

Animal Law in the United States

- Important Issues and Recent Developments -

Daniel J. Rohlf*

<Abstract>

This article examines recent developments in animal law in the United States in four general areas and explains their implications. Section II discusses recent changes in state laws affecting animals, including those that increase protections for animals associated with agriculture and others that have the opposite effect or make it more difficult for activists to publicize what they view as mistreatment of animals. Section III reviews developments related to standards for housing and treatment of captive wild animals that are members of species given special legal protections for their wild populations. Section IV discusses two recent court decisions from the state of Oregon that could contribute to formulating a new legal status for animals in general. Finally, Section V details a new funding mechanism that increases government capacity to enforce animal laws already on the books, but which has caused some people to raise ethical concerns. Together, these developments can provide interest scholars and practitioners in Korea and other countries with ideas for developing animal law in their countries.

Animal law is one of the newest and most dynamic areas of law in the United States. While both the federal government and individual states have for many years had laws preventing cruelty to animals and setting forth minimal standards at least some animals held in captivity, increasing interest by the public in treatment of animals of all types has accelerated legislative and judicial developments in this area of the law. Moreover, animal law is a recognized and growing legal specialty, with academic programs and journals focusing on the topic and a growing cadre of practitioners.

Recent developments in American animal law provide a window into some of the most important discussions of how to structure the relationship between humans and animals in the

DOI: 10.18215/envlp.17..201609.1

* Professor of Law, Lewis and Clark Law School

21st century, and the cutting-edge legal issues that arise in this important area. The policy and legal struggles over treatment of animals used in agriculture, the legal and market-based pressures on entities that maintain captive animals for entertainment, and the challenges of enforcing existing laws are a rich source of information and ideas for attorneys and policy-makers in Korea and other countries interested in animal law.

Key words: Animal law, Ag-gag, Captive, Animals-as-property, Prosecution

- I. Introduction
- II. State Laws Affecting Animals
- III. Housing and Treatment of Captive Wild Animals
- IV. Legal Status of Animals
- V. Animal Welfare Prosecutions
- VI. Conclusion

I . Introduction

A decade ago, many attorneys and academics in the United States had never heard of animal law. Others viewed the field as the merely the province of activists, or a fringe topic not taken seriously by respected legal practitioners and academics.

Such attitudes have changed dramatically.¹⁾ Animal law courses are now taught at law schools throughout the country, some of which offer specialized programs or degrees. Attorneys also no longer see animal law as an obscure discipline; in fact, many bar associations now have sections devoted to animal law. While the number of attorneys who dedicate all or part of their practices to animal law issues remains relatively low, legal issues involving animals arise in increasing

¹⁾ See generally J. Tischler, *A brief History of Animal Law, Part II (1985-2011)*, 5 Stan. J. Animal L. & Policy 27, 2012.

contexts. For example, family law practitioners increasingly must resolve custody disputes involving pets - landing them among the many attorneys whose work now involves animal issues.

The rising prominence of animal law in the United States has made the country a leader in scholarship and practical developments throughout the field. At least five legal journals focus on animal law, the oldest first published in 1994 by the students at Lewis and Clark Law School in Portland, Oregon. American legal scholars, as well as experts from many other fields, have explored a wide variety of legal and ethical issues surrounding the status of animals and their relationships with humans. Some of the ideas in scholarly works have become part of local, state, and federal law. At the same time, Congress, state legislatures, local governments, and citizens increasingly engage in debates and political battles over the status and treatment of animals. And since the United States has a relatively litigious society, animal law issues arise in litigation with increasing frequency.

People sometimes mistake animal law as the label for a drive to provide increased legal protections for animals. However, in the United States the term “animal law” usually refers simply to law and policy issues involving pets and domestic animals, animals used in agriculture, and captive animals.²⁾ While there are indeed vocal and sophisticated organizations - as well as many people - advocating for greater legal protections for animals, other economically powerful interests such as agricultural industries often oppose such a direction. Cultural traditions such as hunting and consuming meat and dairy products also provide pressures countervailing efforts to elevate the legal status and treatment standards applied to animals. These opposing forces mean that while the United States is a leader in animal law scholarship and its various jurisdictions provide a wide array

²⁾ Legal issues involving protection and management of wild animals and their habitat usually fall under the heading of “wildlife law.” While there is obviously some overlap between animal law and wildlife law, *see e.g.* Section __ *infra*, the two fields - and the interest groups and commercial entities most involved in each area - tend to remain relatively discrete.

of examples of how to regulate animals and resolve disputes involving animals, the country's standards for treating animals are not necessarily always among the world's most protective or innovative.

Nevertheless, on balance the United States can provide countries that are beginning to consider animal law issues more systematically - such as the Republic of Korea - with a the theoretical underpinnings for, and practical examples of, a wide variety of ways the law can define the status of animals and their relationships with humans. Recent developments in animal law in the United States therefore give particularly valuable insight into some of the most important issues in this rapidly evolving field.

This article examines recent developments in animal law in the United States in four general areas and explains their implications. Section II discusses recent changes in state laws affecting animals, including those that increase protections for animals associated with agriculture and others that have the opposite effect or make it more difficult for activists to publicize what they view as mistreatment of animals. Section III reviews developments related to standards for housing and treatment of captive wild animals that are members of species given special legal protections for their wild populations. Section IV discusses two recent court decisions from the state of Oregon that could contribute to formulating a new legal status for animals in general. Finally, Section V details a new funding mechanism that increases government capacity to enforce animal laws already on the books, but which has caused some people to raise ethical concerns. Together, these developments can provide interest scholars and practitioners in Korea and other countries with ideas for developing animal law in their countries.

II. State Laws Affecting Animals

As with its environmental and natural resources laws, the United States'

regulatory scheme governing humans' relationships with animals consists of laws at the federal, state, and local levels. Unlike in the environmental arena, animal law has little cooperative federalism whereby state agencies administer federal statutes. This means that separate decision-making bodies largely control specific aspects of animals' status and treatment.

