

**A Survey of Animal Law in the United States:
An overview of laws that should protect animals and the barriers that prevent
animals from receiving legal protection.**

Ashley Duncan Gibbons¹

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1. Introduction

What is the current status of animal law in the United States (U.S.)?² The area of law known as animal law began in the 1970s; since that time, interest in the subject has grown dramatically.^{3,4}

¹ Ashley Duncan Gibbons, 2008 Fulbright Grantee (Finland); 2008 Juris Doctorate, University of Louisville Louis D. Brandeis School of Law. I would like to thank my dear friend and colleague, Birgitta Wahlberg, for making Finland my home away from home, and for being a steadfast voice for the welfare and rights of animals.

² Animal law encompasses the statutory laws, agency regulations and court cases concerning the treatment and welfare of animals.

At the same time, and perhaps as a byproduct of the animal law movement, societal views about our relationship with animals has progressed. However, the ability of the animal law movement to effectively address and regulate the way humans interact with animals is constrained by the historic legal view that animals are personal property. Working within this legal framework, animal advocates must creatively use existing traditional areas of law – tort, criminal and constitutional law – and federal and state statutes – to address and redress the human use and abuse of animals. This paper will give a brief overview of the American legal system, highlight the legal resources that are available to animal law practitioners, and describe the limitations that animal law practitioners face as a result of animals’ legal status as personal property.

2. Short Overview of the American Legal System

The American legal system is founded upon four primary sources of law: 1) federal and state constitutions; 2) federal and state statutes or laws; 3) administrative agency decisions; and 4) common law and federal and state court decisions.⁵

3. The Constitution of the United States

3.1. General Comments

The federal Constitution is the supreme law of the U.S. It was ratified in 1788 and has been amended twenty-seven times since its inception; many of these amendments prohibit social ills such as the Thirteenth Amendment to prohibit slavery.⁶ The Constitution does not provide any protection for animals. However, animal law attorneys have tried to creatively apply constitutional protections to animals.

The People for the Ethical Treatment of Animals (PETA), an animal rights organization, filed a lawsuit on behalf of five orcas against Sea World, a marine mammal theme park, for holding them captive and, thereby, violating their theoretical Thirteenth Amendment rights to be free from slavery.⁷ The judge hearing the case ruled that the Thirteenth Amendment “only

³ The first animal right laws course was taught at Seton Hall in 1977. Joyce Tischler, *The History of Animal Law, Part I (1972-1987)*, 1 *Stanford Journal of Animal Law & Policy* 1, 3 (2008), available at <http://vermontanimallaw.files.wordpress.com/2013/07/a-brief-history-of-animal-law-part-ii-1985-2011.pdf>.

⁴ There have been as many as 141 animal law classes offered in law schools across the U.S: a dramatic increase considering that there were only nine classes offered in 2000. In 1985, there was one law course specifically dedicated to animal law. Joyce Tischler, *A Brief History of Animal Law, Part II (1985-2011)*, 5 *Stanford Journal of Animal Law & Policy* 5, 4 (2012) available at <http://vermontanimallaw.files.wordpress.com/2013/07/a-brief-history-of-animal-law-part-ii-1985-2011.pdf>

⁵ *Introduction to the American Legal System*, Jones and Bartlett Publishers, 3, available at http://www.jblearning.com/samples/0763734454/34454_CH01_ROACH.pdf.

⁶ See Amendment XIII, Constitution of the United States, available at http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html.

⁷ US Judge May Rule on whether US Constitution Protects Animals against Slavery, Global Post, 6 Feb. 2012.

applies to ‘humans’ and therefore affords no redress” for the grievances named in the lawsuit.⁸ The judge dismissed the lawsuit for lack of subject matter jurisdiction because he ruled that the plaintiff, PETA, lacked standing to bring the claim on behalf of the orcas. Standing is the biggest hurdle for bringing legal claims on behalf of animals; and it will be discussed further in Section 3.1, below.

