

# RUMINATIONS ON TWENTY-FIVE YEARS OF ANIMAL LAW

By  
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*In this Article, the author tracks the ‘progress’ of the animal law movement over the past twenty-five years, focusing on the perennial ambiguity in the property status of animals and the kinds of harm to animals the law is, and is not, willing to condone, and the power of the media to shed light on these harms. The author also explains how her own work, concentrating on the question of the ‘value’ of the animals, has contributed to the field of animal law. In particular, she highlights her work on the problem of legal valuation of companion animals for damages claims, the struggle to recognize the ‘intrinsic’ value of companion animals in the debate around ‘no kill’ shelters and trap, neuter, release (TNR) programs, and the ‘problem’ of feral cats. Overall, the author concludes that her experience in animal law has been a positive one, reflecting fondly on finding her home among a community of like-minded, passionate individuals who care about sentient beings*

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*“The manner in which a nation in the aggregate treats animals, is one chief measure of its real civilization.”*

—David Fredrich Strauss<sup>1</sup>

## I. INTRODUCTION

Congratulations to *Animal Law* on its twenty-fifth anniversary! I am honored to have been asked to provide a narrative on my own experiences in animal law to celebrate this milestone. The first issue of

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<sup>1</sup> DAVID FREDRICH STRAUSS, *THE OLD FAITH AND THE NEW: A CONFESSION* 59 (Mathilde Blind, trans. 3d Eng. ed. 1874).

*Animal Law* described itself as focusing on “animal-related legal issues” and aimed to be the “key forum” for learning, discussing, and debating relevant “compelling issues.”<sup>2</sup> *Animal Law* has exceeded its goal; it is a true testament to the Journal’s hard work and commitment to be going strong twenty-five years later and looking forward to another twenty-five years!

## II. AMBIGUITY OF THE LEGAL SYSTEM REGARDING ANIMALS

To begin my ruminations, I thought it would be interesting to see what topics were discussed in the very first issue and to reflect on the progress made over the past twenty-five years. Professor David Favre (a pioneer in animal law and one of the most respected and influential animal law scholars of our time) authored the introductory article.<sup>3</sup> Professor Favre is a colleague and friend, and when I was chair of the American Bar Association (ABA) Tort Trial & Insurance Practice Section (TIPS) Animal Law Committee, I was honored to award Professor Favre with the 2010 Excellence in the Advancement of Animal Law Award. Professor Favre, in his article, noted that humans have “ambiguous feelings” about animals and how we should treat and/or use them:

The legal system is equally ambiguous. The infliction of pain is usually illegal only if it is cruel, but how is cruelty to be judged? The same act of cutting a live animal with a knife may be illegal if done by the kid down the street, but legal if done in a college laboratory . . . .

. . . . It is the human interest that continues to provide the context for judging legality. It is not the infliction of pain and suffering that is illegal, it is the unnecessary or cruel infliction of pain and suffering that is illegal. The qualifying words are judged in the human context rather than that of the animals that experience the pain and anguish.<sup>4</sup>

This ambiguity has not changed in the intervening twenty-five years and remains one of the most challenging aspects of legal reform to provide greater protection for animals’ interests and to obtain legal “rights” for them. A fundamental problem is the legal characterization of animals as property. As property, the law is organized around humans’ instrumental use of animals and provides protection for their interests only to the extent it does not interfere with our use. State anti-cruelty laws generally protect only companion animals—those who live in our homes and provide companionship—and fails to protect wildlife and animals used in research or for food or sport.<sup>5</sup> The federal

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<sup>2</sup> David Favre, *Time for a Sharper Legal Focus*, 1 ANIMAL L. 1, 4 (1995).

<sup>3</sup> *Id.* at 1.

<sup>4</sup> *Id.* at 2, 4.

<sup>5</sup> See generally Yolanda Eisenstein, *Animal Cruelty and the Law: Prohibited Conduct*, in ANIMAL CRUELTY: A MULTIDISCIPLINARY APPROACH TO UNDERSTANDING 45, 48 (Mary Brewster & Casandra Reyes eds., 2d ed. 2016) (highlighting the special treatment companion animals receive under anti-cruelty laws).

Animal Welfare Act (AWA),<sup>6</sup> provides very minimal standards of care for animals used in research and for entertainment but provides no protections for animals on the farm.<sup>7</sup> Our interactions with wildlife are governed nationally by state game laws regulating hunting, trapping, and fishing unless the species is threatened or endangered and then some additional protections for the species are provided via environmental laws such as the Endangered Species Act (ESA) or the Marine Mammal Protection Act (MMPA).<sup>8</sup> In fact, Professor Favre noted as an example of this legal and ethical ambiguity the provision in the MMPA “that prohibits the killing of seal pups before they are weaned from their mother’s milk”<sup>9</sup> in contrast to our treatment of veal calves who “are often removed from their mothers within the first day after birth and either taken immediately to a slaughter house or raised in crates for 12-14 weeks”<sup>10</sup> before being slaughtered. The only apparent explanation for protecting seal pups and not veal calves, a legal ambiguity that remains today, is that humans use veal calves as units in food production and removing them immediately from their mothers serves our economic interests.