The federal Animal Welfare Act (AWA) controls standards for housing and treatment of animals kept for purposes of entertainment and public display, such as captive wild animals exhibited in zoos, educational facilities, and tourist attractions.³⁾The statute also governs housing and treatment of animals used for research and medical and product testing. The AWA is implemented by the Animal and Plant Health Inspection Service (APHIS), an agency within the federal Department of Agriculture. The statute has not changed significantly in recent years, though as discussed in Section III, *infra*, questions have arisen about whether other federal laws covering specific species of wildlife add protections for some animals in captivity.

While some members of Congress have introduced bills that would set national standards for treatment of animals other than those held for display or research – primarily animals used in agriculture for meat and other food production – such legislation has made little headway. The lack of cooperation among Democrats and Republicans in Congress, as well as the two parties significantly different outlooks on many issues related to animals, has made it nearly impossible in recent years for enactment of new federal laws affecting animals. On the other hand,

³⁾ See 7 U.S.C. §§ 2131-2159. An American NGO, The Animal Welfare Institute, provides a good overview of the statute's history, available at <https://awionline.org/content/animal-welfare-act>. Commentators and animal advocates often criticize this legislation for excluding many animals from its reach; for example, the law excludes from its coverage rats and mice used for research – meaning that the vast majority of research animals in the United States are not regulated by federal law. See C. Lee, *The Animal Welfare Act at 50: Problems and Possibilities in Animal Testing Regulation*, 95 Neb. L. Rev. ____ (forthcoming 2016). Others have expressed concern about inadequate enforcement of the law. See K. Swanson, *Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. Mich. J. L. Reform 937, 2002.

particularly when a Democrat occupies the White House, some actions within the authority of the Executive Branch have increased protections for animals or placed additional emphasis on implementing existing legal standards.

Inaction by Congress means that most meaningful legislative changes to standards governing animals take place within individual states. Controversy over exactly what those standards should be has intensified in recent years, particularly over treatment of animals used in agriculture generally and food production in particular - an issue left largely to the states with the exception of federal standards governing transportation of such animals. Popular support for improving treatment of agricultural animals has grown, but powerful interests and corporations involved in agriculture have used their influence over state legislatures and elected executives to fight increased protections that they fear would increase costs or otherwise interfere with agricultural and slaughterhouse operations. Pro-agriculture forces have also backed legislation making it more difficult to make public information about conditions and practices experienced by agricultural animals.

1. Increases in legal protections for agricultural animals

Raising animals for meat and products such as milk and eggs contributes significant income to the economic bottom line of many states, so the agricultural lobby has substantial influence over the actions of most state legislatures. State lawmakers therefore have been reluctant to follow increasing public concern over the treatment of agricultural animals with legislation increasing protections for these animals. However, many states have a referendum process by which citizens or organizations that gather a specified number of signatures from eligible voters may put before the state's electorate a measure that, if passed by a majority of voters in a state-wide election, changes state law. In several states, advocates of better conditions for agricultural animals have turned to this means of bypassing a state's legislature to enact new laws advancing their policy goals.

California's Proposition 2 provides the most prominent and influential example of increased legal protections for agricultural animals stemming from citizens' initiative

e.⁴⁾ In 2008, California voters passed a measure placed on the statewide ballot by a broad coalition of animal advocacy, food safety, and environmental groups along with unions, consumer organizations, and even religious groups.⁵⁾ The law passed overwhelmingly, and after a phase-in period became fully effective in 2015.

Prop 2 governs confinement standards for pigs, baby cows, and chickens used in food production. While producers often employ small cages to decrease space and costs associated with keeping animals, animal rights advocates have targeted this cramped confinement as unduly cruel. The California law banned gestation crates and veal crates, two types of small cages that effectively prevent pigs and baby cows from moving freely. The measure also outlawed so-called battery cages for chickens, which are so small they prevent chickens from standing or spreading their wings.

California's legislature significantly multiplied the effect of the state's law in 2010, when lawmakers passed a statute requiring that all eggs sold in California - no matter where they were produced - come from chickens confined under conditions that comply with the more protective standards of Prop 2. Since California has more people than any other state, this law puts significant pressure on other states' egg producers to implement California's more protective chicken confinement standards - or face exclusion of their products from the nation's largest market. Moreover, a number of grocery stores and restaurants - most based in California or with significant economic ties to the state - have announced that they will go farther than required under Prop 2 and use or sell only eggs laid by chickens that are not confined to cages.⁶⁾

⁴⁾ For an excellent discussion of the circumstances leading to passage of Proposition 2, see J. Lovvorn and N. Perry, *California Proposition 2: A Watershed Moment for Animal Law*, 15 *Animal Law* 149, 2009.

⁵⁾ See *id.* at 160-161.

⁶⁾ See "Prop 2 Timeline," available at <http://cagefreeca.com/about-the-issue/prop-2-timeline/> (accessed 18 August 2016). However, there are multiple systems for confining chickens that technically are "cage-free" but still provide less-than-ideal conditions for egg-laying chickens. See J. Sherfey, "What the Fast Food Industry's Shift to Cage-Free Eggs Really Means," *Eater*, 17 Feb. 2016, available at

Pushed in part by California's actions, other states and businesses have also moved to increase protections for animals involved in food production. At least 10 states have enacted similar laws that ban very small cages for agricultural animals, and other states are actively considering following suit.⁷⁾ Some of these laws were passed by state legislatures, but several also stemmed from voter-enacted initiatives.⁸⁾

Perhaps more significantly, many businesses have begun to recognize that consumers have become more aware of and concerned by the conditions faced by animals used to produce food. As a result many companies have announced programs to sell or use only meat or other animal products that were produced from animals not held under the harsh conditions that still represent industry standards in much of the United States. For example, in 2015 the McDonalds restaurant chain announced that it would transition over a ten-year period to using only eggs from chickens held under cage-free conditions for its restaurants in the United States and Canada.⁹⁾ While some "cage free" confinement systems may represent only modest improvements over standard battery cages¹⁰⁾, McDonalds' use of over 2 billion eggs per year in its U.S. and Canadian outlets will put significant pressure on egg producers throughout the two countries to abandon battery cages even if the states in which they operate have not banned this means of confinement. Market forces may therefore achieve more quickly the better living

<http://www.eater.com/2016/2/17/11009252/what-are-cage-free-eggs> (accessed 18 August, 2016).

