines against animal

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163. *Id.* § 54-86n(a), (c).

164. *Id.* § 54-86n(b).

165. H.B. 5344, 2016 Gen. Assemb. Reg. Sess. (Conn. 2016) (enacted).

166. CONN. GEN. STAT. § 54-86n (2019). An earlier draft of the Act stated that advocates should act in the “animal’s best interests.” CONN. HOUSE JUDICIARY COMM., OFF. LEGIS. RES. BILL ANALYSIS, SUBSTITUTE H.B. 5344 (as amended by House “A”), 2016 Sess. (Conn. 2016), <https://www.cga.ct.gov/2016/ba/2016hb-05344-r01-ba.htm>. This language was replaced with “interests of justice” for the enacted law. *Id.*

167. Connecticut laws regarding children’s representatives require the representative to advocate or argue on behalf of the child’s best interest, which, as seen *supra* note 166, was rejected in the case of the Advocate Act. See Nancy E. Halpern, *Connecticut Advocates for Justice, Not Animals*, FOX ROTHSCHILD LLP (June 14, 2017), <https://animallaw.foxrothschild.com/2017/06/14/connecticut-advocates-for-justice-not-animals/>.

168. See Sullo, *supra* note 161.

abusers.<sup>169</sup>

### C. Pennsylvania’s Humane Law Enforcement Officers

Pennsylvania animal protection statutes include liability for (a) abandonment or poisoning of a dog,<sup>170</sup> (b) neglect, cruelty, or overworking an animal,<sup>171</sup> (c) taunting, tormenting, striking, or injuring a law enforcement animal,<sup>172</sup> and (d) other specialized circumstances constituting abuse.<sup>173</sup> Pennsylvania also prohibits animal fighting activities (including spectatorship) and any form of sexual intercourse with an animal.<sup>174</sup> Animal protection statutes generally exempt veterinary practice, research animals, wildlife, pest control, and accepted farm animal husbandry practices.<sup>175</sup>

Pennsylvania’s animal cruelty code also includes a civil action provision that empowers humane society officers—called Humane Law Enforcement Officers (HLEO)—to initiate criminal proceedings against an animal abuser.<sup>176</sup> HLEOs are employed by humane societies,<sup>177</sup> appointed by a court

169. *Id.* Prior to 2016, about 80% of animal cruelty offenses were dismissed or not prosecuted. *Id.*  
170. 3 PA. STAT. AND CONS. STAT. ANN. § 459-601(b), (c) (West 2019).

171. 18 PA. CONS. STAT. §§ 5531, 5532, 5534, 5540 (2018). Although “animal” is not defined in the animal cruelty statute, other listed definitions include protections for the following animals or categories of animals: bear, bovine animal, bull, cat, cock, cow, dog, equine animal (including horses, asses, mules, ponies, and zebra), fowl, goat, honey bees, pigeons, porcine animal, sheep, or other creature. *Id.* § 5531.

172. 3 PA. STAT. AND CONS. STAT. ANN. § 459-602(a), (b) (West 2019).

173. *See, e.g.*, 18 PA. CONS. STAT. §§ 5535–5549 (2018). Other included circumstances include (a) attack of a guide dog, (b) tethering an unattended animal, (c) transporting animals in a cruel manner, (d) cruelty to a cow to enhance appearance of udder, (e) killing homing pigeons, (f) live animals as prizes, and (g) assaulting an animal with biological agent. *Id.*

174. 18 PA. CONS. STAT. §§ 5543–5544 (2018).

175. 18 PA. CONS. STAT. §§ 5536, 5538, 5542, 5553, 5560, 5561 (2018); 63 PA. STAT. AND CONS. STAT. ANN. § 485.32(4) (West 2019). Although veterinary practice in general is exempted, it is unlawful for a person to practice veterinary medicine on animals he or she owns. 63 PA. STAT. AND CONS. STAT. ANN. § 485.32(4).

176. 18 PA. CONS. STAT. § 5551 (2018); 22 PA. CONS. STAT. § 3708 (2018). For a generally comprehensive table of applicable state statutes and the powers granted to humane societies, see Cynthia F. Hodges, *Table of Enforcement Powers Granted to Humane Societies by State*, ANIMAL LEGAL & HIST. CENTER (2012), <https://www.animallaw.info/topic/table-humane-society-enforcement-powers>. Many states allow humane societies to enforce animal cruelty statutes in some capacity. *Id.* A humane officer’s authority will vary by state and could fall anywhere on the spectrum, from providing medical care to seized animals to investigating and prosecuting abuse cases. *Id.*

177. In order to employ an HLEO, a humane society must be a nonprofit organization, and is usually a 501(c)(3) charity funded by private donations. Elizabeth Anderson, *Protecting Lassie, Morris and Mr. Ed: Pennsylvania’s Evolving Animal Cruelty Statute*, 89 PA. B. ASS’N. Q. 58, 60 (2018).