The Sea World ruling that “the only reasonable interpretation of the Thirteenth Amendment's plain language is that it applies to persons, and not to non-persons such as orcas,” reflects the American society’s reluctance to extend comprehensive legal protections to animals.⁹ A review of American history reveals that society has been slow to honor the rights of African Americans, the poor, and the mentally ill.¹⁰ Given this history, it is not surprising that “in the face of such gross and ongoing violations of human rights—this society’s support for granting nonhuman animals meaningful rights is exceedingly low.”¹¹

3.2. Standing

The threshold for bringing a lawsuit centers on whether a litigant has standing. Standing has been described as “whether a litigant is entitled to have the court decide the merits of the dispute presented or of the particular issues raised.”¹² A simple way to describe requirements for standing is: the person filing the lawsuit must demonstrate that 1) she has been injured; 2) that the injury was caused by the defendant she is suing; 3) and that the court has the ability to redress the injury with a favorable decision.”¹³

Animals cannot sue to enforce a law aimed at their protection. Therefore, an organization, such as the Humane Society of the United States (HSUS), must file lawsuits on behalf of animals: to do this, the organization must have standing.¹⁴ For an organization to have standing, it must show that (1) its members would otherwise individually have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief requires participation of individual members.¹⁵ Standing “has been and continues to be a barrier to bringing claims on behalf of animals, particularly wild

⁸ *Tilikum, et al. v. Sea World Parks and Entertainment, Inc.*, 842 F.Supp. 2d 1251, 1262 (S.D. Cal. 2012).

⁹ *Id.*

¹⁰ “[u]p to and through the mid-1970s, federal and state governments conducted medical experiments on unwitting prisoners, indigents, and the mentally ill.” Jonathan R. Lovvorn, *Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform*, 12 *Animal Law* 133, 135 (2006) (citing James H. Jones, *Bad Blood: The Tuskegee Syphilis Experiment* (The Free Press 1993) (experiments) and Howard Markel, *The Ghost of Medical Atrocities: What’s Next, After the Unveiling?* N.Y. Times F6 (Dec. 23, 2003)), available at http://www.animallaw.info/journals/jo_pdf/lralvol12_2_p133.pdf.

¹¹ *Id.*

¹² Franch, et al., *Animal Law in a Nutshell*, 225, 225 (West 2011).

¹³ Stephen Wells, *Standing” for Animals*, Animal Legal Defense Fund, <http://aldf.org/article.php?id=148>. See also U.S. Const. art. III, § 2.

¹⁴ The HSUS is America’s largest animal protection organization. See The Humane Society of the United States, <http://www.hsus.org>.

¹⁵ See *Friends of the Earth, et al. v. Laidlaw Environmental Serv., Inc.*, 528 U.S. 167 (2000).

animals and animals who belong to other persons and entities and who are used for commercial purposes.”¹⁶

The Sea World case was dismissed before the court would hear the merits of the case. PETA, the organization filing the lawsuit on behalf of the orcas, “had the burden to show the likelihood that the alleged injury will ‘be redressed by a favorable decision.’”¹⁷ Because there was no likelihood that the Thirteenth Amendment could redress the orcas’ injuries (because of the presumption that the Thirteenth Amendment only applies to humans), the court dismissed the case for lack of standing.

3.3. State Constitutions

Each of the 50 states that comprise the United States of America has its own state constitution, and the provisions of each constitution vary from state to state. Some state constitutions allow voters to directly vote on ballot initiatives and constitutional referendums, compared to elected officials voting on all proposed legislation.¹⁸ Animal advocates have strategically targeted ballot initiative states to pass animal welfare legislation that may be difficult to pass through the standard legislative process.

In Florida, voters used a constitutional amendment to ban the use of gestation crates for pregnant sows.¹⁹ Arizona voters voted to ban gestation crates and crates for veal calves.²⁰ California, the largest state to pass a constitutional referendum on behalf of animals, requires any livestock owner that cages an animal to provide the animal with enough space to lie down, standup, fully extend her limbs or wings and turn around freely.²¹ These California requirements essentially ban battery cages for egg-laying hens, gestation crates for pregnant sows and veal crates.

While some states are amending their constitutions to provide new protections for animals, other states are amending their constitutions to protect human activity that harms animals. In Kentucky, voters amended the state constitution to protect hunting rights, even though there was no documented threat to hunting activity in the state.²² In North Dakota, voters passed a constitutional amendment “guaranteeing” “the right of farmers and ranchers to engage in modern farming and ranching practices.”²³ This constitutional amendment also prohibits the passage of

¹⁶ Frasch, et al., *Animal Law in a Nutshell*, 225 (West 2011).

¹⁷ *Tilikum, et al. v. Sea World Parks and Entertainment, Inc.*, 842 F.Supp. 2d 1251, 1264 (S.D. Cal. 2012) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130 (1992)).