7) A list of states that have outlawed, or are considering banning, small cages for agricultural animals can be found at <http://www.aspc.org/animal-protection/public-policy/farm-animal-confinement-bans> (accessed 18 August 2016).

8) *See id.*

9) *See S. Strom, McDonalds Plans a Shift to Eggs from Only Cage-Free Hens*, New York Times, September 9, 2015, available at <http://www.nytimes.com/2015/09/10/business/mcdonalds-to-use-eggs-from-only-cage-free-hens.html>.

10) There are multiple systems for confining chickens that technically are "cage-free," but which still provide less-than-ideal conditions for egg-laying chickens - and which would likely surprise many consumers who envision happy chickens roaming around a lush farmyard. *See J. Sherfey, "What the Fast Food Industry's Shift to Cage-Free Eggs Really Means," Eater*, 17 Feb. 2016, available at <http://www.eater.com/2016/2/17/11009252/what-are-cage-free-eggs> (accessed 18 August, 2016).

conditions for at least some agricultural animals that legal standards have been slower to bring about.

2. Legislative barriers to enforcing animal protection standards

A slaughterhouse scandal caused by an undercover operative associated with a prominent animal rights organization played a significant role in fueling the public concerns over animal treatment that led to passage of California's Prop 2. In 2007, an undercover animal rights activist filmed employees at the Hallmark Meat Packing Company in California using cruel methods to try to force into a slaughterhouse cattle that were too sick or injured to walk on their own (commonly known as "downer" cows). These actions, which included ramming animals with machinery and using high pressure water hoses and electric shocks, violated state anti-cruelty laws as well as federal food safety laws banning slaughter for human consumption of downer cows.¹¹⁾ The incident led the company that owned the slaughterhouse to issue the largest recall of beef in history¹²⁾, and resulted in criminal animal cruelty convictions of two Hallmark employees.¹³⁾ Experts also argue that this scandal played a key role in galvanizing public support for increasing protections for agricultural animals and thus paving the way for passage of Prop 2 in California's November, 2008 statewide election.¹⁴⁾

On the other hand, the Hallmark scandal and others like it have also had the effect of encouraging some states to enact legislation that arguably works against both new protections for agricultural animals and enforcement of existing standards. Politically powerful agricultural interests have turned to state lawmakers for relief from the sorts of exposes that fueled the furor in California. A law recently

¹¹⁾ See Lovvorn & Perry, note 2 supra, at 156-157.

¹²⁾ See A. Martin, *Largest Recall of Ground Beef is Ordered*, New York Times, February 18, 2008, available at http://www.nytimes.com/2008/02/18/business/18recall.html?_r=0.

¹³⁾ See Lovvorn & Perry, note 2 supra, at 157-158.

¹⁴⁾ See *id.* at 160 (arguing that the Hallmark scandal "woke a sleeping giant of public consciousness concerning farm animals and filled people with a terrible resolve to take action.").

passed by the state of Idaho typifies so-called “ag-gag” legislation introduced in more than half of state legislatures in the United States, and enacted into law in eight states. In 2014, the Idaho legislature passed a law making “interference with agricultural production” a crime.¹⁵⁾ The statute’s definition of such interference includes the sorts of actions taken by animal rights activists to expose cruel or illegal practices at slaughterhouses and other animal-based food production facilities, such as making video or audio recordings of activities at these facilities.¹⁶⁾ The law also makes it a crime to enter such facilities by “misrepresentation,” a term intended to include animal rights activists who get a job with a food or agricultural company for the purpose of gaining access to its facilities in order to film or otherwise record conditions experienced by animals at those locations.¹⁷⁾

Idaho lawmakers made it clear that the 2014 law aimed to halt actions by animal rights activists. The law’s principal sponsor asserted that “the most extreme conduct we see threatening Idaho dairymen and other farmers occurs under the cover of false identities and purposes [when] extremist groups implement vigilante tactics to deploy self-appointed so-called investigators who masquerade as employees to infiltrate farms in the hope of discovering and recording what they believe to be animal abuse.”¹⁸⁾

Tactics used by animal advocates that are targeted by ag-gag laws engender polar opposite views and have created considerable controversy. Agricultural companies and producers argue that undercover videos “are really an unfair portrayal of the industry as a whole” and thus should be regulated.¹⁹⁾ They also assert that “[t]hose tactics have become very popular and successful for the activist

¹⁵⁾ Idaho Code § 18-7042.

¹⁶⁾ *Id.* at § 18-7042 (1)(d).

¹⁷⁾ *Id.* at § 18-7042 (a).

¹⁸⁾ Quoted by the court in *Animal Legal Defense Fund v. Otter*, 118 F.Supp3d 1195, 1200-1201 (D. Idaho 2015).

¹⁹⁾ See S. Cagle, *Two views on ag-gags: The investigator and the farm advocate*, *Grist*, 25 April 2013, available at <https://grist.org/food/two-views-on-ag-gags/> (accessed 19 August 2016).

community in their fundraising efforts and spreading misinformation about industry.”²⁰⁾ Activists, in contrast, contend that their undercover investigations are important to bring to light violations that regulators may otherwise overlook: “With such minimal [government] oversight, these industries are pretty much left to police themselves, so it’s not uncommon to find acts of abuse or negligent behavior that may violate state or federal laws.”²¹⁾ There is little doubt that publication of harsh conditions for animals has an effect on public demand for animal-based food products, however. For example, a study by Kansas State University concluded that “media attention to animal welfare has significant, negative effects on U.S. meat demand.”²²⁾