to enforce (within a designated county) only the animal cruelty sections of the criminal code, and have the power and authority to (a) investigate cases under the animal cruelty statutes, (b) rescue or seize abandoned or mistreated animals, (c) apply for and execute search warrants, and (d) prosecute or assist in the prosecution of animal abusers.<sup>178</sup> Similar to Connecticut’s animal advocates, HLEOs lessen the burden felt by overworked prosecutors and understaffed police departments.<sup>179</sup> Contrary to Connecticut’s animal advocates, who merely assist prosecutors in animal abuse proceedings, HLEOs can command the proceedings from an initial report of abuse—reported to a humane society’s dispatch team—all the way through prosecution.<sup>180</sup> Training to become a qualified HLEO consists of forty hours of instruction pertaining to law enforcement duties and forty hours of instruction pertaining to animal care and accepted animal husbandry practices.<sup>181</sup> While they have been helpful in initiating and investigating animal abuse cases, most HLEOs are not properly trained in the intricate aspects of police or legal work, such as application of *Miranda* warnings or filing criminal complaints.<sup>182</sup>

#### D. Oregon’s Victim Classification

Oregon animal protection statutes include liability for: (a) inflicting or encouraging animal abuse, neglect, or abandonment,<sup>183</sup> (b) threatening injury

178. 18 PA. CONS. STAT. § 5551 (2018); 22 PA. CONS. STAT. § 3708 (2018).

179. Diana Bocco, *Pennsylvania SPCA’s Humane Law Enforcement Officers: What They Do and Why*, HONEST KITCHEN (Mar. 14, 2016), <https://www.thehonestkitchen.com/blog/pennsylvania-spcas-humane-law-enforcement-officers/>.

180. *Id.*

181. 22 PA. CONS. STAT. § 3712(d) (2018).

182. Anderson, *supra* note 177, at 60. “*Miranda* warnings” refers to the case of *Miranda v. Arizona*, in which the Supreme Court held that a defendant cannot be questioned by police in the context of a custodial interrogation until the defendant is made aware of the right to remain silent, the right to consult with an attorney and have the attorney present during questioning, and the right to have an attorney appointed if indigent. 384 U.S. 436 (1966). If the HLEO does not properly provide a *Miranda* warning to a defendant, statements made by that defendant may be inadmissible evidence at trial. *See id.* Because the HLEOs—and the humane societies that employ them—bear the costs and liabilities of prosecuting a defendant under an animal cruelty statute, they cannot afford even the slightest of legal mistakes. Jonas Fortune, *Oversight of Humane Society Police Officer Position in Lancaster County Not Clear*, LANCASTERONLINE (Sept. 12, 2016), [https://lancasteronline.com/news/local/oversight-of-humane-society-police-officer-position-in-lancaster-county/article\\_e8da6f98-76d5-11e6-8222-cb2b131dfad6.html](https://lancasteronline.com/news/local/oversight-of-humane-society-police-officer-position-in-lancaster-county/article_e8da6f98-76d5-11e6-8222-cb2b131dfad6.html).

183. OR. REV. STAT. §§ 167.315, 167.320, 167.322, 167.325, 167.330, 167.340, 167.349 (2017).

to an animal to coerce a person’s behavior,<sup>184</sup> (c) assaulting a law enforcement animal or interfering with an assistance, search and rescue, or therapy animal,<sup>185</sup> and (d) unlawful tethering, horse tripping, trading in nonambulatory livestock, or violating a standard of care for breeding dogs.<sup>186</sup> Various animal fighting activities and participating in or encouraging sexual activity with an animal are also prohibited.<sup>187</sup> The animal protection statutes generally exempt veterinary practice, research animals, wildlife, accepted farm animal husbandry practices, slaughter, pest control, and rodeos.<sup>188</sup>

In 2014, the Oregon Supreme Court decided two cases that significantly bolstered animal protections and could potentially initiate a plausible compromise for animal rights and animal welfare advocates.<sup>189</sup> In *State v. Fessenden*, the Oregon Supreme Court upheld a police officer’s seizure of an emaciated horse without a warrant on the basis that exigent circumstances and an emergency aid exception justified the warrantless seizure.<sup>190</sup> Although the court

184. OR. REV. STAT. § 163.275 (2017).

185. OR. REV. STAT. §§ 167.339, 167.352 (2017). A “search and rescue animal” is one that “has been professionally trained for, and is actively used for, search and rescue purposes.” *Id.* § 167.352(3)(a). A “therapy animal” is “an animal other than an assistance animal that has been professionally trained for, and is actively used for, therapy purposes.” *Id.* § 167.352(3)(b). An “assistance animal” is “a dog or other animal designated by administrative rule that has been individually trained to do work or perform tasks for the benefit of an individual.” OR. REV. STAT. § 659A.143(1)(a) (2017).

