

## Animal Law Committee

### PROJECTING A GREAT APE FUTURE

By: Paul Waldau and Michele Stumpe

The Great Apes Subcommittee was convened to discuss ways to assist the legal community, and society as a whole, to engage the bitter debates and extraordinary possibilities that have emerged at the intersection of human society and the fates of our fellow great apes. (Yes, humans are, along with chimpanzees, gorillas, orangutans and bonobos, scientifically classified as great apes.)

#### Great Ape Protection Act

Consider the implications of just one piece of proposed legislation. In the U.S. House of Representatives, legislation entitled “Great Ape Protection Act”<sup>1</sup> was

introduced in Spring 2008 and is expected to be re-introduced in 2009<sup>2</sup> during the 111<sup>th</sup> Congress. The proposed legislation would prohibit invasive research, federal funding of such research, and breeding of nonhuman great apes for invasive research.



If this bill is enacted, certain government agencies will be forced to retire to sanctuaries some 600 chimpanzees to which the United States government has legal title. In effect, this legislation would create a

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<sup>1</sup> H.R. 5852, 110th Cong. (2008).

<sup>2</sup> The original four lead sponsors, Edolphus Towns (D-NY), David Reichert (R-WA), James Langevin (D-RI) and Roscoe Bartlett (R-MD), will re-introduce the bill.

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## LETTER FROM THE CHAIR

It has been a busy first half of my term and I wanted to take this opportunity to update all of you on recent developments, current projects, and upcoming activities of the Animal Law Committee (ALC). I also want to thank our active members and leaders for their exceptional work over the past six months.

In Fall 2008, we restructured our subcommittees and leadership and reduced the number of substantive subcommittees. All of the prior areas are still represented, but some are now under broader umbrella categories. The 12 current substantive subcommittees are: Agriculture; Companion Animal; Disaster Relief; Equine Law; Great Apes; Humane Education; Insurance Issues; International Issues; Legislation; Litigation; Science & Technology; and Wildlife. These subcommittees are described *infra* and I encourage all of you to join one or more of them. Please contact the chairs or co-chairs listed for these subcommittees to let them know if you are interested in participating. I am sure that you will find subcommittee membership to be rewarding. It is a wonderful opportunity to work with other ALC members on a variety of projects, stay informed in areas of interest to you, and forge new friendships.

Our Legislation subcommittee has made great strides in developing model legislation on recovery for harm to a companion animal. Thanks to the efforts of our Vice-Chair and subcommittee chair David Favre, former Chair Kristina Hancock, and Vice-Chairs Ledy Van Kavage and John Kerr, among other members, and the guidance of TIPS Staff Director Susan Nolte, we are close to finalizing our Committee's report and recommendation for this model legislation. We will keep you posted in the coming months on our progress in this important area.

We have been keen to increase communication among our talented and diverse membership and I am happy to report that we now have an ALC Discussion Board that you can join. We are grateful to TIPS Associate Director Wanda Workman for her assistance in helping us get this discussion board up and running. You can easily access it from a link on our website homepage, <http://www.abanet.org/tips/animal>. It would be great if you would share information and your thoughts on a variety of animal-related topics with the rest of the ALC in this forum. We have organized the categories by our substantive subcommittees and each of our subcommittee chairs will be involved with posting relevant content and promoting an exchange of ideas on this discussion board. Please contribute your thoughts in this forum—we want to hear from you!

The ALC has always been eager to welcome student members and we are proud of our substantial student membership. I would like to thank Akisha Townsend, our Law Student Vice-Chair, for helping to facilitate communication among this group. For those of you who are law students, I want to let you know that we are now developing a Mentoring Program where law students can be matched with attorneys with experience in the field of animal law. If you would like to benefit from this new program, please inform Akisha at [akt25@law.georgetown.edu](mailto:akt25@law.georgetown.edu) of your name, school, hometown, year of graduation, and any particular area of animal law that interests you.

I also want to inform our student members that TIPS sponsors a Law Student Writing Competition and I encourage you to submit a piece related to animal law. As added incentive, there is an excellent prize involved, including cash and round-trip airfare to attend the ABA's Annual Meeting in Chicago in August 2009! The winning essay might also be published in the *Tort Trial & Insurance Practice Law Journal*. Submissions are due by March 2, 2009. For more information please visit: <http://www.abanet.org/tips/lawstudent/lswritingcomp0809.pdf>.

In the first year that the TIPS Enterprise Fund awarded grants to Committees for innovative projects, the Animal Law Committee was the recipient of a \$6,000 grant to begin a test pilot program for a podcast series called "Insights" on emerging and rapidly evolving animal law issues. Thanks to the tireless efforts of former Chair Jill Mariani, the ALC recently completed recording seven full length podcasts, which are all posted on the ALC website homepage. The following podcasts are now available for listening: *Animal Law: A Practice Whose Time Has Come* – an interview with former TIPS Chair Peter Bennett about the creation and the development of the ALC; *Forging a Career in Animal Law* – an interview with Joyce Tischler, an ALC member and

co-founder of the Animal Legal Defense Fund, providing an overview of career opportunities in the practice of animal law; *Estate Planning for Pets* and *Funding Your Pet's Trust Fund* – a two-part audio interview with Peggy Hoyt, a nationally prominent trust and estates attorney; *When An Animal Enters The Case* – an interview with David Ball, a nationally known jury and trial consultant; *Interview with Raj Panjwani, the author of the TIPS book "Wildlife Law: A Global Perspective,"* – a comparative study of the laws enacted in nine countries for the protection of wildlife and its habitat; and *CSI: Testing Animal DNA for Toxic Exposure* – an interview with Dr. Bruce Gillis, Chief Executive Officer of the Cytokine Institute. We are very excited about the recent completion of this podcast series. A more detailed explanation of "Insights" can be found *infra*.

I would like to congratulate Jill Mariani for bringing this podcast project to the next level. Through her efforts (also as Chair-Elect-Designee of the Government Law Committee), the Animal Law and Government Law Committees received a second Enterprise Fund grant of \$14,700 to produce six podcasts as part of an internet radio program pilot for the TIPS Section called "*Legal TIPS*." Jill and ALC Founding Chair Barbara Gislason will co-host this radio show. One of the approved programs is an interview with Ellen O'Neil-Stephens, a Senior Deputy Prosecutor in Seattle, Washington, who instituted the Courthouse Dogs Program in which trained, certified dogs provide emotional support to crime victims. She will be joined by John Christopher from DecisionQuest, a TIPS sponsor. This internet program will also serve to promote our postponed conference entitled "*Providing People with Disabilities and the Elderly Equal Access to Justice*" that we are co-sponsoring with Stetson University, the TIPS Standing Committee on Diversity in the Profession, and a host of other TIPS General Committees and ABA entities.

On the CLE front, we have continued to be very active. As you know, the ALC held a CLE program at DePaul University in September 2008 on the federal dog fighting case against Michael Vick and its impact on future cruelty cases. Our Vice-Chair Ledy Van Kavage organized this conference and it was such a success that the ABA has now posted audio files from this program on our Committee homepage. Many thanks to Debbie Weixl and Julie Brown from ABA Media Relations for all their help in making this happen and getting us this excellent coverage.

I am also pleased to report that we recently received approval for our proposal to conduct a moot court program at the Annual Meeting in Chicago in August 2009 entitled "*The Supreme Court and the Ownership of Life*" on the patentability of higher life forms. We will be co-sponsoring this program with the TIPS Intellectual Property, Government Law, and Appellate Advocacy Committees. Our Chair-Elect-Designee, Mariann Sullivan, has assumed the task of co-chairing this program on behalf of the Animal Law Committee along with co-chairs Dan Polsenberg, Chair of the Appellate Advocacy Committee, Jill Mariani, Chair-Elect-Designee of the Government Law Committee and Barbara Gislason, Chair-Elect of the Intellectual Property Committee.

The Humane Education subcommittee is currently planning a webcast with the Law in Public Service Committee entitled "*Humane Education: Teaching Compassion to End Abuse*." Our panel of speakers will discuss various legal and policy issues related to humane education and the link between animal abuse and human violence. We will keep you posted on program details as they get confirmed.

In addition, in the past several months, the ALC has been busy with various publications. We have been working on two books that we hope to soon publish: "*Litigating Animal Law Disputes*" edited by Chair-Elect Joan Schaffner and Vice-Chair and subcommittee chair Julie Fershtman; and "*ABA TIPS Guide to Handling Dangerous Dog Issues*." Vice-Chairs Adam Karp and Julie Fershtman recently submitted our comprehensive annual update in animal law to the *Tort Trial & Insurance Practice Law Journal*. In addition, Joan Schaffner and I recently co-authored a Committee profile that will be published in the February 2009 issue of TIPS *The Brief* magazine. Our Newsletter Editor, Joan Schaffner, and associate editors Becky Silverstein and Stacy Kelly, have also been hard at work in putting together three Newsletters this year.

Finally, the Humane Education subcommittee in collaboration with HEART (Humane Education Advocates Reaching Teachers), the non-profit public charity I run, recently prepared an extensive manual on humane education as part of the joint pro bono project with the Law in Public Service Committee. I am excited to report that we are on track to begin our public service project this spring. The primary objective of the Humane Education Project is to cultivate compassion and empathy in our youth toward animals and foster respect for

the environment. We are soliciting lawyer and law student volunteers from the ABA membership, and from the membership of state or local bar associations, to work on implementing humane education programs in their local schools. This public service project has been developed for elementary school children in 4th and 5th grades. In its pilot phase in Spring 2009, the project will be implemented in New York and the District of Columbia where interested volunteers will be trained by HEART's instructional staff to offer a four-lesson humane education program. Please check our ALC website for updated information and further details this month, but we are planning to conduct two trainings in DC and NYC from 10am-1pm on March 8, 2009, at George Washington University Law School and on March 14, 2009, at one of the offices of the Mayor's Alliance for NYC's Animals.