Animal advocates have begun to mount legal attacks on ag-gag laws. In 2015, animal welfare groups successfully argued that Idaho’s statute violates the U.S. Constitution guarantees of free speech and equal protection. A federal district judge in Idaho found that the Idaho legislature intended the law to suppress political speech aimed at improving animal welfare rather than regulate conduct.²³⁾ The court reviewed the legislature’s discussions of the law, finding that lawmakers intended to “limit and punish those who speak out on topics related to the agricultural industry, striking at the heart of important First Amendment values.”²⁴⁾ The judge also compared the tactics of modern animal advocates to actions by the famous American author Upton Sinclair Jr., whose 1906 novel *The Jungle* exposed problems in the meatpacking industry that threatened public health, leading

²⁰⁾ *Id.*

²¹⁾ *Id.* Many legal commentators have taken positions against ag-gag laws. See, e.g. L. Wilson, *Ag-Gag Laws: A Shift in the Wrong Direction for Animal Welfare on Farms*, 44 *Golden Gate Univ. Law Rev.* 311 (2014); N. Negowetti, *Opening the Barnyard Door: Transparency and the Resurgence of Ag-Gag and Veggie Libel Laws*, 38 *Seattle Univ. Law Rev.* 1345, 2015.

²²⁾ Dept. of Agricultural Economics, Kansas State University, U.S. Meat Demand: The Influence of Animal Welfare Media Coverage, 2010, available at <http://www.agmanager.info/livestock-meat/us-meat-demand-influence-animal-welfare-media-coverage> (accessed 19 August 2016).

²³⁾ See *Animal Legal Defense Fund v. Otter*, note 16 *supra*, 118 F.Supp2d at 1202.

²⁴⁾ *Id.* at 1201.

Congress to reform federal laws to protect the public food supply.²⁵⁾

The state of Idaho has appealed the district court's decision to the Ninth Circuit Court of Appeals. If upheld, however, the Idaho court's decision could provide powerful legal ammunition for animal welfare advocates seeking to invalidate other ag-gag laws, and may deter other states from enacting similar legislation.

III. Housing and Treatment of Captive Wild Animals

Congress passed the federal Endangered Species Act (ESA) in 1973, landmark legislation that provides extensive federal protections for species listed as threatened and endangered.²⁶⁾ Since the ESA regulated trade in protected species, the statute's lists of threatened and endangered species include wildlife and plants in peril around the world.²⁷⁾ Listing species found outside the United States carries potentially significant implications for captive animals since Americans' interest in "exotic" and popular species not found in the wild in the United States means that zoos and similar facilities in the U.S. often keep such animals as means to educate the public and attract visitors.

Legal requirements for treatment of exotic animals on public display in the United States are modest and often not well enforced. The Association of Zoos and Aquariums (AZA), a private non-profit organization that accredits most high-profile zoos and aquariums in the U.S., sets forth detailed standards for management of specific species held in captivity by its members.²⁸⁾ However, less

²⁵⁾ *Id.*

²⁶⁾ 16 U.S. C. 1531-1544; See D. Rohlf, *The Endangered Species Act at Forty: The Good, The Bad, and the Ugly*, 20 Animal L. Rev. 251, 2014.

²⁷⁾ According to the U.S. Fish and Wildlife Service, as of August 2016 the ESA's protected lists include 2266 species, subspecies and distinct population segments, 673 of which occur outside of the United States. See <http://ecos.fws.gov/ecp0/reports/box-score-report>.

²⁸⁾ The Association published manuals with detailed care requirements for a wide variety of species commonly held in captivity for purposes of display. See

than ten percent of entities in the United States licensed by APHIS to display animals are AZA members.²⁹⁾ This means that the operation of many so-called “roadside zoos,” which consist of mostly small facilities that display exotic species for profit, are governed principally by the federal Animal Welfare Act (AWA); both commentators and federal government auditors have criticized the AWA’s enforcement and implementation.³⁰⁾ Animal advocates have documented some of the significant problems at roadside animal attractions resulting from this relative lack of regulation.³¹⁾

Unlike the AWA, the Endangered Species Act includes a citizen suit provision that authorizes interested parties to file suit in federal court to enforce the statute against either the government or third parties.³²⁾ In recent years, therefore, animal welfare activists have begun to employ the ESA in efforts to improve living conditions captive wildlife belonging to species listed as threatened and endangered. The ESA’s protections generally apply captive specimens belonging to listed species. Nothing in the ESA itself distinguishes captive members of a protected species from the species’ members in the wild. While a handful of listing decisions have expressly excluded captive animals³³⁾ or treated specimens in captivity differently from their wild counterparts, most listings of a species as

<https://www.aza.org/animal-care-manuals>.

²⁹⁾ See <https://www.aza.org/about-us>.

³⁰⁾ See Swanson, note 2, *supra*; USDA Office of Inspector General Report, APHIS Oversight of Research Facilities (2014), available at <https://www.usda.gov/oig/webdocs/33601-0001-41.pdf>.

³¹⁾ See A. Miller & A. Shah, *Invented Cages: The Plight of Wild Animals in Captivity*, 1 Animal L. 23 (2005); see also the following for a description of 17 small facilities where animals suffered due to their conditions of confinement and inadequate care: <http://www.peta.org/living/entertainment/deadly-destinations/>.

³²⁾ While a statute’s citizen suit provision can give citizens the right to enforce a law, and plaintiff using such a provision to file suit still must satisfy the U.S. Constitution’s Article III requirement that a plaintiff demonstrate standing to sue, which requires a plaintiff to show that it has suffered an injury in fact, that the plaintiff’s injury is traceable to the alleged violation of the law, and that the court can grant effective relief to remedy the plaintiff’s injury. See *Kuehl v. Sellner*, 2016 WL 590468 (D. Iowa 2016) at 5.

