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Bringing Animal Protection Legislation Into Line With its Purported Purposes: A Proposal for Equality Amongst Non-Human Animals

Jane Kotzmann
Deakin University

Gisela Nip

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ARTICLE

Bringing Animal Protection Legislation Into Line With its Purported Purposes: A Proposal for Equality Amongst Non-Human Animals

JANE KOTZMANN* & GISELA NIP†

The United States has a strong history of enacting laws to protect animals from the pain and suffering inflicted by humans. Indeed, the passage of the Massachusetts' Body of Liberties in 1641 made it the first country in the world to pass such laws. Nevertheless, contemporary animal protection laws in all jurisdictions of the United States are limited in their ability to adequately realize their primary purpose of protecting animals from unnecessary or unjustifiable pain and suffering. This is a result of limited statutory definitions of 'animal' and far-reaching exclusions commonly found in animal protection legislation. These exclusions frequently apply to farm animals, animals used in experiments as part of scientific or medical research, and animals that are the subject of hunting or fishing. While the purpose of animal protection laws is clearly supported by scientific research, they largely fail to achieve their purposes for most animals. Accordingly, this Article advocates for the introduction of an equality principle into animal protection laws in order to enable those laws to better meet their primary purpose of preventing and punishing cruelty to animals. The Article proposes that an equality principle be adapted from international human rights law to generally provide that all sentient animals are equal before the law and entitled to the equal protection of the law. Implementation of such a principle would require significant amendments to animal protection laws, including the introduction of an express statement of equality amongst animals, creation of an

* Dr. Jane Kotzmann is a Lecturer in International Law at Deakin University, Melbourne, Australia. She researches in animal rights and current laws as they relate to animals.

† Gisela Nip is currently Senior Associate to a judge in the Victorian Court of Appeal in Australia, and her work involves assisting with criminal and civil law appeals. She previously practiced as a solicitor with Clayton Utz in Melbourne.

overarching prohibition on conduct causing animals unnecessary or unjustifiable pain and suffering, and removal of existing discriminations against animals (including farm animals, research animals and animals that are hunted or fished). These amendments, if enacted and enforced, would operate to significantly reduce, as well as punish, the unnecessary cruelty that animals experience in contemporary society.

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I. INTRODUCTION

Many non-human animals do not live well.¹ This unfortunate reality is frequently a result of the manner in which humans use

¹ Note that this paper uses the term “animal” to refer to all animals, excluding human beings. While human beings are themselves animals, this popular use of the term animal is helpful for the purpose of clear communication.

animals.² Animals that are used in human research are often exposed to chemicals or used in experiments. Animals used by humans for entertainment are habitually removed from their natural habitats and subjected to painful training techniques. Animals produced for food are subject to crowding, disease, and painful procedures in factory farms, which have become increasingly prevalent in the last few decades. Even animals that live in the wild are not beyond the reach of humans — they are commonly subjected to hunting and culling practices.

Public concern in relation to the situation of animals has led to the passage of animal protection laws in all jurisdictions in the United States (“U.S.”), as well as in most other western countries.³ Most animal protection legislation in the United States is enacted at the state level, which broadly seeks to protect animals from the actions of humans that are likely to cause them unnecessary pain or suffering.⁴

Animal protection laws, however, do not treat all animals equally. Companion animals — those animals that are used by humans for friendship and company — generally receive the strongest levels of legal protection.⁵ Other animals, including farm animals and animals used in scientific research, are often exempted from anti-cruelty provisions. The level of legal protection provided to animals therefore depends on the relationship that humans have with those animals.⁶ This is in spite of scientific research demonstrating that most animals (including all vertebrates) are sentient, and thus have an equal interest in avoiding pain and suffering.⁷ Moreover, the public is becoming increasingly concerned for non-human animals, including those species with which they

² See generally MIRKO BAGARIC & KEITH AKERS, HUMANISING ANIMALS: CIVILISING PEOPLE (2012).

³ See *infra* Part II (discussing current law relating to animal protection in the United States).

⁴ See *infra* Part II(B)(1)(ii)–(vi) (describing animal protection laws in California, Texas, Florida, New York, and Illinois).

⁵ See *infra* Part II(B)(1)(vii) (summarizing animal protection legislation in practice).

⁶ *Id.*

⁷ See *infra* Part IV(B)(ii) (discussing scientific research showing animal ability to feel pain and to suffer).

are not necessarily personally involved (for example, farm animals).⁸

This Article proposes amendments to animal protection laws that are underpinned by the legal principle of equality. In international human rights law, equality is one of the key principles that supports the attribution of rights to humans.⁹ The Universal Declaration of Human Rights (“UDHR”), the International Covenant on Civil and Political Rights (“ICCPR”), and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) all assert that “recognition of the inherent dignity and of the *equal* and inalienable rights” of people “is the foundation of freedom, justice and peace in the world.”¹⁰ In this context, equality means that all people, regardless of distinctions such as race, sex, or age, have the same entitlement to human rights.¹¹ This is because all people have human dignity or inherent value, and respecting human rights is the way in which we recognize that dignity in each other.¹² Further, while all people have an equal claim to human rights, this does not mean that equal *treatment* is required; policies should prioritize support for those people that are particularly vulnerable to discrimination and are more likely to have their human rights infringed.¹³

The equality principle should apply to sentient animals because they are capable of pain and suffering, and thus have an

⁸ See *infra* Part IV(B)(1) (discussing ability of public sentiment and morals to influence animal protection laws).

⁹ See *infra* Part IV (explaining justifications and recommendations for an equality principle in animal protection law).

¹⁰ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (emphasis added).

¹¹ Marcia H. Rioux & Paula C. Pinto, *A Time for the Universal Right to Education: Back to Basics*, 31 BRIT. J. SOC. EDUC. 621, 628 (2010).

¹² Jane Kotzmann & Cassandra Seery, *Dignity in International Human Rights Law: Potential Applicability in Relation to International Recognition of Animal Rights*, 26 MICH. ST. INT'L L. REV. 1, 8 (2017) (discussing the meaning of human dignity in the context of international human rights law).

¹³ *Human Rights Based Approaches*, AUSTL. HUM. RTS. COMMISSION (June 18, 2013), <https://www.humanrights.gov.au/human-rights-based-approaches> [https://perma.cc/J6Z9-L3FQ].

equal interest in avoiding that pain and suffering,¹⁴ regardless of their value to humans. In this respect, scientific research indicates that most animals are sentient and can feel both physical and psychological pain in a manner similar to humans.¹⁵ Further, consideration of both utilitarian and deontological theories leads to the conclusion that animals have moral status and should therefore be factored into our moral reasoning.¹⁶ It is a general moral norm of conduct that humans should avoid action that causes unnecessary pain or suffering, and animals should therefore be factored in to this standard.¹⁷ Further, the equality of interest in avoiding pain and suffering that animals experience converges with the purported purposes of animal protection legislation — to prevent the unnecessary pain and suffering of animals.¹⁸

Incorporation of an “equality amongst animals” principle in animal protection legislation would require significant legislative amendments. In particular, distinctions that may be drawn between animals or between species, other than those based on their level of sentience, such as the ways in which different species are used by humans,¹⁹ are not relevant to the purposes of animal protection legislation; therefore, these distinctions should not inform the obligations imposed on humans in their relations with animals, or the criminal offence taxonomies created by law. Thus, an equality principle may require amendment to the definition of “animal” in legislation to ensure all sentient animals are included. It would also require the removal of any exemptions from animal protection legislation. Further, legal obligations to animals and animal cruelty offences would need to be revised to ensure that they do not entrench discrimination against particular species.

¹⁴ See PETER SINGER, *ANIMAL LIBERATION: THE DEFINITIVE CLASSIC OF THE ANIMAL MOVEMENT* 8 (HarperCollins eds., 2009) (2015) (arguing that animals feel pain and that their pain should be considered equally with the pain of any other being).

¹⁵ See *infra* Part IV(B)(2) (discussing scientific research relating to animals’ capacity to feel pain and suffer).

¹⁶ See *infra* Part IV(B)(4) (analyzing the moral standing of animals).

¹⁷ *Id.*

¹⁸ See *infra* Part IV(B)(5) (providing that the introduction of an equality principle into animal protection laws would minimize animal pain and suffering as well as reflect public desire for increased legal protection for animals).

¹⁹ See Jessica Eisen, *Liberating Animal Law: Breaking Free From Human-Use Typologies*, 17 *ANIMAL L.* 59, 60–61 (2010).

This Article demonstrates that amendments to animal protection legislation that reflect animals' equal interest in avoiding pain and suffering would better align with the purposes of animal protection laws and better protect species of animals that are commonly discriminated against under those laws. While it is acknowledged that many of the problems experienced by animals result from their legal property status, and that these reforms would not change that status, the reforms may nonetheless improve treatment for particular species. In this respect, it is worthwhile noting that significant legal developments generally occur as a result of incremental changes in conjunction with evolving social norms.

The next part of this Article outlines the contemporary law relating to animal protection in the U.S. This includes identification of the purposes of animal protection legislation and a summary of the obligations and offenses set out in the relevant legislation. Part III explains the principle of equality, as set out in international human rights law, and its role as a foundation for international human rights law. This is followed in Part IV by a discussion of the reasons why, as well as how, the principle of equality might be incorporated into animal protection law and the changes that would be required in order to achieve this.

II. THE CONTEMPORARY LAW RELATING TO ANIMAL PROTECTION IN THE UNITED STATES

A. Overview of Animal Protection Law

Before examining the animal protection laws in force in particular jurisdictions of the U.S., this section sets out a broad overview of the framework of animal protection law. The purpose of providing this summary is to help explain the current approach to animal protection. It will also serve to contextualize the proposal being made for the reform of these laws.

Animal protection laws have a long history in the U.S. In fact, the U.S. was the first country in the world to enact laws aimed at protecting animals from cruelty and negligence. These laws were proclaimed in the Massachusetts' Body of Liberties in 1641, which prohibited "any Tirranny or Crueltie towards any brute Creature

which are usually kept for man's use" and required periodic rest, food, and water breaks for any cattle being driven or led.²⁰

In contemporary times, animal protection laws can be, and are, passed and enforced at all levels of government in the U.S. At the federal level, the key pieces of legislation are the Preventing Animal Cruelty and Torture ("PACT") Act of 2019,²¹ the Animal Welfare Act ("AWA") of 1966,²² the Twenty-Eight Hour Law of 1873,²³ the Humane Methods of Livestock Slaughter Act ("HMSA") of 1958,²⁴ and the Endangered Species Act ("ESA") of 1973.²⁵ However, most of the legislation relating to animal protection is enacted at the state level.²⁶ In this respect, all states have legislation in place to protect animals and all states have felony offenses relating to cruelty to animals.²⁷ Further, some cities and counties have also enacted animal protection laws, which are often a precursor to more extensive protections.²⁸

The Animal Legal Defense Fund ("ALDF") publishes the U.S. Animal Protection Laws State Rankings on an annual basis, with the most recent report being published in 2019.²⁹ In the Rankings Report, the ALDF ranks all fifty states in relation to the strength of their animal protection laws.³⁰ Each state is given a number from one to fifty (with "one" being the best performing state), and is further classified as "Top Tier," "Middle Tier," or "Bottom Tier."³¹

²⁰ Janet M. Davis, *The History of Animal Protection in the United States*, ORG. OF AM. HISTORIANS, <https://tah.oah.org/november-2015/the-history-of-animal-protection-in-the-united-states/> [<https://perma.cc/E5CL-3RNP>].

²¹ Preventing Animal Cruelty and Torture Act, Pub. L. No. 116-72, 133 Stat. 1151 (2019) (to be codified at 18 U.S.C. § 48) [hereinafter PACT Act].

²² Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2020) [hereinafter AWA].

²³ Twenty-Eight Hour Act, 49 U.S.C. § 80502 (2020).

²⁴ Humane Methods of Livestock Slaughter Act of 1958, 7 U.S.C. §§ 1901–1907 (2020) [hereinafter HMSA].

²⁵ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2020) [hereinafter ESA].

²⁶ *Laws That Protect Animals*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/article/laws-that-protect-animals/> [<https://perma.cc/RT3L-7ZCU>].

²⁷ *Id.*

²⁸ *Id.*

²⁹ *2019 U.S. Animal Protection Laws State Rankings: The Best and Worst States for Animal Protection Laws*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/project/2018-us-state-rankings/> [<https://perma.cc/57K7-WBBK>] [hereinafter *Animal Protection Laws State Rankings*].

³⁰ *Id.*

³¹ *Id.*

According to the ADLF, the animal protection laws of the states in the “Top Tier” have three strengths and two weaknesses, the laws in the “Middle Tier” states have two strengths and three weaknesses, and the laws in the “Bottom Tier” states have one strength and four weaknesses.³² Looking at the disparity amongst the states in the Rankings Report, it is clear that the animal protection laws across the U.S., as a whole, do not sufficiently protect the interests of animals. On the other hand, the Rankings Report provides opportunities for state legislatures to learn from other states and improve the laws within their own jurisdictions.

The section below will summarize the animal protection laws at the federal level and across the five most populated states in the U.S.: California, Texas, Florida, New York, and Illinois. Of these five states, Illinois is in the Top Tier and ranks number one in the Rankings Report.³³ California (number eight), Florida (number ten), and Texas (number eleven) are also in the Top Tier.³⁴ New York, however, has been attributed number thirty-two of the fifty states and is in the Middle Tier.³⁵

B. Animal Protection Law and Practice in the United States

1. Overview of Legislation Concerning the Purposes, Obligations and Offenses in Animal Protection Laws

i. Federal

On November 25, 2019, President Donald Trump signed into law the PACT Act, which constitutes a new federal ban on some forms of animal cruelty.³⁶ The bipartisan bill, which passed the House and Senate earlier in 2019, outlaws purposeful crushing, burning, drowning, suffocation, impalement, or other violence causing serious bodily injury to “one or more living non-human

³² *Id.*

³³ ANIMAL LEGAL DEF. FUND, ANIMAL PROTECTION: U.S. STATE LAWS RANKINGS REPORT 6–7 (2019).

³⁴ *Id.* at 6.

³⁵ *Id.*

³⁶ PACT Act, Pub. L. No. 116-72, 133 Stat. 1151 (2019) (to be codified at 18 U.S.C. § 48).

mammals, birds, reptiles, or amphibians.”³⁷ Violations of the PACT Act may result in a fine or felony sentence of up to seven years’ imprisonment for the offender.³⁸ The PACT Act closes a loophole which materialized following the introduction of the federal Animal Crush Video Prohibition Act of 2010, which prohibits anyone from knowingly creating an “animal crush video.”³⁹ These are videos which are posted online, and involve extreme acts of animal cruelty and torture, including stepping on, mutilating, or skinning animals alive.⁴⁰ The PACT Act revises section 48 of the U.S. Code, which previously dealt only with “animal crush videos,” and extends the list of prohibited acts of cruelty towards animals beyond the making and distribution of such videos.⁴¹ There are exemptions to the prohibited conduct under the PACT Act, including normal and customary veterinary procedures; the slaughter of animals for food; hunting, trapping, fishing, and any other sporting activity not otherwise prohibited by federal law; pest or predator control; and acts of scientific or medical research.⁴² Despite the exemptions in the PACT Act, it is a step in the right direction for the protection of animals and prevention of animal abuse in the U.S.

Before the introduction of the PACT Act, the AWA was the primary piece of legislation in place to protect animals. The AWA regulates the treatment of animals in research, exhibition, and transport by dealers, ensuring that such animals are provided humane care and treatment.⁴³ The AWA provides for criminal penalties, civil penalties, and revocation of permits for violations of its provisions.⁴⁴ In this respect, the AWA regulates the interactions between humans and animals, which, by nature, are related to interstate or foreign commerce, or that substantially affect such commerce.⁴⁵

³⁷ *Id.* § 48(f)(1).

³⁸ *See id.* § 48(c) (“Whoever violates this section shall be fined under this title, imprisoned for not more than 7 years, or both.”).

³⁹ Animal Crush Video Prohibition Act of 2010 § 48(b)(1), Pub. L. 111-294, 124 Stat. 3177.

⁴⁰ *See, e.g., Justice v. State*, 532 S.W.3d 862, 863–64 (Tex. Ct. App. 2017) (determining an animal cruelty case involving “animal crush videos”).

⁴¹ Animal Crush Video Prohibition Act of 2010 § 48(a)(1)–(3).

⁴² *Id.* § 48(d).

⁴³ AWA, 7 U.S.C. § 2131(1)–(2) (2020).

⁴⁴ *Id.* § 2149.

⁴⁵ Interactions between humans and animals which are intrastate in nature are addressed by state legislation.

The AWA directs the Secretary of the U.S. Department of Agriculture (“USDA”) to “promulgate standards to govern the humane treatment handling, care, treatment of animals in research, exhibition and, transportation of animals, and by dealers,”⁴⁶ as well as the proper handling of these animals during transportation in commerce.⁴⁷ It also prohibits most commercial animal fighting (but not bird fighting)⁴⁸ and prohibits dealers and exhibitors from disposing of any dog or cat, either through a sale or otherwise, five days after the acquisition of the animal.⁴⁹ The AWA also requires pounds, shelters, and research facilities licensed by the USDA to “hold and care for” any dog or cat they acquire for no less than five days.⁵⁰

In terms of application, the AWA regulates animals that are relevant to the contexts identified. This includes live or dead dogs, cats, monkeys, guinea pigs, hamsters, and rabbits, as well as other warm-blooded animals that the Secretary determines are being used, or are intended for use, in research, for exhibition, or for companionship.⁵¹ However, the term expressly excludes birds, rats, and mice which are bred for use in research, horses not used for research purposes, and other farm animals.⁵²

While these animals may be covered by relevant state legislation, their exclusion from the AWA may mean that they are effectively less protected than other species. For example, rats and mice used in research are ostensibly not entitled to humane care and treatment, whereas other animals used in research are so entitled.⁵³

The Twenty-Eight Hour Law seeks to ensure the humane and proper transportation of animals, including those raised for food or

⁴⁶ AWA, § 2143(a)(1).

⁴⁷ *Id.* § 2143(a)(4).

⁴⁸ *Id.* § 2156.

⁴⁹ *Id.* § 2135.

⁵⁰ *Id.* § 2158(a).

⁵¹ *Id.* § 2132(g).