Humane education examines many of the challenges facing our world, and the specific lessons we are offering focus on people's relationships to animals and the environment. The program invites students to become problem-solvers, engaged young citizens, and conscious choice-makers so that their lives become part of the solution to persistent challenges. If you are interested in participating in this public service project in NYC, please contact me at [alagappan.meena@gmail.com](mailto:alagappan.meena@gmail.com) or email Joan Schaffner at [jschaf@law.gwu.edu](mailto:jschaf@law.gwu.edu) if you reside in the DC area. We intend to expand the geographical reach of this public service program over time, so I hope that eventually all of you will be able to work with youth in this transformative way. In my view, your commitment to the humane treatment of animals and your legal backgrounds make all of you excellent potential humane educators, and I hope students can benefit from your instruction.

Whether it is through public service, joining subcommittees, organizing CLE programs, conducting research, tracking or drafting legislation, or other activities, I hope that all of you will get more involved with the ALC in 2009 and help recruit new members (*see* our online brochure: <http://www.abanet.org/tips/animal/animallawbrochure.pdf>). If you would like to distribute printed brochure copies to prospective members, please contact TIPS Membership Specialist, Linda Wiley, at [lmwiley@staff.abanet.org](mailto:lmwiley@staff.abanet.org).

Thank you all for your membership, your collegueship and, most importantly, your concern for the animals. ⚖️

Very Truly Yours,

[Meena Alagappan](#)

**VISIT OUR WEBSITE AT:**

<http://www.abanet.org/tips/animal/home.html>

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Editorial Policy: This Newsletter publishes information of interest to members of the Animal Law Committee of the Tort Trial & Insurance Practice Section of the American Bar Association — including reports, personal opinions, practice news, developing law and practice tips by the membership, as well as contributions of interest by nonmembers. Neither the ABA, the Section, the Committee, nor the Editors endorse the content or accuracy of any specific legal, personal, or other opinion, proposal or authority.

Copies may be requested by contacting the ABA at the address and telephone number listed above.

## ANIMAL LAW COMMITTEE SUBSTANTIVE SUBCOMMITTEES

The ALC boasts several substantive subcommittees. Each subcommittee is recruiting members. Please contact the chair or co-chair of a committee you find of interest. This is a great way to get involved in the ALC!

### Agricultural Subcommittee

Co-Chairs

Mariann Sullivan ([marisul@earthlink.net](mailto:marisul@earthlink.net))

Robert Friedlander ([robertfriedlander@msn.com](mailto:robertfriedlander@msn.com))

The Agriculture subcommittee will cover a wide range of issues regarding the legal status of animals in agriculture, including the applicability of current animal protection laws, proposals for the development of state and federal legislation regulating such treatment, the appropriate availability and regulation of information to consumers and others regarding the condition in which such animals are held, and the links between animal welfare issues and other food policy concerns, including global warming and other environmental issues, world hunger issues, fossil fuel dependency and human health issues.

### Companion Animal Subcommittee

Co-Chairs

Frances Carlisle ([francescarlisle@earthlink.net](mailto:francescarlisle@earthlink.net))

Michelle Welch ([mwelch@oag.state.va.us](mailto:mwelch@oag.state.va.us))

Companion animals are important members of the family to many clients and the Companion Animal subcommittee will work on issues that affect companion animals and their guardians. These issues include pet custody litigation, veterinary malpractice, dog bites and other dangerous dog issues, criminal laws, estate planning for companion animals, including the use of pet trusts, and the link between animal abuse and domestic violence.

### Disaster Relief Subcommittee

Chair

Barbara Gislason ([gislasonbj@aol.com](mailto:gislasonbj@aol.com))

The purpose of this subcommittee is to educate the legal community about existing emergency management laws that pertain to animals, and to participate in efforts to improve them. The subcommittee has created and utilized the ABA-TIPS Select Legal Panel on Emergency Management to develop hold period language. It also hosts the ABA-TIPS Animal Disaster Relief Network, which was created shortly after Hurricane Katrina and is reactivated in times of greater national need. Through this subcommittee, the PETS

Act was supported by the ABA. Its recommendation that all states adopt emergency related hold period language is pending before the TIPS Council. We seek members with broad range subject matter expertise or a willingness to develop expertise in this emerging area.

### Equine Law Subcommittee

Chair

Katherine Bloomquist ([kbloomquist@earthlink.net](mailto:kbloomquist@earthlink.net))

The subcommittee's goal is to educate TIPS members on the diverse facets of equine law. Equine law involves not only issues regarding the welfare of the horse, but also business issues including transactional work, litigation, and Association representations for Olympic and international athletes in the sport horse world. According to the United States' American Horse Council, 4.2 million Americans are involved with the horse industry and 2 million people own horses. The horse industry has a direct economic effect on the U.S., as horse-related expenditures exceed \$39 billion annually. An estimated two hundred attorneys in the United States attend equine law conferences each year, with many more hundreds practicing in the equine law area. The time is ripe to grow this subcommittee. We look forward to TIPS members' support as we grow this subcommittee.

### Great Apes Subcommittee

Co-Chairs

Paul Waldau ([paul.waldau@tufts.edu](mailto:paul.waldau@tufts.edu))

Michele Stumpe ([mlstumpe@taylorbusch.com](mailto:mlstumpe@taylorbusch.com))

The Great Apes subcommittee explores the law as it applies to the Great Apes. Because sciences, philosophy, and ethical critiques regarding human interactions with these animals' lives and communities are so well developed, and because the captive situations of many nonhuman great apes are dire, we anticipate looking into a wide range of concerns and approaches. They will range from the practical to the highly theoretical, from legislation to litigation, from local to national to international. Our overall goal is to excite judges, practicing lawyers, students, academics, and non-lawyers about these extraordinary animals and the ways in which legal systems can be used to develop and enhance fundamental protections for them.

## Humane Education Subcommittee

Co-Chairs

Meena Alagappan ([alagappan.meena@gmail.com](mailto:alagappan.meena@gmail.com))

Debora Bresch ([deborab@aspc.org](mailto:deborab@aspc.org))

Humane education cultivates important character traits such as empathy, compassion and the respectful treatment of other people, animals and the environment. The link between human abuse and animal cruelty has been well documented and humane education helps break these cycles of violence. The mission of the Humane Education subcommittee is to raise awareness about the need for humane education, support efforts to enforce existing state humane education laws, and assist with the enactment of humane education laws in the numerous states without these statutes. Please join our subcommittee and help us create a more compassionate world through education.

## Insurance Issues Subcommittee

Co-Chairs

Julie Fershtman ([fershtman@aol.com](mailto:fershtman@aol.com))

Ben Zvenia ([drzvenia@myfedlawyer.com](mailto:drzvenia@myfedlawyer.com))

This subcommittee is involved with insurance and insurance-related issues that are unique to animals such as Veterinary Insurance for pets, Animal Mortality Insurance, Liability insurance (and exclusions unique to animals such as breed exclusions), and Worker's Compensation insurance. Members of our subcommittee will assist in drafting and/or preparing the annual "Animal Tort & Insurance" section of the ABA-TIPS *Tort Trial & Insurance Practice Law Journal*. We will also contribute articles involving insurance issues for the Animal Law Committee's Newsletter. With sufficient interest, we might also conduct seminars and CLE programs.

## International Issues Subcommittee

Co-Chairs

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This subcommittee will focus on issues and laws affecting animals around the world and will reach out to national Bar Associations in other countries to assist them in establishing their own animal law committees. Where countries have established animal law committees the subcommittee will collaborate on efforts in advancing the awareness of international animal welfare issues through joint programs and publications.

The subcommittee will also monitor and record relevant international legislation and treaties and compile this information into an accessible information source for fellow attorneys and the public on the ABA Animal Law website.

## Legislative Subcommittee

Chair

David Favre ([favre@law.msu.edu](mailto:favre@law.msu.edu))

The Legislative subcommittee drafts general model laws for state consideration or on demand for particular individuals who need some help with a topic. The Committee is presently working on legislation that creates a cause of act for harm to pets and allows for damages beyond the normal market value limitations.

## Litigation Subcommittee

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The goal of the Litigation subcommittee is to keep the community informed about the very latest trends and issues in animal law litigation as well as about new case law on animal law topics coming out of all of the state and federal courts.

## Science & Technology Subcommittee


TBA

## Wildlife Subcommittee

Co-Chairs

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There have been important recent legal developments regarding wildlife, and the Wildlife subcommittee will attempt both to educate interested TIPS members regarding them, and to further the public debate regarding how wildlife laws should be implemented. For example, in a case involving the Navy's use of sonar, the Supreme Court recently issued a major ruling potentially affecting all federal litigation over wildlife. In addition, one of the Bush Administration's last actions is the adoption of sweeping regulations that will eviscerate a range of Endangered Species Act protections. The subcommittee intends to solicit articles on these and other topics for the Newsletter and other TIPS/ABA publications, and perhaps to organize teleconferences and/or live conferences concerning them, depending on the level of interest and logistics. 

## THE PUPPY “BLACK MARKET”

By: Yolanda Eisenstein

Mention the black market in animals and most people conjure up images of shadowy characters exchanging elephant ivory or rhinoceros horn for suitcases full of cash. But there is another illicit trade in animals, not quite so exotic, that is growing internationally. It is a trade in cuddly, barely weaned puppies that are being packed onto airplanes, shipped to the United States, and sold by unscrupulous breeders in violation of federal and state laws. These puppies come from puppy mills in countries such as, but certainly not limited to, Russia, China, Lithuania, Latvia, and the Ukraine. Breeders are making handsome profits, selling puppies such as French bulldogs for \$2,500 - \$3,500 each without the associated costs of breeding and caring for the dogs until they are sold.

While it is not illegal to import puppies, it is illegal to defraud the federal government and the consumer in the process. Federal regulations require that puppies be quarantined by the importer until they are three-months-old, then vaccinated for rabies, and confined another 30 days before they can be sold. This means that an imported puppy cannot be sold until at least four months of age.<sup>1</sup> But there has been scant funding for enforcement and breeders have openly flouted them. The reality is that breeders are importing puppies at eight weeks of age and younger, and selling them immediately rather than complying with the quarantine regulations. Some sellers arrange to have their suppliers ship the puppies directly to their customers in an attempt to circumvent their legal obligations.