³³⁾ The National Marine Fisheries Service’s initial decision to list a population of orcas in Puget Sound as threatened excluded captive animals See ___, *infra*.

threatened or endangered make no distinction between captive and wild members of the species.³⁴⁾

In February 2016, a federal district court ruled in *Kuehl v. Sellner* that the Animal Legal Defense Fund had successfully demonstrated that a small zoo in Iowa violated the ESA by failing to adequately care for lemurs and tigers held at the facility.³⁵⁾ The ESA bans “take” of listed species; the law’s definition of take makes it illegal to “harm” or “harass” listed species.³⁶⁾ Significantly, however, regulations implementing the ESA provide that harassment of captive species does not include practices that meet the minimum standards of the AWA. The court concluded that the Cricket Hollow Zoo fell short of meeting several requirements of the AWA in housing its lemurs and tigers, using these violations to find that the zoo also “harassed” these animals in violation of the ESA.³⁷⁾ The court ordered that the Iowa facility transfer its lemurs and tigers to a licensed facility capable of meeting the animals’ needs, and enjoined the Cricket Hollow Zoo from acquiring any additional animals on the threatened or endangered lists without first demonstrating that it could adequately care for them and receiving approval from the court.³⁸⁾

The decision in *Kuehl v. Sellner* does not suggest that captive members of species listed as threatened or endangered are necessarily entitled to better conditions than the AWA requires for all other species held for purposes of display. However, by allowing animal advocates to use the ESA to effectively

³⁴⁾ For example, for many years FWS listed captive chimpanzees as threatened - with a “special rule” authorizing research activities involving these animals - while classifying wild chimps as endangered. However, in 2015 FWS reversed this position and listed both captive and wild chimpanzees as endangered, concluding that the ESA does not permit captive animals to be classified differently than their wild counterparts based solely on their captive status. *See* Final Rule Listing All Chimpanzees as Endangered Species, 80 Fed. Reg. 34500, 34501, 2015.

³⁵⁾ *See Kuehl v. Sellner*, note 31, *supra*.

³⁶⁾ 16 U.S.C. §1538(a)(1)(B) and §1538(a)(1)(G); §1532(18).

³⁷⁾ *See Kuehl v. Sellner*, note 31, *supra*, at 28-35.

³⁸⁾ *See id.* at 36.

enforce the AWA's standards of care through the Endangered Species Act, the court opened the door for concerned citizens to take legal action in cases where federal regulators are not adequately enforcing the AWA and ensuring proper care of captive members of threatened and endangered species.

The court in *PETA v. Miami Seaquarium*³⁹⁾ addressed an important question left open in the Iowa litigation. This case involved an orca named Lolita, which was captured in Puget Sound as a five year-old in 1970 and has since lived in a tank at the Miami Seaquarium. When it originally protected orcas living in Puget Sound under the ESA, the National Marine Fisheries Service (NMFS) explicitly exempted captive orcas and their progeny - though Lolita was the only remaining captive orca from the listed population. People for the Ethical Treatment of Animals later petitioned NMFS to include Lolita as part of the endangered population, a step NMFS took in 2015.⁴⁰⁾ PETA then filed suit under the ESA, arguing that the conditions of Lolita's confinement - including the small size of her tank and the aquarium's practice of keeping captive dolphins in the tank along with Lolita - constituted illegal harm and harassment under the ESA. Since the plaintiffs in the case did not clearly dispute a finding by APHIS that Lolita's tank complies with the AWA, their claims asked the court to determine whether the conditions experienced by a threatened or endangered animal in captivity can violate the Endangered Species Act even when the conditions of the animal's confinement comply with those required under the AWA.

The district court's clear response was "no." After analyzing both the statutes, the court declined to "bring the ESA into conflict with the AWA" by finding that conditions experienced by a threatened or endangered animal in captivity could constitute "harm" or "harassment" - and thus violate the ESA - when the

³⁹⁾ *PETA v. Miami Seaquarium*, No. 1:15-cv-22692 (S.D. Fla. 2016).

⁴⁰⁾ See NMFS, *Listing Endangered or Threatened Species: Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whale Distinct Population Segment*, 80 Fed. Reg. 7380, Feb. 10, 2015.

animal's conditions of confinement comply with the AWA.⁴¹⁾ In ruling against animal activists, the court narrowly interpreted "harm" to a captive animal within the meaning of the ESA to include only instances where the conduct of a federally licensed exhibitor "gravely threatens or has the potential to gravely threaten the animal's survival."⁴²⁾

If upheld on appeal, the decision in *PETA v. Miami Seaquarium* would block plaintiffs from using the ESA in an effort to secure conditions for threatened and endangered species in captivity that exceed the minimum standards required under the AWA.

Even when animal advocates have not succeeded in using litigation to improve conditions for captive members of threatened and endangered species, there are indications that forces outside the law - public sentiment and market pressures - may bring about substantial changes in treatment of these animals. After years of litigation by animal protection groups, in 2011 a court dismissed a lawsuit under the ESA challenging treatment of elephants used as part of the traveling Ringling Brothers circus.⁴³⁾ Despite prevailing in court, however, less than five years later the circus halted its use of elephants as public sentiment turned against elephants being made to perform tricks.⁴⁴⁾ Similarly, SeaWorld announced in 2016 that it would phase out shows featuring orca whales as performers at its theme parks in the United States.⁴⁵⁾ SeaWorld's announcement followed significant public pressure and controversy generated by a documentary film that told the story of an orca housed at SeaWorld that killed three people, perhaps in part due to psychological problems caused by the animal's conditions of confinement.⁴⁶⁾ The public backlash

41) *PETA v. Miami Seaquarium*, note 38 *supra*, at 37.

42) *Id.* at 38.

43) See *American Society for the Prevention of Cruelty to Animals v. Feld Entertainment*, 659 F.3d 13 (D.C. Cir. 2011).

44) See Reuters, *Unpack the Trunk: Ringling's elephants retire to Florida*, May 6, 2016, available at <http://www.cbsnews.com/news/unpack-the-trunk-ringlings-elephants-retire-to-florida/>.