¹⁸ *Initiatives and Referendums in the United States*, Wikipedia, http://en.wikipedia.org/wiki/Initiatives_and_referendums_in_the_United_States (last visited 29 Nov., 2013).

¹⁹ Fl. Const. art X, § 21.

²⁰ Ariz. Rev. Statute §13-2910.07

²¹ Cal. Health and Safety Code § 25990.

²² See *Kentucky Voters to Consider Amending Constitution to Protect Hunting Rights*, 13 Oct. 2012, <http://www.kentucky.com/2012/10/13/2370812/kentucky-voters-to-consider-amending.html>.

²³ N.D. Const. art. XI, § 29.

any future laws which would “abridge the right of farmers and ranchers to employ agricultural technology, modern livestock production and ranching practices.”²⁴

4. Federal Statutes

4.1 General comments

There is no federal law that prohibits the mistreatment of animals. However, America’s federal legislature, the U.S. Congress, has enacted several federal laws that aim to protect some animals in particular situations. Most federal laws that pertain to animals regulate how an animal will be used and treated for a specific purpose. For example, animal testing is regulated by the Animal Welfare Act and the slaughter of farmed animals for food is regulated by the Humane Methods of Slaughter Act. Specific federal government agencies are vested with the responsibility of implementing a particular federal law: the United States Department of Agriculture (USDA) oversees the Animal Welfare Act, the Humane Methods of Slaughter Act, and the Twenty-Eight Hour law which are discussed below. The U.S. Congress also delegates specific aspects of its lawmaking authority to administrative agencies, as discussed in Section 5, below.

4.2. Animal Testing is Regulated by the Animal Welfare Act

The Animal Welfare Act (AWA) is the principle source of regulation for animals used in research or for exhibition. If an animal used in research or for exhibition is an endangered species or marine mammal other laws such as the Endangered Species Act or the Marine Mammal Protection Act may also apply.²⁵

The AWA sets federal minimum standards that “covered entities” must meet while allowing states and individual research facilities to set higher standards for animal care and housing if they choose to implement more stringent rules.²⁶ In essence, the AWA “is a regulatory scheme, in that its primary activity is to register certain animal users and then inspect the facilities of those users to determine whether the care guidelines or regulations for animals in their possession are being followed.”²⁷

The USDA’s current interpretation and application of the AWA exempts approximately 95% of animals used in research. Birds, rats and mice make up nearly 95% of the animals used in research, but the AWA exempts these animals from regulatory standards.²⁸ Congress’ original

²⁴ Id.

²⁵ For a comprehensive listing of federal laws that protect animals: see Vivian S. Chu, *Brief Summaries of Federal Animal Protection Statutes*, Congressional Research Service, 1 Feb. 2010, available at http://www.animallaw.info/articles/art_pdf/aruscohen2009fedlawsummaries.pdf.

²⁶ 7 USC §§2143(a)(8), 2145(b).

²⁷ David S. Favre, *Quick Summary of the Animal Welfare Act*, Animal Legal and Historical Center, (2002), <http://www.animallaw.info/topics/tabbed%20topic%20page/spusawa.htm>.

²⁸ National Association for Biomedical Research, *The Humane Care and Use of Laboratory Animals*, 1, available at www.nabr.org/WorkArea/DownloadAsset.aspx?id=346.

draft of the AWA did not exclude these animals from the law. However, Congress does not oversee the day-to-day implementation of the AWA. Congress vested the USDA with the responsibility of implementing the AWA and a branch of the USDA, the Animal and Plant Health and Inspection Service (APHIS), has the day-to-day responsibility for implementing the law.²⁹ When APHIS drafted AWA regulations, it added this exclusion to prevent the law from applying to birds or mice.³⁰

4.3. The Slaughter of Animals Raised For Food is Regulated by the Humane Methods of Slaughter Act

There is no federal law that protects animals raised for food. The only federal law regulating the treatment of animals used in food production is the Humane Methods of Slaughter Act (HMSA).³¹ The declaration of the policy behind the HMSA includes the finding that “the use of humane methods in the slaughter of livestock prevents needless suffering; results in safer and better working conditions for persons engaged in the slaughtering industry; brings about improvement of products and economies in slaughtering operations; and produces other benefits for producers, processors, and consumers.”³² There is a conflict between the humane treatment of animals and the economics of providing an animal product at a low cost; the USDA's interpretation of the HMSA is one example of this conflict.