### A Host Of Problems For The Consumer

Purchasers of imported puppies may encounter a host of problems, beginning with the breeder's failure to disclose that their dog has been imported. Knowing the concerns a buyer may have about the lack of history associated with an imported puppy, some breeders actively promote that they lovingly breed and raise these puppies in their own homes, while actually selling puppies they have bought from foreign suppliers. Or they claim to import to enhance the bloodline, knowing that the puppies are churned out of foreign puppy mills, many with serious genetic defects. The travel is stressful and some puppies die in transit or come into the country with a variety of illnesses including Parvovirus, a highly contagious canine virus that is



expensive and difficult to treat. Dogs with Parvovirus may die even after receiving the best veterinary care.

Many unhappy buyers have purchased their puppies via the internet, never thinking that something could go wrong. Then after spending thousands of dollars treating a dog with Parvovirus or genetic defects, they find themselves trying to resolve a dispute with a breeder halfway across the country. While breeders often advertise “health guarantees” or sign contracts, the contracts and warranties are generally worded so as to reduce, rather than extend, protections the buyer may already have under the law. For example, the warranties almost universally deny refund of the purchase price under any conditions and promise only a replacement puppy. This leaves the purchaser with the possibility of taking another puppy that may have the same or more serious problems; or filing a lawsuit against a breeder who may be 1,000 miles away. With jurisdictional problems and expense, litigation is rarely a viable option for the purchaser. Most of the cases that are litigated are filed in small claims court because of minimal damages. In Texas, for example, small claims courts issue judgments of up to \$10,000.

### Consumer Remedies

For those purchasers who do choose to take legal action, states vary in the remedies that may be available. In Texas, purchasers may look to the Texas Deceptive Trade Practices and Consumer Protection Act, part of the Texas Business and Commerce Code, which protects consumers from sellers' fraudulent practices. The act contains a “laundry list” of 26 violations, and if the court finds that the breeder made misrepresentations knowingly or intentionally, deceived consumers may collect double or treble damages.<sup>2</sup> Consumers may also pursue a fraud or breach of

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<sup>1</sup> 42 C.F.R. § 71.51(c)(2)(ii) (2009).

<sup>2</sup> Tex. Bus. & Com. Code § 17.46.

## PEOPLE V. LARSON: ILLINOIS COURT OF APPEALS REJECTS CONSTITUTIONAL CHALLENGE TO ANIMAL CRUELTY STATUTE

By: Anthony T. Eliseuson

### Larson: The Facts

The Second District Illinois Court of Appeals recently rejected a defendant's challenge to the constitutionality of the Illinois aggravated cruelty to animals statute,<sup>1</sup> which is part of the Illinois Humane Care for Animals Act.<sup>2</sup> In *Larson*, the Defendant was charged with aggravated cruelty based upon evidence that he killed one of his family's household dogs by shooting it three times. The Defendant claimed that it was an act of euthanasia in light of the alleged aggressive tendencies of the dog, a Rhodesian Ridgeback named Sinai. The record contained a significant amount of conflicting testimony regarding the temperament of Sinai. The Defendants' wife, Linda, claimed Sinai never displayed any aggressive tendencies toward anyone, and never bit anyone.<sup>3</sup> Defendant, his three children, and Defendants' father, however, all testified to minor biting incidents and varying amounts of aggressive behavior that they allegedly witnessed from Sinai.<sup>4</sup>

### The Jury Verdict

A jury convicted the Defendant of committing aggravated cruelty to an animal and possession of a firearm without a valid license. The trial court imposed a sentence of 12 months probation.<sup>5</sup> Defendant appealed that conviction based, in part, on the argument that the aggravated cruelty to an animal statute was unconstitutionally vague.

The statute at issue states:

No person may intentionally commit an act that causes a companion animal to suffer serious injury or death. Aggravated cruelty does not include euthanasia of a companion animal through recognized methods approved by the Department of Agriculture.

A person convicted of violating Section 3.02 is guilty of a Class 4 felony.<sup>6</sup>

### The Defendant's Challenge

Defendant's vagueness challenge was based upon his assertion that "a reasonable person cannot determine from the statute what acts or methods are permissible means to euthanize one's own companion animal," because the "statute fails to define 'euthanasia' and 'recognized methods approved by the Department of Agriculture.'" The Defendant also argued that the aggravated cruelty provision was "an abrogation of his common-law property right to dispose of his property and that, therefore, the statute must be strictly construed."<sup>7</sup>

### The Court's Opinion: Not Void for Vagueness

The Illinois Court of Appeals rejected Defendant's arguments. The Court held that a statute can only be void for vagueness if it fails to "provide the kind of notice that would enable a person of ordinary intelligence to understand what conduct is prohibited," or fails to "provide explicit standards for those who apply it, thus authorizing or even encouraging arbitrary and discriminatory enforcement."<sup>8</sup> The Court then applied these standards to the aggravated cruelty statute and found the statute was not vague.<sup>9</sup>

The Court first determined that the statute sufficiently defined the prohibited conduct. The Court reasoned that the ordinary and popular meaning of the statutory language provided adequate notice that it intended to prohibit the "intentional killing or injuring of companion animals," and that it provided sufficient notice of the conduct prohibited to prevent arbitrary enforcement. Accordingly, the Court ruled, as a matter of law, that "a person of ordinary intelligence would reasonably know that, absent an affirmative defense, she or he may not simply grab a firearm, take the

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<sup>1</sup> 510 ILCS 70/3.02.

<sup>2</sup> *People v. Larson*, 379 Ill. App. 3d 642, 885 N.E.2d 363 (Ill. Ct. App. 2008).

<sup>3</sup> *Id.* at 366-67.

<sup>4</sup> *Id.* at 367-69.

<sup>5</sup> *Id.* at 370.

<sup>6</sup> 510 ILCS 70/3.02.

<sup>7</sup> *Larson*, 885 N.E.2d at 370.

<sup>8</sup> *Id.* at 371 (internal quotation omitted).

<sup>9</sup> *Id.* at 372.

## FILLING THE VOID: JUDICIAL ANALYSIS OF WILDLIFE IMPACTS IN A POST-WINTER WORLD

By: William S. Eubanks II

The National Environmental Policy Act (NEPA)<sup>1</sup> is a comprehensive statute that “promotes its sweeping commitment to prevent or eliminate damage to the environment . . . by focusing Government and public attention on the environmental effects of proposed agency action.”<sup>2</sup> Since its enactment in 1969, environmental plaintiffs have consistently invoked NEPA to ensure public involvement in federal agency action and to mitigate environmental harms stemming from such action. Recently, in *Winter v. Natural Resources Defense Council*,<sup>3</sup> the United States Supreme Court had the opportunity to address such agency action in the context of the Navy’s obligation to comply with NEPA in connection with its use of sonar for training exercises off the coast of California. However, the Court brushed aside many of the NEPA issues presented by the factual circumstances of the case and instead ruled quite narrowly, holding that a preliminary injunction was improper because “the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy.”<sup>4</sup> Therefore, the majority decidedly viewed *Winter* as more of a national security case and less of a substantive environmental case since its analysis focused predominantly on potential hardships to the Navy under the unique factual situation. The majority opinion, however, cursorily opened some environmental issues under NEPA that were never fully addressed once the Court moved on to its balancing of hardships—one of which was the level of harm necessary to establish irreparable harm in a wildlife context.

### The *Winter* Case

The case has a complex procedural history, but the most salient facts are as follows. For many years the Navy has conducted training exercises using mid-frequency sonar off the coast of Southern California, an area rich in marine life. In February 2007, the Navy prepared an Environmental Assessment (EA) with regard to fourteen specific training exercises scheduled through January 2009. The EA predicted that,



although many whales and other marine mammals would be subjected to sonar impacts causing temporary physiological or behavioral changes, few were likely to be killed or permanently injured. On that basis, as well as various measures the Navy claimed would mitigate adverse effects, the Navy concluded that an Environmental Impact Statement (EIS) pursuant to NEPA was unnecessary.

The Natural Resources Defense Council (NRDC) sued and sought preliminary injunctive relief, supported by declarations from marine mammal experts predicting far graver impacts than acknowledged in the EA. Finding that the NRDC was likely to prevail on its claim that the Navy was required to prepare an EIS, the court enjoined the use of mid-frequency sonar.<sup>5</sup> On appeal, the Ninth Circuit directed the district court to narrow the injunction to provide for “mitigation conditions” that would allow the training exercises to proceed on a restricted basis.<sup>6</sup> The Navy subsequently lost another appeal in the Ninth Circuit when the Navy attempted to invoke an emergency circumstances regulation to exempt itself from NEPA’s statutory requirements.<sup>7</sup>

When the case reached the Supreme Court, the gravamen of the Court’s ruling was that the “balance of equities and consideration of the overall public interest tip strongly in favor of the Navy” because the Navy had submitted detailed affidavits from “some of the Navy’s most senior officers” predicting that the two objectionable conditions would in fact interfere with the training exercises

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<sup>1</sup> 42 U.S.C. §§ 4231-4370f (2008).

<sup>2</sup> *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989).

<sup>3</sup> *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008).

<sup>4</sup> *Id.* at 378.

<sup>5</sup> *Natural Res. Def. Council v. Winter*, 2007 WL 2481037 (C.D. Cal. 2007).

<sup>6</sup> *Natural Res. Def. Council v. Winter*, 508 F.3d 885 (9th Cir. 2007).

<sup>7</sup> *Natural Res. Def. Council v. Winter*, 518 F.3d 658 (9th Cir. 2008).