45) See H. O'Hara, *SeaWorld vs Blackfish: The film that saved the whales*, (The Guardian, June 4, 2016), available at <http://www.telegraph.co.uk/films/2016/06/04/seaworld-vs-blackfish-the-film-that-saved-the-whales/>.

generated by concern over orcas' treatment - which SeaWorld spent \$15 million in an effort to counter - led to a 17% drop in visitors at the SeaWorld park in San Diego and a steep decrease in the company's stock prices.⁴⁷⁾

Overall, recent events in the United States show that animal advocates are having success in finding ways to use existing laws to improve conditions for at least some captive animals. The ESA and its citizen suit provision at least allows plaintiffs to enforce standards governing minimum conditions for captive animals set forth under the AWA, provided those animals are also listed as threatened and endangered. Even when unsuccessful, however, such lawsuits - together with media stories about conditions faced by animals held for purposes of display and entertainment - have made the general public much more aware of these creatures' plight. The public's concern over captive wild animals - reflected in increasing choices to avoid spending money in ways that supports businesses perceived as cruel to animals - may provide the most significant pressure to decrease or halt exploitation of captive wild animals for entertainment.

IV. Legal Status of Animals

Laws such as the Animal Welfare Act and state anti-cruelty statutes promote animal welfare by prescribing minimum conditions for captivity and banning at least some forms of animal abuse. However, leading academics and theorists in animal law draw a distinction between animal welfare and rights for animals. They argue that an animal welfare perspective allows balancing between the interests of humans and animals to determine what sort of conduct toward animals is "humane" and thus legally acceptable.⁴⁸⁾ On the other hand, a concept of animal rights would target "speciesism," drawing distinctions between morally acceptable behavior toward humans and behavior toward non-human animals.⁴⁹⁾ Advocates of

⁴⁶⁾ *Id.*

⁴⁷⁾ *Id.*

⁴⁸⁾ *See generally* Gary Francione, *Animals, Property, and the Law*, 1995.

⁴⁹⁾ For the classic text on moral arguments against treating animals differently than humans,

an animal rights perspective assert that law should provide far greater protections for animals than it generally does at present.

Animal advocates argue that the present legal status of animals in all American states and in most countries around the world incorporates a fundamental barrier to greater legal protections for animals pursuant to an outlook of animal rights:

[H]uman interests are protected by rights in general and by the right to own property in particular. As far as the law is concerned, an animal is the personal property, or chattel, of the animal's owner and cannot possess rights. Indeed, it is a fundamental premise of our property law that property cannot itself have rights as against human owners and that, as property, animals are objects of the exercise of human property rights.⁵⁰⁾

A great deal of animal law scholarship in the United States has focused on issues and perceived legal shortcomings in animal law as a result of animals' status as property.⁵¹⁾

In the United States, state law generally defines property and property rights. Two recent judicial decisions in the state of Oregon suggesting legal distinctions between animals and other types of property raise the possibility that law in at least some states may begin to provide animals with greater protections by putting animals in a legal category different than traditional forms of property.

State of Oregon v. Newcomb involved a criminal conviction for animal neglect

see Peter Singer, *Animal Liberation*, 1975.

⁵⁰⁾ Francione, note 47 *supra*, at 4.

⁵¹⁾ See, e.g. B. Bearup, *Pets: Property and the Paradigm of Protection*, 3 J. Animal L. 173 (2007); E. Peak, *Fido Seeks Full Membership in the Family: Dismantling the property classification of companion animals by statute*, 25 U. Haw. L. Rev. 481, 2003; E. DeCoux, *Pretenders to the Throne: A First Amendment analysis of the property status of animals*, 18 Fordham Env'tl L. Rev. 185, 2007; A. Dryden, *Overcoming the Inadequacies of Animal Cruelty Statutes and the Property-Based View of Animals*, 38 Idaho L. Rev. 177, 2001.

t.⁵²⁾ A state animal cruelty investigator, responding to a report that defendant Newcomb was abusing and neglecting her dog, took custody of the dog from Newcomb after finding it in an emaciated condition. A veterinarian at the facility where the dog was housed by the state after its confiscation withdrew blood from the dog for purposes of a medical test to determine whether the dog's condition was due to lack of food or some other cause. As a result of the test, which showed the dog's condition resulted from malnourishment, the state charged Newcomb with criminal animal neglect. Newcomb contested her conviction on grounds that the state unlawfully searched her personal property, i.e. the dog, without a search warrant.⁵³⁾

Reversing the Court of Appeals, the Oregon Supreme Court allowed Newcomb's conviction to stand. While the Court acknowledged animals are classified as property under Oregon law, it noted that "some animals, such as pets, occupy a unique position in people's hearts and in the law," and that this unique legal position "is not well-reflected in the cold characterization of a dog...as mere property."⁵⁴⁾ The Court went on to distinguish a dog from other types of property in that the law "prohibits humans from treating animals in ways that humans are free to treat other forms of property."⁵⁵⁾ The Court therefore held that examination of the dog's physical health while making a medical judgment as to what is appropriate for diagnosis and treatment "is not a form of government scrutiny that, under legal and social norms and conventions, invades a dog owner's protected privacy rights [related to her property]."⁵⁶⁾ Newcomb's criminal conviction was thus upheld.

The Oregon Supreme Court's decision in *Newcomb* followed another decision by the Court suggesting legal protections for animals beyond their status as property.

⁵²⁾ *State of Oregon v. Newcomb*, 359 Or. 756, 375 P.3d 434 (2016).

⁵³⁾ *Id.* at 359 Or. at 761.

⁵⁴⁾ *Id.* at 766 (internal quotations omitted).

⁵⁵⁾ *Id.* at 768.

⁵⁶⁾ *Id.* at 771-772.