Another example of our ambiguity recounted by Professor Favre involved Alaska’s wolf “control program,” created to assure hunters that sufficient caribou would be alive for them to kill during the next hunting season. The program had garnered significant attention after the national nightly news ran film of a “wolf caught in a snare trap and an inept attempt to kill it by a state official who fired five times at the wolf’s head.”<sup>11</sup> Citizens were so outraged by the film—although the depiction of the suffering is commonplace throughout our nation that allows trapping and predator control programs— that the newly elected Alaskan governor ended the program in 1995.<sup>12</sup> Ironically, at the same time, the federal government was working to reintroduce wolves into Yellowstone National Park and the Bitterroot Mountains, under its wolf recovery program, to allow the predator to control the population of herd animals in the area.<sup>13</sup> Twenty-five years later, as I write this piece, a tragic headline in the *Washington Post* reads: “A Hunter Killed a Legendary Yellowstone Wolf. Years Later, her Cub Dies the Same Way.”<sup>14</sup> The story notes that Spitfire’s legal killing just outside

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<sup>6</sup> Animal Welfare Act of 1970, 7 U.S.C. §§ 2131–2159 (1985).

<sup>7</sup> Joan Schaffner, *Animal Cruelty and the Law: Permitted Conduct*, in *ANIMAL CRUELTY: A MULTIDISCIPLINARY APPROACH TO UNDERSTANDING* 63, 65–78 (Mary Brewster & Casandra Reyes eds., 2d ed. 2016) (noting the ‘cruel’ conduct that remains legal).

<sup>8</sup> *Id.* at 78–81; see also JOAN E. SCHAFFNER, *AN INTRODUCTION TO ANIMALS AND THE LAW* 135–51 (2011) (outlining state and federal laws governing wildlife).

<sup>9</sup> Favre, *supra* note 2, at 3.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> *Id.*

<sup>14</sup> Alex Horton, *A Hunter Killed a Legendary Yellowstone Wolf. Years Later, Her Cub Dies the Same Way*, WASH. POST (Dec. 2, 2018), <https://www.washingtonpost.com/science/2018/12/02/hunter-killed-legendary-yellowstone-wolf-years-later-her-daughter->

the federal park in Montana, “reignited demands for more protection of wolves, who advocates say keep elk moving and help restore grasslands but have been unfairly maligned for decades. . . . [Meanwhile, hunters argue] for relaxed regulations say[ing] they need to hunt more to protect elk and livestock, clashing with wolf advocates over the role of wolves in the modern west.”<sup>15</sup> Thus, the legal ambiguity continues, and the wolves remain viewed as instruments to serve human interests with minimal legal protections.

### A. *The Media and Animals*

One aspect of the Alaskan wolf story that remains viable twenty-five years later but that may inure to the benefit of animals, is the powerful influence the media has to educate the public, allowing them to harness empathy and compassion for animals by shining a light on the individual animals who suffer. In 1995, the airing of the film of a single wolf struggling in the snare trap made the suffering of trapped animals “real,” allowed the public to empathize with the wolf, and in turn, galvanized them to pressure the Governor to end the program.<sup>16</sup> In the intervening twenty-five years, we have seen several instances of the power of the media and its positive effect on policy and law affecting animals.

In July 2015, Cecil the lion was killed by a wealthy American trophy hunter. Although there was nothing particularly unique about the hunt, his death went viral and brought increased attention to the horrors of trophy hunting.<sup>17</sup> The public uproar generated by the significant media attention created an opportunity to transform the Cecil moment into a Cecil movement.<sup>18</sup> Soon after, several airlines banned the transport of lion, leopard, elephant, rhinoceros, and buffalo trophies.<sup>19</sup> When Conservation Force sued Delta Airlines claiming that a common carrier may not discriminate against a particular class of cargo, the Fifth Circuit, in an unpublished decision, upheld dismissal of the complaint.<sup>20</sup> In 2016, the U.S. Fish and Wildlife Service listed African lions as endangered, implemented a permitting process for tro-

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died-same-way/?noredirect=on&utm\_term=.2368735efafd [https://perma.cc/3LQU-42CQ] (accessed Apr. 30, 2019).

<sup>15</sup> *Id.*

<sup>16</sup> Favre, *supra* note 2, at 2.

<sup>17</sup> Zack Beauchamp, *Cecil the Lion: The Killing That's Enraged the Internet, Explained*, Vox (July 29, 2015), <https://www.vox.com/2015/7/28/9064325/cecil-the-lion> [https://perma.cc/B4UR-W2RW] (accessed Apr. 30, 2019).

<sup>18</sup> Jason Goldman, *Why Did the Death of Cecil the Lion Cause Such an Uproar?*, THE GUARDIAN (May 5, 2016), <https://www.theguardian.com/environment/2016/may/05/why-did-death-of-a-single-lion-cecil-cause-such-an-uproar> [https://perma.cc/57ZY-QCHB] (accessed Apr. 30, 2019).