## LIABILITIES INVOLVING EQUESTRIAN EQUIPMENT

By: Julie I. Fershtman

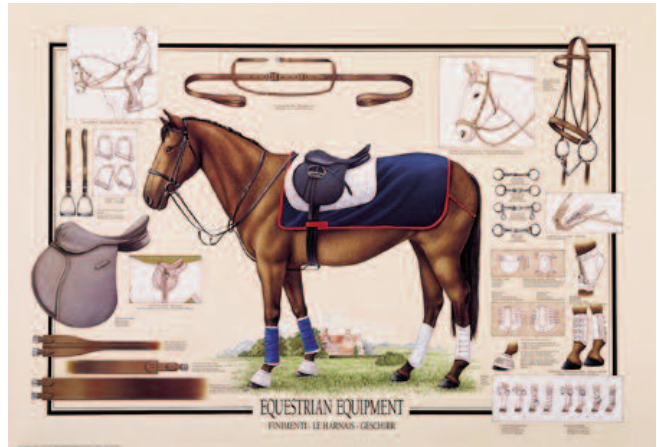
Since the domestication of the horse, equipment has become an integral part of their control and utilization. While many court cases have focused on injuries resulting from propensities and actions of the horse itself, litigation has also centered on equipment used with the horse. This article addresses a small sampling of the many cases.

### Saddles

Most of the litigation involving equestrian equipment arises from slipping saddles. Over sixty years ago, the court in *Ogan v. Perkins*,<sup>1</sup> evaluated whether a stable could be liable for a slipped saddle. In that case, the plaintiff rented a horse from the defendant's public riding stable but the horse "got out of control," ran off, and the saddle turned during the ride. The plaintiff was thrown, sustaining severe injuries and his lawsuit asserted that the defendant was negligent for improperly failing to tighten the girth (the strap that secures the saddle around the horse's belly; also known as a "cinch" on some types of saddles) before providing him with the horse. Evidence showed that the girth, itself, might have been defective because the plaintiff argued it was broken "about an inch below the ring" on the left side.

In defense of the case, the defendant testified that the horse had not given a rider trouble before and that the girth was checked and found to be tight before the plaintiff mounted. Testimony also indicated that the girth was only about six-months-old. Ultimately, the defense lost. The court found that the defendant breached its duty to "exercise ordinary care to ascertain if the girth needed tightening in order to be reasonably safe, and to tighten if such was found to be necessary in order to make reasonably safe."

The defense prevailed, by comparison, in *Cooperman v. David*.<sup>2</sup> There, the plaintiff and his family took part in a trail ride organized by the defendant. Riders dismounted for a brief lunch, and the saddles were loosened. Saddles were tightened before the riders re-mounted to finish the ride, but the saddle on the plaintiff's horse slipped, causing plaintiff to fall and become injured. The defendant in *Cooperman* successfully moved for summary judgment, arguing that a



slipping saddle was an "inherent risk" of riding under the Wyoming Recreation Safety Act.<sup>3</sup> The appellate court affirmed. It acknowledged that Wyoming law imposes no duty to a participant for injuries that result from "inherent risks" and explained that "a slipping saddle, with no other facts provided, is an inherent risk of horseback riding." In an interesting passage, the court acknowledged how saddling a horse can be an inexact science:

"As discussed above, it is inherent that a saddle will slip, and the plaintiffs' expert testified that saddles will slip for a variety of reasons. The expert also testified that although there are dangers in cinching the saddle too loosely, there are also dangers in cinching the saddle too tightly. For example, if a saddle is cinched too tightly the expert testified that the horse may roll, which could also obviously result in injury to the rider. Thus, because cinching a saddle is done by hand, and not with scientific precision, a provider must make a judgment call as to how tight or loose to cinch the saddle. This imprecision in the cinching of the saddle is "characteristic" or "typical" of and therefore "inherent in" the sport of horseback riding. It is an undesirable risk which is simply a collateral part of the sport. When the cinching of the saddle can be too tight or too loose, and the cinching is not done with scientific precision, it is inherent in the sport that the provider at all times will cinch too loosely or too tightly. . . ."<sup>4</sup>

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<sup>1</sup> *Ogan v. Perkins*, 191 S.W.2d. 666 (Mo. 1945).

<sup>2</sup> *Cooperman v. David*, 214 F.3d 1162 (10th Cir. 2000)(Wyoming law).

<sup>3</sup> Wyo. Stat. Anno. § 1-1-121, *et seq.*

<sup>4</sup> *Cooperman v. David*, 214 F.3d 1162 (10th Cir. 2000)(Wyoming law).

## OFFICERS CAN KILL A PET; IF A CIVILIAN KILLS A POLICE DOG, A FELONY IS COMMITTED

By: Gary C. Norman

### Introduction

An incident in Prince George's County, Maryland, in which police killed the pets of a mayor, calls into discussion the manner in which law enforcement manage situations that involve family pets and service animals.<sup>1</sup> From a certain point of view, the article in the Baltimore Sun reflects a potential dissidence by police: on the one hand, police dogs are heralded, while on the other, pets are considered dangerous, and in many instances, disposable. In many states, police dogs receive a special status under the law, which imposes criminal sanctions against those who would perpetrate harm against them.<sup>2</sup> Yet, tragic circumstances where police unilaterally decide to kill a pet, even where less drastic means could have been employed, abound.<sup>3</sup> No matter what one thinks regarding the actions of officers in Maryland and many other states that have resulted in the death of a pet, the goal should be the prevention of future incidents by ensuring that officers properly manage situations that involve pets. Working to shore up the level of respect by police for both police dogs and family pets is a fitting role for a lawyer as both a litigator and a teacher.

### Claims

To address the act of an officer killing a pet or service animal, one may turn to one of myriad potential claims that can be pursued by filing litigation under 42 U.S.C. §1983. Plaintiffs must demonstrate under §1983 that a state actor has deprived them of a constitutional or federally protected right.<sup>4</sup> An improper search and seizure, executed by law enforcement based on the use of deadly force, is one such type of claim that can be pursued under §1983 by an industrious lawyer.

### Fourth Amendment—Deadly Force

Where a valid warrant is lacking, and where an exception does not apply, seizures by officers are per se unreasonable.<sup>5</sup> Courts of Appeals for the Third, Fourth, Eighth, and Ninth Circuits hold that dogs comprise *personal effects* for purposes of the Fourth Amendment and that the destruction of those dogs by law enforcement comprises a seizure.<sup>6</sup> A seizure, based on the use of deadly force, is subject to the reasonableness requirements of the Fourth Amendment.<sup>7</sup> Furthermore, when the state claims a right to engage in a warrantless seizure, the nature and quality of the intrusion on the individual's Fourth Amendment interests must be balanced against the importance of the interests of the government.<sup>8</sup>

Courts determine the reasonableness of a particular seizure based on the totality of the circumstances, from the perspective of a reasonable officer under the circumstances and without regard to subjective motives of officers.<sup>9</sup> Moreover, deadly force utilized by an officer exists regardless of the instrumentality employed—whether a weapon or a police dog.<sup>10</sup>

Courts have held a reasonable seizure exists when the dog poses an imminent threat to the police and the police then seize the dog.<sup>11</sup> However, the Third, Eighth, and Ninth Circuits have held a seizure unreasonable where a pet dog does not pose an imminent threat to officers, especially in circumstances in which its handler is desirous of taking control and is standing in close proximity to the dog.<sup>12</sup>

Qualified immunity, which is “an entitlement not to stand trial,” when a state actor engages in a reasonable mistake, must be discussed hand-in-hand with §1983 as it constitutes a potential barrier to recovery.<sup>13</sup> Qualified

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<sup>1</sup> See, Doug Donovan, *Prince George's Raid Prompts Call for Probe Berwyn Heights Mayor Denounces Tactics*, BALT. SUN at 1B, (Aug. 8, 2008).

<sup>2</sup> See, e.g., LA. REV. STAT. §14:102 (2008).

<sup>3</sup> See, *Brown v. Muhlenberg Tp.*, 269 F.3d 205 (3<sup>rd</sup> Cir. 2001); *Smoak v. Hall*, 460 F.3d 768 (6<sup>th</sup> Cir. 2006).

<sup>4</sup> *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

<sup>5</sup> *Brown v. Muhlenberg Tp.*, 269 F.3d 205 (citing *United States v. Place*, 462 U.S. 696 (1983)).

<sup>6</sup> See *Brown*, 269 F.3d at 209-10; *Altman v. City of High Point*, 330 F.3d 194 (4<sup>th</sup> Cir. 2003); *Leshner v. Reed*, 12 F.3d 148, 150-151 (8<sup>th</sup> Cir.1994); *Fuller v. Vines*, 36 F.3d 65, 68 (9<sup>th</sup> Cir.1994).

<sup>7</sup> *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

<sup>8</sup> *Graham v. Connor*, 490 U.S. 386 (1989).

<sup>9</sup> See e.g., *Altman v. City of High Point*, 330 F.3d 194 (citing *Graham v. Connor*, 490 U.S. 386, 397).

<sup>10</sup> See e.g., *Mendoza v. Block*, 27 F.3d 1357, 1362 (9<sup>th</sup> Cir. 1994).

<sup>11</sup> See e.g., *Altman*, 330 F.3d at 194, 206.

<sup>12</sup> See *Brown*, 269 F.3d at 211; *Andrews v. City of West Branch*, 454 F.3d 914 (8<sup>th</sup> Cir. 2006); *Fuller v. Vines*, 36 F.3d 65, 66 (1994); *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9<sup>th</sup> Cir. 2005).

<sup>13</sup> *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001).

## “INSIGHTS”: AN INTERVIEW WITH GILDA MARIANI

By: Megan A. Senatori

As the recipient of TIPS “Most Innovative Committee” Award in 2005 and 2006, it was not surprising that the Animal Law Committee (“ALC”) would apply technology to advancing its mission. Using the funds from a grant conferred by the TIPS Enterprise Fund Board, ALC completed a series of podcasts, titled “Insights.” I had an opportunity to speak with former ALC 2007-2008 Chair Gilda (Jill) Mariani who created this project and conducted the podcast interviews to learn more about it.

“This is a wonderful tool for educating young lawyers or aspiring law students about the many avenues to the practice of animal law.”

### How Many Podcasts Are In This Series?

There are seven full-length podcasts, lasting between 17 to 40 minutes. All of them are posted on the ALC webpage. There is also a 90-second promotional podcast produced in which the TIPS Section Chair described TIPS social events at the 2008 Annual ABA meeting in New York City. It was an experiment at using a creative marketing tool.