⁵² *Id.*

⁵³ See *Animals Used in Research*, ANIMAL LEGAL DEF. FUND, https://aldf.org/focus_area/animals-used-in-research/ [https://perma.cc/Q7TA-MMEQ] (explaining how mice and rats are some of the most commonly used animals in experimentation).

in food production, across state lines.⁵⁴ Essentially, the law requires vehicles transporting animals for slaughter to stop every twenty-eight hours to allow the animals exercise, food, and water.⁵⁵ Sheep, however, are able to be confined for an additional eight consecutive hours without being unloaded when the twenty-eight hour period ends at night.⁵⁶ The rationale behind this distinction appears to be based on the difficulty of unloading sheep at night.⁵⁷

The objectives of the HMSA include the prevention of needless suffering by livestock.⁵⁸ In accordance with this, among other objectives, the HMSA declares that “the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods.”⁵⁹ Under the legislation, there are two lawful methods for the slaughter of livestock. Primarily, animals should be “rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut.”⁶⁰ Alternatively, where applicable, livestock should be slaughtered according to the “ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter”⁶¹

The ESA seeks to conserve threatened and endangered species and their habitats.⁶² The law requires federal agencies to ensure that any actions they authorize, fund, or undertake are not likely to threaten the existence of any listed endangered species, or result in the habitats of such species being destroyed or adversely modified.⁶³ The Act also prohibits any action that results in the taking of any listed endangered species,⁶⁴ and prohibits interstate and overseas import and export of such species.⁶⁵ While the ESA applies to all endangered species, the term is defined so as to exclude

⁵⁴ U.S. DEP’T OF AGRIC. BUREAU OF ANIMAL INDUS., BULL. NO. 589, THE 28-HOUR LAW REGULATING THE INTERSTATE TRANSPORTATION OF LIVE STOCK: ITS PURPOSE, REQUIREMENTS, AND ENFORCEMENT 2 (1918).

⁵⁵ *Id.*

⁵⁶ Twenty-Eight Hour Act, 49 U.S.C. § 80502(a)(2) (2020).

⁵⁷ U.S. DEP’T OF AGRIC. BUREAU OF ANIMAL INDUS., *supra* note 54, at 16.

⁵⁸ HMSA, 7 U.S.C. § 1901 (2020).

⁵⁹ *Id.*

⁶⁰ *Id.* § 1902(a).

⁶¹ *Id.* § 1902(b).

⁶² ESA, 16 U.S.C. § 1531(b) (2020).

⁶³ *Id.* § 1536(a)(2).

⁶⁴ *Id.* § 1538(a)(1)(B)–(C).

⁶⁵ *Id.* § 1538(a)(1)(A), (E).

“a species of the Class Insecta determined by the Secretary to constitute a pest whose protection . . . would present an overwhelming and overriding risk to man.”⁶⁶

ii. California

The main legislative protection for animals in California is contained in the California Penal Code.⁶⁷ Although the Penal Code does not contain a provision that specifies the purpose of the legislation, courts have identified that the purpose of the animal protection law is “to prevent the active or passive infliction of *unnecessary or unjustifiable pain or suffering*, or cruelty, on animals by their owner, or keeper, or others.”⁶⁸ Courts have further held that “[i]n our society, those who mistreat animals are the deserved object of obloquy, and their conduct is wrongful of itself and not just as a matter of legislative declaration.”⁶⁹

The list of prohibited acts under the California Penal Code is extensive. These acts include: poisoning an animal,⁷⁰ maliciously and intentionally injuring or killing an animal,⁷¹ general cruelty and neglect,⁷² maliciously and intentionally injuring or killing a threatened or endangered animal,⁷³ keeping an animal without proper care and attention,⁷⁴ improper treatment of animals in live animal markets,⁷⁵ animal fighting,⁷⁶ confining an animal in an unattended motor vehicle,⁷⁷ cruelty to animals being transported,⁷⁸ insufficient food and water for impounded animals,⁷⁹ abandoning

⁶⁶ *Id.* § 1532(6).

⁶⁷ CAL. PENAL CODE § 597 (West 2020).

⁶⁸ *People v. Untiedt*, 116 Cal. Rptr. 899, 900–01 (Cal. Ct. App. 1974) (emphasis added).

⁶⁹ *People v. Speegle*, 62 Cal. Rptr. 2d 384, 391 (Cal. Ct. App. 1997).

⁷⁰ CAL. PENAL CODE § 596.

⁷¹ *Id.* § 597(a).

⁷² *See id.* § 597(b).

⁷³ *Id.* § 597(c).

⁷⁴ *Id.* § 597.1(a)(1).

⁷⁵ *See id.* § 597.3.

⁷⁶ *Id.* §§ 597.5 (describing dog fighting), 597b(a)–(b) (describing other animal fighting), 597c (prohibiting spectators of animal fights), 597j (describing bird fights).

⁷⁷ *Id.* § 597.7(a).

⁷⁸ *Id.* §§ 597a (describing general transport), 597o (describing transport for slaughter).

⁷⁹ *Id.* § 597e.

an animal,⁸⁰ improper maintenance of pet shops,⁸¹ horse poling,⁸² horse and cattle “docking,”⁸³ and confining animals without adequate exercise area.⁸⁴ Other provisions in the Penal Code prohibit certain behaviors against animals including sexual assault of animals,⁸⁵ and killing dogs or cats for their pelts.⁸⁶

In terms of the application of the Penal Code, “animal” means “every dumb creature.”⁸⁷ Thus, *prima facie*, a wide range of animals are protected from acts of general cruelty under this legislation. Nevertheless, there are a number of exclusions within the legislation. First, the anti-cruelty obligations are not to be interpreted as interfering with research experiments involving animals, and mandatory seizure and impoundment does not generally apply to such animals.⁸⁸ Second, human conduct in relation to wildlife is, in some circumstances, exempt. This is the case where the relevant conduct is hunting wild mammals or birds for sport or food in accordance with other legal provisions, including “game laws,”⁸⁹ and where the relevant conduct is abandoning an animal.⁹⁰ Further, animals intended for slaughter are exempt in some circumstances. The protections do not impact “the right to kill all animals used for food.”⁹¹ Further, the prohibitions on leaving or confining an animal in an unattended motor vehicle do not prohibit the transportation of farmed animals for agricultural purposes.⁹²

⁸⁰ *Id.* §§ 597f(a) (prohibiting abandonment), 597s(a) (imposing misdemeanor penalty).

⁸¹ *Id.* § 597l(a).

⁸² *Id.* § 597g.

⁸³ *Id.* § 597n.

⁸⁴ *Id.* § 597t.

⁸⁵ *Id.* § 286.5(a).

⁸⁶ *Id.* § 598a(a).

⁸⁷ *Id.* § 599b.

⁸⁸ *Id.* §§ 597(g)(2), 599c.

⁸⁹ *Id.* § 599c.

⁹⁰ *Id.* § 597s(b) (detailing an exception for the release or rehabilitation of wildlife).

⁹¹ *Id.* § 599c.

⁹² *Id.* § 597.7(f).

iii. Texas

In Texas, the Penal Code prohibits the cruel treatment of both livestock animals and non-livestock animals, respectively.⁹³ Like the California Penal Code, there is no specific provision stating the purpose of the laws. However, the judiciary has commented that the law needs to evolve to avoid becoming irrelevant and in this context, “law should reflect society’s recognition that *animals are sentient and emotive beings* that are capable of providing companionship to the humans with whom they live.”⁹⁴

The Texas Penal Code sets out general anti-cruelty provisions. In this respect, it prohibits the torture,⁹⁵ neglect,⁹⁶ abandonment,⁹⁷ cruel transportation,⁹⁸ overworking,⁹⁹ and poisoning of livestock animals.¹⁰⁰ It also criminalizes causing a livestock animal to fight with another animal,¹⁰¹ using a live animal as a lure in relation to dog racing,¹⁰² and tripping a horse.¹⁰³ Further, it prohibits similar cruelty to non-livestock animals.¹⁰⁴ It also criminalizes causing an animal to fight with another animal where neither animal is a dog.¹⁰⁵ Further prohibitions in the Penal Code include interference with police service animals,¹⁰⁶ attacking an assistance animal,¹⁰⁷ dogfighting,¹⁰⁸ cockfighting,¹⁰⁹ and bestiality.¹¹⁰ Moreover, the

⁹³ TEX. PENAL CODE ANN. §§ 42.09, 42.092 (West 2019).

⁹⁴ *Bueckner v. Hamel*, 886 S.W.2d 368, 378 (Tex. Ct. App. 1994) (emphasis added).

⁹⁵ TEX. PENAL CODE ANN. § 42.09(a)(1).

⁹⁶ *Id.* § 42.09(a)(2).

⁹⁷ *Id.* § 42.09(a)(3).

⁹⁸ *Id.* § 42.09(a)(4).

⁹⁹ *Id.* § 42.09(a)(9).

¹⁰⁰ *Id.* § 42.09(a)(5).

¹⁰¹ *Id.* § 42.09(a)(6).

¹⁰² *Id.* § 42.09(a)(7).

¹⁰³ *Id.* § 42.09(a)(8).

¹⁰⁴ *Id.* §§ 42.092(b)(3)–(6), (9). Note that some of these acts are only criminalized where they occur without the owner’s effective consent. *Id.* §§ 42.092(b)(2), (6). Poisoning is only an offense in relation to livestock other than cattle, horses, sheep, swine or goats, where the animal belongs to another person and is done without legal authority or the owner’s effective consent. *Id.* § 42.09(a)(5).

¹⁰⁵ *Id.* § 42.092(b)(7)–(8).

¹⁰⁶ *Id.* § 38.151.

¹⁰⁷ *Id.* § 42.091.

¹⁰⁸ *Id.* § 42.10.

¹⁰⁹ *Id.* § 42.105.

¹¹⁰ *Id.* § 21.09.

Texas Health and Safety Code also prohibits the unlawful restraint of a dog.¹¹¹

As noted, the Texas Penal Code distinguishes between livestock and non-livestock animals, with different prohibitions being applicable depending on the category to which the relevant animal belongs. In this respect, an animal refers to “a domesticated living creature, including any stray or feral cat or dog, and a wild living creature previously captured,” but does not include “an uncaptured wild living creature or a livestock animal.”¹¹² On the other hand, a livestock animal refers to “cattle, sheep, swine, goats, ratites, or poultry commonly raised for human consumption . . . a horse, pony, mule, donkey, or hinny . . . native or nonnative hoofstock raised under agriculture practices . . . [or] native or nonnative fowl commonly raised under agricultural practices.”¹¹³ The clear exemption is wild animals that have not been captured, to which the general anti-cruelty prohibitions do not apply.

The legislation also contains further, extensive exemptions from the anti-cruelty provisions. In particular, prohibitions on cruelty to livestock and non-livestock do not extend to conduct that is related to fishing, hunting or trapping, wildlife management or control, or animal husbandry and agriculture.¹¹⁴ For example, it is a defense to a prosecution for cockfighting that the conduct is a “generally accepted and otherwise lawful animal husbandry or agriculture practice.”¹¹⁵ Moreover, it is a defense to a prosecution for cruelty to livestock and non-livestock animals, and for cockfighting, if the impugned conduct was for bona fide scientific research.¹¹⁶ It is also a defense to prosecution for cruelty to non-livestock animals where the actor had a reasonable fear of bodily injury by a dangerous wild animal, where the animal was on the actor’s property and killed animals or damaged crops on the property, or where the conduct was within the scope of the actor’s

¹¹¹ TEX. HEALTH & SAFETY CODE ANN. § 821.077 (West 2019).

¹¹² TEX. PENAL CODE ANN. § 42.092(a)(2).

¹¹³ *Id.* § 42.09(b)(5).

¹¹⁴ *Id.* §§ 42.09(f) (describing livestock animals), 42.092(f) (describing non-livestock animals).

¹¹⁵ *Id.* § 42.105(e)(2).

¹¹⁶ *Id.* §§ 42.09(e) (describing livestock), 42.092(d)(2) (describing non-livestock), 42.105(e)(1) (describing cockfighting).

employment as a public servant or in operations associated with electricity or natural gas generation or delivery.¹¹⁷

iv. Florida

The Florida Statute contains various provisions that criminalize cruelty to animals. While the legislature did not include a specific “purpose” provision with regard to these laws, the courts have stated that the “statutory scheme is clear.”¹¹⁸ Further, it has been held that for an offense of causing the cruel death of an animal to be made out, the statute “does not require an intent to cause the cruel death of an animal, but only an intent to commit the act that results in the cruel death,” suggesting that the legislation seeks to prevent the *actions* that cause animal pain and suffering rather than the *intent* to cause such pain and suffering.¹¹⁹

The Florida Statute criminalizes general cruelty and aggravated cruelty to animals. The general cruelty provisions include prohibitions on overloading, overdriving, tormenting, depriving of sustenance and shelter, mutilating, or killing an animal.¹²⁰ The aggravated cruelty to animals provisions include prohibitions on causing “cruel death” and “excessive or repeated infliction of unnecessary pain or suffering” to an animal.¹²¹ Other offenses against animals include tripping horses,¹²² confining or abandoning animals,¹²³ animal fighting,¹²⁴ and sexual assault of an animal.¹²⁵

At first glance, the anti-cruelty provisions contained in the Florida Statute appear comprehensive, as “animal” is defined as “every living dumb creature.”¹²⁶ However, the definitions of “torture,” “torment,” and “cruelty” exclude acts that occur “in the interest of medical science.”¹²⁷ Further, provisions against the killing or aggravated abuse of horses or cattle are expressly not to be

¹¹⁷ *Id.* § 42.092(d)–(e).

¹¹⁸ *Hynes v. State*, 1 So. 3d 328, 330 (Fla. Dist. Ct. App. 2009).

¹¹⁹ *Bartlett v. State*, 929 So. 2d 1125, 1126 (Fla. Dist. Ct. App. 2006).

¹²⁰ FLA. STAT. ANN. § 828.12(1) (West 2019).

¹²¹ *Id.* § 828.12(2).

¹²² *Id.* § 828.12(5).

¹²³ *Id.* § 828.13.

¹²⁴ *Id.* § 828.122.

¹²⁵ *Id.* § 828.126.

¹²⁶ *Id.* § 828.02.

¹²⁷ *Id.*

construed as interfering with “recognized livestock husbandry practices.”¹²⁸ Licensed veterinarians are also immune from prosecution for cruelty to animals.¹²⁹ Moreover, prohibitions on artificial coloring and sale of certain animals do not apply where the animals are temporarily dyed for protective health purposes,¹³⁰ and do not apply to animals used or raised for agricultural purposes in certain circumstances.¹³¹

v. New York

Laws prohibiting animal cruelty in New York are found in the Agriculture and Markets Law.¹³² While the purposes of the legislation are expressly stated, they relate to promotion of the agricultural industry rather than animal welfare.¹³³ The offense of aggravated cruelty to “companion animals” was enacted in 1999 in response to an incident where a cat “was doused with kerosene and set on fire.”¹³⁴ While there is no statutory statement regarding the purpose of this provision, courts have commented on the legislative intent to the effect that the provision “represents the Legislature’s recognition that man’s inhumanity to man often begins with inhumanity to those creatures that have formed particularly close relationships with mankind.”¹³⁵ The implication appears to be that anti-animal cruelty provisions are aimed at preventing eventual cruelty to humans.

In spite of this, the legislation criminalizes a range of general acts of cruelty against animals. These include overdriving, torturing, and injuring animals;¹³⁶ aggravated cruelty to animals;¹³⁷ animal fighting;¹³⁸ failing to provide appropriate shelter for dogs left

¹²⁸ *Id.* § 828.125(5).

¹²⁹ *Id.* § 828.12(4).

¹³⁰ *Id.* § 828.1615(2).

¹³¹ *Id.* § 828.1615(3).

¹³² N.Y. AGRIC. & MKTS. LAW § 353-a (McKinney 2020).

¹³³ *Id.* § 3.

¹³⁴ *People v. Degiorgio*, 36 A.D.3d 1007, 1008–09 (N.Y. App. Div. 2007) (internal quotations omitted).

¹³⁵ *People v. Garcia*, 29 A.D.3d 255, 257 (N.Y. App. Div. 2006); *see also Degiorgio*, 36 A.D.3d at 1009.

¹³⁶ N.Y. AGRIC. & MKTS. LAW § 353.

¹³⁷ *Id.* § 353-a.

¹³⁸ *Id.* § 351.

outdoors;¹³⁹ tattooing or piercing a companion animal;¹⁴⁰ abandoning animals;¹⁴¹ failing to provide proper food and drink to impounded animals;¹⁴² carrying or transporting animals in a cruel manner;¹⁴³ poisoning or attempting to poison animals;¹⁴⁴ interfering with or injuring an animal used for racing or breeding;¹⁴⁵ and throwing injurious substances in public places that could injure animals.¹⁴⁶

As with other states, conduct in specified circumstances is exempt from the anti-cruelty to animals provisions. In particular, conduct that relates to scientific testing and research involving the use of living animals is not encompassed within the prohibition on torturing and injuring animals.¹⁴⁷ Further, hunting, trapping and fishing, dispatch of animals that are diseased or are a threat to human safety are exempt from the prohibition on aggravated cruelty to companion animals.¹⁴⁸

vi. Illinois

In Illinois, the Humane Care for Animals Act is the primary piece of legislation prohibiting animal cruelty.¹⁴⁹ Notwithstanding that the Act does not contain a “purpose” statement, its application is considered by the courts to be “clear—that being to prevent injury or death to companion animals.”¹⁵⁰

The Act prohibits a wide range of conduct relating to animals, including beating, cruelly treating, tormenting, starving, and overworking or otherwise abusing any animal.¹⁵¹ The Act also prohibits aggravated cruelty to companion animals,¹⁵² torturing animals,¹⁵³

¹³⁹ *Id.* § 353-b.

¹⁴⁰ *Id.* § 353-f.

¹⁴¹ *Id.* § 355.

¹⁴² *Id.* § 356.

¹⁴³ *Id.* §§ 359, 359-a (extending the protection to the transportation of horses).

¹⁴⁴ *Id.* § 360.

¹⁴⁵ *Id.* § 361.

¹⁴⁶ *Id.* § 362.

¹⁴⁷ *Id.* § 353.

¹⁴⁸ *Id.* § 353-a(2).

¹⁴⁹ 510 ILL. COMP. STAT. 70/3.01 (2019).

¹⁵⁰ *People v. Larson*, 885 N.E.2d 363, 372 (Ill. App. Ct. 2008).

¹⁵¹ 510 ILL. COMP. STAT. 70/3.01(a).

¹⁵² *Id.* § 70/3.02(a).