The HMSA requires animals to be “rendered insensible to pain . . . before being shackled, hoisted, thrown, cast, or cut.”³³ The method of rendering an animal insensible to pain is “by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective.”³⁴ The HMSA applies to “cattle, calves, horses, mules, sheep, swine, and other livestock.”³⁵ Even though an estimated 7 billion chickens are slaughtered in the U.S. each year for food, chickens are not included in HMSA regulations. Instead, chickens and other poultry can “lawfully be shackled upside-down, cut by mechanical blades, and immersed in scalding water while fully conscious.”³⁶

The USDA, the agency in charge of implementing the HMSA, was sued for its interpretation that chickens are not protected by the HMSA. While the HMSA applies to “other livestock,” the USDA does not consider chicken and other poultry “other livestock.”³⁷ A California court ruled in favor of the agency's decision; the court held that chickens are not “other livestock” within the meaning of the HMSA and are not protected by the law.³⁸ The court

²⁹ Favre, *supra* n. 27.

³⁰ *Id.*

³¹ *See* 7 U.S.C.A. §§ 1901 et seq.

³² *See* 7 U.S.C.A. § 1901

³³ *Id.* at § 1902(a).

³⁴ *Id.*

³⁵ *Id.* at § 1902.

³⁶ Complaint, *Levine, et al. v. Mike Johanns*, (N.D. Cal. 2005), 2.

³⁷ *Id.*

³⁸ *Levine v. Connor*, 540 F. Supp. 2d 1113 (ND Cal. 2008) *vacated on other grounds Levine v. Vilsack*, 587 F.3d 986 (9th Cir. 2009).

specifically found that “Congress intended to exclude poultry from the categorical word ‘livestock.’”³⁹ The USDA's interpretation of "other livestock "is difficult to reconcile with the HMSA's goal of preventing "needless suffering;" however, it is just one example of the inherent conflict with the USDA overseeing laws that are intended to protect animals.

4.4. The Transportation of Animals is Regulated by the Twenty-Eight Hour Law

The Twenty-Eight Hour Law is a federal law that regulates the transportation of animals across state lines.⁴⁰ The law mandates that after twenty-eight hours of travel, animals must be unloaded for at least five hours for food, water and rest.⁴¹ While the law is arguably not in touch with current scientific data about the health and welfare of animals during transportation, the more pressing concern is the fact that the law is not being followed by animal transporters. A 2005 undercover investigation revealed regular trips across the U.S. in excess of twenty-eight hours.⁴²

The USDA, the agency in charge of overseeing the law, has created barriers to the effectiveness of the Twenty-Eight Hour law. The original law was passed in 1873 and amended in 1906, at times when the majority of animals were transported by rail.^{43, 44} The law mandates that “a rail carrier, express carrier, or common carrier (except by air or water) may not confine animals in a vehicle or vessel for more than 28 consecutive hours without unloading the animals for feeding, water, and rest.”⁴⁵ The terms “common carrier” and “vehicle” are not defined by the law. As truck transportation became the predominant means of transport in the 1950s, the USDA did not recognize trucks as “common carriers” under the law.⁴⁶ The USDA interpreted the law to apply “only to rail shipments,” thus rendering the law virtually ineffective.⁴⁷

In 2003, the USDA changed its interpretation of the law to cover animals transported by truck, but it did not make this information known outside of the agency for three years. Jim Rogers, spokesperson for USDA-APHIS confirmed this, stating “[t]he agency never publicly

³⁹ *Id.* at 1121.

⁴⁰ 49 U.S.C. § 80502

⁴¹ 49 U.S.C. § 80502(a)(1), (b).

⁴² Compassion Over Killing, *Interstate Transport Investigation*, July 2005.

⁴³ 49 U.S.C. § 80502 (referencing Ch. 3594, 59th Cong., 34 Stat. 607).

⁴⁴ Henry Cohen, *CSR Report for Congress: Brief Summaries of Federal Animal Protection Statutes*, 24 (2007), available at http://lieberman.senate.gov/documents/crs/animalprotect_fedstatutes.pdf (referencing Ch. 252, 42d Cong., 17 Stat. 584, R.S. §§ 4386-4389).

⁴⁵ 49 U.S.C. § 80502(a)(1).

⁴⁶ *Petition from The Humane Society of the United States, et al. to Mike Johanns, U.S. Department of Agriculture*, 4 Oct. 2005. (“The law covered only animals moved by the railroads, and did not apply to interstate livestock by trucks, a means of conveyance that had come to wholly dominate livestock transportation by the early 1950s.”)