### What Was The Genesis Of This Project?

In Fall 2006 the TIPS’ Enterprise Fund Board (“EF”) sought innovative and collaborative proposals that would advance one or more goals of TIPS. I applied on behalf of ALC proposing a podcast series, which I believe is TIPS first formal application of this technology.

I recommended topics designed to discuss emerging issues in the practice of animal law and to familiarize the bar with the ALC’s activities. However, I believed that this project was one that could be replicated by any TIPS General Committee, and therefore beneficial to the Section as a whole.

In November 2006, ALC was among the first recipients of the EF grants. The podcast project was completed within a year.

### What Is A Podcast?

A podcast is an audio media file streamed-lined over the Internet. It can be listened to directly on a personal computer or “on-the-go” by downloading it to a portable MP3 player or an iPod. Essentially I conducted a chatty interview with a guest on a narrow subject, similar to what you and I are doing now.

The production was possible through TIPS collaboration with the ABA Book Publication Department which had been successfully producing the ABA Book Briefs Podcasts for some time. High kudos to Kurt Allen Harzke, Associate Director of Marketing, of the ABA Book Publications, whose skillful editing produced seamless and flawless programs and to TIPS Associate Director Wanda Workman who, as always, walked me through the administrative details and smoothed out the glitches.

### The Podcasts Cover A Wide Range Of Topics From Diverse Perspectives. How Did You Select The Topics?

My goal was to educate people about the evolving area of animal law, TIPS, and the ALC. Thus, I choose some topics from news stories as, for example, articles about real estate billionaire Leona Helmsley bequeathing \$12 million to her little dog, Trouble. Other topics were drawn from programs presented by other TIPS General Committees to demonstrate that animals factor into all areas of law; and others were taken from the work of ALC members involved in the practice of animal law.

### The First Podcast Was An Interview With Peter Bennett, Tell Us A Little About That?

The inaugural podcast is entitled “Animal Law, A Practice Whose Time Has Come.” I had the opportunity to talk with Peter Bennett, then TIPS 2007-2008 Chair, about the formation and evolution of ALC. It may be my favorite podcast because it illustrates how this unconventional Committee has become a mainstay Committee of TIPS and it enlightens the listener about the unwavering support of the TIPS leadership and TIPS staff toward ALC. What is also intriguing about this podcast, it is that it showcases TIPS as a Section, as much as it does ALC as a General Committee.

### A Few Of The Podcasts Focus On The More Traditional Areas Of Animal Law Practice. What Are They?

There are three podcasts in this vein. In a podcast called “Forging a Career in the Practice of Animal Law,” Joyce Tischler, an ALC member and co-founder of the Animal Legal Defense Fund provides a superb

overview of career opportunities in the practice of animal law, from the traditional to the ingenious. By the end of the podcast the audience realizes that the practice of animal law is eclectic and can involve any area of the law. The podcast also provides a discussion of some of the impressive achievements of the ALC leadership. This is a wonderful tool for educating young lawyers or aspiring law students about the many avenues to the practice of animal law.

Then there is a two-part interview with Peggy Hoyt, a prominent Florida trust and estates attorney and author. Part one named, “*Estate Planning For Pets*,” provides a practical “how-to” in creating a “pet trust” to care of a companion animal after the caregiver’s death. In Part two titled, “*Funding Your Pet’s Trust Fund*,” the listener, alerted to the financial considerations attendant in forming and maintaining a pet trust, is given several practical suggestions.

### ***You Also Ventured Outside Of The Pure “Legal” Aspect Of Animal Law With Some Of These Podcasts. What Are They About?***

Yes. There are two podcasts that provide an opportunity for ALC to communicate with non-lawyers in relevant disciplines.

One podcast, entitled “*When Animals Enter The Case*,” is a fascinating interview with David Ball, PhD, the President of Miller Malekpour & Ball, a nationally known trial consulting firm based in North Carolina. Viewing jury trials through the prism of his theatrical background, Dr. Ball illustrates how tapping into the juror experiences with animals can work to the advantage of the trial advocate, providing examples from an ordinary personal injury case to the Kevorkian homicide cases.

The other podcast, termed “*CSI: Testing Animal DNA for Toxic Exposure*,” is a stimulating discourse with Dr. Bruce Gillis, the Chief Executive Officer and founder of the Cytokine Institute. During the podcast,

## **KILL A PET...**

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immunity is said to serve as a shield for officials from “liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>14</sup> A two-step analysis is employed to determine if qualified immunity is applicable:


Dr. Gillis discusses the application of scientific technology to detect animals’ potential injurious exposure to contaminants, whether it be a domestic animal’s exposure to mold or toxins in contaminated pet food or wildlife’s exposure to pollutants in the environment. He also addresses how advances at his institute can be used to monitor the effectiveness of medical treatment administered to an animal.

### ***One Podcast Addresses International Issues With An Author – Why Was That Topic Selected?***

I interviewed ALC Vice-Chair Raj Panjwani because he is the editor of ALC’s first TIPS publication “*Wildlife Law: A Global Perspective*.” This book is a comparative study of the laws enacted in nine countries for the protection of wildlife and its habitat. Mr. Panjwani also authored the chapter on the law of India. I recommend to you the discerning introduction written by ALC Chair-Elect Joan Schaffner. This podcast is also part of the ABA Publications Department library of book briefs podcasts.

### ***How Do You Envision The Future Application Of The Podcast?***

The podcast series provides a host of benefits. It is a low cost means of providing the general community with public service information. Podcasts can be exported to other state and local bars and thereby strengthen our relationship with them. Moreover, the interviews provide an audio history of the Committee which helps as a membership marketing tool. These are just a few examples.

The podcasts are informative, entertaining, and accessible. Please visit <http://www.abanet.org/tips/-animal/home.html> to give them a listen! 

Megan A. Senatori is a litigation partner at *DeWitt Ross & Stevens, S.C.* in Madison, Wisconsin. She is also an adjunct faculty member at the University of Wisconsin Law School and Marquette University Law School where she teaches Animal Law.

1. Whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated, and
2. Whether that right was clearly established.<sup>15</sup>

Courts, such as the Third Circuit in *Brown*,<sup>16</sup> have dismissed actions based on qualified immunity even where they find the actions of police excessive and improper.

<sup>14</sup> Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

<sup>15</sup> Estate of Carter v. City of Detroit, 408 F.3d 305, 310-11 (6th Cir. 2005) (citing Saucier v. Katz, 533 U.S. 194, 201).

<sup>16</sup> *Brown*, 269 F.3d at 216-18.

### Failure To Train

A theory of failure to train constitutes another potential claim to address circumstances where police believe they possess the purview to kill a pet or a service animal. Plaintiffs must present evidence that the need for more or different training was so obvious and so likely to lead to the violation of constitutional rights that the policymaker's failure to respond amounts to deliberate indifference.<sup>17</sup> A claim, based on failure to train, will prove successful, if evidence demonstrates the municipality either possesses an unconstitutional training program or has a facially constitutional training program that is not enforced.<sup>18</sup> Particularly, training of law enforcement on the access rights of the handlers of service animals is needed.

Moreover, there is a saying that for every ounce of prevention in which one engages one may receive a pound of cure. This saying is applicable either from the perspective of a police officer or the handler of a service animal. By collaborating with the service animal community on training initiatives, police departments may formulate a way to shield themselves from §1983 claims, as the likelihood of the liability of a

municipality diminishes if a comprehensive training program is present and is followed. Avenues to ensure the receipt of such training include establishing within the police department a liaison with the disabled and one-day technical assistance conferences that bring law enforcement together with persons with disabilities and handlers of service animals to engage in dialogue.<sup>19</sup> If the police refuse to respond to a request for technical assistance, then one can always charge the department with a lack of adequate training.

### Conclusion

In a utopian world, training would constitute the only measure required to prevent incidents like that in Maryland. However, as long as there are police who would abuse their authority, §1983 litigation is a valuable tool in the protection of pets and service animals.



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<sup>17</sup> *Id.* at 216 (citing *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)).

<sup>18</sup> *Id.* (citing *City of Canton v. Harris*, 489 U.S. 378, 388).

<sup>19</sup> See Gina Davis, *From Blind, a Call for Awareness Guide Dog Users Raise Issues of Concern at "Partnerships with Law Enforcement" Conference*, BALT. SUN at 3B (Apr. 13, 2008).

## EQUESTRIAN EQUIPMENT...

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Claims of products liability and breach of warranty were raised in *Moreland v. Weaver Leather Goods*,<sup>5</sup> where the plaintiff, a trick rider, was dragged from her horse and injured. She sued the defendant saddle manufacturer claiming that a strap on the saddle, known as an "off billet," breached the implied warranty of fitness for a particular purpose in violation of Tennessee's Uniform Commercial Code.<sup>6</sup> She also sued for products liability and failure to warn. The court dismissed the case, finding that the plaintiff failed to come forth with sufficient evidence that the saddle was defective when it left the manufacturer or that it was unreasonably dangerous. As the facts showed, the plaintiff had used the same saddle for five months before the incident, without a problem.

### Helmets

Who ever saw the "Marlboro man" without a cowboy hat while mounted on his horse? In the equine industry, helmets are increasingly popular, and even mandated in some disciplines and organizations. The case of *Ferguson v. Ulmer*,<sup>7</sup> raised the interesting question of whether a horse trainer had a duty to warn his student of the need for protective equestrian headgear. There, the plaintiff, while riding in western attire with a cowboy hat, fell from her horse during a show and sustained a serious head injury. She sued her former trainer, but the court dismissed her case finding no duty to warn of helmets. The court recognized that the plaintiff was a competitor in western events where "the ubiquitous cowboy hat, not a safety helmet, completes the ensemble" and that neither the plaintiff nor her fellow riders sported protective headgear in competition in the same event.

<sup>5</sup> *Moreland v. Weaver Leather Goods*, 13 Fed. Appx. 329 (6th Cir. 2001).

<sup>6</sup> TENN. CODE ANN. § 47-1-101, *et seq.*

<sup>7</sup> *Ferguson v. Ulmer*, 2003 WL 22512042 (Cal. App. 2003).