186. OR. REV. STAT. §§ 167.343, 167.351, 167.374, 167.376, 167.383 (2017). “Tethering” refers to the “restrain[t] [of] a domestic animal by tying the domestic animal to any object or structure by any means.” *Id.* § 167.310(14)(a). “Nonambulatory livestock” is livestock that is “unable to stand or walk unassisted” and trading in such livestock consists of “knowingly deliver[ing] or accept[ing] delivery of a nonambulatory livestock animal at a livestock auction market.” *Id.* § 167.351(1)(a), (2).

187. OR. REV. STAT. ANN. § 163A.005(s) (West 2018); OR. REV. STAT. §§ 167.333, 167.355–167.439, 167.341 (2017).

188. OR. REV. STAT. §§ 167.315, 167.320, 167.332, 167.335 (2017). Exemption provisions do not protect acts committed with gross negligence, however. *Id.* § 167.335. Accepted farm animal husbandry practices “include[,], but [are] not limited to, the dehorning of cattle, the docking of horses, sheep or swine, and the castration or neutering of livestock, according to accepted practices of veterinary medicine or animal husbandry.” *Id.* § 167.310(6).

189. Erica R. Tatioian, *Animals in the Law: Occupying a Space Between Legal Personhood and Personal Property*, 31 J. ENVTL. L. & LITIG. 147, 160 (2015); see *State v. Fessenden*, 333 P.3d 278 (Or. 2014); *State v. Nix (Nix I)*, 283 P.3d 442 (Or. Ct. App. 2012), *aff’d* 334 P.3d 437 (Or. 2014), *vacated*, 345 P.3d 416 (Or. 2015) (vacated for procedural errors).

190. *Fessenden*, 333 P.3d at 278. Because an animal is classified as property, any seizure by law enforcement requires one of three conditions: (a) a warrant for entry and seizure, (b) a need for emergency aid, or (c) exigent circumstances. *Id.* The emergency aid exception applies when “the need to render emergency aid or prevent serious injury or harm is an appropriate justification for an immediate warrantless entry.” *Id.* at 281–82 (quoting *State v. Baker*, 260 P.3d 476, 481 (Or. 2011)). A situation is exigent when it “requires the police to act swiftly to prevent danger to life or serious damage to

admitted that “Oregon law still considers animals to be property,” it held that “[d]omestic animals . . . receive special consideration under Oregon law” because they “occupy a unique position in people’s hearts and in the law.”<sup>191</sup>

The same day, in *State v. Nix*, the Oregon Supreme Court found that an animal can be classified as a “victim” under the state’s anti-merger statute after a criminal court found a defendant guilty of twenty counts of second-degree animal abuse.<sup>192</sup> Unfortunately, during sentencing, the trial court merged the verdicts into a single conviction because “animals are not victims” as defined under the Oregon anti-merger statute.<sup>193</sup> On appeal, the court decided that the word “victim” in the anti-merger statute referred to animal victims when the defendant has violated the second-degree animal neglect statute.<sup>194</sup> Although the defendant argued that animals are considered property of their owners and therefore cannot be “victims,” Oregon’s Supreme Court affirmed the appellate court, finding that the text, context, and legislative history of the statute clearly demonstrated legislative intent to recognize the neglected animals as the victims of the offense.<sup>195</sup> Thus, contrary to mere personal property, an animal in Oregon can now be a legal victim of its owner’s abuse or neglect.<sup>196</sup>

In the fall of 2018, the Animal Legal Defense Fund (ALDF) sought to test the outer limits of the Oregon courts’ willingness to expand on this concept of animals as victims by bringing a negligence claim on behalf on an abused

property.” *Id.* at 282 (quoting *State v. Stevens*, 806 P.2d 92, 98 (Or. 1991)). The court noted that the emergency aid exception generally applies to humans while the exigent circumstances exception applies to animals as property. *Id.* However, the court concluded that both the emergency aid and exigent circumstances exceptions applied in this case because the officer “reasonably believed . . . that immediate action was necessary to prevent further imminent harm to and the death of the horse.” *Id.* at 279.

191. *Id.* at 283–84.

192. *State v. Nix (Nix II)*, 334 P.3d 437, 438 (Or. 2014) (quoting *Nix I*, 283 P.3d at 443).

The defendant was charged with twenty-three counts of animal neglect and seventy counts of second-degree animal abuse, with each count corresponding to a different animal. *Nix I*, 283 P.3d at 443.

193. *Nix I*, 283 P.3d at 444. The anti-merger statute declares that “[w]hen the same conduct or criminal episode, though violating only one statutory provision involves two or more victims, there are as many separately punishable offenses as there are victims.” OR. REV. STAT. § 161.067(2) (2017).

194. *Nix I*, 283 P.3d at 449.

195. *Nix II*, 334 P.3d at 443 (“The phrasing of the offense [in the animal negligence statute] reveal[ed] that the legislature’s focus was the treatment of individual animals, not harm to the public generally or harm to the owners of the animals.”).