⁴⁷ USDA Agricultural Marketing Service, *Cattle and Swine Trucking Guide for Exporters*, 50, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3008268> (“Federal law requires that livestock in interstate commerce be in transit for no more than 28 hours without food, water, and rest. However, this law applies only to rail shipments.”)

announced the policy change.”⁴⁸ Today, there is no readily ascertainable evidence that the law is being enforced by the USDA.⁴⁹

4.5. The Animal Fighting Prohibition Enforcement Act

There is no federal anti-cruelty law; animal cruelty is addressed on the state level by individual states.⁵⁰ There is, however, a federal law that bans animal fighting operations: the Animal Fighting Prohibition Enforcement Act of 2007.⁵¹ The 2007 exposure of Michael Vick’s involvement in a large-scale dog fighting operation brought dog fighting into the national spotlight.⁵² Efforts to combat animal fighting, particularly dog fighting and cockfighting, have received increased attention and funding because these fighting rings also attract illegal drugs and gambling. For example, “the Chicago police force created an animal crime unit in 2006 after 60% of those arrested for animal crimes between 2000 and 2004 were committed by gang members and 70% had previous drug arrests.”⁵³ If animal fighting rings did not attract other illegal activities, it is questionable whether they would receive the same law enforcement attention.

5. State Statutes

5.1. General Comments

Laws that protect animals at the state level are located in a state’s anti-cruelty criminal laws. Most, if not all, state anti-cruelty laws exempt farmed animals from the law’s protection, resulting in virtually no legal protection for farmed animals at the state level. Many states also exempt animals used in research or exhibition. The result is that most anti-cruelty laws pertain to companion animals such as dogs and cats. For a complete listing of anti-cruelty laws by state, visit the Animal Legal Defense Fund’s website.⁵⁴

5.2. Anti-cruelty Laws

⁴⁸ Cristal Cody, *USDA Livestock Rule Changed, Kept Quiet*, Ark. Democrat Gazette, 30 Sept. 2006.

⁴⁹ Gaverick Matheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade*, 70 Law & Contemp. Probs. 325, 335-36 (2007) (“a recent letter from the USDA to Humane Society of the United States (HSUS) states that the agency ‘continues to conduct investigations of alleged violations of the Twenty-Eight Hour Law and it is currently investigating a shipment of breeding pigs from Canada to Mexico’”) (citing Letter from W. Ron DeHaven, USDA Administrator, APHIS, to Peter Brandt, Humane Society of the U.S. (Sept. 22, 2006)).

⁵⁰ Animal cruelty is considered an intentional act or omission that injures or harms an animal. Statutory definitions of “animal cruelty” vary state from state.

⁵¹ 18 U.S.C. § 49.

⁵² Michael Vick is a National Football League quarterback. *Michael Vick*, http://en.wikipedia.org/wiki/Michael_Vick (last visited 29 Nov., 2013).

⁵³ Frasch, supra n. 16 at 77.

⁵⁴ See Animal Legal Defense Fund *Animal Protection Laws of the United States of America & Canada*, 7th ed. (2012), <http://aldf.org/article.php?id=259>.

Historically, criminal anti-cruelty laws were based “on a concern for public morals, protection of one’s property interest in an animal [typically livestock] or, more recently, concern for the well-being of the animals themselves.”⁵⁵ Today, criminal anti-cruelty statutes vary widely from state to state but generally contain “provisions proscribing acts ranging from abandonment and neglect to aggravated cruelty and animal fighting.”⁵⁶ The success rate of whether criminal anti-cruelty laws deter acts of animal cruelty depends, in part, on the severity of punishment allowed under the law and whether the law is enforced by local police officers and prosecutors.

5.3. Administrative Agency Decisions

Congress delegates some of its lawmaking authority to administrative agencies. Administrative agencies such as the Environmental Protection Agency (EPA) and the United States Department of Agriculture (USDA) issue rules, orders and decisions that affect the treatment and welfare of animals. The USDA is the only federal agency in charge of promulgating policy and regulation regarding the treatment and welfare of animals used for food. The responsibility given to the USDA by the federal government is concerning for animal advocates because there is an inherent conflict for the USDA to oversee transportation and slaughterhouse regulation when it is also the agency’s purpose to promote expanding economic opportunities of farmers who raise animals for food.⁵⁷ For example, as discussed in Sections 4.2 and 4.3 above, the USDA routinely makes decisions at the detriment of animals: ruling that chickens are not “other livestock” protected by the Humane Methods of Slaughter Act and ruling that trucks are not “common carriers” subject to the regulations of the Twenty-Eight Hour Law.