¹⁵³ *Id.* § 70/3.03.

depicting animal cruelty,¹⁵⁴ poisoning animals,¹⁵⁵ confining animals in motor vehicles,¹⁵⁶ and animal fighting.¹⁵⁷ Further, the Act also imposes positive obligations on the owners of animals to provide adequate living conditions.¹⁵⁸

While the Act defines an animal as “every living creature, domestic or wild,” excluding humans,¹⁵⁹ a wide range of conduct is exempted from the legislative prohibitions. In particular, animal torture is defined such that it does not apply to activities “lawfully done to an animal.”¹⁶⁰ These include death, harm, or injury caused by hunting, fishing or trapping; alteration or destruction of an animal pursuant to law by a government representative or veterinarian; and any alteration or destruction of an animal for a legitimate purpose, which includes castration, culling, declawing, ear cropping, gelding, neutering, slaughtering, tail docking, and vivisection.¹⁶¹ Further, the Act’s provisions do not proscribe “normal, good husbandry practices” or practices related to the production of livestock for food.¹⁶² Moreover, while government investigators are authorized to enter private property in order to investigate allegations of animal cruelty, they are not authorized to enter institutions operating under federal licenses that conduct research experiments using animals.¹⁶³

vii. Summary of the Purposes, Obligations and Offenses in Animal Protection Laws

The five states discussed above each have detailed laws against animal cruelty, which have been in operation since before the enactment of the PACT Act. The legislation in each state tends to focus on acts or omissions which cause pain and suffering to

¹⁵⁴ *Id.* § 70/3.03-1.

¹⁵⁵ *Id.* § 70/6.

¹⁵⁶ *Id.* § 70/7.1.

¹⁵⁷ *Id.* § 70/4.01; 720 ILL. COMP. STAT. 5/48-1, 5/33G-3(e)(1) (2019) (defining dog fighting as a chargeable as a Class 2 felony).

¹⁵⁸ 510 ILL. COMP. STAT. 70/3(a).

¹⁵⁹ *Id.* § 70/2.01.

¹⁶⁰ *Id.* § 70/3.03(b)(4).

¹⁶¹ *Id.* § 3.03(b)(1)–(3).

¹⁶² *Id.* § 70/13; *see also* 720 ILL. COMP. STAT. 5/12-35(g) (excluding from the prohibition of sexual conduct with an animal any act constituting accepted animal husbandry).

¹⁶³ 510 ILL. COMP. STAT. 70/10(a).

animals. Indeed, in most jurisdictions, the purpose of the legislation is to minimize the unnecessary pain and suffering experienced by animals. In this respect, the legislation implicitly accepts that animals are sentient creatures.

Yet although acceptance that animals are sentient is inherent within animal protection legislation, many animals are excluded from legal protection. The legal definition of “animal” varies between states. Some states differentiate between “companion animals,”¹⁶⁴ “non-livestock animals,”¹⁶⁵ and animals which are wild or are livestock. Animals receive varying levels of protection depending on which category they fall within. Further, many animals are excluded from protection entirely. For example, in most jurisdictions, it appears to be acceptable to cause animals pain and suffering if it is done in the pursuit of sports such as hunting or fishing, in relation to scientific or research experiments, or as part of animal husbandry practices or other accepted agricultural practices. In this respect, most jurisdictions exclude farm animals from protection — according to the Humane Society of the U.S., only sixteen states out of fifty-two have laws providing protection for farm animals.¹⁶⁶ It should be noted that these exclusions are not made because the animals in question feel less pain or suffer less; it is scientifically accepted that most animals are sentient,¹⁶⁷ and the animals in question here are not those whose sentience is in doubt. Rather, the animals are not protected because it is perceived that humans have something to gain from the activities in question, and pursuant to the laws, any kind of human interest trumps the interest that animals have in not being subjected to pain or suffering.

2. Overview of Animal Protection Practice

This section of the Article will examine the ways in which the animal protection laws discussed above have been used in practice,

¹⁶⁴ N.Y. AGRIC. & MKTS. LAW § 353-a(1) (McKinney 2020).

¹⁶⁵ See TEX. PENAL CODE ANN. § 42.092(a)(2) (West 2019).

¹⁶⁶ HUMANE SOC’Y OF THE U.S., HUMANE STATE RANKING 2018 (ALABAMA THROUGH MISSOURI) 2 (2018), <https://blog.humanesociety.org/wp-content/uploads/2018/12/State-Rank-2018-AL-MO-1.pdf> [<https://perma.cc/KPK3-JFEA>]; HUMANE SOC’Y OF THE U.S., HUMANE STATE RANKING 2018 (MONTANA THROUGH WYOMING) 2 (2018), <https://blog.humanesociety.org/wp-content/uploads/2018/12/State-Rank-2018-MT-WY-1.pdf> [<https://perma.cc/2RMD-SFNP>].

¹⁶⁷ See *infra* Part IV(B)(2) (discussing scientific research showing animals’ ability to feel pain and to suffer).

at a federal level, and also in each of the five states. The focus is on the ways that animals are, and are not, protected by the relevant laws. In particular, this Article is interested in whether the laws operate in practice to discriminate against particular animals on the basis of their species or other status.

i. Federal

Unsurprisingly, despite the existence of some federal legal protection to prevent animals from being treated cruelly, the existing laws are not sufficient to prevent harm to all animals. While the PACT Act introduced a federal ban on animal cruelty, exemptions still apply to certain bodies and industries.¹⁶⁸ In any event, it is too early to analyze any prosecutions under this new law, and this discussion will focus on other federal laws such as the AWA, the Twenty-Eight Hour Law, and the HSMA.

The AWA covers only about 5- to 10% of laboratory animals because it defines “animal” to exclude rats and mice bred for research,¹⁶⁹ and rats and mice reportedly constitute 90 to 95% of animals used in research in the U.S.¹⁷⁰ This legislation also does not apply to farm animals,¹⁷¹ of which more than nine billion are slaughtered annually in the country.¹⁷² Further, while criminal sanctions are available under the AWA, they are seldom used.¹⁷³

Prior to 1998, an observer of alleged mistreatment of animals in research or exhibitions could not establish standing to sue under the AWA. This changed in the seminal case of *Animal Legal Defense Fund, Inc. v. Glickman*,¹⁷⁴ in which the Court of Appeals in the D.C. Circuit recognized that a plaintiff could experience aesthetic injury by observing primates living in inhumane conditions

¹⁶⁸ See discussion *supra* Part II(B)(1)(i) (discussing overview of federal animal protection law and practice in the U.S.).

¹⁶⁹ AWA, 7 U.S.C. § 2132(g)(1) (2020).

¹⁷⁰ Henry Cohen, *The Animal Welfare Act*, 2 J. ANIMAL L. 13, 13 (2006); see also AWA, 7 U.S.C. § 2132(g).

¹⁷¹ AWA § 2132(g)(3).

¹⁷² Cohen, *supra* note 170, at 13.

¹⁷³ AWA § 2149(d); see David Favre, *Overview of U.S. Animal Welfare Act*, ANIMAL LEGAL & HIST. CTR. (2002), <https://www.animallaw.info/article/overview-us-animal-welfare-act> [<https://perma.cc/8H8Q-UC7L>].

¹⁷⁴ 154 F.3d 426, 431–32 (D.C. Cir. 1998).

in animal exhibitions, thereby establishing standing.¹⁷⁵ However, standing only gets a lawsuit through the metaphorical and literal doors of a court. The argument this Article has pursued from the beginning of this section — that the exemptions under the AWA render its application too narrow to be properly effective in preventing animal abuse — remains unaffected by the expansion of standing.

The Twenty-Eight Hour Law also has obvious limitations. First, it does not apply if the vehicle in which animals are being transported already contains access to food or water.¹⁷⁶ Birds such as chickens and turkeys, which are the most-farmed animals in the U.S., are also considered exempt.¹⁷⁷ Further, the enforcement of this law has been less than stringent. The USDA, which is tasked with implementing the Twenty-Eight Hour Law, has not developed any systematic monitoring program to oversee the transportation of animals, despite efforts by humane organizations.¹⁷⁸ Accordingly, in practice, the law relating to the transportation of animals in the U.S. is entirely ineffective.

Similarly, the protections provided under the HMSA suffer from significant limitations. First, like the Twenty-Eight Hour Law, the HMSA protections do not extend to chickens, turkeys, and other birds.¹⁷⁹ Second, the way in which the HMSA is enforced is also often criticized as being inconsistent by government inspectors.¹⁸⁰ Although federal suspensions under HMSA increased in 2008, after the release of a video recording inhumane handling of animals in a beef facility resulted in the largest beef recall in U.S. history, the number of suspensions gradually decreased until

¹⁷⁵ See *Mountain States Legal Fund v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) (held that “[f]or each claim, if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim.”).

¹⁷⁶ Twenty-Eight Hour Law, 49 U.S.C. § 80502(e) (2020).

¹⁷⁷ *Laws that Protect Animals*, *supra* note 26.

¹⁷⁸ ANIMAL WELFARE INST., LEGAL PROTECTIONS FOR FARM ANIMALS DURING TRANSPORT 3, <https://awionline.org/sites/default/files/uploads/legacy-uploads/documents/FA-LegalProtectionsDuringTransport-081910-1282577406-document-23621.pdf> [<https://perma.cc/CB58-P7ZQ>].

¹⁷⁹ See HMSA, 7 U.S.C. § 1902(a) (2020). All “livestock” are rendered insensible to pain so long as method of slaughtering or handling is rapid and effective.

¹⁸⁰ *Laws That Protect Animals*, *supra* note 26.

2013.¹⁸¹ Third, in terms of means of enforcement, in theory shutting down a plant should provide a strong disincentive to future offences.¹⁸² However, this is not necessarily the case, particularly for large plants, which are often suspended for less than a day.¹⁸³ While criminal prosecutions are likely to serve as an effective deterrent for egregious conduct, reports by the USDA Food Safety and Inspection Service show that since at least 2007, the USDA has not initiated any civil or criminal proceedings for inhumane slaughter of animals against licensed plants.¹⁸⁴ Rather, the USDA has only taken action against illegal establishments (i.e., “back-yard” operations).¹⁸⁵ Overall, it appears that enforcing the HMSA is a relatively low priority within the USDA.¹⁸⁶

ii. California

As explained above, “animal,” for the purposes of animal cruelty legislation in California, means “every dumb creature.”¹⁸⁷ Californian courts have construed the phrase “dumb creatures” to encompass all animals except human beings. For example, in *People v. Baniqued*, the court found that roosters and other birds are plainly included in the phrase “dumb creatures.”¹⁸⁸

iii. Texas

An animal, for the purposes of Texas animal cruelty laws, is defined as “a domesticated living creature, including any stray or feral cat or dog, and a wild living creature previously captured. The term does not include an uncaptured wild living creature or a livestock animal.”¹⁸⁹ As discussed above, there are specific provisions prohibiting acts of cruelty to both livestock and non-livestock

¹⁸¹ See ANIMAL WELFARE INST., HUMANE SLAUGHTER UPDATE: FEDERAL AND STATE OVERSIGHT OF THE WELFARE OF FARM ANIMALS AT SLAUGHTER 6 (2017), <https://awionline.org/sites/default/files/products/FA-HumaneSlaughterReport-2017.pdf> [<https://perma.cc/VLJ2-3E4Y>].

¹⁸² *Id.* at 8.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 9.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ CAL. PENAL CODE § 599b (West 2020).

¹⁸⁸ 85 Cal. App. 4th 13, 20 (Cal. Ct. App. 2000).

¹⁸⁹ TEX. PENAL CODE ANN. § 42.092(a)(2) (West 2019).

animals.¹⁹⁰ In this respect, there have been many successful prosecutions in Texas under the sections prohibiting cruelty to both livestock and non-livestock animals. Courts have determined that the animal cruelty laws in Texas apply to a range of different animals, including dogs,¹⁹¹ cats,¹⁹² goats,¹⁹³ and cows.¹⁹⁴

While animal cruelty laws seem to apply to many different species of domesticated animals, the application of this law in Texas is confined by its narrow statutory definition of an animal as being a “domesticated living creature” or any “wild living creature previously captured.”¹⁹⁵ This means that the law does not provide any protection for animals over which no one has custody, such as wild or stray animals. This aspect of the Texas animal protection laws has often been criticized, particularly in light of a 2002 court case in Waco, Texas, in which the defendants shot a homeless cat (which had been named Queso and cared for by employees

¹⁹⁰ See *supra* Part II(B)(1)(iii) (discussing overview of Texas legislation regarding purposes, obligations, and offenses in animal protection laws).

¹⁹¹ See, e.g., *Justice v. State*, 532 S.W.3d 862, 865–66 (Tex. Ct. App. 2017) (upholding a felony conviction for cruelty to a puppy); *Mouton v. State*, 513 S.W.3d 679, 683 (Tex. Ct. App. 2016) (affirming conviction under Tex. Penal Code § 42.092 for cruelty to dogs when they were found in bad health and living in unsuitable conditions); *Swilley v. State*, 465 S.W.3d 789, 797 (Tex. Ct. App. 2015) (upholding felony offense conviction under Texas Penal Code § 42.092 for cruelty to a dog by shooting it with a crossbow).

¹⁹² See, e.g., *Dixon v. State*, 455 S.W.3d 669, 678–79 (Tex. Ct. App. 2014) (upholding conviction for cruelty to non-livestock animal for failing to provide adequate living conditions at a cat sanctuary); *Celinski v. State*, 911 S.W.2d 177, 180–81 (Tex. Ct. App. 1995) (upholding conviction for cruelty to animals by poisoning and microwaving cats).

¹⁹³ See, e.g., *Qaddura v. State*, No. 2-05-361-CR, 2007 Tex. App. LEXIS 1493 (Tex. Ct. App. Mar. 1, 2007). In this case, the defendant was charged with the offense of cruelty to animals for failing to provide necessary food for one or more goats in his custody, abandoning the goat(s), and confining the goat(s) in a cruel manner. *Id.* at *1–2. The defendant had arranged for his tenant to feed and water the animals while he was away from his home for more than a month. *Id.* at *6. However, the only thing the defendant left his tenant to feed the animals was moldy hay. *Id.* When a grain delivery was attempted, no one was present to receive the grain, so the truck driver left without delivering the grain. *Id.* It was discovered that the water troughs contained little, if any, water. *Id.* at *7. The defendant was found guilty under § 42.09 (cruelty to livestock animals) and his conviction was affirmed on appeal. *Id.* at *9.

¹⁹⁴ See, e.g., *Westfall v. State*, 10 S.W.3d 85, 91 (Tex. Ct. App. 1999). The defendant in *Westfall* was found guilty of animal cruelty to their cattle when they failed to adequately provide sustenance and care for the cattle, resulting in death, emaciation, and malnourishment of the cows. *Id.* at 93.

¹⁹⁵ TEX. PENAL CODE ANN. § 42.092(a)(2) (West 2019).

of a restaurant nearby where it spent time) with a pellet gun, struck the cat with a golf club, decapitated it, and skinned its head.¹⁹⁶ One defendant was found not guilty of any misdemeanor animal cruelty offense, and charges against the other defendant were dropped, since the evidence against him was the same and was held to be insufficient to uphold a claim.¹⁹⁷ The court held that the cat was not protected under the law because it had not been captured or domesticated.¹⁹⁸

It is highly problematic that the application of animal protection laws in Texas depends on the use humans ascribe to animals because this is not reflective of any difference in animal sentience. For example, cats are the subject of both the Waco case and the case of *Celinski v. State*.¹⁹⁹ In *Celinski*, the defendant, who tortured pet cats by poisoning and burning them in a microwave oven, was found guilty of the misdemeanor animal cruelty offense.²⁰⁰ Both cases involved inhumane and cruel treatment of cats, yet the cats in *Celinski v. State* are protected under the law, while the cat in the Waco case was not protected only because it was a stray and not domesticated. This legal situation implies that an animal's value and its rights are determined entirely by human ownership, which is not in keeping with the purposes of animal protection legislation to prevent animal pain and suffering. The discrimination between domesticated and wild animals, expressly stated in the statutory definition of "animal," is insufficient to fully protect animals against abuse under state law in Texas.

¹⁹⁶ See generally Brandi Dean, *Opening Statements, First Witnesses Mark Start of Trial for Derek Brehm*, BAYLOR U. LARIAT ARCHIVES (Mar. 19, 2002), <https://www.baylor.edu/lariatarchives/news.php?action=story&story=17753> [<https://perma.cc/VD77-2HTN>]; Stephen Dove, *Jury Finds Baseball Player 'Not Guilty' of Cruelty to Animals*, BAYLOR U. LARIAT ARCHIVES (Mar. 20, 2002), <https://www.baylor.edu/lariatarchives/news.php?action=story&story=17759> [<https://perma.cc/Z2Q7-ALQL>].

¹⁹⁷ See Dylan Forest, *Hangin' Judge Roy Bean "Justice" Prevails in Texas for Feral Cats*, ANIMAL PEOPLE (May 1, 2002), <https://newspaper.animalpeopleforum.org/2002/05/01/hangin-judge-roy-bean-justice-prevails-in-texas-for-feral-cats/> [<https://perma.cc/4WSA-5S4L>].

¹⁹⁸ See Gianna M. Ravenscroft, *Overview of Texas Animal Cruelty Laws*, ANIMAL LEGAL & HIST. CTR. (2002), <https://www.animallaw.info/article/overview-texas-animal-cruelty-laws> [<https://perma.cc/NDU8-7X29>].

¹⁹⁹ 911 S.W.2d 177 (Tex. Ct. App. 1995).

²⁰⁰ *Id.* at 181.

iv. Florida

Animal protection laws in Florida define “animal” as “every living dumb creature,”²⁰¹ which is almost identical to the definition of “animal” as “every dumb creature” in the California Penal Code. Unlike states that have offenses of aggravated animal cruelty only against pets or “companion animals” (for example, New York, which is discussed later in this section), one can be convicted of felony cruelty to any animal in Florida.

In *Bartlett v. State*, for example, the appellate court affirmed a conviction for felony cruelty to animals where the defendant shot an opossum countless times with a BB gun and the animal had to be euthanized as a result.²⁰² The court did comment, however, that the felony cruelty offenses under section 828.12 create a “potential tension” between criminal conduct and lawful hunting, and observed that “[t]his fuzziness could be corrected by amending the criminal statute to require that the actor intend to cause the results that the statute seeks to avoid — a cruel death or unnecessary pain or suffering.”²⁰³ Courts have also held that “the statutory scheme [regarding animal cruelty] is clear ... [if a] person intentionally commits an act which results in a cruel death or in excessive or repeated pain or suffering, a felony is committed.”²⁰⁴

These statements highlight the way in which exemptions operate in Florida. While animal protection laws purport to prevent acts that cause pain or suffering to animals, they are undermined by exemptions that prioritize human interests. Here, the desire of humans to hunt animals is prioritized over the pain or suffering that animals may experience as a result.

v. New York

In New York, “animal” is defined in the Agriculture and Markets Law as “every living creature except a human being.”²⁰⁵ A person is guilty of aggravated cruelty to animals when “with no

²⁰¹ FLA. STAT. ANN. § 828.02 (West 2019).

²⁰² 929 So. 2d 1125, 1125–26 (Fla. Dist. Ct. App. 2006).

²⁰³ *Id.* at 1126; see also William Scott Bartlett, *Appellant, v. State of Florida, Appellee*, ANIMAL LEGAL & HIST. CTR. (2020), <https://www.animal-law.info/case/bartlett-v-state> [<https://perma.cc/YBU6-HWDV>].