196. Although *Nix I* was later vacated for a procedural error, the Oregon Court of Appeals adopted the court’s argument in *State v. Hess*, 359 P.3d 288, 293 (Or. Ct. App. 2015), stating that “we nonetheless are persuaded by the *Nix* court’s reasoning on the merger question, and we adopt it.”

and neglected horse named Justice, against his abuser.<sup>197</sup> The district court dismissed the case, but ALDF filed a notice to appeal the decision on January 22, 2019.<sup>198</sup> The complaint, filed in the district court, alleged that when Justice’s previous owner surrendered him to an equine rescue, he was severely emaciated and suffered from lice, rain rot, and genital frost bite and necrosis.<sup>199</sup> Justice’s previous owner pled guilty to misdemeanor animal neglect and was ordered to pay restitution for Justice’s past incurred medical costs.<sup>200</sup> However, the complaint alleged that Justice continues to require extensive medical care for the foreseeable future, if not for the rest of his life.<sup>201</sup> Although Justice is currently living at a rescue, the fact that he will have continuous and substantial medical bills significantly decreases his opportunities to be adopted into a permanent home.<sup>202</sup> Represented by the ALDF, Justice is seeking damages from his previous owner for future medical costs and pain and suffering.<sup>203</sup> According to the complaint, the ALDF will deposit any damages awarded into a trust—of which Justice will be the sole beneficiary—to provide for his medical costs as long as possible.<sup>204</sup>

To provide necessary and standardized protections for animals across the United States, Congress should build on the PACT and combine Connecticut,

197. See, e.g., *Justice Complaint*, *supra* note 1. Matthew Liebman, the director of ALDF litigation, believes that this case is modest because they are “not seeking to establish federal constitutional rights for animals.” Joyeeta Biswas, *Horse’s Case Raises an Important Question: What Would Happen if Animals Could Sue Us?*, ABC NEWS (Aug. 23, 2018, 2:28 PM), <https://abcnews.go.com/US/horses-case-raises-important-question-happen-animals-sue/story?id=57167970>. This case, he argues, is merely following the logical progression set in motion by *Nix II*. *Justice Complaint*, *supra* note 1, at 12. If an animal is considered a victim of animal neglect statutes, and victims can sue their abusers for negligence per se, then theoretically, as a victim of criminal neglect, Justice should be able to sue his abuser. *Id.* at 10–11.

198. *Animal Legal Defense Fund Appeals Dismissal of Groundbreaking Lawsuit for Abused Horse*, ANIMAL LEGAL DEF. FUND (Jan. 22, 2019), <https://aldf.org/article/animal-legal-defense-fund-appeals-dismissal-of-groundbreaking-lawsuit-for-abused-horse/>.

199. *Justice Complaint*, *supra* note 1, at 4–6. Justice was found at least 300 pounds underweight. *Id.* at 4. His “penis was swollen, traumatized, infected and prolapsed, with a moderate amount of necrotic tissue that had to be removed.” *Id.* at 5. Justice had also contracted penile frost bite, which led to infection and scarring, and will most likely result in paralysis or the need for amputation. *Id.* at 5, 7. “Justice also suffered from lice and rain rot, a bacterial skin infection that irritates a horse’s hair and skin and may result in a continuous painful sheet of scabbing.” *Id.* at 6.

200. *Id.* at 8. Defendant did not pay the court-ordered restitution before the deadline of August 10, 2017. *Id.*

201. *Id.*

202. *Id.* at 7–8.

203. *Id.* at 13.

204. *Id.* at 8.



Oregon, and Pennsylvania’s attempts at animal protection into a workable federal legislative measure.<sup>205</sup>

## V. A PROPOSED FEDERAL SOLUTION

Despite America’s evolving perspective toward companion animals, society is probably not prepared for the potential ramifications accompanying a decision to classify animals as legal persons.<sup>206</sup> Professor Steven Wise diagnosed seven categories of issues that must be managed before society can extend comprehensive legal rights to animals:

- (1) the physical problem—the sheer number of animals we kill and exploit each day; (2) the economic problem—the size and extent of industries that depend on the use of animals; (3) the political problem—the way in which our socio-economic fabric is interwoven with the exploitation of animals; (4) the religious problem—the Judeo-Christian tradition of human dominion over animals; (5) the historical problem—the traditions of western philosophy and law with regard to the status of animals; (6) the legal problem—the fact that animals are categorized as property and therefore can only be the subjects of others’ legal interests; and (7) the psychological problem—deeply held beliefs about the proper relationship of humans and animals.<sup>207</sup>

In addition to the unsolved issues presented within Wise’s seven categories, classifying animals as legal persons may be dangerous for the most vulnerable humans in our society.<sup>208</sup> Professor Richard Cupp argues against allowing animal legal personhood based on animals’ cognitive abilities because including cognitive abilities in the standard of what makes a legal person will inevitably diminish protections for the least intelligent humans.<sup>209</sup> Although Cupp