<sup>19</sup> *Major U.S. Airlines End Trophy Hunter Shipments After Cecil Outcry*, REUTERS (Aug. 4, 2015), <https://www.reuters.com/article/zimbabwe-wildlife-airlines/major-u-s-airlines-end-trophy-hunter-shipments-after-cecil-outcry-idUSKCN0Q90XP20150804> [https://perma.cc/X99Q-PP4H] (accessed Apr. 30, 2019).

<sup>20</sup> *Conservation Force v. Delta Air Lines*, 682 Fed. Appx. 310 (5th Cir. 2017).

phy imports, and banned the import of trophies of captive-bred lions killed during canned hunts.<sup>21</sup> Despite these reforms, however, tragedy struck the same family two years later when, in July 2017, Xanda, Cecil's six-year-old son "met the same fate" as his father—killed in a trophy hunt in Zimbabwe.<sup>22</sup>

*Blackfish* is a documentary film on the tragic life of Tilikum the orca, who was ripped from his family at two-years-old; held captive; forced to perform until his death at the age of thirty-three; and who killed three people, including his trainer, in 2010.<sup>23</sup> The film made a huge 'splash' with audiences world-wide and arguably contributed to one of the greatest advancements in animal advocacy for exotic animals in entertainment—Sea World's announcement in 2016 that they would end the breeding of orcas.<sup>24</sup> The *Huffington Post* article written by Caty Chattoo in March 2017<sup>25</sup> describes the almost 'perfect storm' whereby media attention and legal reform when the California Coastal Commission banned the breeding of captive orcas in the state,<sup>26</sup> signaled the beginning of the end of an era of using these majestic marine mammals for human entertainment.

Just one year later, after years of controversy, litigation, and legislation, the so-called "Greatest Show on Earth" closed. Ringling Brothers had been embroiled in a fourteen year lawsuit over their treatment of Asian elephants, fined \$270,000 by the U.S. Department of Agriculture (USDA) for violations of the AWA, and was unable to travel to key cities, like Los Angeles, after the cities banned the use of bullhooks.<sup>27</sup> Legal progress continues: on December 14, 2018, New Jersey enacted

<sup>21</sup> Karen Brulliard & Lindsey Bever, *Cecil the Lion's Son has 'Met the Same Fate'—Killed in a Trophy Hunt in Zimbabwe*, WASH. POST (July 20, 2017), [https://www.washingtonpost.com/news/animalia/wp/2017/07/20/cecil-the-lions-son-shot-dead-by-trophy-hunter-officials-say/?utm\\_term=.1a52dbb4f4a2](https://www.washingtonpost.com/news/animalia/wp/2017/07/20/cecil-the-lions-son-shot-dead-by-trophy-hunter-officials-say/?utm_term=.1a52dbb4f4a2) [<https://perma.cc/5ETS-HZU6>] (accessed Apr. 30, 2019).

<sup>22</sup> *Id.*

<sup>23</sup> Joan E. Schaffner, *Blackfish and Public Outcry: A Unique Political and Legal Opportunity for Fundamental Change to the Legal Protection of Marine Mammals in the United States*, in ANIMAL LAW AND WELFARE: INTERNATIONAL PERSPECTIVES 237, 237–38 (Deborah Cao & Steven White eds., 2016).

<sup>24</sup> *Sea World to Stop Breeding Orcas Following Controversy*, BBC NEWS (Mar. 17, 2016), <https://www.bbc.com/news/world-us-canada-35829477> [<https://perma.cc/NG3W-ZN5L>] (accessed Apr. 30, 2019).

<sup>25</sup> Caty B. Chattoo, *Anatomy of the "Blackfish Effect,"* HUFFINGTON POST (Mar. 26, 2017), [https://www.huffingtonpost.com/caty-borum-chattoo/anatomy-of-the-blackfish-b\\_9511932.html](https://www.huffingtonpost.com/caty-borum-chattoo/anatomy-of-the-blackfish-b_9511932.html) [<https://perma.cc/N7EN-XYSJ>] (accessed Apr. 30, 2019).

<sup>26</sup> *California Agency Votes to Ban SeaWorld Orca Breeding*, CNBC (Oct. 9, 2015), <https://www.cnbc.com/2015/10/09/california-agency-votes-to-ban-seaworld-orca-breeding.html> [<https://perma.cc/K7LP-D6NF>] (accessed Apr. 30, 2019).

<sup>27</sup> Charlotte Allen, *The Forces That Shut Down Ringling Bros. Want to End a Lot More Than Animal Abuse*, L.A. TIMES (May 22, 2017), <https://www.latimes.com/opinion/op-ed/la-oe-allen-ringling-circus-20170522-story.html> [<https://perma.cc/Z9ZA-UV54>] (accessed Apr. 30, 2019); Patrick McGreevy, *Bullhooks to Control Elephants Banned in California*, L.A. TIMES (Aug. 29, 2016), <https://www.latimes.com/politics/essential/la-pol-sac-essential-politics-updates-gov-brown-outlaws-use-of-bullhooks-to-1472519298-htmstory.html> [<https://perma.cc/D7VF-WXV2>] (accessed Apr. 30, 2019).