There is some oversight regarding agency policy and regulation. Agency actions are comprised of rules, orders and decisions. These “actions” “must comply with the Administrative Procedure Act (APA) and the National Environmental Policy Act (NEPA).”⁵⁸ Interested persons with standing can utilize the APA and NEPA to challenge agency actions.⁵⁹ The APA is important because it governs judicial review of administrative decisions.⁶⁰ A court must set aside any agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁶¹ The Supreme Court of the United States has set established a two-part test to determine whether an agency is not acting “in accordance with law.”⁶² If a court determines that an agency’s action or decision does not have a basis in the law, it will not be

⁵⁵ Frasch, *supra* n. 16, at 20.

⁵⁶ *Id.*

⁵⁷ USDA Vision Statement and Strategic Plan Framework, *available at* http://www.usda.gov/wps/portal/usda/usdahome?navid=MISSION_STATEMENT (last visited 20 Oct., 2013).

⁵⁸ Frasch, *supra* n. 16, at 239.

⁵⁹ *Id.*

⁶⁰ 5 U.S.C. § 706.

⁶¹ *Id.* at § 706(2)(A).

⁶² *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

upheld. Considering that agencies such as the USDA make decisions affecting millions of animals every day, the APA is a very important tool for animal advocates.

6. Common Law and Federal and State Court Decisions

6.1. Torts

Torts are wrongs recognized by the law as grounds for a lawsuit.⁶³ Injured parties can file a civil lawsuit based on the injury or harm that she experienced. For example, someone injured in a car accident can sue the responsible driver to recover the cost of medical bills, lost wages, and property damage.

Torts have not provided a meaningful avenue to redress the injury or death of a companion animal, such as a dog or cat. Animals are classified as personal property by every state in the U.S. The property status of animals “weighs heavily into the causes of action that may be asserted and in the nature and extent of damages that may be awarded.”⁶⁴ Due to an animal’s status as property under the law, “pet owners’ damage claims have been restricted to the fair market value as the measure of damages.”⁶⁵ The fair market value of a non-pure bred dog would be nominal. The nominal dollar value that is placed on an animal’s life severely diminishes the deterrent effect that a lawsuit typically has.

Some courts have departed from the traditional fair market value model in order to increase the value of a judgment in favor of an injured or deceased companion animal. In an Ohio veterinary malpractice case, a veterinarian negligently performed surgery on a German Shepherd show dog which ultimately led to the euthanasia of the dog.⁶⁶ The court used the “value to the owner” standard which recognizes “that property may have value to the owner in exceptional circumstances which is the basis of a better standard than what the article would bring in the open market.”⁶⁷ Because the dog’s owner would have been capable of breeding the dog for \$350 to \$500 for each puppy produced, the court ordered the veterinarian to pay the dog’s owner \$5,000 to compensate her for the loss of her dog.⁶⁸ The standard of value used in this case did not take into account any intrinsic value that the owner experienced outside of the dog’s breeding abilities. In a different tort case, a Hawaiian court recognized the emotional distress suffered by a family whose dog died in a state quarantine station.⁶⁹ The court awarded the family \$1,000 to compensate them for their emotional injuries.⁷⁰

⁶³ *Tort*, Legal Information Institute, <http://www.law.cornell.edu/wex/tort> (last visited 29 Nov., 2013).

⁶⁴ Frasc, *supra* n. 16, at 101.

⁶⁵ Lynn A. Epstein, Resolving Confusion in Pet Owner Tort Cases: Recognizing Pets’ Anthropomorphic Qualities Under a Property Classification, 26 SILULJ 31, (2001), available at <http://www.animallaw.info/articles/arus26silulj31.htm>.

⁶⁶ *McDonald v. Ohio State Univ. Veterinary Hosp.*, 644 N.E.2d 750 (Ohio Ct. Cl. 1994).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Campbell v. Quarantine Station*, 632 P.2d 1066 (Haw. 1981).