205. See *infra* Part V.

206. Geordie Duckler, *The Necessity of Treating Animals as Legal Objects*, 7 J. ANIMAL & ENVTL. L. 1 (2016).

207. Burke, *supra* note 111, at 635–36 (citing WISE, DRAWING THE LINE, *supra* note 24, at 9–23).

208. See, e.g., Richard L. Cupp, Jr., *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood*, 69 FLA. L. REV. 465 (2017) [hereinafter Cupp, *Intelligent Animals*]; Richard L. Cupp, Jr., *Edgy Animal Welfare*, 95 DENV. L. REV. 865 (2018) [hereinafter Cupp, *Edgy Animal Welfare*]; Cupp, *Litigating Legal Personhood*, *supra* note 93.

209. See Cupp, *Litigating Legal Personhood*, *supra* note 93, at 594 (“But, over time, both the courts and society might be tempted not only to view the most intelligent animals more like we now view humans but also to view the least intelligent humans more like we now view animals.”); see also

presents a slippery slope argument,<sup>210</sup> to best avoid his proposed negative consequences, animal protections should be initiated by the legislature and enacted with due caution.<sup>211</sup>

Enacting a federal ban against animal crushing was a critical step toward protecting animals, but the federal government can and should go further.<sup>212</sup> Many state animal protection provisions are insufficient to properly address the issue of animal cruelty, and states regularly do not have the resources to enforce the statutes.<sup>213</sup> Congress should look to the state animal protection statutes for guidance and combine elements from different states to enact truly effective and standardized protections.<sup>214</sup> This Article submits a Proposed Animal Protection Bill (Proposed Bill)<sup>215</sup> in accordance with state statutes and federal judicial requirements, which aims to include (a) general provisions against animal cruelty (not limited to crushing), (b) a civil action provision for criminal investigations, (c) an animal advocate provision for criminal prosecutions and civil causes of action, and (d) an animal suit provision for civil

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Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1, 7 (2001) (arguing that requiring intelligence for legal personhood could lead to “genocidal and horrific” consequences).

210. A slippery slope argument rejects a course of action “because, with little or no evidence, one insists that it will lead to a chain reaction resulting in an undesirable end or ends. The slippery slope involves an acceptance of a succession of events without direct evidence that this course of events will happen.” *Slippery Slope*, TEX. ST. U. DEP’T OF PHIL., <https://www.txstate.edu/philosophy/resources/fallacy-definitions/Slippery-Slope.html> (last visited Nov. 1, 2019). Cupp’s article, *Edgy Animal Welfare*, specifically addresses “slippery rhetoric and slippery slopes.” Cupp, *Edgy Animal Welfare*, *supra* note 208, at 865. Cupp argues:

Virtually all legal reforms providing stronger protections for animals have at least some potential to contribute to the slipperiness of a slope that could cause society to slide downward into a harmful animal rights legal paradigm . . . . [B]ecause any time law evolves to give more protections to animals it brings legal requirements regarding them at least a bit closer to legal requirements regarding humans.

*Id.* at 869.

211. See Cupp, *Human Responsibility*, *supra* note 36, at 539.

212. See Chokshi, *supra* note 8; West, *supra* note 154.

213. *Id.*; see also 2018 U.S. Animal Protection Laws State Rankings, *supra* note 144 (ranking states according to the quality of their animal protection laws).

214. See *supra* Sections IV.B–D, for discussions of such state provisions.

215. The Proposed Bill incorporates elements of both legal rights arguments and legal welfare arguments. See *supra* Section III.A (discussing animal rights and animal welfare arguments). The Bill recommends granting an animal victim the legal right to sue his abuser, but also integrates animal welfare policies allowing humans to protect animals from unnecessary suffering in a more paternalistic system. See *infra* Section V.D (discussing legal rights for animal victims); *infra* Sections V.A–C (discussing human participation).

damages.<sup>216</sup>

#### A. General Provisions

The Proposed Animal Protection Bill builds on the animal crushing prohibition and recommends liability for (a) animal crushing, (b) general neglect or cruelty to pet animals, (c) abandonment, (d) animal fighting activities or spectatorship, (e) sexual activity with an animal, and (f) special provisions for service, therapy, or law enforcement animals.<sup>217</sup> Similar to most state statutes, the Proposed Animal Protection Bill should also include exemptions for veterinary practices, research animals, wildlife, and accepted farm animal husbandry practices.<sup>218</sup> The definitions of a pet,<sup>219</sup> service, therapy, or law enforcement animal should be construed narrowly to limit frivolous lawsuits or an overcrowding of courts.<sup>220</sup> Maximum penalties should include citations, misdemeanors, or felonies and a statute of limitations of two to four years (depending on the maximum penalty level) would apply.<sup>221</sup> Veterinarians

216. See *infra* Sections V.A–D. This Article combines general practices across many states in order to propose a workable statute that is more likely to be enacted. See *supra* Part IV. Because many of the states have already enacted similar provisions, the Author assumes that a national consensus has generally been formed concerning the suggested provisions, and therefore, the proposal is probably not too extreme to be enacted. See *supra* Part IV (describing the animal protection statutes of Connecticut, Pennsylvania, and Oregon, some of which overlap and indicate a national consensus). This Article also attempts to find a feasible compromise between granting animal rights and providing animal protections, in order to appease a wider range of animal advocates. See *infra* Part V.