“Nosey’s Law”<sup>28</sup> and became the first state to ban most wild animals in circuses and traveling shows.<sup>29</sup>

### B. *Animals in the Courts*

A second author in the first issue of *Animal Law* was Steve Wise, who traced ethical views on animals back to ancient times to explain why the “common law denies justice to all nonhuman animals.”<sup>30</sup> Steve Wise is another legend in animal law whom I had the immense pleasure of meeting when I invited him in 2008, to participate on the Association of American Law Schools (AALS) panel entitled *Debating Animals as Legal Persons*. That same year, the AALS approved the creation of the Section on Animal Law, and I was honored to serve as founding chair of the Section. Steve Wise has devoted his life to establishing legal rights that protect fundamental interests for certain nonhuman animals. In the intervening twenty-five years since that article appeared in the first issue, and after extensive scientific, legal, and political research, the Nonhuman Rights Project has brought “ground-breaking habeas corpus lawsuits [to] demand recognition of the legal personhood and fundamental right to bodily liberty of individual great apes, [and] elephants.”<sup>31</sup> On December 14, 2018, Justice Tracey A. Bannister heard oral arguments in the habeas corpus case seeking legal personhood and a right to bodily integrity for Happy, a forty-seven-year-old Asian elephant held alone in captivity in the Bronx Zoo.<sup>32</sup>

Also in the first issue of *Animal Law*, Henry Mark Holzer analyzed the Supreme Court case *Church of the Lukumi Babalu Aye v. City of Hialeah*<sup>33</sup> involving a First Amendment challenge to a local animal cruelty law outlawing animal sacrifice.<sup>34</sup> In the intervening twenty-five years, the Supreme Court has addressed only a handful of “animal law” cases and in each, the decision cut against the animals’ interests.<sup>35</sup>

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<sup>28</sup> N.J. STAT. ANN. § 23:2A-16 (West 2018).

<sup>29</sup> Amir Vera, *New Jersey Law Says Wild Animals Can’t Be Used In Circuses*, CNN (Dec. 14, 2018), <https://www.cnn.com/2018/12/14/us/new-jersey-elephant-law/index.html> [<https://perma.cc/7YZP-A93E>] (accessed Apr. 30, 2019).

<sup>30</sup> Steven M. Wise, *How Nonhuman Animals Were Trapped in a Nonexistent Universe*, 1 ANIMAL L. 15, 17 (1995).

<sup>31</sup> *Litigation*, NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/litigation/> [<https://perma.cc/WFV4-26N6>] (accessed Apr. 30, 2019).

<sup>32</sup> Lauren Choplin, *Nonhuman Rights Project Argues for Elephant Personhood, Rights in New York Supreme Court*, NONHUMAN RIGHTS PROJECT (Dec. 14, 2018), <https://www.nonhumanrights.org/blog/happy-habeas-hearing-albion/> [<https://perma.cc/AM92-WJDT>] (accessed Apr. 30, 2019).

<sup>33</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

<sup>34</sup> Henry Mark Holzer, *Contradictions Will Out: Animal Rights vs. Animal Sacrifice in the Supreme Court*, 1 ANIMAL L. 83, 83 (1995).

<sup>35</sup> See *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S.Ct. 361, 363 (2018) (holding only habitat of a species is eligible for designation as critical habitat under the Endangered Species Act and the Secretary’s decision not to exclude an area from such designation is subject to judicial review); *Nat’l Meat Assoc. v. Harris*, 565 U.S. 452, 455

In *United States v. Stevens*, the Court again decided a First Amendment challenge to a federal animal cruelty statute outlawing depictions of animal cruelty.<sup>36</sup> In both First Amendment cases, the Court sided with the challenger and found the laws unconstitutional. Interestingly, in *Lukumi Babalu* the law was *too narrow*—outlawing only animal cruelty to serve religious purposes—to survive under the Free Exercise Clause. In *Stevens*, by contrast, the statute was *too broad* in its definition of depictions of animal cruelty outlawed by the statute to survive under the Free Speech Clause. In both cases, however, there arguably was a solution to address the specific harms targeted by the laws. General animal cruelty laws may outlaw animal sacrifice without infringing religious rights,<sup>37</sup> and the more narrowly drafted federal crush video statute,<sup>38</sup> enacted in response to the Supreme Court’s decision in *Stevens*, has been upheld as constitutional.<sup>39</sup>

What I find more interesting about the cases are the Justices’ discussion of our treatment of animals which has not changed in the intervening years. In *Lukumi Babalu*, the Court emphasized the excessive underinclusive nature of a law that is allegedly designed to protect animals from cruelty. The Court noted that under the law:

Few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the orishas, not food consumption. Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.<sup>40</sup>