In *State of Oregon v. Arnold Weldon Nix*, the defendant was convicted of 20 counts of second-degree animal neglect for failing to adequately feed and care for his horses and goats.⁵⁷⁾ Nix argued that because the animals collectively are property, as a matter of law there could not be not 20 “victims” of his conduct, meaning that he could be convicted of only a single count of neglect.⁵⁸⁾

The Court rejected Nix’s contention that his conduct did not affect multiple “victims” as the law defines that term. After examining relevant Oregon law in detail, the Court held that a victim “can include both human and non-human animals, and nothing in the text, context, or legislative history of the statute necessarily precludes an animal from being regarded as such.”⁵⁹⁾ The Court noted animals’ treatment as property under most provisions of American law, but noted that “[a]lthough early animal cruelty legislation may have been directed at protecting animals as property of their owners or as a means of promoting public morality, Oregon’s animal cruelty laws have been rooted - for nearly a century - in a different legislative tradition of protecting individual animal themselves from suffering.”⁶⁰⁾ In ruling that the defendant could be convicted of neglect for each individual animal “victim,” the Court sided with prosecutors’ argument that state laws “evinced a concern to protect more than a general public interest in animal welfare; rather, those laws reflect the legislature’s intention to protect individual animals from suffering.”⁶¹⁾

Organizations dedicated to advancing animal rights have pointed to the Oregon Supreme Court’s rulings as potentially marking a legal shift away from considering animals as “mere” property and toward providing animals with additional legal protections. One NGO called the Nix case a “landmark ruling,”⁶²⁾ while a

⁵⁷⁾ *State of Oregon v. Arnold Weldon Nix*, 355 Or. 777, 334 P.3d 437 (2014).

⁵⁸⁾ *Id.* at 355 Or. at 779.

⁵⁹⁾ *Id.* at 789.

⁶⁰⁾ *Id.* at 796-797.

⁶¹⁾ *Id.* at 781.

⁶²⁾ M. Cronin, *Landmark Ruling: Animals can legally be considered victims, just like humans*, The Dodo (August 22, 2014), available at <https://www.thedodo.com/landmark-ruling->

dog-lovers' group highlighted language in the Newcomb opinion recounting the changing legal status of animals.⁶³⁾

Though the Oregon Supreme Court's decisions indeed contain at least some language suggesting a different legal outlook toward animals, the Court was careful to avoid any express recognition of a new status for animals. Its opinion in *Nix* emphasized that "our decision is not one of policy about whether animals are deserving of such treatment [as individual victims] under the law. That is a matter for the legislature. Our decision is based on precedent..."⁶⁴⁾ Similarly, the Court emphasized that its holding in *Newcomb* was "limited to the circumstance that this case presents."⁶⁵⁾

Ultimately, the Oregon decisions discussed in this section likely do provide an indication that - at least in some states - courts, state legislatures, and prosecutors are beginning to formulate and interpret laws in a manner more favorable to animal protection than standards consistent with the concept of animals as only property. Nevertheless, this progression will undoubtedly be slow and incremental, and in the near future the law in the United States is unlikely to incorporate many of the notions of animal "rights" conceived of by commentators such as Peter Singer and Gary Francione and advocated by some NGOs.

V. Animal Welfare Prosecutions

Virtually all states as well as the federal government have enacted laws regulating animal welfare, including criminal sanctions for animal neglect and abuse. However, governments often lack the resources to adequately enforce these

animals-can-le-685596943.html.

⁶³⁾ See C. Kawczynska, *Court rules that pets are not "mere" property*, July 11, 2016, available at <https://thebark.com/content/court-rules-pets-are-not-mere-property>.

⁶⁴⁾ *Nix*, note 56 *supra*, at 448.

⁶⁵⁾ *Newcomb*, note 51 *supra*, at 773.

laws, meaning that animals suffer despite the existence of legal standards designed to protect them.⁶⁶⁾

A unique program in Oregon seeks to substantially improve the rate of prosecutions of crimes involving animals. Oregon has the nation's only full-time prosecutor for such offenses; the deputy district attorney works for the state government, and under the direction of elected district attorneys has prosecuted cases in 15 counties across Oregon.⁶⁷⁾ Yet money to fund his position does not come from state taxpayers - instead, it stems from a financial grant to the state from the Animal Legal Defense Fund, an NGO that advocates for increased protection for animals in both legislatures and courtrooms around the country.

The Oregon program to increase enforcement of animal laws represents an interesting experiment. The animal law prosecutor has a track record of success, and allows the state to take enforcement actions in cases that may have been neglected without an attorney dedicated to animal issues. On the other hand, some people have raised concerns that animal welfare groups are improperly influencing how state government enforces the law by "buying a prosecutor."⁶⁸⁾ Even though ALDF has no influence over the cases selected by the animal crimes prosecutor funded through the group's grant - or how those cases are handled - critics of the arrangement insist that an advocacy group's funding for state criminal prosecutions raises thorny ethical issues. Nonetheless, particularly when budgets are tight all over the country, other states may be interested in similar arrangements to improve their ability to enforce their animal protection laws.

VI. Conclusion

⁶⁶⁾ See notes 2, 30, *supra*; P. Conly, *Time to Give Anticruelty Laws Some Teeth - Bridging the Enforcement Gap*, 3 J. Animal L. & Ethics 1, 2009.

⁶⁷⁾ See N. Jaquiss, *The Animal Lawyer*, Willamette Week, December 2, 2014, available at <http://www.wweek.com/portland/article-23626-the-animal-lawyer.html>.

⁶⁸⁾ *Id.*

Animal law is one of the newest and most dynamic areas of law in the United States. While both the federal government and individual states have for many years had laws preventing cruelty to animals and setting forth minimal standards at least some animals held in captivity, increasing interest by the public in treatment of animals of all types has accelerated legislative and judicial developments in this area of the law. Moreover, animal law is a recognized and growing legal specialty, with academic programs and journals focusing on the topic and a growing cadre of practitioners.

Recent developments in American animal law provide a window into some of the most important discussions of how to structure the relationship between humans and animals in the 21st century, and the cutting-edge legal issues that arise in this important area. The policy and legal struggles over treatment of animals used in agriculture, the legal and market-based pressures on entities that maintain captive animals for entertainment, and the challenges of enforcing existing laws are a rich source of information and ideas for attorneys and policy-makers in Korea and other countries interested in animal law.