²⁰⁴ *Hynes v. State*, 1 So. 3d 328, 330–31 (Fla. Dist. Ct. App. 2009).

²⁰⁵ N.Y. AGRIC. & MKTS. LAW § 350(1) (McKinney 2020).

justifiable purpose, he or she intentionally kills or intentionally causes serious physical injury to a companion animal with aggravated cruelty.”²⁰⁶ A companion animal under the statute is “any dog or cat,” as well as “any other domesticated animal normally maintained in or near the household of the owner or person who cares for such other domesticated animal,” but does not include certain farm animals.²⁰⁷

New York appears to be relatively broad when construing its definition of “companion animal;” courts have expanded the definition to include fish and reptiles, animals which are excluded in equivalent laws in other states. In *People v. Garcia*, the defendant stomped to death a pet goldfish, and was convicted of aggravated animal cruelty, among other crimes.²⁰⁸ The trial court held that the pet goldfish was a “companion animal” within the meaning of the statute because a companion animal “need only be cared for and maintained in or near the household of its human owner.”²⁰⁹ In this case, among other things, the fish in the tank all had names, the fish tank was regularly cleaned, and the owner of the fish reacted to the defendant’s actions (smashing the tank against a wall) by hurriedly fetching a new bowl of water for the fish.²¹⁰ On appeal, the defendant argued that a fish is not a companion animal; the appellate court rejected his argument and upheld the trial court’s decision.²¹¹ This broad approach to the definition of “companion animal” was further applied in *People v. Lohnes*,²¹² in which the court stated that a horse (which the defendant had stabbed to death) could be considered a “companion animal” for the purpose of aggravated animal cruelty legislation when it is “normally maintained in or near the household of the owner or person who cares for [it].”²¹³ Horses are considered farm animals and thus not companion animals when they are “raised for commercial or subsistence purposes.”²¹⁴

²⁰⁶ *Id.* § 353-a(1).

²⁰⁷ *Id.* § 350(5).

²⁰⁸ 777 N.Y.S.2d 846, 847 (N.Y. Sup. Ct. 2004).

²⁰⁹ *Id.* at 851.

²¹⁰ *Id.*

²¹¹ *People v. Garcia*, 812 N.Y.S.2d 66, 70, 73 (App. Div. 2006).

²¹² 976 N.Y.S.2d 719, 719–721 (App. Div. 2013).

²¹³ *Id.* at 721 (internal quotations omitted).

²¹⁴ *Id.* internal quotations omitted.

As observed, the courts in New York tend to be more liberal in defining what a “companion animal” is, and this broadens the operation of the aggravated cruelty to animal offenses. In spite of this, the inherent issue with New York animal laws, with respect to the sentience of animals, still exists: the protection of animals is determined by human categorization or use of the animals.²¹⁵ In the context of animal cruelty offenses, to focus on human actions in relation to animals is to disregard the capacity of animals to experience pain and suffering. The legal demarcation between companion animals and non-companion animals in New York is perhaps explained by the legislative intent of its animal protection laws, which is to recognize the connection between animal abuse and violence towards humans: “[t]he connection between animal abusers and violence towards humans shows that virtually every serial killer had a history of abusing animals before turning their attention to people.”²¹⁶ This purpose is anomalous in the context of animal protection laws across the U.S., which are generally directed towards the protection of animals. While it is valid to recognize the connection between animal abuse and violence toward humans, it is a rather problematic starting point for animal protection laws. Such laws should primarily protect animals, not humans, as there are many other laws which achieve that purpose. Further, animal protection laws should not afford protection to only specific species of animals, which are considered protected under the law by reference to the value that humans assign to them.

vi. Illinois

The Illinois Humane Care for Animals Act defines “Animal” as “every living creature, domestic or wild, but does not include man.”²¹⁷ In assessing the Act, an Illinois court has recognized that “the evil the statute intends to prevent, *i.e.*, the intentional killing or injuring of companion animals.”²¹⁸ “Companion animal” is

²¹⁵ See, e.g., *Garcia*, 777 N.Y.S.2d at 849 (examining N.Y. AGRIC. & MKTS. LAW § 353-a).

²¹⁶ N.Y. STATE ASSEMB., DEP’T OF AGRIC. & MKTS. – AGGRAVATED CRUELTY TO ANIMALS, MEMORANDUM IN SUPPORT, 222d Sess., at 1585 (1999).

²¹⁷ 510 ILL. COMP. STAT. 70/2.01 (West 2019).

²¹⁸ *People v. Larson*, 885 N.E.2d 363, 372 (Ill. App. Ct. 2008). In this case, the defendant shot and killed the family dog, the court held that “a person of ordinary intelligence would reasonably know that, absent an affirmative defense, she or he

defined as “an animal that is commonly considered to be, or is considered by the owner to be, a pet ... [it] includes, but is not limited to, canines, felines, and equines,”²¹⁹ and cats,²²⁰ horses,²²¹ and dogs.²²²

The courts have also compared cruelty to animals to cruelty to humans. In *People v. Robards*, the defendant appealed her conviction for two counts of aggravated animal cruelty under the Humane Care for Animals Act after her two dogs were discovered dead in her previous home, emaciated, and dehydrated.²²³ The defendant was sentenced to twelve months’ probation. On appeal, the defendant argued that the prosecutor failed to prove that she intended to cause serious injury or death to the dogs. The appellate court rejected her argument and held that, for conviction, it is only necessary that the act itself was intentional and it caused the death or serious injury of an animal. The court further stated that the defendant was “very fortunate to have only received a sentence of 12 months’ probation for these heinous crimes,” and criticized the lower court for its “unjustly and inexplicably lenient” sentence, simply because the defendant caused harm to an animal and not to a human being:

Harm to a human being is neither an element of the offense nor a statutory aggravating factor. Thus, it makes no sense to consider the absence of harm to a human being as a mitigating factor in cases involving aggravated cruelty to a companion animal. In arguing for mitigation on this ground, a convicted defendant is essentially saying, ‘Yes, I abused and killed a dog, but at least I didn’t abuse and kill the owner too.’ While such restraint should be applauded, it does not support a reduced sentence for aggravated cruelty to a companion animal. In this case, the defendant abandoned her dogs and left them alone to die. There can be no

may not simply grab a firearm, take the family dog outside, and shoot the dog in the head three times so as to kill it.” *Id.*

²¹⁹ 510 ILL. COMP. STAT. 70/2.01a.

²²⁰ See *People v. Curtis*, 944 N.E.2d 806, 806–16 (Ill. App. Ct. 2011). In this case, the court noted that the defendant was not permitted to own companion animals after it was found that she failed to provide humane care and treatment to one of her cats that required medical care. *Id.* at 811.

²²¹ See *People v. Lee*, 41 N.E.3d 994, 994–1006 (Ill. App. Ct. 2015).

²²² See *People v. Robards*, 97 N.E.3d 600, 600–05 (Ill. App. Ct. 2018); see also *People v. Land*, 955 N.E.2d 538, 538–61 (Ill. App. Ct. 2011); *Larson*, 885 N.E.2d at 363–76.

²²³ 97 N.E.3d at 601.

doubt that the defendant's acts caused serious physical harm and death to two sentient creatures that suffered greatly from terminal starvation and dehydration, which the defendant callously inflicted on them.²²⁴

The comments from this court in Illinois reflect the legislative intent of the Humane Care for Animals Act. In this way, the laws in Illinois focus more on the subject of the legislation (animals), rather than on humans, unlike the laws in New York. The law in Illinois recognizes that companion animals deserve to be protected against cruel treatment in their own right, not because of the correlation between violent behavior towards animals and violent offending against humans.

While this attitude towards enforcing animal protection laws has obviously resulted in extensive animal protection provisions, which has in turn secured Illinois the top spot in the Rankings Report,²²⁵ the issue not addressed by the Illinois legislature is that many of the protections available under the Humane Care for Animals Act only apply to "companion animals." As this Article has argued above, any law that draws a distinction between animals that are capable of feeling pain,²²⁶ and that invertebrates, such as eels and crustaceans, may also have the capacity to experience pain.²²⁷

²²⁴ *Id.* at 604–05.

²²⁵ *Animal Protection Laws State Rankings*, *supra* note 29.

²²⁶ See, e.g., Lynne U. Sneedon, *Evolution of Nociception and Pain: Evidence from Fish Models*, PHIL. TRANSACTIONS ROYAL SOC'Y B 1, 1 (2019) (concluding that it is highly likely that fish experience pain); K.P. Chandroo et al., *Can Fish Suffer?: Perspectives on Sentience, Pain, Fear and Stress*, 86 APPLIED ANIMAL BEHAV. SCI. 225, 225 (2004) (suggesting fish can experience affective states of pain, fear, and stress); VICTORIA BRAITHWAITE, *DO FISH FEEL PAIN?* 183 (2010) (concluding that fish feel pain).

²²⁷ See, e.g., E. Lambooi et al., *Welfare Aspects of Live Chilling and Freezing of Farmed Eel (*Anguilla Anguilla L.*): Neurological and Behavioural Assessment*, 210 AQUACULTURE 159, 166 (2002) (observing responses to pain stimuli in eels); see G. Fiorito, *Is There "Pain" in Invertebrates?*, 12 BEHAV. PROCESSES 383, 386 (1986) (concluding that invertebrates possess a pain system); see also Stuart Barr et al., *Nociception or Pain in a Decapod Crustacean?*, 75 ANIMAL BEHAV. 745, 749–50 (2008) (asserting that prolonged rubbing and grooming are consistent with the idea of pain in crustaceans).

vii. Summary of Animal Protection Practice

The above discussion has considered the application of animal cruelty laws to different animal species in various jurisdictions, and in doing so, has highlighted particular judicial rulings and comments. A common theme that emerges from this analysis is that courts have taken a liberal approach to defining the term “animals,” insofar as it relates to the protection of animals under legislation. While legislatures in certain states have demarcated between animals to be protected under the law and animals which are not afforded the same legal protection,²²⁸ there appears to be a willingness by the courts to recognize the sentience of most, if not all, animals.²²⁹ Further, while some of these laws offer varying degrees of protection to different “classes” of animals (for example, “companion” or “non-livestock” animals seem to be better protected under law when compared to the kind of protection that is available to “livestock” animals), courts are prepared to extend the definition of “animal” under animal protection laws beyond the “usual” companion animals or pets such as dogs and cats, to animals such as opossums, roosters, and goldfish.

It is also apparent from the above discussion that legislative discrimination between animals on the basis of species membership has an enormous impact in operation. This is best illustrated by reference to the federal jurisdiction. While the AWA prohibits the cruel treatment of animals used in research, it excludes rats and mice, bred for the use in research, from this protection.²³⁰ In practice, rats and mice constitute the vast majority of animals used for research, and thus the anti-cruelty provisions have a very limited impact on the overall treatment of animals used in scientific and research experiments. Similarly, while chickens and turkeys are the most-farmed animals in the U.S., they are excluded from the protections provided by the Twenty-Eight Hour Law and the HMSA.²³¹ Thus, the protections provided by these laws actually

²²⁸ See *supra* Section I(B)(1)(iv).

²²⁹ See, e.g., *Bueckner v. Hamel*, 886 S.W.2d 368, 378 (Tex. Ct. App. 1994).

²³⁰ AWA, 7 U.S.C. § 2132(g) (2018).

²³¹ *Laws that Protect Animals*, *supra* note 26; see HSMA, 7 U.S.C. § 1902 (2018). The statute does not address chickens and turkeys. *Id.*; see also Twenty-Eight Hour Law, 49 U.S.C. § 80502 (2018). The statute generally addresses animals, but does specifically indicate which are protected. *Id.*

have a limited scope of operation in relation to the overall picture of farm animal welfare.

Overall, it appears that the inherent discrimination between animal species, which results in an inequality of status and protection among species of animals under the law, is perpetuated by the very laws that are designed to protect them. This is problematic because it sends a message to the communities in which those laws operate that not all animals are to be treated equally; that while animals are sentient, the ways in which they are protected are dependent not on their sentience, but on the use that humans ascribe to them. This approach further encourages people to view animals as valuable only in respect of the ends to which humans can put them, rather than as inherently valuable in themselves.

III. THE EQUALITY PRINCIPLE

A. Equality in International Human Rights Law

One of the core principles of international human rights law is equality. The principle of equality is embedded in all the documents making up the international bill of rights: the UDHR, the ICCPR, and the ICESCR. The UDHR identifies the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of world freedom, justice and peace.”²³² Article 1 repeats the assertion that “[a]ll human beings are born free and equal,”²³³ while article 7 provides that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.”²³⁴ Similarly, the preambles of the ICCPR and ICESCR each recognize the “inherent dignity and ... equal and inalienable rights” of human beings.²³⁵ Like article 7 of the UDHR, article 26 of the ICCPR provides for equality before the law and equal protection of the law.²³⁶ Thus, the equality principle is expressed in treaty law, inter alia, as a recognition that human beings are equal in value, a requirement that rights must be enjoyed without discrimination, together with

²³² UDHR, *supra* note 10, Preamble.

²³³ *Id.* at art. 1.

²³⁴ *Id.* at art. 7.

²³⁵ ICCPR, *supra* note 10, at 1; ICESCR, *supra* note 10, at 1.

²³⁶ ICCPR, *supra* note 10, at art. 26.

an independent and generally applicable right to equality before the law, and equal protection of the law.²³⁷

The principle of equality is also prominent in other key human rights treaties. It is reflected in treaties including the Convention on the Rights of the Child,²³⁸ the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,²³⁹ and the Convention on the Rights of Persons with Disabilities.²⁴⁰ Further, two United Nations (“UN”) human rights treaties were established explicitly to prohibit discrimination, being the International Convention on the Elimination of All Forms of Racial Discrimination²⁴¹ and the Convention on the Elimination of All Forms of Discrimination against Women.²⁴² In all of these treaties, UN Members have proclaimed that every person is equally entitled to all of the rights and freedoms set out in these covenants, and are committed to ensure that the rights are to be enjoyed without discrimination or inhibition.

It is unsurprising then, that equality is one of the central principles underpinning any human rights based approach to a particular issue.²⁴³ In this respect, the UN Human Rights Committee has stated that “[n]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”²⁴⁴ Thus, where a human rights based approach is taken in a particular context, the principle of equality and non-

²³⁷ JOHN TOBIN, *Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations*, in THE HUMAN RIGHTS OF CHILDREN 61, 70 (Antonella Invernizzi & Jane Williams eds., 2011).

²³⁸ Convention on the Rights of the Child, art. 2, ¶ 1, Nov. 20, 1989, 1577 U.N.T.S. 46.

²³⁹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art. 7, Dec. 18, 1990, 2220 U.N.T.S. 97.

²⁴⁰ Convention on the Rights of Persons with Disabilities, art. 5, ¶ 1, Dec. 13, 2006, 2515 U.N.T.S. 75.

²⁴¹ International Convention on the Elimination of All Forms of Racial Discrimination, art. 2, ¶ 1, Dec. 21, 1965, 660 U.N.T.S. 195.

²⁴² Convention on the Elimination of All Forms of Discrimination against Women, art. 2, Dec. 18, 1979, 1249 U.N.T.S. 13.

²⁴³ TOBIN, *supra* note 237, at 70.

²⁴⁴ United Nations Human Rights Comm., Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *General Comment No. 18: Non-Discrimination (Thirty-seventh session, 1989)*, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.1 at 1 (1994) [hereinafter *General Comment 18*].

discrimination must be employed, together with the other general express principles of a human rights-based approach – accountability and participation.²⁴⁵

In the following sections, this Article outlines the substantive content of the obligations that flow from the principle of equality: the non-discrimination requirement and the right to equal treatment before the law and equal protection of the law. In providing this overview, the Article will focus on the requirements of the UDHR and ICCPR, which generally illustrate what equality and non-discrimination encompass, and how they have been applied in case law.

B. Substantive Content of the Non-Discrimination Requirement

Article 1 of the UDHR provides “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”²⁴⁶ Article 2 provides a general statement of equality as follows: “[e]veryone is entitled to all the rights and freedoms set forth in [the UDHR], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁴⁷ This statement is echoed in Article 2 of the ICCPR: “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁴⁸ This declaration is complemented by more specific protections set out later in the ICCPR. For example, article 3 stresses the importance of non-discrimination between men and women, article 23(4) requires state parties to take adequate steps to ensure equality of rights and responsibilities of spouses as to marriage (during marriage and at its dissolution), and article 24 prohibits any

²⁴⁵ See TOBIN, *supra* note 237, at 61–62.

²⁴⁶ UDHR, *supra* note 10, art. 1.

²⁴⁷ *Id.* at art. 2.

²⁴⁸ ICCPR, *supra* note 10, at art. 2.

discrimination against children based on race, color, sex, language, religion, national or social origin, property, or birth.²⁴⁹

The non-discrimination obligation essentially requires that people not be treated unfavorably in respect of their rights on the basis of a distinction that is irrelevant or unreasonable in the particular context, when compared to how others would be treated. For example, prohibiting the torture and inhumane treatment of all people except for African Americans would constitute unlawful discrimination against African Americans on the basis of race.²⁵⁰ In certain circumstances, however, the principle of equality can require a state to take affirmative action in order to reduce or eliminate conditions that cause or help to perpetuate discrimination. Where, for example, a particular population is subject to generational poverty, it may be appropriate to grant members of the population certain preferential treatment in particular matters when compared with the rest of the population. Such treatment constitutes “legitimate differentiation.”²⁵¹

Thus, under international human rights law, not every difference or distinction in treatment will automatically amount to unlawful discrimination. In *Broeks v. The Netherlands*,²⁵² the Human Rights Committee (“HRC”) held that “[a] differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.”²⁵³ Thus, generally, under international law, the principle of discrimination is violated where identical or equal cases are treated differently, there is no objective or reasonable justification for this difference in treatment, and the means are not proportionate to the objective to be achieved.²⁵⁴

²⁴⁹ *Id.* at art. 3, 23(4), 24.

²⁵⁰ Note that “age” would come within the parameter of “other status” here.

²⁵¹ *General Comment 18*, *supra* note 244, ¶ 10.

²⁵² Communication No. 172/1984, U.N. Doc. CCPR/C/29/D/172/1984, HRC (Apr. 9, 1987).

²⁵³ *Id.* at ¶ 13.

²⁵⁴ *See id.*

These requirements have been expressed clearly in writings by international human rights supervisory bodies, including the European Court of Justice,²⁵⁵ and the HRC.²⁵⁶

C. Substantive Content of the Right to Equality before the Law and Equal Protection of the Law

The principle of equality before the law is contained in article 26 of the ICCPR. This article states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Thus the protection under article 26 is not limited to the rights within the ICCPR; article 26 establishes free-standing rights to equality, the application of which is not confined to the rights set forth in the ICCPR.²⁵⁷ The HRC has stated:

[A]rticle 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. *Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination*

²⁵⁵ See, e.g., *Marckx v. Belgium*, App. No. 6833/74, Eur. Ct. H.R. ¶ 33 (1979) (landmark family law case finding the daughter’s rights were violated); *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, App. No. 9214/80; 9473/81; 9474/81, Eur. Ct. H.R. ¶ 72 (1985) (finding a violation of Article 14 together with Article 8 on the grounds of sex discrimination).