In fact, most all killing is expressly allowed:

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(2012) (holding the Federal Meat Inspection Act preempted application against federally inspected swine slaughterhouses of the California Penal code provision governing sale of meat of non-ambulatory animals and their euthanization); *United States v. Stevens*, 559 U.S. 460, 464–65, 482 (2010) (holding federal statute outlawing depictions of animal cruelty unconstitutional); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 170–71 (2001) (holding an Army Corp of Engineers rule extending the definition of “navigable waters” under the Clean Water Act to include intrastate waters used as habitat by migratory birds exceeded its authority under the Clean Water Act); *Bennett v. Spear*, 520 U.S. 154, 159, 166, 179 (1997) (holding ranch operators and irrigation districts have standing to seek judicial review of a biological opinion issued by the U.S. Fish and Wildlife Service in accordance with the Endangered Species Act).

<sup>36</sup> *Stevens*, 559 U.S. at 460. As chair of the ABA TIPS Animal Law Committee in 2010, I moderated a webinar analyzing the case, *Deconstructing U.S. v. Stevens: Animal Cruelty and Freedom of Speech* (Sept. 23, 2010), [https://www.americanbar.org/groups/tort\\_trial\\_insurance\\_practice/events\\_cle/audio\\_archive/](https://www.americanbar.org/groups/tort_trial_insurance_practice/events_cle/audio_archive/) [<https://perma.cc/D554-DMQQ>] (accessed Apr. 30, 2019).

<sup>37</sup> See Shannon L. Doheny, *Free Exercise Does Not Protect Animal Sacrifice: The Misconception of Church of Lukumi Babalu Aye v. City of Hialeah and Constitutional Solutions for Stopping Animal Sacrifice*, 2 J. ANIMAL L. 121, 121 (2006) (explaining why animal sacrifice is not a constitutional right under the First Amendment).

<sup>38</sup> 18 U.S.C. § 48 (2010).

<sup>39</sup> *United States v. Richards*, 755 F.3d 269 (5th Cir. 2014).

<sup>40</sup> *Lukumi Babalu*, 508 U.S. at 536.

[F]ishing . . . is legal. Extermination of mice and rats within a home is also permitted. Florida law sanctions euthanasia of “stray, neglected, abandoned, or unwanted animals,” destruction of animals judicially removed from their owners “for humanitarian reasons” or when the animal “is of no commercial value,” the infliction of pain or suffering “in the interest of medical science,” the placing of poison in one’s yard or enclosure, and the use of a live animal “to pursue or take wildlife or to participate in any hunting,” and “to hunt wild hogs.”<sup>41</sup>

Moreover, although the state attorney general had decided that killings for religious reasons are deemed “unnecessary”:

The city, on what seems to be a per se basis, deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary. There is no indication in the record that respondent has concluded that hunting or fishing for sport is unnecessary. Indeed, one of the few reported Florida cases . . . concludes that the use of live rabbits to train greyhounds is not unnecessary. . . . [Nevertheless,] many of these secular killings fall within the city’s interest in preventing the cruel treatment of animals.<sup>42</sup>

Similarly, the Court in *Stevens* suggested (but refused to decide) that depictions of animal cruelty meant to be targeted by the federal statute—crush videos and dog fighting—could be outlawed because the conduct depicted is illegal in all states.<sup>43</sup> However, the statute was still found to be overbroad because depictions of hunting, trapping, and various agricultural practices, which are arguably “cruel,” could be subject to the law as written and thus the statute exceeded the bounds of constitutionality.<sup>44</sup> Why? Because each of these practices are generally legal. As Justice Alito noted, “virtually all state laws prohibiting animal cruelty either expressly define the term ‘animal’ to exclude wildlife or else specifically exempt lawful hunting activities.”<sup>45</sup> Further, most anti-cruelty laws also exempt accepted agricultural husbandry practices.<sup>46</sup> In fact, hunting and fishing are a cherished aspect of this county’s heritage. In 1972, President Richard Nixon first proclaimed the fourth Saturday in September as National Hunting and Fishing Day, since then “Presidents have regularly issued proclamations extolling the values served by hunting.”<sup>47</sup> Thus, it appears that in the past twenty-five years our need and desire to kill animals has not diminished despite our increased knowledge of the capabilities of nonhuman animals<sup>48</sup> and growth in the area of animal protection law.

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<sup>41</sup> *Id.* at 543–44 (citations omitted).

<sup>42</sup> *Id.* at 537.

<sup>43</sup> *Stevens*, 559 U.S. at 481–82.

<sup>44</sup> *Id.* at 481.

<sup>45</sup> *Id.* at 487.

<sup>46</sup> *Id.* at 489.

<sup>47</sup> *Id.* at 487–88.

<sup>48</sup> See, e.g., MARK BEKOFF & JESSICA PIERCE, *THE ANIMALS’ AGENDA: FREEDOM, COMPASSION, & COEXISTENCE IN THE HUMAN AGE 1* (2017) (listing headlines that depict new scientific findings on the cognition and emotion of animals).