⁷⁰ *Id.*

While some courts appear willing to exceed the limitations of fair market value recovery in awarding damages for the death of a companion animal, available remedies are inherently limited by the animal's status as property: available remedies are based on how the injury or death of the animal affected its owner. Claims founded in tort "recognize that injury to an animal causes injury to humans who are close to the animal," but do not provide a cause of action for the specific suffering experienced by the animal.⁷¹

6.2. Nuisance Laws

Nuisance laws are founded on the common law principle that people may use their property as they desire, so long as they use it in a manner that does not injure other people.⁷² Using a nuisance action, a court can issue an injunction to order a landowner to stop a certain activity if the activity is causing substantial damages to another person.⁷³ If a judge is unwilling to issue an injunction, the court may consider awarding monetary compensation to the injured landowner to compensate him for the diminution in the value of his land caused by the offending nuisance.⁷⁴

The increase in the number of concentrated animal feeding operations (CAFOs), or factory farms, has caused many problems for nearby landowners. Landowners near proposed CAFO sites have utilized nuisance laws to try to prevent a CAFO's construction. Success rates in stopping the construction of CAFOs has varied among states, and has been especially low in those states where "right to farm" laws are asserted as a defense.⁷⁵

7. "Non-Animal Laws" that are Helping Animals

7.1. Consumer Protections Laws

Animal advocates are creatively going beyond the laws that were specifically drafted for the protection of animals in order to expand the tools that they have to raise awareness about the treatment of animals.

Food labels are regulated to ensure that they provide truthful information to consumers. False advertising laws are "one of the few avenues that animal advocates can use to have courts and public agencies review the actual treatment of animals."⁷⁶ It is important to remember,

⁷¹ Frasch, *supra* n. 16, at 136-37.

⁷² Serena Williams, *CAFOs as Neighbors: An Analysis of Kentucky Nuisance Law and Agricultural Operations*, Widener Univ. School of Law, 14 (Fall/Winter, 2002), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1006&context=serena_williams.

⁷³ *Id.* at 16.

⁷⁴ *Id.*

⁷⁵ Right to farm laws have been implemented in some states. The law prevents a landowner from purchasing a property close to an agricultural operation and then filing a lawsuit to cease or limit the offending operation. For example, Kentucky's Right to Farm law prohibits an agricultural operation from being deemed a nuisance after it has been in operation for more than one year. See KRS 413.072(2)(2010).

⁷⁶ Carter Dillard, *False Advertising, Animals, and Ethical Consumption*, 10 Animal Law 25, 27 (2004).

however, that “the consumer or food competitor is the victim actually protected under the law” and not the actual animal.⁷⁷

Three federal government agencies “are all empowered to remedy false advertising.”⁷⁸ Each agency, however, has the discretion whether or not to act – even when a complaint may prove that a seller is falsely advertising its product.⁷⁹ States also have laws aimed at prohibiting false advertising. Recently, the Animal Legal Defense Fund (ALDF) filed a class action lawsuit on behalf of consumers of Judy’s Family Farm Organic Eggs for violation of California’s consumer protection laws.⁸⁰ Judy’s Eggs’ packaging “feature an image of hens roaming about an expansive green field [and] the packages contain a written message that states hens are ‘raised in wide open spaces in Sonoma Valley, where they are free to ‘roam, scratch, and play.’”⁸¹ The harsh reality is that “the hens are crammed in covered sheds with no outdoor access.”⁸² By suggesting that Judy’s Eggs come from hens living a free-range lifestyle, consumers who purchase these products (at a higher price than conventional eggs) are being misled, and the company is getting an unfair advantage over farmers who actually raise free-range egg laying hens.⁸³

Even if a false advertising lawsuit does not ultimately result in a favorable judgment against the misleading company in court, it does expose the treatment of egg-laying hens, dairy cows and ducks and geese raised for foie gras.^{84, 85}

7.2. Food Safety Claims

Food safety claims have been used as a tool to address the conditions in which animals are raised and slaughtered for food. For example, the inability of a cow to ambulate is a sign that the cow could have Bovine Spongiform Encephalopathy (BSE) or mad cow disease.⁸⁶ Cows that cannot walk are commonly referred to as “downer” cows. The slaughter of downer cows for food was banned in 2003 when the first case of mad cow disease in the U.S. was discovered.⁸⁷ However, a loop hole allowed the slaughter of a cow if she collapsed after passing inspection and did not

⁷⁷ *Id.* at 32.

⁷⁸ *Id.* at 30.

⁷⁹ *Id.* at 32.