²⁵⁶ See, e.g., *General Comment 18*, *supra* note 244, ¶ 13 (noting that all differentiations of treatment will not constitute discrimination); *Jacobs v. Belgium*, Communication No. 943/2000, U.N. Doc. CCPR/C/81/D/943/2000, HRC, ¶ 9.3 (Aug. 17, 2004) (determining that an objective and reasonable standard must be used when ensuring access to equality).

²⁵⁷ See *The Right to Equality and Non-Discrimination*, ICELANDIC HUM. RTS. CTR., <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-equality-and-non-discrimination> [<https://perma.cc/R763-2AGZ>].

*contained in article 26 is not limited to those rights which are provided for in the [ICCPR].*²⁵⁸

Therefore, while article 2 of the UDHR and article 26 of the ICCPR prohibit discrimination on ten grounds (being race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, and other status), these grounds are merely illustrative and not exhaustive.

Article 26 of the ICCPR is enlivened when there is a legislative provision, or an action or omission by a State Party with a discriminatory impact on the enjoyment of the rights in the ICCPR and those which are not set forth in the ICCPR.²⁵⁹ The HRC has considered article 26 in numerous contexts and the resulting body of jurisprudence is large, dynamic, and informative. For example, the HRC has found violations of article 26 of the ICCPR on the enumerated grounds, such as sex,²⁶⁰ nationality,²⁶¹ and religion.²⁶² It has also held that “other status” grounds (i.e., grounds which are not specified in article 26) include age,²⁶³ sexual orientation,²⁶⁴ and place of residence.²⁶⁵ It therefore appears that the reach of the principles of equality and non-discrimination under international human rights law is vast, and applicable to many different situations.

²⁵⁸ *General Comment 18, supra* note 244, ¶ 12 (emphasis added).

²⁵⁹ *Id.*

²⁶⁰ *See* Zwaan-de Vries, U.N. Doc. Supp. No. 40 (A/42/40) at 160, ¶¶ 14–15.

²⁶¹ *See* Gueye et al. v. France, Communication No. 196/1985, U.N. Doc. CCPR/C/35/D/196/1985, HRC, ¶¶ 9.4, 10 (Apr. 6, 1989); Adam v. Czech Republic, Communication No. 586/1994, U.N. Doc. CCPR/C/57/D/586/1994, HRC, ¶ 13.1 (1996); Karakurt v. Austria, Communication No. 965/2000, U.N. Doc. CCPR/C/74/D/965/2000, HRC, ¶ 8.4 (Apr. 4, 2002).

²⁶² *See* Hudoyberganova v. Uzbekistan, Communication No. 931/2000, U.N. Doc. CCPR/C/82/D/931/2000, HRC, ¶ 6.2 (Dec. 8, 2004); Brinkhof v. Netherlands, Communication No. 402/1990, CCPR/C/48/D/402/1990, HRC, ¶ 9.3 (July 30, 1993); Waldman v. Canada, Communication No. 694/1996, CCPR/C/67/D/694/1996, HRC, ¶ 10.6 (Nov. 5, 1999).

²⁶³ *See* Love et al. v. Australia, Communication No. 983/2001, U.N. Doc. CCPR/C/77/D/983/2001, HRC, ¶ 8.2 (2003).

²⁶⁴ *See* Young v. Australia, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000, HRC, ¶ 10.4 (Sept. 8, 2003).

²⁶⁵ *See* Lindgren et al. v. Sweden, Communication Nos. 298/1988 and 299/1988 U.N. Doc. Supp. No. 40 (A/46/40) 253, HRC, ¶¶ 10.2, 10.4 (1991).

D. Why an Equality Principle?

Claims for marginalized groups are often made on the basis of equality. In this respect, arguments on behalf of women, people with disabilities, indigenous people, and lesbian, gay, bisexual, transgender, and queer people, among others, have been based on gaining equality rights. However, the equality principle has been criticized for encouraging “sameness” and comparisons, while suppressing difference.²⁶⁶ This criticism can be seen in the context of animal advocacy, where comparisons between humans and animals are often made on the basis of whether animals have human-like attributes such as reason, rationality, and sentience.²⁶⁷

This criticism, however, overlooks a deeper point that underpins arguments for equality. Advocating for equality is not about arguing that something is sufficiently similar to the dominant group to be deserving of the equal protection of the law, but about arguing that something has equal value such that it requires equal protection. In this respect, laws that seek to protect living beings from experiences of pain and suffering are fundamentally based on recognizing sentience. If something lacks sentience, then it would make little sense to pass laws protecting it from actions that may cause it pain or suffering, because it is simply incapable of those experiences. Thus, in order to have value for the purposes of such laws, there must be sentience. This is not because humans have sentience, but because sentience is a prerequisite for needing legal protection.

It might also be argued that the notion that human dignity underpins equality in human rights law is problematic for potential equality arguments in the context of animals. As noted above, key human rights documents recognize human beings as having “inherent dignity,” a value which is said to provide the foundation for “equal rights.” Yet dignity is referred to in the instruments as “human dignity,” and has been interpreted as something that belongs only to humans, by virtue of their rationality, morality, or other defining characteristics.²⁶⁸ If only humans have dignity, and dignity underpins equality, then it might be problematic to argue

²⁶⁶ Maneesha Deckha, *Vulnerability, Equality, and Animals*, 27 CAN. J. OF WOMEN & L. 47, 47 (2015).

²⁶⁷ *Id.* at 52–54.

²⁶⁸ See MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* 9, 22 (Harvard Univ. Press ed., 2012).

for application of an equality principle in relation to animals. However, analysis of the historical background to the human rights instruments indicates that at the time of adoption, the concept of dignity lacked a shared understanding beyond meaning something intrinsic that must be respected.²⁶⁹ Further, there is nothing inherent in the concept of dignity that precludes recognition of animal dignity.²⁷⁰ In light of this, there is no real obstacle to legal recognition of animal dignity and application of an equality principle to animals.

IV. INTEGRATION OF EQUALITY IN ANIMAL PROTECTION LAWS

In the context of animal protection, implementation of an equality principle similar to that discussed would have a narrower operation than it does in international human rights law. Unlike humans, animals have not been granted legal rights in the manner of human rights, and thus the principle of non-discrimination whereby animals should not be treated unfavorably in respect to their rights when compared with other animals, is plainly inapplicable. Nevertheless, the requirement of equality before the law and equal protection by the law would have significant impacts in the context of animal protection. In the next sections of this Article discuss the need for incremental changes to laws relating to animals before proceeding to provide a justification for the implementation of an equality principle into animal protection laws in the U.S.

A. Incremental Reform

There is debate in animal law related literature over whether to advocate for total abolition of the property status of animals, or to work within existing welfare frameworks to achieve meaningful gains for animals in the more immediate future.²⁷¹ The abolitionist

²⁶⁹ See Kotzmann & Seery, *supra* note 12, at 9–12.

²⁷⁰ *Id.* at 37.

²⁷¹ See generally David Glasgow, *The Law of the Jungle: Advocating for Animals in Australia*, 13 DEAKIN L. REV. 181 (2008); Ellen P. Goodman, *Animal Ethics and the Law*, 79 TEMP. L. REV. 1291, 1294 (2006) (reviewing ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford Univ. Press 2004)).

argument, led by Gary Francione, broadly posits that the property status of animals is the fundamental source of their oppression and that justice cannot be achieved for animals while they remain the property of humans.²⁷² The welfare argument, on the other hand, advocates for incremental reforms within the current legal welfare framework.²⁷³

It is beyond the scope of this Article to go into any depth in relation to the merits of these arguments. While the viewpoint of this Article favors substantial changes to the laws relating to animals, the likelihood of radical reform being undertaken within a short time period is limited. To propose radical changes in this context risks the likelihood that the suggestions will be dismissed out of hand, overlooked, or, at best, significantly watered down. The experiences of past social justice movements suggests that important legal developments generally occur as a result of incremental reforms.²⁷⁴ For example, the progression to equality for African Americans may be seen as beginning with the abolition of slavery in 1865 and progressing to the attribution of voting rights about fifty years ago.²⁷⁵ Moreover, African Americans continue to be subjected to discrimination and disadvantage.²⁷⁶ For this reason, this Article proposes that a limited version of an equality principle be integrated into animal protection laws in the U.S.

B. Justification for the Introduction of an Equality Principle in Animal Protection Law

This Article argues that a principle similar to the equality principle that forms part of international human rights law, as discussed above, should underpin animal protection laws. The most

²⁷² See generally GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW (Tom Regan ed., 1995).

²⁷³ See generally, THE HUMANE SOCIETY OF THE UNITED STATES, THE WELFARE OF ANIMALS IN THE CHICKEN INDUSTRY (Dec. 2013), https://animalstudiesrepository.org/hsus_reps_impacts_on_animals/12/ [<https://perma.cc/38A4-PP5N>] (examining the welfare of animals in the chicken industry).

²⁷⁴ See generally DUNCAN GREEN, HOW CHANGE HAPPENS 47–67 (Oxford Univ. Press ed., 2016) (discussing how significant social and environmental change occurs).

²⁷⁵ Deborah N. Archer, *Still Fighting After All These Years: Minority Voting Rights 50 Years After the March on Washington*, 17 BERKELEY J. AFR.-AM. L. & POL'Y 69, 69 (2015).

²⁷⁶ See *Racial Disparity*, THE SENTENCING PROJECT (2019), <https://www.sentencingproject.org/issues/racial-disparity/> [<https://perma.cc/UR33-J7J8>].

obvious reason for this argument is that it would enable the laws to better meet their legislative objectives, which are broadly to prevent the unnecessary pain and suffering of animals. In this respect, the science is clear that most animals – all vertebrates and some invertebrates – are sentient, meaning that they are capable of their own subjective emotional states. Moreover, according to the main moral ideologies, animals do have moral status, meaning their interests should be taken into account when making decisions that affect them.²⁷⁷ Further, laws should, at least to some extent, take public sentiment into account – and the public is broadly in favor of increased protections for animals.

1. Purposes of Animal Protection Laws

Animal protection laws in the U.S., at both federal and state levels, are primarily directed towards preventing the unnecessary pain and suffering of animals. This is demonstrated by the above discussion of current animal protection laws in America. In light of this primary purpose, introducing an equality principle will enable the legislation to better protect the subjects of the animal protection laws. This is because an equality principle would require all animals to be equally protected by the law, meaning that animals would not be excluded from legal protections solely on the basis of their species or their use by humans. Increasing the protections available to animals will necessarily reduce the pain and suffering experienced by animals. In the next section, this Article outlines the scientific research in relation to the capacity of animals to feel pain and suffer.

2. Scientific Research in Relation to Animals' Capacity to Feel Pain and Suffer

Conclusive scientific proof that animals experience pain and suffering has been difficult to attain, largely because there is no universal, objective or infallible measure for detecting and evaluating pain. This is the same for humans as it is for animals. The experience of pain is subjective, and everyone reacts to and tolerates pain differently. Further, animals do not necessarily react to

²⁷⁷ The main moral ideologies being utilitarianism and rights-based theories. See *infra* Part IV.

pain in the same way that humans do. There is, however, recent research which shows that many animals experience physical pain in a similar way to humans.²⁷⁸ Scientific evidence also confirms that some animals experience psychological suffering.²⁷⁹ The discussion below will focus on research in relation to these capacities. This research provides information and perspective on the impact of animal cruelty, and thus provides context within which animal protection laws apply. This research further provides a foundation to the argument that animals which are capable of suffering should be entitled to the equal protection of the law from that suffering.

i. Animals Can Experience Physical Pain

Lynne Sneddon, a scientist, has cautioned that it is difficult to ascertain an animal's experience of physical pain because it is subjective: "[w]hether animals can feel pain has been a controversial issue for many years. Animals and humans share similar mechanisms of pain detection, have similar areas of the brain involved in processing pain and show similar pain behaviours, but it is notoriously difficult to assess how animals actually experience pain."²⁸⁰

Keeping in mind the inherent difficulty in evaluating animals' (and, indeed, humans') experience of pain, this section will discuss the three approaches that scientists have taken in determining whether animals experience pain. These approaches all depend on observations of animals, as animals are unable to communicate their experience of pain in the way that humans do. They are also anthropomorphic,²⁸¹ because they compare animal responses to pain to determine whether they are similar to human responses.

²⁷⁸ See *infra* Part IV(B)(2)(i).

²⁷⁹ See, e.g., Franklin D. McMillan et al., *Behavioral and Psychological Characteristics of Canine Victims of Abuse*, 18 J. APPLIED ANIMAL WELFARE SCI. 92, 92–93 (2015) (noting the difficulty in determining psychological effects in animals); Franklin D. McMillan, *Behavioral and Psychological Outcomes For Dogs Sold as Puppies Through Pet Stores and/or Born in Commercial Breeding Establishments: Current Knowledge and Putative Causes*, 19 J. VETERINARY BEHAV. 14, 14 (2017) [hereinafter *Dogs Sold as Puppies*] (“Events occurring in the early developmental stages of mammalian life . . . can have profound and lifelong effects on an individual’s psychological and behavioral characteristics”).

²⁸⁰ Lynne U. Sneddon, *Can Animals Feel Pain*, WELCOME TR. (2015), <https://web.archive.org/web/20120413122654/http://www.welcome.ac.uk/en/pain/microsite/culture2.html> [<https://perma.cc/DVH9-CHUM>].

²⁸¹ “Anthropomorphism” describes the habit that humans have of imposing human qualities on their observation of animals and animal behavior.

The first method looks at animals' bodily functions (such as consumption of food and water); the second method evaluates animals' physiological responses (specifically, measuring the concentrations of plasma cortisol); and the third method assesses animals' behavior, and in particular whether behavior such as vocalization or physical movement is exhibited.²⁸²

By using these approaches, particularly the third approach, scientists have concluded that many animals do, in fact, experience physical pain. Many species of animals, especially mammals, primates and vertebrates (and some invertebrates, too), exhibit similar behavioral reactions to pain stimuli as humans, such as screaming or thrashing about in response to a physical attack.²⁸³ Scientists have observed similar responses to physical pain in vertebrates, such as guinea pigs,²⁸⁴ rats,²⁸⁵ horses,²⁸⁶ chickens, cows,

²⁸² Daniel M. Weary et al., *Identifying and Preventing Pain in Animals*, 100 THE HUMANE SOC'Y INST. FOR SCI. & POL., ANIMAL STUD. REPOSITORY 64, 65 (2006).

²⁸³ See Sneddon, *supra* note 280.

²⁸⁴ Hilde Vermeirsch et al., *Evaluation of Pain Behavior and Bone Destruction in Two Arthritic Models in Guinea Pig and Rat*, 87 PHARMACOLOGY BIOCHEMISTRY & BEHAV. 349, 349–359 (2007).

²⁸⁵ John V. Roughan & Paul A. Flecknell, *Evaluation of a Short Duration Behaviour-Based Post-Operative Pain Scoring System in Rats*, 7 EUR. J. PAIN 397, 397–406 (2005).

²⁸⁶ Johannes P.A.M. van Loon, DVM et al., *Application of a Composite Pain Scale to Objectively Monitor Horses with Somatic and Visceral Pain Under Hospital Conditions*, 30 J. EQUINE VETERINARY SCI. 641, 641 (2010); see generally P.D. McGreevy Editorial, *The Fine Line Between Pressure and Pain: Ask the Horse*, 188 VETERINARY J. 250, 250 (2011) (discussing pain that horses experience while wearing reins).

and sheep.²⁸⁷ are capable of feeling pain,²⁸⁸ and that invertebrates, such as eels and crustaceans, may also have the capacity to experience pain.²⁸⁹

The international scientific community now accepts, in light of all of the available evidence, that humans and many animals experience physical pain in a similar manner.²⁹⁰ As a result of this knowledge, scientists have developed tables for measuring pain levels in animals.²⁹¹ Various organizations around the world (including the Australian National Health and Medical Research

²⁸⁷ M.J. Gentle, *Attentional Shifts Alter Pain Perception in the Chicken*, 10 ANIMAL WELFARE 187, 191–92 (2001); Weary et al., *supra* note 282, at 71–72; Kristen A. Walker et al., *Identifying and Preventing Pain During and After Surgery in Farm Animals*, 135 APPLIED ANIMAL BEHAV. SCI. 259, 259–265 (2011); Ignacio Viñuela-Fernández et al., *Pain Mechanisms and Their Implication for the Management of Pain in Farm and Companion Animals*, 174 VETERINARY J. 227, 227–29 (2007); K.M.D. Rutherford, *Assessing Pain in Animals*, 11 ANIMAL WELFARE 31, 31 (2002); *see generally* Andrew D. Fisher, *Addressing Pain Caused by Mulesing in Sheep*, 135 APPLIED ANIMAL BEHAV. SCI. 232, 239 (2011) (detailing pain that sheep experience through the mulesing process); *see also* S. Lomax et al., *Use of Local Anaesthesia for Pain Management During Husbandry Procedures in Australian Sheep Flocks*, 86 SMALL RUMINANT RES. 56, 57 (2009); *see also* Kevin J. Staffor & David J. Mellor, *Addressing the Pain Associated With Disbudding and Dehorning in Cattle*, 135 APPLIED ANIMAL BEHAV. SCI. 226, 229 (2011); AMY SIMON, UNIV. OF SYDNEY, TAIL DOCKING AND CASTRATION OF LAMBS 1 (Ctr. for Veterinary Educ., 2003), http://essays.cve.edu.au/sites/default/files/vein_essays/content_2708/SimonAmy.pdf [<https://perma.cc/2XV4-TYAX>].

²⁸⁸ *See, e.g.*, Sneddon LU. 2019 Evolution of Nociception and Pain: Evidence from Fish Models, *Phil. Trans. R. Soc. B* 374: 20190290 (concluding that it is highly likely that fish experience pain); K.P. Chandroo et al., *Can Fish Suffer?: Perspectives on Sentience, Pain, Fear and Stress*, 86 APPLIED ANIMAL BEHAV. SCI. 225, 225 (2004) (suggesting fish can experience affective states of pain, fear, and stress); VICTORIA BRAITHWAITE, DO FISH FEEL PAIN? 183 (2010) (concluding that fish feel pain).