## Equine Activity Liability Acts

As of November 2008, 46 states (all but California, Maryland, Nevada, and New York), have passed laws commonly known as “equine activity liability acts” that in some way affect liabilities within their equine industries. Although these laws differ, most include a “faulty tack or equipment” exception to the immunities set forth within each law. For example, New Mexico’s statute states, in part:

“Nothing in the Equine Liability Act shall be construed to prevent or limit the liability of the operator, owner, trainer, or promoter of an equine activity who (1) provided the equipment or tack, and knew or should have known that the equipment or tack was faulty and an injury was the proximate result of the faulty condition of the tack.”<sup>8</sup>

Over the years, numerous cases have examined claims under the “faulty tack or equipment” exceptions within these laws. The earliest known case is *Day v. Snowmass Stables, Inc.*<sup>9</sup> There, a neck yoke ring broke on a wagon during a horse-drawn wagon ride at the defendant’s stable, causing two wagons to collide when one of the teams bolted. The defendant stable moved to dismiss the litigation based, in part, on Colorado’s equine activity statute. Refusing to dismiss the case, however, the trial court cited an exception in Colorado’s equine activity liability statute providing that “equine professionals” could be liable if they “provided equipment or tack and knew or should have known that the equipment or tack was faulty to the extent that it did cause injury.” Consequently, the court remanded the case to proceed under that exception.

## Defenses

### Assumption of Risk

Courts have differed on the issue of whether a rider assumes the risk of defective equipment on a horse. In *Cooperman v. David*,<sup>10</sup> the court applied the defense in this setting. Other courts have disagreed, finding that

people typically do not assume the risk of negligently-adjusted equipment. There are several cases that exist wherein the courts have rejected the assumption of risk defense.<sup>11</sup>

### Proximate Cause

In *O’Mara v. City of New York*,<sup>12</sup> a mounted police officer, who wore no helmet, was thrown from a horse during a practice session and suffered a head injury. She sued the City of New York. Her expert witness conceded that even if she had worn a helmet, it might not have protected her head from a hard impact. Both the trial and appellate courts found for the defendant because the failure to provide a properly fitting helmet was not a substantial cause of the incident.

Proximate cause was also at issue in *Mounts v. Vanbeeste*,<sup>13</sup> where the plaintiff rode bareback on a horse that bucked and threw him. The court determined that the plaintiff had no recourse under the “faulty tack or equipment” exception of Michigan’s Equine Activity Liability Act because the saddle – left in the tack room and not on the horse – was not the proximate cause of the injuries.

### Waiver/Release

Most states have shown a general willingness to enforce releases of liability. However, courts differ on whether claims of faulty equipment can be released away, particularly where those claims derive from an exception in an equine activity liability act. In *Riehl v. B & B Livery, Inc.*,<sup>14</sup> and *Terrill v. Stacy*,<sup>15</sup> for example, the courts held that releases could bar claims of faulty equipment under an Equine Activity Liability Act. By comparison, the court in *Teles v. Big Rock Stables, L.P.*,<sup>16</sup> held that a release could not bar claims of faulty equipment under Tennessee’s equine activity liability statute.

## Conclusion

Counsel handling cases involving equipment liability can seek guidance from the large and growing body of case law involving these settings. In addition, the foreseeability of litigation provides counsel with an

<sup>8</sup> N.M. Stat. Ann. §42-13-4.

<sup>9</sup> *Day v. Snowmass Stables, Inc.*, 810 F. Supp. 289 (D. Colo. 1993).

<sup>10</sup> *Cooperman v. David*, 214 F.3d 1162 (10th Cir. 2000).

<sup>11</sup> *Ashcroft v. Calder Race Course*, 492 So. 2d 1310 (Fla. 1986); *Cole v. New York Racing Assoc.*, 266 N.Y.S.2d 267; 24 A.D.2d 993 (N.Y. App. 1965), *affirmed*, 270 N.Y.S.2d 421; 217 N.E.2d 144 (N.Y. 1965); *Lackey v. Perry*, 366 S.W.2d 91 (Tex. App. 1963); *Lanzilli v. Smith*, 170 N.E.2d 340 (Mass. 1960).


<sup>12</sup> *O’Mara v. City of New York*, 819 N.Y.S.2d 263 (N.Y. App. 2006).

<sup>13</sup> *Mounts v. Vanbeeste*, 2004 WL 1737676 (Mich. App. 8/3/2004)(unpublished).

<sup>14</sup> *Riehl v. B & B Livery, Inc.*, 960 P.2d 134 (Colo. 1998).

<sup>15</sup> *Terrill v. Stacy*, 2006 WL 473799 (Mich. App. 2/28/2006)(unpublished).

<sup>16</sup> *Teles v. Big Rock Stables, L.P.*, 419 F. Supp.2d 1003 (E.D. Tenn. 2006).

excellent opportunity to help their equine industry clients avoid liability. Counsel can advise their clients, for example, to inspect equipment regularly and to clean and maintain equipment consistent with the manufacturer's instructions. 

### FILLING THE VOID...

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and hence with national defense.<sup>8</sup> While stressing that, “[o]f course, military interests do not always trump other considerations, and we have not held that they do,”<sup>9</sup> the Court concluded that there was sufficient evidence in the record to demonstrate that the conditions posed a genuine “threat to preparedness for war,”<sup>10</sup> so that this particular case did not present a “close question.”<sup>11</sup>

Although the government and others seeking to circumvent NEPA will invariably attempt to apply *Winter* outside the national security context, the ruling is written in sufficiently narrow terms, and so clearly focused on concerns with defense preparedness in a time of war, that its impact on other cases should be limited. For example, the Court did not embrace the Solicitor General's most far-reaching arguments regarding the nature of the irreparable injury that must be established in NEPA cases, particularly those implicating wildlife interests.

#### Question Left Unresolved By *Winter*: What Level Of Impact Is Necessary To Establish Irreparable Injury To Wildlife?

One very important question left open in *Winter* is what level of impact is necessary to establish irreparable injury in a wildlife context. In *Winter*, the government argued that NRDC could only establish irreparable harm sufficient to obtain a preliminary injunction by proving that the agency action at issue would result in “permanent or long lasting harm to a species as a whole.”<sup>12</sup> In multiple places in its brief, the government asserted this notion that the plaintiffs' showing of irreparable harm is dependent on definitive proof of species-level effects.<sup>13</sup> Although the majority opinion recognized that “the Navy asserts that plaintiffs have failed to offer evidence of species-level harm that

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would adversely affect *their* scientific, recreational, and ecological interests,”<sup>14</sup> the majority never relied on this assertion as a basis for its ruling.

#### NEPA's Language

In any event, the government's assertion is erroneous considering NEPA's text and underlying regulations. More importantly, it is a very dangerous contention because it seeks to undermine the statutory purpose of NEPA and other statutes aimed in whole or in part at wildlife protection. In NEPA, Congress expressly provided that, among other things, every EIS must address “the relationship between *local short-term uses* of man's environment and the maintenance and enhancement of long-term productivity.”<sup>15</sup> Thus, Congress intended for NEPA to include assessments of local uses significantly impacting the environment, which invariably will have a greater impact locally than on the environment at large. Further, NEPA's implementing regulations make clear that an action may be subject to the NEPA review process for its significant local or regional effects; “in the case of a site-specific action, significance would usually depend upon *the effects in the locale rather than in the world as a whole.*”<sup>16</sup> Therefore, NEPA recognizes that localized impacts—including such impacts on wildlife—may be sufficient to establish irreparable injury, thus refuting the government's assertion in *Winter* that large-scale, species-wide impacts must be shown to establish such harm.

#### Case Law

In addition, the pertinent case law has consistently held that localized impacts to wildlife are sufficient to establish both injury in fact for standing purposes and irreparable injury for injunctive relief purposes. In *Lujan v. Defenders of Wildlife*, the Supreme Court stated, “Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably

<sup>8</sup> *Winter*, 129 S. Ct. at 377, 378.

<sup>9</sup> *Id.* at 378.

<sup>10</sup> *Id.* at 380.

<sup>11</sup> *Id.* at 378.

<sup>12</sup> Brief for the United States Navy as Petitioners, *Winter v. Natural Res. Def. Council*, 555 U.S. \_\_\_, \_\_\_ (2008) (No. 07-1239) (“Pet. Br.”) at 19-20, [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-1239\\_Petitioner.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-1239_Petitioner.pdf).

<sup>13</sup> *Id.* at 19-20; *id.* at 44 - 45.

<sup>14</sup> *Winter*, 129 S. Ct. at 375 (emphasis in original).

<sup>15</sup> 42 U.S.C. 4332(C)(iv) (emphasis added).

<sup>16</sup> 40 C.F.R. § 1508.27(a) (emphasis added).

a cognizable interest” for establishing injury.<sup>17</sup> Naturally, an individual’s “cognizable interest . . . [in] us[ing] or observ[ing] an animal species” may be gravely impaired by adverse impacts to local wildlife “use[d] or observe[d]” by that individual regardless of whether the “species as a whole” will be driven to extinction by the action under review.<sup>18</sup>

Numerous federal court decisions reinforce the notion that localized impacts to wildlife are sufficient to establish irreparable injury. The most notable case is *Anderson v. Evans* in the Ninth Circuit, which provided detailed discussion of these issues where significant localized impacts to gray whales were expected despite the lack of anticipated species-wide impacts.<sup>19</sup> In *Anderson*, the court opined, “Even if the eastern Pacific gray whales overall or the smaller [ ] group of whales are not significantly impacted by the Makah Tribe’s whaling, the summer whale population in the local Washington area may be significantly affected. Such local effects are a basis for a finding that there will be a significant impact from the Tribe’s hunts.”<sup>20</sup>

Other courts have also supported this approach. For example, a D.C. district court had a similar issue before it when environmental plaintiffs complained that “even if the predicted impacts of the proposed take of 525 swans on the 3,600 strong swan population of the entire state of Maryland are likely to be minimal, the impacts may be substantially greater on the local level.”<sup>21</sup> Weighing this issue, the court held that “the *impact of a proposed action on a local population of a species, even where all parties acknowledge that the action will have little or no effect on broader populations, is a*

basis for a finding that there will be a significant impact and setting aside a FONSI [Finding of No Significant Impact].”<sup>22</sup> On that basis, the court concluded that there was a “compelling showing of irreparable harm” to warrant injunctive relief.<sup>23</sup> This approach—finding localized impacts to wildlife sufficient to establish irreparable harm—has been echoed in other wildlife cases brought under NEPA and other federal environmental statutes.<sup>24</sup>

### Conclusion

Based on the foregoing, it is clear that the government’s contention in *Winter* that a plaintiff can only show irreparable harm by proving definitive and long-lasting harm to an entire species was merely an attempt to obfuscate the issue. Although the Court did not address the merits of this argument in *Winter*, both NEPA and legal precedent applying it and other statutes aimed at wildlife protection resoundingly rebut the argument and provide clear guidance for courts. In a wildlife context, significant localized impacts to wildlife may be the basis for establishing irreparable injury, even where no threat exists to the species as a whole.