## III. THE VALUE OF ANIMALS

Compared to David Favre, Henry Mark Holzer, and Steven Wise, I am a novice to animal law, having first learned of the area fifteen years ago, when a colleague and I created a one-year pro bono project at the George Washington University Law School to research the state of animals and the laws that govern them in the District of Columbia. Our goal was to identify amendments to the laws to provide greater protections for animal interests, and that project culminated in the enactment of the 2008 D.C. Animal Protection Amendment Act.<sup>49</sup>

On the professional side, I turned the focus of my scholarship and service beyond the law school to animal law. My scholarship has focused generally on the theme of “value.” Humans respect and protect that which we value, and thus legal recognition of not only animals’ instrumental economic value to humans but their instrumental noneconomic value and, most importantly, their intrinsic value—their worth independent of their utility to humans—is key to providing greater legal protections for their interests and ultimately granting them legal rights.<sup>50</sup>

The legal valuation of companion animals is a debate that has been waged since the beginning of the animal law movement.<sup>51</sup> Rooted in the law’s characterization of animals as property, the traditional view is that the value of an animal is based on fair market value with no recognition of the special relationship the human shares with their companion animal. My earlier work argued for recognizing the “companionship” value of our companion animals in the measurement of damages for their loss.<sup>52</sup> This is a first step toward engendering greater appreciation for animals’ lives as sentient beings and not mere items of property. By capitalizing on the animals Americans cherish, our companion animals, and arguing that the law should compensate owners for the loss of the companionship when that animal is killed, we begin to set the stage for recognizing in companion animals’ their intrinsic value as independent sentient beings. In the past twenty-five

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<sup>49</sup> Animal Protection Amendment Act of 2008, D.C. Law 17–281 (2008).

<sup>50</sup> See generally Joan E. Schaffner, *Values, Wild Animals and Law*, in ANIMAL WELFARE AND INTERNATIONAL ENVIRONMENTAL LAW: FROM CONSERVATION TO COMPASSION (Werner Scholtz ed., 2019) (arguing that “[r]ecognising and accounting for the intrinsic value of wild animals that justifies their moral significance is key to creating . . . [a] paradigm shift that will in turn take wild animal well-being seriously and provide greater protection for the well-being of wild animals under international and domestic law”).

<sup>51</sup> Joyce Tischler, *The History of Animal Law, Part I (1972–1987)*, 1 STAN. J. ANIMAL L. AND POL’Y 1, 22–23 (2008) (noting a workshop at the first animal law conference in the U.S. on “the potential for a new measure of damages for the intentional or negligent death or injury of an owned animal”).

<sup>52</sup> Joan Schaffner, *Valuing Nature in Environmental Law: Lessons for Animal Law and the Valuation of Animals*, in WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW? 243, 258–61 (Randall S. Abate ed., 2015); Joan Schaffner, *Damages in Dog-Bite and Other Animal-Related Litigation*, 2 MID-ATLANTIC J. ON L. & PUB. POL’Y 39, 52 (2013).

years, some small progress has been made in this arena. In many states today, rather than limiting damages to the economic fair market value of the animal, courts will award the ‘value to owner’; unfortunately, that value is typically limited to economic value and thus does not account for companionship value. However, at least one state, Tennessee, statutorily allows for noneconomic damages “for the loss of the reasonably expected society, companionship, love and affection of the pet.”<sup>53</sup>

#### IV. THE NO KILL MOVEMENT

##### A. *Intrinsic Value of Animals*

Because compensatory damages to owners for the loss of their companion animal is, by definition, a function of the instrumental value of the animal to their owner, intrinsic value is not legitimately a component of such damages. Animals’ intrinsic value is more legally relevant to regulation of our treatment of the animal—whether the animal is owned or lives in the wild. This means that recognition of their intrinsic value counsels against inhumane treatment and lethal methods of management out of respect for their intrinsic worth. The no-kill sheltering movement is founded on the principles that our companion animals have intrinsic value and that animal shelters are designed to provide just that—shelter—and care for the animals. Thus, killing a shelter animal, unless they are irremediably suffering, is wrong. For decades, even the use of the term *no-kill* was highly controversial as animal shelters throughout the country killed millions of animals annually.<sup>54</sup> In 2007, I met Nathan Winograd when I hosted the D.C. leg of his tour for his first book, *Redemption*. That meeting was a game changer for me as I was confronted with the reality of the killing of healthy, innocent animals in our shelters. Nathan not only talked about the problem, he developed an equation that would end the killing.<sup>55</sup> From 2009–2013, Nathan and I co-sponsored the No-Kill Conference at the George Washington University, which catapulted in attendance from about 100 attendees the first year to some 900 attendees in our final year.<sup>56</sup>

##### B. *Trap Neuter Return Programs*

One key component of the No-Kill Equation is trap-neuter-return (TNR)—a non-lethal method to address the population of free-roam-

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<sup>53</sup> TENN. CODE ANN. § 44-17-403(d) (2018).