²⁸⁹ *See, e.g.*, E. Lambooi et al., *Welfare Aspects of Live Chilling and Freezing of Farmed Eel (Anguilla Anguilla L.): Neurological and Behavioural Assessment*, 210 AQUACULTURE 159, 166 (2002) (observing responses to pain stimuli in eels); *See* G. Fiorito, *Is There "Pain" in Invertebrates?*, 12 BEHAV. PROCESSES 383, 386 (1986) (concluding that invertebrates possess a pain system); *see also* Stuart Barr et al., *Nociception or Pain in a Decapod Crustacean?*, 75 ANIMAL BEHAV. 745, 749–50 (2008) (asserting that prolonged rubbing and grooming are consistent with the idea of pain in crustaceans).

²⁹⁰ *See infra* Part IV(B)(2)(i)–(iii).

²⁹¹ Rughan & Flecknell *supra* note 285, at 400 tbl.1; Patrick Bateson, *Assessment of Pain in Animals*, 42 ANIMAL BEHAV. 827, 8234 (1991); Lucia Martini et al., *Evaluation of Pain and Stress Levels of Animals Used in Experimental Research*, 88 J. SURGICAL RES. 114, 116–18 (2000); SARAH WOLFENSOHN & MAGGIE LLOYD, HANDBOOK OF LABORATORY ANIMAL MANAGEMENT AND WELFARE 60–72 (Blackwell Publ'g Ltd., 3rd ed. 2003).

Council, the Association for Assessment and Accreditation of Laboratory Animal Care International, the USDA, and the United Kingdom Animal Procedures Committee) have prescribed guidelines for research involving animals, mandating methods during research which reduce the experience of pain for the animals in the studies.²⁹² Further, veterinarians administer analgesics and anesthetics to animals to reduce their pain, and humanely euthanize animals in circumstances where observations of the animal demonstrates that it is suffering from great levels of pain.²⁹³

ii. Animals Can Experience Psychological Pain

It is now largely accepted by scientists that animals can feel not only physical pain, but also psychological pain. While this conclusion may be considered logical as a matter of common sense,²⁹⁴ proving it scientifically has been challenging. Scientific methods to measure animals' physical pain, discussed above, are not as appropriate to measure the existence of psychological pain. In particular, the experience of psychological harm depends on feeling emotions, which by definition are internal responses that are necessarily challenging to ascertain. Moreover, the experience of emotions may be different for animals as compared to humans.

Nevertheless, there is now consensus that animals do feel emotions. Research has shown that “[a]natomical, physiological, and behavioral similarities across species demonstrate that animals experience pain and distress [including psychological pain and distress] in ways similar or identical to humans.”²⁹⁵ Moreover, it is often the same influences that cause psychological pain in

²⁹² See, e.g., NAT'L HEALTH AND MED. RES. COUNCIL, AUSTL. GOV'T, AUSTRALIAN CODE FOR THE CARE AND USE OF ANIMALS FOR SCIENTIFIC PURPOSES 10 (8th ed. 2013) (“Unless there is evidence to the contrary, it must be assumed that procedures and conditions that would cause pain and distress in humans cause pain and distress in animals.”).

²⁹³ See Rashmi Shivni, *It Doesn't Have to Hurt*, AM. VETERINARY MED. ASS'N (Oct. 14, 2015), <https://www.avma.org/News/JAVMANews/Pages/151101a.aspx> [<https://perma.cc/MP3D-65SD>]; see also AM. VETERINARY MED. ASS'N, AVMA GUIDELINES ON EUTHANASIA 1 (2007) (recommending euthanasia when animals' lives no longer have positive net value).

²⁹⁴ See David DeGrazia & Andrew Rowan, *Pain, Suffering, and Anxiety in Animals and Humans*, 12 THEORETICAL MED. 193, 193–94 (1991).

²⁹⁵ Hope Ferdowsian & Debra Merskin, *Parallels in Sources of Trauma, Pain, Distress, and Suffering in Humans and Nonhuman Animals*, 13 J. TRAUMA & DISSOCIATION 448, 461 (2012).

humans and in animals.²⁹⁶ For example, at the Münster Zoo in northern Germany, a gorilla named Gana seemed to be distressed and in grief while embracing, caressing and seemingly trying to revive her three-month-old baby who had died.²⁹⁷ Similarly, for some time, scientists have conjectured that pigs and other animals feel depressed when confined to small spaces and unable to engage in behavior that is commonly seen by members of their species.²⁹⁸

While there is evidence that many animals appear to have primary emotions, such as surprise and fear, it has also been shown that animals with greater cognitive ability seem to display social emotions, including sympathy, brashness, humiliation, shame, guilt, and greed.²⁹⁹ Social emotions are more complex than primary emotions, as they require a level of self-reflection, and the expression of social emotions contributes to the dynamic of the community in which animals live.³⁰⁰ Biologists have also observed that some animals experience joy. For example, scientist Klaus Wilhelm observed that “[i]n the rain forests of Sumatra, orangutans swing from branches and splash their hands into pools of water with no other apparent purpose than just for the fun of it.”³⁰¹ Significantly, analyses of metabolism in the brains of animals and humans show that animals and humans share “similar physical brain processes,” including “the neurotransmitter dopamine,” which, at least in humans, leads to them experiencing joy.³⁰²

²⁹⁶ Ferdowsian & Merskin, *supra* note 295, at 461.

²⁹⁷ Marcus Dunk, *A Mother's Grief: Heartbroken Gorilla Cradles Her Dead Baby*, DAILY MAIL (Aug. 19, 2008), <https://www.dailymail.co.uk/sciencetech/article-1046549/A-mothers-grief-Heartbroken-gorilla-cradles-dead-baby.html> [<https://perma.cc/F5RZ-PVT5>].

²⁹⁸ See Ferdowsian & Merskin, *supra* note 295, at 454.

²⁹⁹ Klaus Wilhelm, *Do Animals Have Feelings?*, 17 SCI. AM. MIND 24, 27–28 (Feb./Mar. 2006) (“Dominant gorillas swagger around to demand respect from their peers. Low-ranking wolves in packs make gestures of abasement. Dogs reprimanded by their owners for doing something wrong show clear signals of embarrassment. Yet even in such cases, as with primary emotions, some neuroscientists say these actions are largely automatic and inborn and count them among the routinized mechanisms animals use to help them survive.”).

³⁰⁰ *Id.*

³⁰¹ *Id.* at 29.

³⁰² *Id.*

Research further shows that animals are capable of experiencing psychological illness.³⁰³ According to Franklin McMillan, “[a] rapidly proliferating literature provides extensive evidence supporting the existence of psychological trauma and its characterization in nonhuman species.”³⁰⁴ For example, research on chimpanzees has found that that they can behave in ways that that are similar to humans’ experience of generalized anxiety disorders, obsessive-compulsive disorders, and post-traumatic stress disorder.³⁰⁵ There are also a number of studies on the experience of post-traumatic stress disorder in other animals, including wolves, elephants, and dogs.³⁰⁶

Just as it has been shown that animals and humans both experience joy in similar ways, there is evidence which demonstrates that similar factors appear to contribute to psychological suffering in both humans and animals.³⁰⁷ In studies on chimpanzees, it was found that potentially traumatic experiences endured by them when they were the subjects of experimental research (such as confinement, physical harm, and isolation) resulted in the chimpanzees developing behaviors associated with post-traumatic stress disorder, depression, anxiety, and obsessive-compulsive disorder.³⁰⁸ Similarly, studies on dogs that were sold as puppies through

³⁰³ Shreya Dasgupta, *Many Animals Can Become Mentally Ill*, BBC (Sept. 9, 2015), <http://www.bbc.com/earth/story/20150909-many-animals-can-become-mentally-ill> [<https://perma.cc/3KS9-NSY2>].

³⁰⁴ FRANKLIN D. McMILLAN, INT’L ASSOC. OF ANIMAL BEHAVIOR CONSULTANTS, *PSYCHOLOGICAL TRAUMA IN ANIMALS: PTSD AND BEYOND* 107 (2011) [hereinafter *PSYCHOLOGICAL TRAUMA IN ANIMALS*]; see also Marc Bekoff, *Do Wild Animals Suffer From PTSD and Other Psychological Disorders?*, *PSYCHOL. TODAY* (Nov. 29, 2011), <https://www.psychologytoday.com/us/blog/animal-emotions/201111/do-wild-animals-suffer-ptsd-and-other-psychological-disorders> [<https://perma.cc/VRB4-4VMR>] (concluding captive animals clearly can experience PTSD); see also Marc Bekoff, *Animals Don’t Laugh, Think, Get Depressed, or Love Declares a Psychiatrist*, *PSYCHOL. TODAY* (Sept. 3, 2012), <https://www.psychologytoday.com/us/blog/animal-emotions/201209/animals-dont-laugh-think-get-depressed-or-love-declares-psychiatrist> [<https://perma.cc/4SGM-KUPC>] (discrediting the conclusion that animals do not have emotional capacity).

³⁰⁵ Hope R. Ferdowsian et al., *Signs of Generalized Anxiety and Compulsive Disorders in Chimpanzees*, 7 *J. VETERINARY BEHAV.* 353, 360 (2012).

³⁰⁶ *PSYCHOLOGICAL TRAUMA IN ANIMALS*, *supra* note 304, at 107–09.

³⁰⁷ *Id.* at 107.

³⁰⁸ Ferdowsian et al., *supra* note 305, at 360; see also *Chimps Used in Experiments Develop Psychological Disorders*, ARCUS FOUND. (June 11, 2008), <https://www.arcusfoundation.org/stories-of-impact/great-apes/chimps-used-experiments-develop-psychological-disorders/> [<https://perma.cc/6PCP-E8W3>].

pet stores and/or born in commercial breeding establishments discovered an increase in aggression and fear when compared to dogs that were not raised in such circumstances.³⁰⁹ The aggressive behaviors were likely to have been a result of experiencing stress, stimulus deprivation, and maternal separation.³¹⁰ Further, potential causes of psychological injury in animals include, but are not limited to, abuse, neglect, confinement, multiple re-homing, natural disasters, fighting, racing, forced work, experiences in armed conflict, experiences as laboratory subjects, and physical trauma and injury.³¹¹

iii. Conclusion on the Ability of Animals to Feel Pain and Suffer

The above section explored the breadth of data that confirms animals' experience of physical pain, as well as animals' ability to feel emotions and experience psychological harm. This research underpins the commonly provided objectives of animal welfare legislation. Moreover, given the research indicates that particular animals are sentient – including farm animals and animals used in research – it justifies ensuring that the law provides equal protection to sentient animals.

3. Public Sentiment

Fundamentally, laws are rules that human society makes for itself to establish what behavior is and is not acceptable. From this perspective, it is clear why public sentiment has a significant influence on the development of the law. If the public does not generally consider the law to be valid and reflective of shared morality, the law is unlikely to be respected or obeyed. Further, the link between public normative values and the law is particularly strong

³⁰⁹ McMillan, *supra* note 279, at 15.

³¹⁰ *Id.* at 20.

³¹¹ *Psychological Trauma in Animals*, *supra* note 304, at 110; see also Jessica Pierce, *Emotional Pain in Animals: An Invisible World of Hurt*, *PSYCHOL. TODAY* (Apr. 24, 2012), <https://www.psychologytoday.com/us/blog/all-dogs-go-heaven/201204/emotional-pain-in-animals-invisible-world-hurt> [<https://perma.cc/VR5Q-TJRA>].

in the area of criminal law,³¹² of which significant components of animal protection laws form a part.

Yet it is important to be cautious in allowing public norms to influence the substantive content of the law for a number of reasons. First, public norms can change rapidly – as indicated through the recent emergence of the vegan movement – while the law generally takes time to change. Second, public norms often conflict, as shown by the increased interest in veganism in contrast with unsurpassed levels of cruelty to animals (and particularly farm animals). Further, the law has a significant and valid role in influencing the development of public norms. Keeping this caution in mind, this Article now proceed to outline public sentiment in relation to human treatment of animals.

This section will set out results from research into public perceptions about human treatment of animals. Generally, these results indicate that Americans support increased legal protections for animals. While there is no consensus on the moral status of animals, evolving attitudes in favor of greater protection for animals have resulted in “the enactment of legislation such as the [AWA and the PACT Act], decreased reliance on animal testing of consumer products, a decline in acceptance of the fur trade, and a dramatic increase in the number of Americans who are members of animal protection organizations.”³¹³

i. Snapshots of Public Perceptions of the Treatment of Animals

In May 2015, Gallup, an American analytics and advisory company known domestically and internationally for its public opinion polls, conducted telephone interviews with a random sample of 1,024 American adults to gauge public opinion regarding animals rights.³¹⁴ The poll found that almost a third of Americans (32%) believed that animals should be afforded the same rights as humans, while 62% believed that animals deserved some protection

³¹² See Mirko Bagaric, *The ‘Civil-isation’ of the Criminal Law*, 25 CRIM. L.J. 184, 185 (2001).

³¹³ Harold Herzog et al., *Social Attitudes and Animals*, in THE STATE OF THE ANIMALS 55, 55 (D.J. Salem & A.N. Rowan eds., 2001).

³¹⁴ 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> [<https://perma.cc/7MK4-JZYY>].

but could still be used for the benefit of humans.³¹⁵ These results demonstrate an increase in public support for increased animal protections following the 2008 poll, which revealed that only 25% of Americans believed that animal rights should be “on par” with human rights.³¹⁶ The 2015 survey found that only 3% of Americans believed that animals do not require protection from harm or exploitation “since they are just animals.”³¹⁷

The 2015 Gallup poll also revealed that women and Democrats are more likely than men and Republicans to support the view that animals should have equal rights to humans.³¹⁸ Further, there is little difference between younger and older Americans in support of this view.³¹⁹

Gallup found that Americans were most concerned about circus animals, animals used in competitive animal sports, and animals used in research; two-thirds of Americans said they were either “very concerned” or “somewhat concerned” about the animals in each of these categories.³²⁰ However, it seems that Americans were less concerned about the treatment of marine animals in amusement parks and aquariums and zoo animals, as they were about the treatment of circus animals.³²¹ The lower levels of concern for marine animals in amusement parks and aquariums is somewhat surprising, particularly after documentaries such as “Blackfish”³²² were released, which examined the treatment of killer whales at SeaWorld parks.³²³ After the release of “Blackfish,” the stock price of SeaWorld dropped dramatically and discussions took place among lawmakers regarding a ban on the use of orcas in shows in amusement parks.³²⁴ Further, it also appears that Americans were relatively less concerned about the treatment of livestock and other animals raised for food, despite increasing media in relation to welfare issues in that context.³²⁵

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.* (internal quotations omitted).

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

³²² BLACKFISH (CNN Films 2013).

³²³ Riffkin, *supra* note 314.

³²⁴ *Id.*

³²⁵ *See id.*; *see, e.g.*, FOOD, INC. (Dogwoof Pictures 2008).

In 2018, following news of the tragic death of a pet French bulldog aboard a United Airlines plane after his owners were told to put him in the overhead compartment of the plane, Garrett Broad, Assistant Professor of Communication and Media Studies at Fordham University, worked with the Nonhuman Rights Project³²⁶ to conduct a survey on public sentiment regarding granting rights to animals.³²⁷ Dr. Broad worked with Qualtrics, a market research and survey company, to poll 1,044 Americans on this issue. The people surveyed were “nationally representative in terms of their age, race and ethnicity, gender, income and region.”³²⁸ This survey revealed similar results to the Gallup survey in 2015 (discussed above); it found that 46.9% of Americans believed that animals deserve the same rights as humans to be free from harm and exploitation, while 47.5% of Americans believed that “animals deserve some protection from harm and exploitation, but it is still appropriate to use them for the benefit of humans.”³²⁹ This survey is a very recent indication that public support for the legal protection of animals is strong in the U.S. The discussion below will focus particularly on public sentiment relating to the use of animals in research and for food.

ii. Animals Used in Research

“The animal protection movement has had a profound impact on public attitudes toward the use of animals in research and on the evolution of laws, policies, and voluntary compliance by the scientific community.”³³⁰ While animal protection groups and the scientific community have historically had a relatively antagonistic relationship, the biomedical research community has, since the

³²⁶ The Nonhuman Rights Project is a non-profit organization that seeks to “secure fundamental rights for nonhuman animals through litigation, legislation, and education.” *Who We Are*, NONHUMAN RTS. PROJECT (2020), <https://www.nonhumanrights.org/who-we-are/> [<https://perma.cc/HJ8A-4YNH>].

³²⁷ Garrett M. Broad, *Public Support for Animal Rights Goes Beyond Keeping Dogs Out of Overhead Bins*, THE CONVERSATION (Mar. 22, 2018), <https://theconversation.com/public-support-for-animal-rights-goes-beyond-keeping-dogs-out-of-overhead-bins-93410> [<https://perma.cc/GTQ3-M7Z7>].

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ COMM. ON SCI. & HUMANE ISSUES IN THE USE OF RANDOM SOURCE DOGS AND CATS IN RESEARCH, SCIENTIFIC AND HUMANE ISSUES IN THE USE OF RANDOM SOURCE DOGS AND CATS IN RESEARCH 34 (2009).

1950s, put systems in place to improve and attempt to ensure more humane treatment of animals used in research.³³¹

In August 2014, the Pew Research Center (“Pew”) conducted a telephone survey (by landline and cellular telephones) of 2,002 American adults regarding their “views on a range of science-related topics and explor[ing] the degree to which political views, educational attainment, religion and demographic factors are connected to those views.”³³² Pew subsequently published its findings in a report in July 2015.³³³ Chapter 7 of the report outlined the data that Pew collected regarding public opinion about the use of animals in research.³³⁴ Pew found that Americans were closely divided on the use of animals in research, with 50% opposed to animal testing and 47% in favor.³³⁵ This showed a decrease in public support for the use of animals in scientific research from 2009, when Pew found, through a nationwide survey, that 52% of Americans favored animal testing and 43% opposed it.³³⁶ From the 2014 results, Pew also observed that there were only small differences between the 2014 and 2009 survey results; however, the trend in public opinion among Americans appeared to be slowly moving away from support for animal testing for scientific and research purposes.

iii. Livestock and Animals Raised for Food

In 2001, approximately 9.5 billion animals were slaughtered annually for food production in the U.S., compared to “218 million killed by hunters and trappers and in animal shelters, biomedical research, product testing, dissection, and fur farms, *combined*.”³³⁷ It was estimated that in 2013, about 3.8 million finned fish and 43.1 million shellfish were killed to support the food supply in the

³³¹ *Id.* at 35.

³³² PEW RESEARCH CENTER, AMERICANS, POLITICS AND SCIENCE ISSUES 2 (2015).

³³³ *Id.*

³³⁴ *Id.* at 141–44.

³³⁵ *Id.* at 141.