Overall, although it is always precarious to predict the precedential ripple effects of any particular Supreme Court ruling, *Winter* should not have severe repercussions for NEPA enforcement and implementation other than in the relatively few cases in which the government can proffer a plausible national security justification for its action. Additionally, the Court’s narrow ruling left open the level of impact necessary to establish irreparable harm in a wildlife context, but the

<sup>17</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992); *see also Lujan*, 504 U.S. at 566 (Explaining that irreparable injury can be shown on the basis of threatened harm to a single member of a species, the Court stated, “It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist.” (emphasis added)).

<sup>18</sup> *See* Brief for Defenders of Wildlife et al. as Amici Curiae Supporting Respondents, *Winter v. Natural Res. Def. Council*, 555 U.S. \_\_\_, \_\_\_ (2008) (No. 07-1239) (“Amici Curiae Brief”) at 28, [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-1239\\_RespondentAmCu8ConservationOrgs.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-1239_RespondentAmCu8ConservationOrgs.pdf).

<sup>19</sup> *Anderson v. Evans*, 314 F.3d 1006 (9th Cir. 2002).


<sup>20</sup> *Id.* at 1019.

<sup>21</sup> *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 232 (D.D.C. 2003).

<sup>22</sup> *Id.* at 234 (internal citations omitted).

<sup>23</sup> *Id.* at 237.

<sup>24</sup> *See, e.g., Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1256-58 (10<sup>th</sup> Cir. 2003) (In this case, the Fish and Wildlife Service anticipated that a golf course development would result in “the loss of three bald eagle nests and twelve juvenile bald eagles during the construction period,” but the Service and other defendants argued that irreparable harm could only be shown by proof of “irretrievabl[e] damage to the entire species.” In rejecting that argument, the court stated, “Plaintiffs contend that a proponent of a preliminary injunction under these circumstances, seeking to prevent harm to members of a threatened or endangered species, need not show harm to the species as a whole. We agree.”); *Sierra Club v. Norton*, 207 F. Supp. 2d 1310, 1340 (S.D. Ala. 2002) (“The threatened harm, destruction of optimal habitat of an endangered species, is clearly irreparable. The portions of the dune ecosystem on which construction is begun will no longer be available to support the local ABM population. That loss of habitat will have an effect on the beach mouse population, including loss of individual members of the species.” (emphasis added)); *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14-15 (D.D.C. 1998) (“[T]he combination of the injury suffered by plaintiffs due to federal defendants’ procedural failure to comply with NEPA and the aesthetic injury the individual plaintiffs would suffer from seeing or contemplating the bison being killed in an organized hunt [despite the lack of species-level impacts] leads the court to conclude that the plaintiffs have carried their burden of demonstrating the presence of an irreparable harm should the court not grant injunctive relief.”); *Sierra Club v. Martin*, 71 F. Supp. 2d 1268, 1327 (N.D. Ga. 1996) (“The question of irreparable injury does not focus on the significance of the injury, but rather whether the injury, irrespective of its gravity, is irreparable – that is, whether there is any adequate remedy at law for the injury in question. . . . In the instant case, the logging will destroy certain sensitive plants and animals located in the timber project areas, as well as suitable habitats for these and other similar sensitive and endangered species in the two Forests. No monetary award can recompense this injury; thus, there is no adequate remedy at law for these injuries.” (emphasis added)).

applicable lower court decisions, statutory language and purpose, and NEPA's implementing regulations compel the conclusion that localized wildlife impacts may serve as the basis for establishing irreparable harm that supports preliminary injunctive relief. 

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family dog outside, and shoot the dog in the head three times so as to kill it.”<sup>10</sup>

The Court also went on to hold that the statute's exception for “euthanasia of a companion animal through recognized methods approved by the Department of Agriculture,” also was sufficiently clear. The Court noted that Section 2.09 of the Humane Care for Animals Act specifically defined “humanely euthanized” as “the painless administration of a lethal dose of an agent or method of euthanasia prescribed in the Report of the American Veterinary Medical Association Panel on Euthanasia published in the Journal of the American Veterinary Medical Association, March 1, 2001, (or any successor version of that Report), that causes the painless death of an animal.”<sup>11</sup> Further, the term “euthanize” is defined as the “act of inducing humane death in an animal,” which was consistent with the statutory text of the aggravated cruelty statute. Accordingly, the Court found that there was nothing vague about the aggravated cruelty statute's use of the term “euthanasia,” because that term unambiguously meant the “painless or humane killing of a companion animal.”<sup>12</sup> The Court further noted that the reference to “recognized methods approved by the Department of Agriculture” did not render the statute vague because it was proper for the statute to reference another authoritative source or document as an aid in understanding the methods of euthanasia allowed by the statute.<sup>13</sup>

Moreover, the Court previously had noted that a veterinarian expert had testified at trial regarding accepted

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methods of euthanasia, and noted that the Department of Agriculture had adopted the American Veterinary Medical Association panel's report on euthanasia. The report did state that, under proper circumstances, the use of a gunshot to the brain was a conditionally acceptable method of euthanizing an animal, but only as a last resort, and that such a method of euthanasia required “well trained and monitored” personnel.<sup>14</sup> Accordingly, the Court found that Defendant's use of a gun was not an acceptable method of euthanasia under the statute as a matter of law.

The Court also rejected Defendant's argument that the statute was required to be strictly construed because it was an abrogation of his common law property right in his dog. The Court noted that in the eyes of the common law a pet is “an item of personal property,” even though the Court noted that this view is considered outdated by animal law scholars.<sup>15</sup> But the Court correctly held that because it found the statutory language to be unambiguous it did not need to employ canons of statutory construction to interpret the unambiguous language.<sup>16</sup> Finally, the Court rejected several other arguments raised by the Defendant including Defendant's contention that his use of a gun to euthanize his dog was protected by the defense of necessity because he could not afford the \$75 dollar fee to have his veterinarian euthanize the dog.<sup>17</sup> Accordingly, the Court affirmed Defendant's conviction. 

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

<sup>11</sup> *Id.* at 373 (quoting 510 ILCS 70/2.09).

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

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

<sup>14</sup> *Id.* at 369.

<sup>15</sup> *Id.* at 371-72 (collecting authorities, internal quotations and citations omitted).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 375.

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contract claim. In certain situations, a cause of action in tort may exist under the contract, but Texas courts have narrowly defined those situations, requiring the existence of a “special relationship” between the parties, such as that between an insurer and insured. Damages vary, depending on the cause of action, so a plaintiff may plead multiple claims and choose the most advantageous relief. However, animals are considered property and damages based on market value often leave the plaintiff without adequate compensation, even if successful.

Some states, such as California, have puppy “lemon laws” to protect consumers in these situations. Section 122160 of California’s Health and Safety Code offers purchasers several remedies if the dog becomes ill within 15 days of purchase or is diagnosed with an adverse congenital or hereditary condition.<sup>3</sup> Among the various proof requirements is a written statement from a licensed veterinarian. Once proven, the purchaser may keep the dog and obtain reimbursement of veterinary expenses. This is important because breeder contracts generally do not include reimbursement of veterinary expenses; damages otherwise available may be limited to the market value of the dog, which is often well below the veterinary expenses; and owners often become attached to the dogs and do not want to return them.

### Public Enforcement

The states’ Attorneys General can, and have, taken action to protect the public. In September 2008, the Texas Attorney General filed suit against importers Epuppypro and LoBoPuppies for deceptive trade practices. The breeders were charged with a number of violations, including causing confusion and misunderstanding on the availability of certification papers; misrepresenting and failing to disclose the geographic origin of the puppies; misrepresenting the quality of the puppies; and, failing to disclose health defects. The case is ongoing. Breeders may also come to the attention of the federal government when their interstate trade violates multiple laws. In Tennessee, a puppy importer received what was surely a sobering conviction for mail fraud, wire fraud, income tax fraud, and social security fraud in connection with her puppy

import business. She is facing a possible multi-year sentence in federal prison.

In light of the growing concern about puppy imports, Senator Richard Durbin, Democrat of Illinois, added legislation to the Food, Conservation and Energy Act of 2008 (Farm Bill) that requires all dogs imported into the United States for resale to be at least six-months-old. The new provision means that dogs to be imported for resale must be vaccinated and in good health *before* they leave their country of origin.

### Ethical Concerns & Education

Beyond the legal issues, many animal welfare advocates make compelling ethical and moral arguments for curbing imports. According to the Humane Society of the United States, every year six to eight million dogs and cats enter shelters, with three to four million euthanized because there are no homes for them.<sup>4</sup> As a society, we must ask whether we should freely import more animals, many of which will meet the same fate. Unknowing buyers of imported puppies are often horrified to learn that they have contributed to the success of disreputable puppy mills.