투고일자 2016.07.08, 심사일자 2016.09.22, 게재확정일자 2016.09.23

Reference

- A. Dryden, *Overcoming the Inadequacies of Animal Cruelty Statutes and the Property-Based View of Animals*, 38 Idaho L. Rev. 177, 2001
- A. Martin, *Largest Recall of Ground Beef is Ordered*, New York Times, February 18, 2008
- A. Miller & A. Shah, *Invented Cages: The Plight of Wild Animals in Captivity*, 1 Animal L. 23, 2005
- B. Bearup, *Pets: Property and the Paradigm of Protection*, 3 J. Animal L. 173, 2007
- C. Kawczynska, *Court rules that pets are not “mere” property*, July 11, 2016
- C. Lee, *The Animal Welfare Act at 50: Problems and Possibilities in Animal Testing Regulation*, 95 Neb. L. Rev. ____, forthcoming 2016
- Dept. of Agricultural Economics, Kansas State University, U.S. Meat Demand: The Influence of Animal Welfare Media Coverage, 2010
- D. Rohlf, *The Endangered Species Act at Forty: The Good, The Bad, and the Ugly*, 20 Animal L. Rev. 251, 2014
- E. DeCoux, *Pretenders to the Throne: A First Amendment analysis of the property status of animals*, 18 Fordham Envtl L. Rev. 185, 2007
- E. Peak, *Fido Seeks Full Membership in the Family: Dismantling the property classification of companion animals by statute*, 25 U. Haw. L. Rev. 481, 2003
- Gary Francione, *Animals, Property, and the Law*, 1995
- H. O’Hara, *SeaWorld vs Blackfish: The film that saved the whales*, The Guardian, June 4, 2016
- J. Lovvorn and N. Perry, *California Proposition 2: A Watershed Moment for Animal Law*, 15 Animal Law 149, 2009
- J. Sherfey, “*What the Fast Food Industry’s Shift to Cage-Free Eggs Really Means*,” Eater, 17 Feb. 2016
- J. Tischler, *A brief History of Animal Law, Part II (1985-2011)*, 5 Stan. J. Animal L. & Policy 27, 2012

- K. Swanson, *Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. Mich. J. L. Reform 937, 2002
- L. Wilson, *Ag-Gag Laws: A Shift in the Wrong Direction for Animal Welfare on Farms*, 44 Golden Gate Univ. Law Rev. 311, 2014
- M. Cronin, *Landmark Ruling: Animals can legally be considered victims, just like humans*, The Dodo, August 22, 2014
- N. Jaquiss, *The Animal Lawyer*, Willamette Week, December 2, 2014
- N. Negowetti, *Opening the Barnyard Door: Transparency and the Resurgence of Ag-Gag and Veggie Libel Laws*, 38 Seattle Univ. Law Rev. 1345, 2015
- P. Conly, *Time to Give Anticruelty Laws Some Teeth - Bridging the Enforcement Gap*, 3 J. Animal L. & Ethics 1, 2009
- Peter Singer, *Animal Liberation*, 1975
- Reuters, *Unpack the Trunk: Ringling's elephants retire to Florida*, May 6, 2016.
- S. Cagle, *Two views on ag-gags: The investigator and the farm advocate*, Grist, 25 April 2013
- S. Strom, *McDonalds Plans a Shift to Eggs from Only Cage-Free Hens*, New York Times, September 9, 2015

<국문초록>

미국의 동물법

- 주요 쟁점 및 최근 동향 -

Daniel J. Rohlf*

논문은 4가지 일반영역에서 미국 동물법의 최근 발전을 검토하면서 그 영향을 설명한다. 섹션II는 동물에 영향을 주는 주(州)법이 최근 개정되었는데 이 개정은 농장동물 보호수준을 향상시키면서도 역효과 또는 운동가들이 동물학대를 알리는 것을 더욱 어렵게 한다는 것을 논한다. 섹션III은 특별한 법적 보호 종(種)으로 야생동물 개체수를 위해 포획된 야생동물의 수용과 취급을 위한 기준의 발전을 검토한다. 섹션IV는 전반적으로 동물에게 새로운 법적지위를 주는데 기여할 수 있는 오리건 주의 법원 결정 두 개를 논한다. 마지막으로, 섹션V는 새로운 펀딩 메커니즘을 상세히 기술한다. 이는 정부역량이 이미 기록되어 있는 동물법 시행에 대한 정부역량을 증가시키면서, 일부 사람들에게 윤리적 관심을 불러일으키게 한다. 동시에, 이러한 발전은 한국과 여타 나라의 관심이 있는 학자와 변호사에게 자국의 동물법 발전을 위한 아이디어를 제공할 수 있다.

동물법은 미국에서 가장 새롭고 가장 역동적인 법분야 중 하나이다. 연방정부와 주(州) 모두 오랫동안 동물학대를 예방하고 적어도 수용된 일부동물에 대한 최소기준을 설정하는 법이 있었지만, 모든 유형의 동물처우에 있어서 일반국민의 관심 증가가 해당 법분야에서 입법적 사법적 발전을 가속화했다. 더욱이, 동물법은 동주제에 초점을 맞춘 학문적 프로그램과 학술지 그리고 증가된 변호사 핵심그룹과 함께 인식 및 증가되는 법적 특수성이 있다.

미국동물법의 최근 발전은 21세기 인간과 동물의 관계를 어떻게 구조화 할 것인지에 있어 가장 중요한 논의 중 일부와 중요분야에서 일어나는 최신 법적 쟁점을 보여준다. 정치가와 법률가는 농업에 이용되는 동물대우에 있어 분투하고 있으며,

* 루이스앤클락로스쿨 교수

오락을 위한 동물 포획을 지속하는 단체에 대한 법적 시장기반적 압력 그리고 법적 강제에 대한 이의제기는 동물법에 관심있는 한국과 여타 국가의 변호사와 정책 입안자에게 풍부한 정보원과 아이디어를 준다.

주제어: 동물법, 동물학대행위를 비밀스럽게 찍는 행위를 금지하는 법률, 포획, 재산동물, 기소