³³⁶ *Id.*

³³⁷ David J. Wolfson & Mariann Sullivan, *Foxes in the Henhouse: Animals, Agribusiness, and the Law: A Modern American Fable*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205, 206 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

U.S.³³⁸ In 2019, about 6 billion land animals were killed for food in the U.S.³³⁹ This is unsurprising, as Americans are among the largest consumers of meat in the world.³⁴⁰ In 2012, Gallup conducted telephone interviews with a random sample of 1,014 American adults living in all fifty states and in the District of Columbia regarding consumption habits.³⁴¹ These interviews indicated that 5% of Americans identified as vegetarians, and only 2% of Americans considered themselves vegans.³⁴²

Recently, however, surveys show that American consumers are becoming more concerned about the treatment of livestock, and particularly animals raised for food. In a survey commissioned by the American Society for the Prevention of Cruelty to Animals, 77% of American consumers said that they were concerned about the welfare of animals raised for food.³⁴³ In 2019, Technomic's "Center of the Plate: Beef and Pork Consumer Trend Report" revealed that 50% of consumers who regularly eat beef said that it was important they consume beef derived from humanely treated animals, and 44% of pork eaters said it was important that they consume pork derived from humanely treated animals.³⁴⁴ Similarly, 78% of respondents to a 2018 survey by the National Chicken Council reported that they were concerned about how chickens are raised for consumption.³⁴⁵ In the same year, a survey commissioned by World Animal Protection showed that 80% of American

³³⁸ Harish, *How Many Animals Does a Vegetarian Save?*, COUNTING ANIMALS (Mar. 16, 2015), <http://www.countinganimals.com/how-many-animals-does-a-vegetarian-save/> [<https://perma.cc/U599-DUEL>].

³³⁹ *2019 U.S. Animal Kill Clock*, ANIMAL CLOCK, <https://animalclock.org> [<https://perma.cc/DLS4-6VWE>].

³⁴⁰ See, e.g., *Current Worldwide Annual Meat Consumption Per Capita*, CHARTS BIN, <http://chartsbin.com/view/12730> [<https://perma.cc/HY3D-EE3H>].

³⁴¹ Frank Newport, *In U.S., 5% Consider Themselves Vegetarians*, GALLUP (July 26, 2012), <https://news.gallup.com/poll/156215/consider-themselves-vegetarians.aspx> [<https://perma.cc/QR5T-A838>].

³⁴² *Id.*

³⁴³ Memorandum from Bob Meadow and Joshua Ulibarri, Lake Research Partners, to Interested Parties, ASPCA, Results from a Recent Survey of American Consumers 1 (June 29, 2016), https://www.aspc.org/sites/default/files/public-memo_aspc_labeling_fi_rev1_0629716.pdf [<https://perma.cc/SCV6-4WD6>] [hereinafter Lake Research Partners].

³⁴⁴ *Alternative Proteins, Animal Welfare Concerns Shift Beef, Pork Preferences*, FARMS.COM (Feb. 12, 2019), <https://www.farms.com/news/alternative-proteins-animal-welfare-concerns-shift-beef-pork-preferences-143209.aspx> [<https://perma.cc/BZ9G-DTPC>].

³⁴⁵ NAT'L CHICKEN COUNCIL, U.S. CHICKEN CONSUMPTION REPORT (2018).

consumers were concerned about the treatment of factory-farmed pigs, and 89% of the same sample said that supermarkets should source pork from farms with higher welfare standards.³⁴⁶ A survey conducted by YouGov in 2018 showed that 63% of Americans said that they would cease purchasing meat processed by companies which have a negative reputation; however, 44% of Americans also said that they rarely or never check which company processes the meat they buy.³⁴⁷ Similarly, while the majority of respondents to a Center for Food Integrity survey had no problem with consuming meat and other animal products if the animals were treated humanely, only 25% believed that meat in the U.S. is sourced from humanely treated animals.³⁴⁸

Surveys also demonstrated that American consumers supported regulating the care of farm animals. For example, a 2017 survey by Packaged Facts revealed that nearly two-thirds of consumers considered that humane treatment of animals raised for food should be a societal concern and a regulatory issue.³⁴⁹ Similar surveys also demonstrate that consumers were more inclined to purchase animal products which come from animals that have been “humanely raised,” which is found to be an important food claim, even if it comes at a higher cost compared to less ethical alternatives.³⁵⁰ Top animal welfare practices which are recognized

³⁴⁶ *New Research Shows Major Global Supermarket Chains at Risk of Losing Customers Over Poor Pig Welfare*, WORLD ANIMAL PROTECTION (Apr. 17, 2018), <https://www.prnewswire.com/news-releases/new-research-shows-major-global-supermarket-chains-at-risk-of-losing-customers-over-poor-pig-welfare-300631690.html> [<https://perma.cc/9MRQ-4DQM>].

³⁴⁷ Jamie Ballard, *Women More Likely Than Men to Care About Ethical Meat*, YOUGOV (Nov. 26, 2018), <https://today.yougov.com/topics/food/articles-reports/2018/11/26/ethical-meat-price-quality-animal-rights> [<https://perma.cc/N8XY-UB88>].

³⁴⁸ Press Release, The Center for Food Integrity, Statement on A Dangerous Disconnect: New Research IDs Food and Ag Trust Gaps (Jan. 9, 2018), <http://www.foodintegrity.org/wp-content/uploads/2018/01/Consumer-Trust-Research-News-Release-Jan-9-FINAL1.pdf> [<https://perma.cc/TZ6Q-TBQX>].

³⁴⁹ *Survey: More Consumers Concerned About Animal Welfare*, FEEDSTUFFS (June 2, 2017), <http://www.feedstuffs.com/news/survey-more-consumers-concerned-about-animal-welfare> [<https://perma.cc/UCA9-9PZY>].

³⁵⁰ ANDREW J. ENNS, NRG RESEARCH GROUP, BROILER CHICKEN WELFARE SURVEY 2 (July 5, 2017), https://mercyforanimals.org/files/MFA_2017_Survey_US.pdf [<https://perma.cc/56RN-NK3N>]; Lake Research Partners, *supra* note 343, at 3; *How Your Food is Raised*, KETTLE & FIRE (2016), <http://web.archive.org/>

as being likely to increase the sale of animal products include animals which were not mistreated while alive, animals which were raised in a natural environment, and animals which have not been given hormones or antibiotics.³⁵¹

For instance, in a 2018 survey by Power of Meat, it was found that consumers were most aware of food claims regarding all natural, organic, grass-fed, hormone-free, and antibiotic-free products, followed by free range, humanely raised, and vegetarian fed products.³⁵² The findings showed that sales of conventional meat products without any of these food claims have basically flat lined.³⁵³ In the same survey, 67% of consumers indicated that they were more likely to purchase a meat product with a “humanely raised” claim than a similar product without this claim.³⁵⁴ In 2017, a study by the University of Illinois found that the “humanely raised” claim was one of the top three claims for consumers when it came to meat production.³⁵⁵ A study by the Center for Food Integrity in 2016 found that among the 2,001 American consumers surveyed, 56% said that transparency about the way in which livestock, and other animals raised for food, were treated helped to build trust between consumers and manufacturers.³⁵⁶ When these respondents were asked where information on the treatment of animals and animal welfare should be made available, 39% said independent third party websites, 35% said food company websites, 19% voted for food product packaging and the remainder of the

web/20180818201326/https://www.kettleandfire.com/pages/how-your-food-is-raised [https://perma.cc/9NEB-9SNT].

³⁵¹ Ginger Schlueter, *2017 Study Finds Consumer Familiarity with Sustainability Reached All-Time High*, NAT. PRODUCTS INSIDER (May 25, 2018), <https://www.naturalproductsinsider.com/sustainability/2017-study-finds-consumer-familiarity-sustainability-reached-all-time-high> [https://perma.cc/DYS2-K37C].

³⁵² FOUND. FOR MEAT & POULTRY RES. & EDUC., FOOD MKTG. INST., *THE POWER OF MEAT: AN IN-DEPTH LOOK AT MEAT AND POULTRY THROUGH THE SHOPPERS' EYES* 47 (2018).

³⁵³ *Id.* at 46.

³⁵⁴ *Id.* at 48.

³⁵⁵ Debra Levey Larson, *U of I Study Ranks Which Production Attributes are Most Important to Consumers When Buying Beef, Chicken*, EUREKALERT! (Apr. 19, 2017), https://www.eurekalert.org/pub_releases/2017-04/uoi-uoi041917.php [https://perma.cc/ZV27-BSZD].

³⁵⁶ Tom Johnston, *Transparency, Animal Care Crucial for Consumer Trust: CFI, NC AGRIBUSINESS COUNCIL* (Mar. 28, 2016), https://www.ciclt.net/sn/new/n_detail.aspx?ClientCode=ncagbc&N_ID=90636 [https://perma.cc/Z668-SU8R].

group said Quick Response (QR) codes on packages.³⁵⁷ The consumers held food companies most responsible for the provision of this information, followed by farmers, stores, and restaurants.³⁵⁸

iv. Conclusion Regarding Public Sentiment

All of this data, collected from Americans of different demographics, demonstrates that support for the legal protection of animals has increased across the U.S., and continues to increase. This is in response to the heightened awareness of the treatment (and mistreatment) of animals, particularly animals used for scientific research and for food. There appears to be a desire from the plurality of Americans to learn more about the treatment of animals, so as to ensure they (as consumers) do not directly or indirectly participate in causing animals to feel pain or suffer, and to encourage legislatures to make laws and regulations to protect animals from being poorly treated.

4. The Moral Status of Animals

Do animals have moral standing? This is an important consideration in determining how the law should address human conduct towards animals. If, according to moral theory, animals are regarded as having moral standing, then animals should be legally protected from cruel treatment by humans. This is because animals should be recognized as legitimate members of the moral community who deserve protection. If, however, moral theory regards animals as not having moral status, then there is no reason to grant them any more legal protection than is afforded an object. This Article argues that animals do indeed have moral standing, and thus the government should consider the interests of animals when creating and enforcing protection laws, so as to ensure that all animals with moral standing are protected.

There are two major schools of moral philosophy.³⁵⁹ According to each of these, animals have moral standing; these are

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ Stephen O' Sullivan & Philip A. Pecorino, *Ethics: Chapter 4 Ethical Theories*, QUEENSBOROUGH COMMUNITY C. (2002), <https://www.qcc.cuny.edu/>

consequentialist and non-consequentialist (or deontological) theories.³⁶⁰ By reference to consequentialist moral theories, whether an act is right or wrong depends on its capacity to result in a specific outcome.³⁶¹ On the other hand, non-consequentialist theories assert that whether an action is appropriate does not depend upon its ability to produce a particular outcome, but is contingent instead on the inherent features of that act.³⁶² Further, while contractualist theory would support the conclusion that animals cannot have rights,³⁶³ this Article argues that such theory is fundamentally flawed.

i. Consequentialist Theories

Utilitarianism is the most prevalent consequentialist moral theory. While there are various forms of utilitarianism, the most significant form has been hedonistic act utilitarianism, which states that the greatest amount of happiness or pleasure and the least amount of unhappiness or pain is derived from morally correct action.³⁶⁴ This theory considers that the interests of individuals are equal and that humans should behave in a way that maximizes net wellbeing for the community.³⁶⁵

There are, however, two main reasons why utilitarianism has become less popular in Western countries in the last half century. One of the main criticisms of utilitarianism is that it prioritizes net happiness at the expense of fundamental individual interests.³⁶⁶ It has thus been claimed that in certain circumstances, application of utilitarianism leads to unwanted consequences, like punishing innocent people.³⁶⁷ For example, severe punishment may be inflicted

SocialSciences/pppecorino/ETHICS_TEXT/Chapter_4_Ethical_Theories/Consequential_or_NonConsequential.htm [https://perma.cc/5NYN-397J].

³⁶⁰ *Id.*

³⁶¹ L. W. SUMNER, *THE MORAL FOUNDATION OF RIGHTS* 165 (1987).

³⁶² *Id.*

³⁶³ See PETER CARRUTHERS, *THE ANIMALS ISSUE: MORAL THEORY IN PRACTICE* 36 (1992).

³⁶⁴ Mirko Bagaric, *A Utilitarian Argument: Laying The Foundation for A Coherent System Of Law*, 10 OTAGO L. REV. 163, 167 (2002).

³⁶⁵ *Id.* at 178–80.

³⁶⁶ See JOHN RAWLS, *A THEORY OF JUSTICE* 19–24 (Harvard Univ. Press rev. ed., 1999) (1971).

³⁶⁷ HENRY JOHN McCLOSKEY, *META-ETHICS AND NORMATIVE ETHICS* 180–81 (1969).

on a few individuals in order to temper public rebellion, or individuals may be forced to agree to organ removal if those organs would maximize happiness by facilitating the saving of others' lives.³⁶⁸

Utilitarianism has also been criticized on the basis that it is not congruent with the notion of rights. This is because utilitarianism is a "maximizing" principle in that it seeks to maximize net happiness, while the concept of rights is "individualizing" in that its objective is to accord and uphold particular interests for each individual.³⁶⁹ Critics of utilitarianism are concerned that utilitarianism does not differentiate between individuals, and thus fails to protect fundamental rights and interests.³⁷⁰

ii. Non-Consequentialist (Deontological) Theories

Unlike utilitarianism, non-consequentialist – or deontological – theory prioritizes individual rights. These theories assert that the appropriateness of an action depends on its intrinsic features and not on its ability to produce outcomes.³⁷¹ Thus, according to these theories, consequences are an immaterial or minor consideration in considering whether an act is moral.

Deontologists thus focus on the intrinsic morality of an action as opposed to the consequences that it brings about.³⁷² For example, if deontological theory deemed that lying was morally wrong, then lying to a terrorist about the location of his intended target would be wrong, even if that meant that numerous lives would be lost as a result. In the same hypothetical situation, a utilitarian would lie to the potential terrorist about the intended target's location in order to prevent the loss of life, as a result minimizing total pain and suffering.

³⁶⁸ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 206–07 (1974).

³⁶⁹ Mirko Bagaric & Penny Dimopolous, *International Human Rights Law; All Show, No Go*, 4 J. HUM. RTS. 3, 13 (2005) (although it has been argued that utilitarianism and rights are congruent).

³⁷⁰ See RAWLS, *supra* note 366 at 24.

³⁷¹ SUMNER, *supra* note 361, at 165.

³⁷² Stephen O' Sullivan & Philip A. Pecorino, *Ethics: Chapter 7. Deontological Theories: Natural Law Theory*, QUEENSBOROUGH COMMUNITY C. (2002), https://www.qcc.cuny.edu/SocialSciences/ppecorino/ETHICS_TEXT/Chapter_7_Deontological_Theories_Natural_Law/Natural_Law_Theory.htm [<https://perma.cc/R3QY-MDLM>].

The most popular deontological theories are based on rights, particularly human rights. These theories rose in popularity after the Second World War as a result of collective determination to avoid a repeat of the atrocities of that war. Deontological theorists believed that such atrocities would be less likely to occur if the inherent rights of individuals were recognized.³⁷³ Since then, there has been an increased tendency to express moral sentiments in terms of rights.³⁷⁴ In this respect, human rights concepts have displaced utilitarian thinking as the leading philosophical inspiration for advocates of political and social reform.³⁷⁵ Rights-based claims have had some significant success in driving social change. For example, acknowledgement of the universal right to freedom brought about the end of slavery.³⁷⁶ Further, marginalized groups, such as women and people with disabilities, have succeeded in improving their social status to at least some extent, by arguing for the right to equality.³⁷⁷

iii. Animals' Moral Status in Light of Consequentialist and Non-Consequentialist Theories

The question of whether consequentialist or non-consequentialist moral theories are preferable has not been resolved. Significant criticisms have been made in relation to both sets of theories.³⁷⁸ However, while this debate is certainly interesting, it is not necessary to resolve it for the purposes of this Article; both theories can be used to support the attribution of moral status to animals.

Many consequentialist theorists argue that the sentience of animals means that they have moral status. In this respect, writers including Scott Wilson assert that animals have sentience,³⁷⁹

³⁷³ See Mirko Bagaric, *In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent and the Compatibility of Utilitarianism and Rights*, 24 AUSTL. J.L. PHIL. 95, 123 (1999).

³⁷⁴ See SUMNER, *supra* note 361, at 1.

³⁷⁵ H. L. A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 196–97 (1983).

³⁷⁶ Bagaric, *supra* note 364, at 166.

³⁷⁷ *Id.*

³⁷⁸ See *id.* (discussing consequentialist theories in relation to rights theories).

³⁷⁹ Scott Wilson, *Animals and Ethics*, INTERNET ENCYCLOPEDIA PHILOSOPHY, <https://www.iep.utm.edu/anim-eth/> [<https://perma.cc/R6HW-NGLM>].

which means the capacity for sensation or feeling.³⁸⁰ Further, Peter Singer, a prominent animal advocate and utilitarian, focuses on the sentience of animals to justify recognizing animal interests as being equal to human interests.³⁸¹

The link between animal sentience and recognition of their moral status pursuant to consequentialist theory is eloquently expressed by Jeremy Bentham, one of the fathers of utilitarianism, in his famous quote, “*the question is not, Can they reason? nor Can they talk? but Can they suffer?*”³⁸²

In other words, because utilitarian theory focuses on the capacity of an action to bring about happiness or pain, the capacity of animals to experience pain and suffering means that their interests must be taken into account in determining the morality of an action.

Non-consequentialist theories, including rights-based theories, can also be used to justify the attribution of moral status to animals. In this respect, while non-consequentialist theories were originally advanced to protect individual human interests, they are also capable of being extended to encompass animal interests.³⁸³ This is so demonstrated through the following overview of philosophical thinking in relation to the nature of rights.

Various definitions of rights have been propounded over the last century. Perhaps the most well-known definition is that provided by Wesley Hohfeld, who identified four categories of rights: claim-rights, privileges, powers, and immunities. According to Hohfeld, only claim-rights fell within the strict meaning of rights.³⁸⁴ Further definitions of rights have been provided by various philosophers. For example, according to H. McCloskey, rights are essentially entitlements,³⁸⁵ while T. Campbell asserts that

³⁸⁰ See *Sentient*, COLLINS DICTIONARY, <https://www.collinsdictionary.com/dictionary/english/sentient> [<https://perma.cc/P55K-2XPT>].

³⁸¹ SINGER, *supra* note 14, at 8–9.

³⁸² JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 311 (Clarendon Press, 1879) (1823) (emphasis added).

³⁸³ See TOM REGAN, THE CASE FOR ANIMAL RIGHTS 243 (University of California Press ed., 1983); see also James Rachels, *Why Animals Have a Right to Liberty*, in ANIMAL RIGHTS AND HUMAN OBLIGATIONS 122, 124 (Tom Regan & Peter Singer eds., 2d ed. 1989).

³⁸⁴ W. N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING: AND OTHER LEGAL ESSAYS 71 (Walter Wheeler Cook ed., 1919).