217. See, e.g., Preventing Animal Cruelty and Torture Act, Pub. L. No. 116-72, 133 Stat. 1151 (2019) (to be codified at 18 U.S.C. § 48); CONN. GEN. STAT. § 53-247 (2019); 18 PA. CONS. STAT. §§ 5531, 5532, 5534, 5540 (2018); OR. REV. STAT. §§ 167.315, 167.320, 167.322, 167.325, 167.330, 167.340, 167.349 (2017). For comprehensive compendiums containing the general animal protection and related statutes in each state see 2018 U.S. Animal Protection Laws State Rankings, *supra* note 144.

218. See, e.g., CONN. GEN. STAT. § 53-247(b) (2019); 18 PA. CONS. STAT. §§ 5536, 5538, 5542, 5553, 5560, 5561 (2018); 63 PA. STAT. AND CONS. STAT. ANN. § 485.32(4) (West 2019); OR. REV. STAT. §§ 167.315, 167.320, 167.332, 167.335 (2017).

219. Compare KAN. STAT. ANN. § 21-6411(e) (2018) (defining a domestic pet broadly as “any domesticated animal which is kept for pleasure rather than utility”), with ME. REV. STAT. ANN. tit. 7, § 3907(22-B) (West 2018) (defining a pet more narrowly as “a dog, cat, or other domesticated animal commonly kept as a companion, but does not include tamed animals that are ordinarily considered wild animals or livestock”).

220. See *Animal Advocacy and Causes of Action*, *supra* note 6, at 93.

221. See 2018 U.S. Animal Protection Laws State Rankings, *supra* note 144. Almost all of the states impose a statute of limitations encompassing the range of two to four years. *Id.* Seven states do not impose a statute of limitations for felony animal cruelty violations. *Id.* See generally *Charging Con-*

should be immune from civil or criminal liability for reporting suspected violations of this statute.<sup>222</sup> Similarly, civilians who remove unattended pet animals from a vehicle, in certain circumstances, should be immune from civil or criminal liability.<sup>223</sup> A defendant convicted of a misdemeanor or felony violation would forfeit his or her animal(s) and would be prohibited from possessing an animal for five to fifteen years.<sup>224</sup> Lastly, any animal that has been abused, neglected, abandoned, or sexually assaulted by a *convicted* defendant would be classified as a victim for purposes of civil liability.<sup>225</sup>

### B. Civil Action Provision

The Proposed Animal Protection Bill should include a civil action provision that will allow humane societies to employ humane officers, similar to Pennsylvania’s HLEOs.<sup>226</sup> In order to employ a humane officer, a humane society must be a nonprofit organization that is formed to prevent cruelty to animals.<sup>227</sup> A humane officer should be trained, at the expense of the officer or the humane society, in acceptable animal practices and investigative procedures.<sup>228</sup> The Pennsylvania HLEOs’ lack of legal training has proven to be somewhat of an issue within the state’s system; therefore, contrary to Pennsylvania’s HLEOs, under the Proposed Bill humane officers would not have

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*siderations in Criminal Animal Abuse Cases*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/article/charging-considerations-in-criminal-animal-abuse-cases/> (last visited Nov. 1, 2019).

222. *See Laws in Favor of Veterinary Reporting of Animal Cruelty, 2018 U.S. Animal Protection Laws State Rankings*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/project/2018-veterinary-reporting/> (last visited Nov. 1, 2019). As of 2018, forty-nine states either require or permit veterinarians to report suspected animal cruelty and generally grant civil immunity for reporting. *Id.* In stark contrast, Kentucky prohibits veterinarians from reporting suspected abuse. *Id.*

223. *See Acts Against Leaving Dogs Locked in Hot Cars, 2018 U.S. Animal Protection Laws State Rankings*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/project/2018-dogs-in-hot-cars/> (last visited Nov. 1, 2019). As of 2018, thirty states and the District of Columbia have provisions related to leaving animals in a motor vehicle. *Id.* Twenty states provide immunity for law enforcement or animal control officers, or first responders who rescue an animal from a vehicle. *Id.* Fourteen states also provide immunity for civilians who rescue an animal from a vehicle, under certain circumstances. *Id.*

224. *See Laws Supporting Post-Conviction Possession Bans, 2018 U.S. Animal Protection Laws State Rankings*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/project/2018-post-conviction-possession-ban/> (last visited Nov. 1, 2019). As of 2018, thirteen states require a mandatory ban on possession of certain animals after an animal cruelty conviction, and twenty-three states authorize a ban, but leave the decision to the court’s discretion. *Id.*

225. *See infra* Section V.D.