<sup>54</sup> Nathan J. Winograd, *A Defense of No Kill in Both Word & Deed*, NATHAN WINOGRAD (Sept. 29, 2016), <http://www.nathanwinograd.com/a-defense-of-no-kill-in-both-word-deed/> [https://perm a.cc/F95E-ZWQY] (accessed Apr. 30, 2019).

<sup>55</sup> *No Kill Equation*, NO KILL ADVOCACY CENTER, <https://www.nokilladvocacycenter.org/no-kill-equation.html> [https://perma.cc/R64B-B2KA] (accessed Apr. 30, 2018).

<sup>56</sup> *No Kill Conference*, NO KILL ADVOCACY CENTER, <https://www.nokilladvocacycenter.org/no-kill-conference.html> [https://perma.cc/DH8A-PQTL] (accessed Apr. 30, 2018).

ing, e.g. community cats.<sup>57</sup> Community cats are a domesticated species but many of them are unsocialized to humans. As such they fall into an unusual category, somewhere between domestic and wild, and raise unique legal and policy issues governing their treatment.<sup>58</sup> If brought to a shelter, most community cats are killed because they are not adoptable. If left on the streets without intervention, they multiply, raising animal welfare, wildlife conservation, and public health concerns. However, if they are trapped, neutered—so they are unable to reproduce—and then returned to their outdoor home, they may live out their natural lives while not breeding and thereby decreasing the community cat population.<sup>59</sup> Although TNR appears to be a win-win, it is highly controversial, and may be outlawed under traditional animal control laws. Moreover, there is little, if any, legal scholarship on community cats and their compassionate management. As such, I turned my attention to the legal and policy implications of TNR. Ethically, TNR is grounded in the notion that each community cat has intrinsic value and thus we must use compassionate, non-lethal methods for their management.<sup>60</sup> That work ultimately led to the successful adoption of Resolution 102(B) (Aug. 2017) by the ABA House of Delegates<sup>61</sup> urging “governmental agencies to interpret existing laws and policies, and adopt laws and policies, to allow the implementation and administration of trap-neuter-vaccinate-return programs for community cats within their jurisdictions so as to promote their effective, efficient, and humane management.”<sup>62</sup> This resolution has been instrumental in enabling advocates to persuade lawmakers to allow the establishment of TNR programs in their localities.

## V. WILDLIFE

With cats as the ‘gateway’ species to the management of wildlife, and my fortuitous introduction to Rachele Adam that lead to the convening of about a hundred expert animalists and conservationists at the George Washington University Law School for a workshop titled *International Law and Wildlife Well-being: Moving from Theory to Ac-*

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<sup>57</sup> Joan E. Schaffner, *Community Cats: Changing the Legal Paradigm for the Management of So-Called “Pests”*, 67 SYRACUSE L. REV. 71, 74–76 (2017).

<sup>58</sup> *Id.* at 71–72.

<sup>59</sup> *Id.* at 76.

<sup>60</sup> Schaffner, *supra* note 57, at 71–79; Joan E. Schaffner, *Cat Wars: The Devastating Consequences of a Dangerous Book*, 8 J. ANIMAL ETHICS 236, 240–46 (2018).

<sup>61</sup> Debra Cassens Weiss, *Trap-neuter-vaccinate-return Programs for Community Cats Backed by ABA Delegates*, ABA J. (Aug. 14, 2017), [http://www.abajournal.com/news/article/trap\\_neuter\\_vaccinate\\_return\\_community\\_cats\\_aba\\_delegates](http://www.abajournal.com/news/article/trap_neuter_vaccinate_return_community_cats_aba_delegates) (accessed May 5, 2019).

<sup>62</sup> AMERICAN BAR ASSOCIATION, ANNUAL MEETING HOUSE OF DELEGATES RESOLUTIONS – ANIMAL LAW 102(B) (2017), [https://www.americanbar.org/groups/tort\\_trial\\_insurance\\_practice/animal\\_law\\_hist/2016-2017/annual\\_house\\_resolutions\\_2017\\_102b/](https://www.americanbar.org/groups/tort_trial_insurance_practice/animal_law_hist/2016-2017/annual_house_resolutions_2017_102b/) [<https://perma.cc/7BMD-YVF9>] (accessed May 7, 2019).

tion,<sup>63</sup> I became interested on bridging the gap between traditional conservationists and animalists. Traditional conservationists often subscribe to an ecocentric ethic that elevates the well-being of the collective, e.g. species, above that of the individual animal, such that inhumane, lethal techniques are often used to ‘manage’ wildlife.<sup>64</sup> Animalists generally subscribe to a zoocentric ethic that recognizes the intrinsic value of individual animals, and thus are concerned about their individual welfare and lives.<sup>65</sup> In recent years, conservationists concerned for the welfare of individual wildlife have established the field of ‘compassionate conservation’ to promote the consideration of individual animal welfare in conservation.<sup>66</sup> The vision, if we hope to preserve nature and wildlife for future generations, is to end the indiscriminate killing of wild animals as the primary conservation technique and instead reimagine nature and utilize non-lethal methods for the preservation of wildlife.<sup>67</sup>