³⁸⁵ H. J. McCloskey, *Rights: Some Conceptual Issues*, 54 AUSTL. J. PHIL. 99, 115 (1976).

rights are “*moral* entitlements.”³⁸⁶ Similarly, T. Sprigge explains that “[t]he best way of understanding that someone has a right to something seems to be to take it as the claim that there are grounds for complaint on their behalf if they do not have it.”³⁸⁷ What appears to be common to these definitions is that a right is something to which someone is entitled and that they may claim from others.

Some definitions of rights, however, refer expressly to humans. For example, rights have been defined as “those minimum conditions under which *human beings* can flourish . . . and which ought to be secured for them.”³⁸⁸ Similarly, according to T. Hobbes rights are “the liberty each *man* hath.”³⁸⁹ These definitions, however, could be argued to refer to humans only in order to illustrate the nature of rights rather than as claims that only humans can be rights-holders.

Further, some definitions of rights appear to preclude the application of rights to animals as a result of the preconditions that they impose for eligibility to hold rights. Nevertheless, as with the definitions discussed above, close analysis of these theories demonstrates that they do not rule out the possibility of animals being rights-holders. For example, according to H.L.A. Hart, to be eligible to have a right, an individual must be able to choose whether or not to exercise the right.³⁹⁰ This requirement would appear to restrict rights ownership to humans, as animals are, on the face of it, not capable of communicating a decision as to whether or not to exercise a right. Nevertheless, it could be interpreted that animals are capable of such choice, and that they communicate their choice by attempting to avoid pain and suffering. Further, many humans are also incapable of deciding whether to exercise a right, including young children and people with intellectual disabilities, and yet such people are included within the community of rights-

³⁸⁶ TOM CAMPBELL, *THE LEGAL THEORY OF ETHICAL POSITIVISM* 164 (1996).

³⁸⁷ T. L. S. SPRIGGE, *THE RATIONAL FOUNDATION OF ETHICS* 216–17 (Ted Honderich ed., 1987).

³⁸⁸ John Kleinig, *Human Rights, Legal Rights and Social Change*, in *HUMAN RIGHTS* 44–45 (Eugene Kamenka & Alice Erh-Soon Tay eds., 1978) (emphasis added).

³⁸⁹ THOMAS HOBBS, *LEVIATHAN* 84–85 (Michael Oakeshott ed., Basil, Blackwell, Oxford 1946) (1651) (emphasis added).

³⁹⁰ H. L. A. Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 175 (1955).

holders.³⁹¹ To be theoretically consistent, such humans would need to be excluded from rights-holding – a situation which would not be broadly accepted. Similarly, according to Michael Tooley, only individuals that wish to continue existing are entitled to a right to life.³⁹² Again, it may appear that this theory would preclude animals from holding rights, as it may be thought that animals lack the self-consciousness required to desire a continued existence. In this respect, however, animal welfare science has clearly established that many animals are aware of their own existence and are thus capable of having a desire to continue existing.³⁹³

In contrast, some philosophers that adhere to rights-based moral theories argue in favor of the attribution of rights to animals. One of the leading proponents of rights for animals, Tom Regan, argues that because animals are the “subject of a life,” they have inherent value and are entitled to various rights.³⁹⁴ Similarly, James Rachels contends that animals that are used for research should be recognized holders of a number of rights.³⁹⁵

Thus, it is clear that any defensible definition of rights is capable of extension to animals. Some philosophers have already argued in favor of animals being entitled to rights. Under broad rights definitions, such as that rights are an entitlement or a valid claim to something, animals can clearly be understood as rights-holders. Further, even those rights definitions that appear to exclude animals as being entitled to hold rights can either be explained as referring to humans only for illustrative purposes, or as definitions that would also have the result of excluding groups of humans, a result which would not accord with public norms.

iv. Contractualist Theories – A Rebuttal

Alongside utilitarianism and rights theories, contractualist theories have also been influential in relation to the question of who has moral status. Philosophers who hold to contractualist theory emphasize the importance of ideals and determine who has

³⁹¹ See Hamish Ross, *Children’s Rights – A Defence of Hartian Will Theory*, 22 INT’L J. CHILD. RTS. 43, 54 (2014).

³⁹² Michael Tooley, *Abortion and Infanticide*, 2 PHIL. & PUB. AFFAIRS 37, 47 (1972).

³⁹³ See *supra* Section III(B).

³⁹⁴ REGAN, *supra* note 383, at 243.

³⁹⁵ Rachels, *supra* note 383, at 127–28.

moral standing by reference to who has the rational capacity to enter into an imaginary contract regarding the rules to govern society. For example, P. Carruthers describes the theory as one that “views morality as the result of an imaginary contract between rational agents, who are agreeing upon rules to govern their subsequent behaviour.”³⁹⁶ Pursuant to this theory, animals lack the rational capacity to enter into an imaginary contract, and thus lack moral status.³⁹⁷ This conclusion is discussed by J. Rawls, a leading proponent of contractualist theory. He explains that while “it is wrong to be cruel to animals,” animals lack rationality and a sense of justice and accordingly, “it does not seem possible to extend the contract doctrine so as to include them in a natural way.”³⁹⁸ Thus, pursuant to contractualist thinking, it appears that animals are considered inferior to humans in significant ways and thus lack moral status.

While contractualist theory appears to lead to the conclusion that animals lack moral status, it is a theory that is inherently anthropocentric, which means it can be attacked on the basis that it is speciesist. Contractualist theory bases the existence of moral theory on an attribute that is seen to be characteristic of humans.³⁹⁹ It is not clear why this characteristic is more important than other characteristics such as sentience, which many other species do have, yet this human characteristic is relied upon to deny animals moral status and thus justifies cruelty towards them. Further, the application of contractualism would also lead to the conclusion that many humans lack moral status.⁴⁰⁰ This is because many humans, such as young children and people with intellectual disabilities, also lack the capacity to enter a social contract. Consequently, such human individuals would also be excluded from moral status and cruelty towards them would also be justifiable. This result, however, would be antithetical to current social norms.

v. Conclusion Regarding the Moral Status of

³⁹⁶ CARRUTHERS, *supra* note at 363, at 35.

³⁹⁷ *Id.* at 105.

³⁹⁸ RAWLS, *supra* note 370, at 448.

³⁹⁹ Tom Regan, *The Case for Animal Rights*, in ANIMAL RIGHTS AND HUMAN OBLIGATIONS 105, 106 (Routledge & Kegan Paul plc eds., 1983); see CARRUTHERS, *supra* note at 363, at 35–36.

⁴⁰⁰ See Regan, *supra* note 399, at 106–08.

Animals

Therefore, pursuant to moral theory, animals do have moral status. The application of consequentialist, and particularly utilitarian, theories leads to the conclusion that animals should be recognized as having moral status primarily because they are sentient. In order to minimize pain and suffering experienced by animals, their interests must be taken into account. While non-consequentialist, and especially rights-based, theories were initially developed to protect human interests,⁴⁰¹ there is no compelling definition of rights that would limit their application to humans. Further, like rights definitions that seek to limit the operation of rights to humans, contractualist theory can be criticized on the basis that it is inherently anthropocentric and thus discriminates against animals on the basis of species, which is not a relevant moral characteristic. This is because it positions moral status as something belonging only to those individuals who have rational capacity, a characteristic which is generally thought to belong only to (high-functioning) humans.

Given that law, and particularly criminal law, is strongly influenced by morality,⁴⁰² the conclusion that animals have moral status means that their interests should be taken into account in making and enforcing law. In particular, this Article argues that wave concluded that animals are sentient, meaning that they are capable of subjective feelings of pleasure and happiness, as well as pain and suffering. These interests should be taken into account when creating laws that impact them.

5. Conclusion on the Introduction of an Equality Principle in Animal Protection Law

As discussed, the introduction of an equality principle into animal protection laws would better assist such legislation to meet the purposes of minimizing animal pain and suffering. In this respect, such purposes are well supported by both science and moral theory: scientific research establishes that most animals are

⁴⁰¹ See generally H. Verhoog, *Defining Positive Welfare and Animal Integrity*, in 2 NAHWOA WORKSHOP 108, 108–13 (Malla Hovi & Roberto García Trujillo eds., 2000) (discussing the anthropocentric, pathocentric, zoocentric, biocentric, and ecocentric theories).

⁴⁰² Bagaric, *supra* note 312, at 185.

sentient, and moral theory indicates that animals have moral status. Moreover, recent research into public attitudes in the U.S. regarding the ways in which humans interact with animals is indicative of a public desire for increased legal protections for animals. While laws should not be based in *every* instance on public norms, such norms should influence the development of the law to some extent. This is because laws that are unreflective of public norms are unlikely to be respected or enforced. In the next section, this Article discusses means by which an equality principle could be implemented so as to underpin animal protection laws in the U.S.

C. Recommendations for the Implementation of an Equality Principle in Animal Protection Law

In order to incorporate an equality principle into animal protection laws, a number of legislative changes are required. First, while not technically required for the purposes of an equality principle, this Article recommends expressly setting out the purposes of animal protection legislation in the legislation itself. This would be appropriately placed in a preamble or early section of an act. Animal protection legislation should be directed primarily towards recognizing animal sentience and preventing and punishing acts towards animals that cause unnecessary pain or suffering.

Second, animal protection legislation should be amended so as to include a general statement of equality and non-discrimination. In this respect, article 26 of the ICCPR may be adapted for this purpose. For example, the statement of legislative purposes in animal protection legislation could include that all animals are equal before the law and are entitled, on the basis of their sentience and without any discrimination, to the equal protection of the law. It may be appropriate to expand this provision to indicate that the law prohibits any discrimination and guarantees to all animals equal and effective protection against discrimination on any ground, such as species, human use, or sex. While animals are routinely discriminated against on each of these grounds, it may be advisable to include that discrimination should also not be on the basis of any other status.

Third, it is desirable to provide a general prohibition on cruelty to animals. In accordance with the purposes of animal protection legislation, such a prohibition should be focused on the prevention and punishment of conduct that causes animals to feel

unnecessary pain or suffering. In this respect, it should focus on the animal as subject, rather than the human behavior. For example, a provision might require that “[a] person must not do any act, or omit to do any duty, which causes or is likely to cause [unnecessary] pain or suffering to an animal.”⁴⁰³ The legislation may go on to detail, non-exhaustively, the kinds of acts or omissions that are likely to violate this provision. It is acknowledged that a provision like this would require legal authorities to determine, on a case by case basis, what constitutes unnecessary pain or suffering, and that such an approach is vulnerable to privileging the interests of property owners against those of animals.⁴⁰⁴ Nevertheless, some attempt can be made to minimize this consequence by removing the exemptions for industry practices, and by explicitly acknowledging the equality of animals and purposes of animal protection legislation in the legislation itself.

The legislation will also need to define the term “animal.” In this respect, this Article suggests defining animal to include all animals that scientific research has demonstrated are clearly sentient, which includes all live vertebrate animals. Research appears to indicate that some invertebrates, such as cephalopods (like octopuses and squids) are also sentient, and so it is advisable to include within the definition of “animal” other creatures as prescribed for the purposes of the relevant animal protection legislation.⁴⁰⁵ This Article also suggests excluding humans from the definition of “animal,” not because they are not animals or do not feel pain and suffering, but because there are detailed laws already in place to prevent and punish cruelty towards humans.

Extending legislative protections to fish (which are vertebrate animals) is likely to be controversial. The scientific evidence is strongly suggestive that fish are sentient in the same way other vertebrate animals are, in that they can feel fear and pain, and also suffer.⁴⁰⁶ In many cultures, however, it is common to catch fish

⁴⁰³ See, e.g., *Animal Welfare Act 1993* (Tas.) pt I s 8 div 1 (Austl.).

⁴⁰⁴ GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 125–26 (Tom Regan ed., 1995).

⁴⁰⁵ See, e.g., *Animal Welfare Act 1993* (Tas.) pt I s 3 (Austl.).

⁴⁰⁶ *Fish Are Sentient*, FISH COUNT, <http://fishcount.org.uk/fish-welfare-in-commercial-fishing/fish-sentience> [<https://perma.cc/K6CD-8Q85>]; see also European Food Safety Authority Panel on Animal Health and Welfare, *General Approach to Fish Welfare and to the Concept of Sentience in Fish*, at 1–19, Scientific Opinion EFSA-Q-2008-708 (Jan. 29, 2009).

using hooks attached to a line thrown into the water.⁴⁰⁷ To the extent that fish can feel pain, pulling a fish out of the water using a sharp hook is likely to bring about feelings of pain. Ideally then, given their equal sentience, fish should enjoy equal protection from the infliction of pain and suffering by humans. However, in light of cultural norms, it may take time for such a law to be respected and enforced. Accordingly, particular states may need to exclude fish from legislative protection until such time that education initiatives have sufficiently convinced the population that fish are also deserving of protection. This approach may appear inconsistent with the overall argument presented here, but history has demonstrated that real change happens in increments and over time. There is little point suggesting radical changes to the law which are unlikely to be accepted in the current social climate. The situation of fish may be contrasted with the situation of farm animals, who are also routinely excluded from legislative protection. Like fish, farm animals are sentient animals. Unlike fish, however, humans have become sufficiently aware of the situation of farm animals that they generally believe increased legal protections for farm animals are required.⁴⁰⁸

Fourth, current laws must be scrutinized in order to identify and remove any existing discrimination in legal protection. For example, the exclusion of animals such as farm animals from legislative protection should be removed.⁴⁰⁹ Laws should adhere to the principle that the law treats animals equally, irrespective of the species of animal, the use to which humans put the animal or the sex of the animal. Where animals are to be treated differently, there must be an adequate purpose that justifies the distinction. For example, if a particular species is in danger of extinction, it may be justifiable for the law to provide members of that species with special protections.

⁴⁰⁷ See Fisheries Research & Dev. Corp., *Hook and Line*, FISH.GOV.AU, <https://www.fish.gov.au/fishing-methods/hook-and-line> [https://perma.cc/WZ8C-WNRB].

⁴⁰⁸ See FUTUREYE, COMMODITY OR SENTIENT BEING? AUSTRALIA'S SHIFTING MINDSET ON FARM ANIMAL WELFARE 4, 6 (2018), <https://www.sheepcentral.com/wp-content/uploads/2019/05/190129-Commodity-or-Sentient-Being-Australias-Shifting-Mindset-on-Farm-Animal-Welfare-v.-7.0.pdf> [https://perma.cc/AHK4-GJJM].

⁴⁰⁹ See *supra* Section II(B)(i).

Fifth, where it is determined that the treatment of animals in a way that causes pain or suffering is justifiable or reasonable, the law must ensure that there is sufficient transparency such that the conduct is made accountable. This principle may be relevant in the context of animals used in experiments for scientific research. Where it is deemed that the use of animals in that context is justifiable or reasonable because of the likelihood of the research resulting in, for example, lives being saved, then the conduct must be made visible to the public. If the public supports the conduct as justifiable or reasonable, this will not be problematic. This requirement may be contrasted with current approaches in contexts in which animals are legally treated with extreme cruelty, such as farm animals. In this respect, a common legal approach is the enactment of “ag-gag” laws, which operate to prohibit undercover filming or photography on farms without the farm owner’s consent.⁴¹⁰ This approach operates to remove all accountability for the treatment of farm animals, as the public is prevented from knowing the ways in which farm animals are being treated.

Finally, there is little point in having strong legal protections in place to prevent cruelty to animals if there is not also sufficient funding and other resources in place to enforce the laws. It is commonly the case with animal protection laws that “lack of enforcement is a perennial issue amid high caseloads, limited resources ... lack of expertise and a perception that crimes against animals are not a high priority.”⁴¹¹ In order to supplement government-based or funded approaches to enforcement, laws should also give non-profit organizations and individual humans standing to bring lawsuits on behalf of animals.

V. CONCLUSION

Animals are subjected to cruelty by humans on a daily basis and in many varying contexts. Consequently, laws in all jurisdictions in the U.S. criminalize human cruelty to animals. Such laws implicitly recognize that animals are sentient beings and seek to minimize the pain and suffering to which animals are subject. Yet

⁴¹⁰ See, e.g., MO. REV. STAT. §§ 578.405, 578.013 (2019).

⁴¹¹ Nicole Pallotta, *New Animal Cruelty Prosecution Unit Created in Florida*, ANIMAL LEGAL DEF. FUND (July 30, 2016), <https://aldf.org/article/new-animal-cruelty-prosecution-unit-created-in-florida/> [<https://perma.cc/XM7X-FGRC>].

while some of this conduct is criminalized by the relevant animal protection laws, the majority of it remains legal because it occurs in contexts and in relation to species that are excluded from legal protection. This situation means that animal protection laws are actually prevented from properly fulfilling their purposes of minimizing unnecessary animal pain and suffering and is morally untenable.

The most important, and in the law, the most dominant, purpose of animal protection laws is to recognize that animals are sentient beings and, accordingly, to prevent and punish the infliction of unnecessary pain and suffering on them. This purpose is supported by scientific research, which demonstrates that most animals (vertebrates and some invertebrate species) are sentient, meaning that they are capable of experiencing both positive and negative emotional states. In particular, sentient animals are able to experience physical and psychological pain in a similar way to human beings. Further, moral theory also indicates that animals have moral status, meaning that their interest in avoiding pain and suffering should be taken into account in evaluating the morality of human decision-making. Moreover, public sentiment is clearly in favor of improving the legal protections for animals, and in particular, for many species that are currently discriminated against on the basis of their species or the manner in which they are used by humans. Thus, not only do scientific research and moral theory support improved legal protections for animals, such changes would also accord with normative values, which would influence legal standard setting.

This Article contends that the introduction of an equality principle, analogous to that used in international human rights law, as a standard that underpins animal protection laws, would enable those laws to better meet their primary purpose. In international human rights law, the equality principle means that all human beings are equal before the law and entitled, without discrimination, to the equal protection of the law. Similarly, if applied to animals, such a principle would mean that all non-human animals are recognized as being equal before the law and being entitled to the equal protection of the law, including equal protection from the infliction of unnecessary pain and suffering by humans.

In concrete terms, implementing an equality principle would require significant amendments to animal protection laws. In

particular, it would be beneficial to expressly state the purposes of animal protection laws in the relevant legislation, including the primary purpose of preventing and punishing conduct towards animals that causes, or is likely to cause, unnecessary pain and suffering. Further, a general statement providing that all animals are equal before the law and are entitled to the equal protection of the law should be included in the legislation. In terms of substantive provisions, a general anti-cruelty provision should be included to prohibit human conduct towards animals that causes, or is likely to cause, unnecessary pain and suffering. This provision should apply to all sentient animals. That said, it may be necessary to exclude fish until the public are sufficiently educated to understand that fish are also capable of experiencing pain and suffering. While they are incremental in the way described, even these changes may at first appear quite radical. The justifications provided for the law to develop in this direction, however, are compelling. Not only would such legal protections prevent much needless pain and suffering of animals, they would also improve the moral validity of animal protection laws.