226. *See supra* Section IV.B.

227. *See, e.g.*, 22 PA. CONS. STAT. § 3702 (2018).

228. *See, e.g.*, 22 PA. CONS. STAT. § 3712 (2018).

the authority to prosecute abusers.<sup>229</sup> General law enforcement procedures dictate that the police officers respond to and investigate crimes before handing the evidence to the District Attorney’s office to prosecute a violator.<sup>230</sup> Similarly, under the Proposed Bill, humane officers should respond to and investigate instances of animal cruelty and provide evidence to the animal advocate to prosecute the violator.<sup>231</sup>

### C. Animal Advocate Provision

The Proposed Animal Protection Bill should include an animal advocate provision, combining the duties removed from the humane officer position with those duties granted to Connecticut’s animal advocates, in any case brought under the Proposed Bill.<sup>232</sup> A federal department should maintain a list of approved animal advocates who may prosecute the cases investigated by humane officers, or who can be appointed when a court deems necessary or upon request of a party.<sup>233</sup> An animal advocate must be a bar-admitted attorney in any state or a law student working under the supervision of an attorney.<sup>234</sup> Contrary to the Connecticut advocates, who merely provide assistance to the court and district attorneys,<sup>235</sup> the advocates under the Proposed Bill would work alongside a humane officer to build a case against the defendant, prosecute the case as a private attorney general, and present information or recommendations regarding sentencing to the court.<sup>236</sup> Similar to the Connecticut advocates, however, the advocates should act in the interests of justice.<sup>237</sup> When a defendant is convicted of misdemeanor or felony, the advocate may continue to represent the mistreated animal in a civil suit against

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229. See *supra* note 182; see also Anderson, *supra* note 177, at 60 (revealing an insider account of the training of a humane society police officer in Pennsylvania).

230. See Symposium, *Legal Standing for Animals and Advocates*, 13 ANIMAL L. 61, 73 (2006).

231. See *infra* Section V.C.

232. See *supra* Sections IV.A–B, V.B.

233. CONN. GEN. STAT. § 54-86n(c) (2019).

234. *Id.*

235. See *supra* notes 161–68 and accompanying text.

236. See *Legal Standing for Animals and Advocates*, *supra* note 230, at 64.

237. See *supra* notes 166–67 and accompanying text. Requiring the animal advocates to act in the interest of justice distinguishes animal advocates from children’s advocates and combats a perceived slippery slope argument by providing an explicit difference in animal treatment compared to human treatment. See Halpern, *supra* note 167.

the abuser.<sup>238</sup>

#### D. Animal-Suit Provision

Through an animal-suit provision, the Proposed Animal Protection Bill should grant animal *victims* a private right of action to sue their abusers, who have been convicted of violating the Bill.<sup>239</sup> First, by limiting this grant to only the class of animals a court deems to be a victim of a crime prohibited by the Proposed Animal Protection Bill, the animal-suit provision is clear and precise enough to be upheld according to the *Lujan* standard.<sup>240</sup> Because the abuser has already been convicted, there is no doubt that the injury in question will be sufficiently actual, concrete, and particularized.<sup>241</sup> Second, the requirement of a causal connection between the injured party and the challenged action of the defendant is also satisfied because the animal victim may only bring a cause of action against its convicted abuser.<sup>242</sup> The animal-suit provision is an explicit Congressional grant of a private right of action, but the Proposed Bill should be written in a way that also adheres to Justice Scalia’s *Lujan* test; therefore, even if a court denies the private right of action, the animals will continue to satisfy the stricter injury-in-fact test.<sup>243</sup> Thus, the abused animals themselves will have standing in federal court to sue their abusers.<sup>244</sup>

The animal-suit provision must also explicitly allow the animal advocates to act on behalf of the animal victim, according to Rule 17(c) of the Federal Rules of Civil Procedure.<sup>245</sup> Rule 17(c), through “next friend” representation, provides a mechanism for representing a party who cannot speak for him or

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238. See *infra* Section V.D.

239. See *supra* Section IV.C for a discussion regarding a victimized horse, Justice, suing his abuser.

240. Burke, *supra* note 111, at 651 (“The provision need only define the qualifying animals . . . and relate them to the injuries protected . . .”).

241. See *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560 (1992) (“First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) ‘actual or imminent, not conjectural or hypothetical.’” (footnote omitted) (citations omitted)).