⁸⁰ Animal Legal Defense Fund, *Animal Legal Defense Fund Sues Bay Area Egg Producers For False “Free-Range” Advertising*, 1 Oct., 2012, <http://aldf.org/article.php?id=2174>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Animal Legal Defense Fund, *Animal Legal Defense Fund Sues Bay Area Egg Producers For False “Free-Range” Advertising*, 1 Oct., 2012, <http://aldf.org/article.php?id=2174>.

⁸⁴ LA Times, *Judge Rejects “Happy Cow” Lawsuit*, 27, March, 2003, available at <http://articles.latimes.com/2003/mar/27/business/fi-cows27>.

⁸⁵ Animal Legal Defense Fund, *Landmark Victory for Animal Legal Defense Fund in Foie Gras Lawsuit*, 12 April, 2013, <http://aldf.org/article.php?id=2174>.

⁸⁶ Centers for Disease Control and Prevention, *About BSE*, <http://www.cdc.gov/ncidod/dvrd/bse/>.

⁸⁷ NBC News, *Obama Bans ‘Downer’ Cows from Food Supply*, 14 March, 2009, available at http://www.nbcnews.com/id/29691788/ns/health-food_safety/t/obama-bans-downer-cows-food-supply/#.UQmvHPLheSo.

exhibit signs of a central nervous disorder.⁸⁸ Slaughterhouse workers in California took advantage of this loophole by “kicking cows, ramming them with the blades of a forklift, jabbing them in the eyes, applying painful electrical shocks and even torturing them with a hose and water in attempts to force sick or injured animals to walk to slaughter.”⁸⁹

After undercover video of these horrifying abuses was released, animal protection groups called for a complete ban on the slaughter of downer cows, citing food safety concerns over the potential of another BSE outbreak. In 2009, the Agriculture Secretary issued a final rule requiring a complete ban on the slaughter of cows that become non-ambulatory at any time prior to slaughter, citing it as an effort to improve food safety.⁹⁰ In addition to improving food safety, this rule should prevent the abhorrent abuse of cows by slaughterhouse workers in effort to make them ambulatory.

7.3. Environmental Laws

Environmental laws have been used to indirectly help animals, especially in the area of concentrated animal feeding operations (CAFOs), or factory farms. For example, the Clean Water Act (CWA) controls the discharge of pollutants into the waters of the U.S.⁹¹ The agency that implements the CWA, the Environmental Protection Agency, has ruled that CAFOs are “point sources” of pollution, and, therefore, must comply with the CWA's requirements.⁹²

In New York, Hudson Valley Foie Gras, a company that raised, forced-fed, and slaughtered ducks for their enlarged livers (foie gras), was sued by the Humane Society of the United States (HSUS) for violating the CWA.⁹³ The court found that Hudson Valley violated the CWA and ordered it to bring its operations within environmental compliance. While the ducks raised and slaughtered at Hudson Valley may not have directly benefitted from this litigation, public awareness was raised about the lives of ducks that are raised for foie gras.⁹⁴

8. Conclusion

“Legal change rarely comes quickly [and] it is important to remember that the law does not change society, society changes the law.”⁹⁵ The U.S. has experienced a rapid growth in the field of animal law, and the desire of some to end animal suffering has met the barriers of our current

⁸⁸ Id.

⁸⁹ The Humane Society of the United States, *Rampant Animal Cruelty at California Slaughter Plant*, 30 Jan. 2008, http://www.humanesociety.org/news/news/2008/01/undercover_investigation_013008.html.

⁹⁰ United States Department of Agriculture, Agriculture Secretary Tom Vilsack Announces Final Rule for Handling of Non-Ambulatory Cattle, News Release No. 0060.09, 14 March 2009, *available at* <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2009/03/0060.xml>.

⁹¹ 33 USC §§ 1251-1387.

⁹² 40 CFR § 122.23.

⁹³ *The Humane Society of the United States v. HVFG, LLC*, No. 06 CV 6829 (S.D.N.Y. May 18, 2010).

⁹⁴ The Humane Society of the United States, *The HSUS Wins Water Pollution Case against Hudson Valley Foie Gras*, May 6, 2010, http://www.humanesociety.org/news/press_releases/2010/05/HVFG_050610.html.

⁹⁵ Lovvorn *supra* n. 10, at 149.

legal system. Animal law practitioners are currently creatively using all aspects of the law to address humans' use and treatment of animals. However, to start addressing the short-comings of the legal protection currently available to animals, public opinion about the way we are using and treating animals must change.