## VI. CONCLUSION

As Al Johnson wrote in the first issue of *Animal Law*, “the English philosopher and economist John Stuart Mill observed that every social movement could be characterized by three stages: ridicule, discussion, and ultimately, adoption. . . . Perhaps the Animal Rights Movement has now gone beyond the stage of ridicule and attained an air of credibility where serious dialogue can occur.”<sup>68</sup> Twenty-five years later, the animal movement within the legal arena continues to engage the dialogue with increasing levels of credibility. I have been very active in the ABA TIPS Animal Law Committee since its inception because I

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<sup>63</sup> Rachelle Adam & Joan Schaffner, *International Law and Wildlife Well-being: Moving from Theory to Action*, 20 J. INT’L WILDLIFE L. & POL’Y 1 (2017). The workshop was co-hosted by the American Society of International Law’s Forum on Wildlife Law and the AALS Animal Law Section.

<sup>64</sup> See, e.g., John A. Vucetich Et al., *Evaluating Whether Nature’s Intrinsic Value is an Axiom of Anathema to Conservation*, 29 CONSERVATION BIOLOGY 321, 321, 324, 327 (2015) (discussing the ecocentric view that “all forms of life, including organisms and ecological collectives such as populations, species, and ecosystems, possess intrinsic value”).

<sup>65</sup> See, e.g., PETER SINGER, ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS (1975) (arguing that the utilitarian notion that “the interests of every being affected by an action are to be taken into account and given the same weight as the like interests of any other being” be applied to both human and non-human animals); TOM REGAN, THE CASE FOR ANIMAL RIGHTS (1983) (arguing that non-human animals are worthy of moral consideration).

<sup>66</sup> See generally IGNORING NATURE NO MORE: THE CASE FOR COMPASSIONATE CONSERVATION (Marc Bekoff ed., 2013) (including a series of essays arguing for compassionate conservation of nature through ethical, educational, religious, scientific, regulatory and economic paradigms).

<sup>67</sup> See, e.g., Arian Wallach, *Feminist Ferals*, YOUTUBE (Nov. 8, 2018), <https://www.youtube.com/watch?v=lpX-ZHHWN5s&t=2s> [<https://perma.cc/NLW2-JP7D>] (arguing that if conservationist ideals were more similar to feminism, then there would be more compassion in conservation practices).

<sup>68</sup> Al Johnson, *Animal Rights Cause Gains Credibility*, 1 ANIMAL L. 11, 11, 13 (1995).

believe it is imperative that nonhuman animals have a voice in a mainstream legal association and one of the largest voluntary professional associations in the world. Celebrating its fourteenth year, the Animal Law Committee's mission—"to address all issues concerning the intersection of animals and the law to create a paradigm shift resulting in a just world for all"—is accomplished through education, publication, public policy and public service, and by building bridges within TIPS, the ABA, and other outside entities.<sup>69</sup> This 'serious dialogue' has contributed to the enhanced credibility animal law has garnered in the past twenty-five years. Have we achieved stage three—adoption? Not yet (if one believes that adoption requires true legal rights for nonhuman animals), but the dialogue continues to gain momentum and validity with each passing year.

Finally, involvement in animal protection law is truly a transformative experience. Lawyers who advocate for animal protection are a uniquely passionate group, many of whom live a vegan lifestyle that respects all sentient beings. One of the most rewarding aspects of my experience in animal law has been getting to know colleagues who care deeply about all animals, who view them as morally relevant beings who deserve justice and compassion, and who devote their time not only to advancing the law but to helping animals in need. In 2004, soon after 'finding' animal law, I was blessed with the arrival of four six-week-old kittens found by a George Washington University law student. The mother cat had given birth on the street several weeks earlier in the student's apartment complex, but now they were threatened with removal to the shelter where they would likely have been killed as unadoptable, because they were too young and unsocialized. I took the four kittens—Liberty, Justice, Freedom, and Equality—into my home and heart, and I never looked back. Over the years, I have had over 150 felines pass through my home. Some unfortunately did not survive, but many were either adopted to loving families or remained as Schaffners. The love that we share is the best reward of all!

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<sup>69</sup> Yolanda Eisenstein & James Gesualdi, *Creating a Life in Animal Law*, AMERICAN BAR ASSOCIATION, TORT TRIAL & INSURANCE PRACTICE SECTION, ANIMAL LAW COMMITTEE NEWS, Fall 2018 at 1, 21, [https://www.americanbar.org/content/dam/aba/publications/tort\\_trial\\_insurance\\_practice\\_newsletters/animal\\_law\\_committee/animal\\_law\\_fall\\_2018.pdf](https://www.americanbar.org/content/dam/aba/publications/tort_trial_insurance_practice_newsletters/animal_law_committee/animal_law_fall_2018.pdf) [https://perma.cc/N93K-AFLS] (accessed Apr. 30, 2019).