242. Burke, *supra* note 111, at 651.

243. See *id.*; *Lujan*, 504 U.S. at 560–61.

244. See Burke, *supra* note 111.

245. See *id.* at 652–53.

herself.<sup>246</sup> In *Whitmore v. Arkansas*, the Supreme Court determined two requirements for “next friend” standing: (1) “an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf,” and (2) “the ‘next friend’ must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate.”<sup>247</sup> For obvious reasons, an animal cannot appear in court on his own behalf; therefore, the first requirement is satisfied. In order to ensure the second requirement is also satisfied, the next friend must be an animal advocate who adheres to the requirements of the animal advocate provision.<sup>248</sup> As seen in Oregon’s *Justice* case, any awarded damages should be deposited into a trust—of which the animal will be the sole beneficiary—in order to provide for medical and rehoming costs.<sup>249</sup>

The combination of provisions within the Proposed Animal Protection Bill would provide necessary standardized protections for animals to parallel society’s evolving feelings toward animal companions.<sup>250</sup> The Bill also implements an important system of remedies for animal victims, which complies with judicial requirements, without straining the already overworked law enforcement and prosecutorial agencies.<sup>251</sup>

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246. *Id.* at 653.

247. *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990).

248. See *supra* note 234 and accompanying text.

249. See *supra* note 204 and accompanying text. Employing a trust for the animal-beneficiary discourages abuse within the system and ensures that any damages awarded will be spent on costs of care and well-being for the animal-victim. See, e.g., *Justice Complaint*, *supra* note 1, at 6 (revealing how Justice will use the money deposited in the trust).

250. See *supra* Part II for a discussion regarding Americans’ evolving feelings toward companion animals.

251. See, e.g., *Animal Advocacy and Causes of Action*, *supra* note 6, at 92–95; *Legal Standing for Animals and Advocates*, *supra* note 230, at 63–65.

## VI. CONCLUSION

Across the country, animal protection statutes are ineffective.<sup>252</sup> Currently, the duty to protect animals is generally borne by each state, and many of them cannot commit to the task.<sup>253</sup> Animal shelters, humane societies, and animal rescues—who pick up the state’s slack—are often overflowing with animals who have been thrown away.<sup>254</sup> Yet somehow, at the same time, Americans are showing more empathy and care for animals than ever before.<sup>255</sup> Organizations like the Nonhuman Rights Project and the Animal Legal Defense Fund expose this paradox by bringing extreme cases into the public eye.<sup>256</sup> The legal organizations are not merely shining a light on animal abuse and cruelty; they are presenting creative solutions to a generation that thrives on knocking down walls and thinking outside of the box.<sup>257</sup> This Article attempts to build on their momentum by presenting another creative solution and triggering further discussion within this growing area of law.<sup>258</sup>

The Proposed Animal Protection Bill explores animal advocacy movements and current legal restrictions to develop a viable compromise that grants animals limited standing to remedy their injuries but maintains the distinction between an animal and a legal person.<sup>259</sup> Although this may be an underdeveloped framework, the basic premises are gathered from state systems which can (and should) be monitored and adjusted to ensure efficient and effective animal protections.<sup>260</sup> A federal system, which standardizes protections and encourages cooperation with states, humane societies, and effective animal

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252. See Justin Marceau, *How the Animal Welfare Act Harms Animals*, 69 HASTINGS L.J. 925 (2018); Karin Brulliard, *USDA’s Enforcement of Animal Welfare Laws Plummeted in 2018, Agency Figures Show*, WASH. POST. (Oct. 18, 2018, 8:12 AM), [https://www.washingtonpost.com/science/2018/10/18/usdas-enforcement-animal-welfare-laws-plummeted-agency-figures-show/?utm\\_term=.fa98427d7ca7](https://www.washingtonpost.com/science/2018/10/18/usdas-enforcement-animal-welfare-laws-plummeted-agency-figures-show/?utm_term=.fa98427d7ca7).

253. See *supra* Part IV; see also Jordan Fenster, *Animal Cruelty Laws Are Ineffective and Outdated, Advocates Say*, LOHUD (Feb. 1, 2018 6:00 AM), <https://www.lohud.com/story/news/local/2018/02/01/animal-cruelty-laws-ineffective/1083847001/> (“Animal abuse and cruelty laws are hidden away in an obscure section of New York’s legal framework . . . making enforcement and prosecution difficult prospects.”).

254. *The Pet Overpopulation and Overflowing Shelter Problem*, ANIMAL MED. CTR. OF S. CAL., <https://animalmedcenter.com/pet-overpopulation/> (last visited Nov. 1, 2019).

255. See *supra* Part II.

256. See *supra* Sections III.B.1, IV.C.

257. See *supra* Sections III.B.1, IV.C.

258. See *supra* Part V.

259. See *supra* Parts II, III, V.

260. See *supra* Part IV.



advocacy organizations, is well equipped to better protect the animals we so love.

Rebecca Ferrari\*

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