Consumer awareness and education can go far in helping to stop unprofessional importers. Purchasers should never buy a puppy over the Internet or at a retail store without first doing their homework. Information is usually readily available, and a little investigation can go a long way in determining if the breeder is reputable. Good breeders normally screen their buyers carefully and educate them on the expense and commitment that comes with animal ownership. Alternatively, given the knowledge of the millions of dogs and cats that are euthanized every year, more people are choosing to adopt from local shelters or rescue groups. Regardless of the choice, the purchase of a companion animal should not be based on impulse. A well thought-out decision with a purchase from a reputable breeder or adoption from a shelter can help stop the illicit trade in puppies. ⚖️

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<sup>3</sup> Cal. Health & Safety Code § 122160.

<sup>4</sup> See The Humane Society, *The Crisis of Pet Overpopulation* at [http://www.hsus.org/pets/issues\\_affecting\\_our\\_pets/pet\\_overpopulation\\_and\\_ownership\\_statistics/-the\\_crisis\\_of\\_pet\\_overpopulation.html](http://www.hsus.org/pets/issues_affecting_our_pets/pet_overpopulation_and_ownership_statistics/-the_crisis_of_pet_overpopulation.html).

## GREAT APE...

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statutory basis for tracking and building upon the National Institutes of Health's administrative decision to end breeding of federally owned chimpanzees. Theo Capaldo, the president of a prominent antivivisection organization, the New England Antivivisection Society, applauded the bill, stating—"With passage of this bill, the U.S. will join other scientifically advanced nations who have already banned or severely limited the use of chimpanzees, and all great apes, in research. It's time for the U.S.—the single largest user—to join this world community."

As anyone familiar with modern industrial democracies knows, the introduction of legislation is a far cry from enactment. Even when laws are enacted, questions of enforcement and interpretation remain. As the American pundit Will Rogers famously said, "Those who love sausage and respect the law should never watch either one being made." The mere fact that this legislation has been formally proposed, however, reflects an important trend in the burgeoning area of "animal law." In recent years, hundreds of legislative proposals regarding "the animal issue" have been formally introduced and enacted. Further, popular or voter initiatives touching on animal issues are now common on state and local ballots.

H.R. 5852 is revealing in another way. As the Yale legal philosopher Robert Cover once suggested, "law is the projection of an imagined future on reality." The legislative proposal of H.R. 5852 imagines a future in which our fellow great apes are exempted from the harsh realities that accompany the role of being unwilling experimental subjects (a role the primatologist Roger Fouts once referred to as "hairy test tube").

### A Staged Process

That the future projected by this legislative proposal is a staged process, rather than immediately put into place by virtue of an immediate prohibition, also reflects fundamental realities faced by proponents of change. We live in a tradition-centered world. When advocates of additional protections for marginalized beings propose change, they face daunting opposition from those who benefit from the present legal situation.

While staged or incremental changes are a well known way to compromise, such an approach rankles many people's sense of moral justice. Compromises

nudge the debate forward, but they leave harsh realities in place even as their spirit is directed at resolving the underlying dilemma in a more remote future. It is telling that we would be offended by proposals to "phase out" pedophilia, rape or racism, but easily accept proposals to phase out radical harms to nonhumans.

One reason we accept compromise on nonhuman animal issues is that we have inherited political and legal systems dominated by deeply entrenched human-centerednesses that control our public policy. Without question, this political reality will not soon vanish. As a practical and moral matter, it dramatically constrains the legal and moral possibilities of additional protections for nonhuman animals.

Nevertheless, understanding, evaluating and, at times, challenging such political and legal realities is crucially important. Thus, even if the formal proposal of legislation such as H.R. 5852 is viewed as an important step forward, it cannot be denied that it is a compromise that falls far short of what is truly needed—a far more protective future for our cousin great apes and many other animals who suffer an astonishing range of human-caused harms.

Formal introduction of protective legislation is but one step on a journey toward change that can be unduly long. That the legislative path is complicated, however, is not a new concept. Legislation in human matters, as with equal protection for women or condemnation of harms to children or battered spouses, is sometimes hopelessly drawn out. Thus, in dealing with legislative processes, whether they involve fundamental protections for humans or nonhumans, it is beneficial to remember the Zen Buddhist observation that a person who has 100 miles to travel does well to count 90 miles as the half-way point.

Such are the realities of American representative democracy in the early 21st century. These realities and challenges will no doubt remain especially harsh as long as human property rights in "the more-than-human world"<sup>3</sup> are foregrounded again and again in both legislative debate and litigation-based reasoning.

### Defending Liberty And Pursuing Justice For Our Cousin Great Apes

The Great Apes Subcommittee asks, in the spirit of the ABA's motto of "defending liberty [and] pursuing justice," how the American legal system's pivotal

3 DAVID ABRAM, THE SPELL OF THE SENSUOUS: PERCEPTION AND LANGUAGE IN A MORE-THAN-HUMAN WORLD (1996).

commitments to liberty and justice might play out for our cousin great apes even though they are not members of our own species. This dialog has long been engaged in a number of non-legal circles. Pre-eminent philosophers such as Martha Nussbaum in her 2006 book *Frontiers of Justice*, and scientists such as Harvard University's Richard Wrangham, have joined the expanding group of people who raise issues pertinent to the moral dimensions of many nonhuman animals' status.

The subcommittee's goal is to develop robust dialog within the American legal community on the battery of issues that our scientific knowledge of nonhuman great apes raises, and to do so in a legally sophisticated manner. No doubt the overwhelming human-centeredness of our political processes and current legal system will be a factor in this dialog. However, H.R. 5852's subject matter is an opportunity to discuss contemporary realities and possibilities in animal law that get beyond the assumption that legal systems should benefit humans only or even primarily.

Whatever the fate of this particular piece of legislation, it represents a phenomenon that is now a major force in the legal world—animal law. The subcommittee will work with a range of legal topics that provide our society the opportunity to ask what reality we would like to project onto the future of our relationship with the nonhuman great apes.

### Justice For Not Only The Great Apes

These issues have relevance to more than the great apes, though. Inevitably, they pertain to other animals as well. Concerns for our fellow primates have historically been front and center in discussions of the burgeoning growth of the “animal law” phenomenon. Of equal importance have been developments in tort law and other substantive areas, such as law governing wills and trusts regarding those living beings we call “companion animals,” that is, cats and dogs and others which some polls show 98+% of our society thinks of as “family.” Growth in animal law spawned by these relationships will also impact the ways legislators, judges, lawyers, law students and the informed public view the law as it applies to nonhuman great apes.

Another area of astonishing legal growth has been that of farm animal protection. In November 2008, the voters of California approved by a wide margin (63.5% to 36.5%) Proposition 2 that, according to the official summary produced by the State Attorney General,


“requires that calves raised for veal, egg-laying hens and pregnant pigs be confined only in ways that allow these animals to lie down, stand up, fully extend their limbs and turn around freely.” Wildlife has been receiving a lot of attention as well. Several books regarding elephants are now available suggesting that their captivity in zoos traumatizes these large, social animals in profound ways.<sup>4</sup>

The extraordinary diversity of animals that co-exist within our increasingly symbiotic community of earth challenges us to re-evaluate the range and variety of legal protections now available in modern legal systems. Our fellow great apes are a particularly good vehicle for discussing these possibilities as there are many morally compelling options beyond the legislative protections exemplified by H.R. 5852. These options range widely. Some might include prohibitions on legal “ownership” or other restrictions on humans' right to possess these animals. Other possibilities include laws to enforce protections by granting great apes the paradigmatic legal protection we know as specific, positive legal rights, a move recently adopted by the Spanish Parliament. Spread across the long and busy continuum of possible legal protections for non-human great apes and other animals are, literally, dozens of viable options.

So, the subcommittee on Great Apes will ask what legal tools might our society use as our human community engages these animals? This is more than a legal question, for as Robert Cover suggested, in this area we are projecting an imagined future on reality. What do our moral natures and our legal systems make possible as projections that we can choose to put into place?

We will find, no doubt, that this question is not only about our cousin great apes, but also about us. As Mahatma Gandhi once noted, “The greatness of a nation can be judged by the way its animals are treated.” For these reasons, a decision on this matter belongs to our society generally, not to any one set of established interests. Those who can play a constructive role in ongoing discussions, and thus those who can and should be in dialog with the subcommittee on Great Apes, include not only the established interests such as zoos, entertainment industries and biomedical research institutes, but also the non-profit organizations dedicated to protection of nonhuman great apes. The goal of the subcommittee is to create a forum where a full range of issues—not merely the legal rights of existing owners—can be discussed as fully and

<sup>4</sup> See e.g., Dr. Gay Bradshaw, *Inside looking out: neuroethological compromise effects on elephants in captivity* in AN ELEPHANT IN THE ROOM: THE SCIENCE AND WELL-BEING OF ELEPHANTS IN CAPTIVITY 55 (2008).

forthrightly as possible. With such a forum, we can evaluate our options and discuss a variety of imagined futures for all future generations of great apes, human and nonhuman alike. 

**Paul Waldau** is a scholar working at the intersection of animal studies, ethics, religion, law and cultural studies, and currently the President of the *Religion and Animals Institute*. From 2004 through 2008, Paul was the Director of the Center for Animals and Public Policy at Tufts University School of Veterinary Medicine, where he remains on the faculty. Paul publishes widely and copies of his various publications, as well as

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Paul and Michele co-chairs the ALC Great Apes Subcommittee.

## 2009 TIPS CALENDAR

### February

**26-28 Insurance Coverage  
Litigation Committee Meeting Millennium Biltmore Hotel  
Los Angeles, CA**

### March

**5-6 Transportation MegaConference IX Sheraton New Orleans  
New Orleans, LA**

**21-25 TIPS National Trial Academy Grand Sierra Hotel  
Reno, NV**

### April

**2-3 Emerging Issues Motor Arizona Biltmore Resort & Spa  
Vehicle Litigation Phoenix, AZ**

**3-4 Toxic Torts Committee Arizona Biltmore Resort & Spa  
Midyear Meeting Phoenix, AZ**

**23-26 TIPS Section Spring Meeting The Broadmoor  
Colorado Springs, CO**

### May

**14-16 Property Insurance Law Committee Hyatt Regency Lost Pines  
Annual Spring CLE Meeting Resort & Spa  
Lost Pines, TX**