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Animal Law and Environmental Law: Exploring the Connections and Synergies

Randall S. Abate

Florida A & M University College of Law, randall.abate@famuedu

Elizabeth Hallinan

Joan E. Schaffner

Bruce Myers

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D I A L O G U E

Animal Law and Environmental Law: Exploring the Connections and Synergies

Summary

Environmental law, with its intricate layers of international, federal, state, and local laws, is more established than its animal counterpart. Yet animal law faces many of the same legal and strategic challenges that environmental law faced in seeking to establish a more secure foothold, both in the United States and abroad. In *What Can Animal Law Learn From Environmental Law?*, editor Randall S. Abate brought together academics, advocates, and legal professionals to examine the very different histories of environmental and animal law, as well as the legal and policy frameworks that bridge the two fields. On November 16, 2015, the Environmental Law Institute held a Dialogue about these critical issues. Drawing on lessons from history, politics, and law, the panelists examined how environmental law's successes and shortcomings can inform animal law and how the two fields can work together for mutual gain in the future. They also explored important intersections between the two fields, such as concentrated animal feeding operations, agriculture and climate change, the legal valuation of nature, and other critical topics. Below we present a transcript of the discussion, which has been edited for style, clarity, and space considerations.

Randall S. Abate (moderator) is Professor of Law, Director of the Center for International Law and Justice, and Project Director of the Environment, Development & Justice Program at Florida A&M College of Law, and Editor of *What Can Animal Law Learn From Environmental Law?* **Elizabeth Hallinan** is an animal law attorney and consultant, previously with the Animal Legal Defense Fund and Compassion Over Killing. **Joan E. Schaffner** is Associate Professor of Law at The George Washington University Law School. **Bruce Myers** is a public interest animal and environmental lawyer based in Washington, D.C., previously a Senior Attorney at the Environmental Law Institute.

Randall Abate: Three of the fantastic contributing authors for *What Can Animal Law Learn From Environmental Law?*¹ are with us here today on this panel. It was a true labor of love putting this book together. As someone coming from the environmental law field for two decades and only recently transitioning to animal law, working on this book project was an exciting learning process for me and it provided an opportunity to engage with some of the leading academics and practitioners and emerging voices in both animal law and environmental law.

The panel will hit some of the highlights of the book. I want to provide a very general overview of what the book tries to achieve. Primarily, there are two goals. The first goal is reflected in the title's reference to environmental law, which, as a much more established field than animal law, has faced and overcome many challenges as a growing field in the law. Animal law is facing many of those same challenges as it seeks to emerge as an established field of law. There are many valuable lessons that environmental law can offer to animal law in moving forward.

The second objective is a practical emphasis on exploring ways in which there are synergies between these two fields so that there can be common ground for these fields to secure mutual gain by finding opportunities to work together on issues of common concern. Examples of common concerns are food law and policy and climate change law and policy. These are the most significant areas for animal law and environmental law to potentially work together and secure valuable mutual benefit.

One topic that we're not going to be able to get into in much detail (but is critical to the book) involves the international and comparative law dimensions of this topic. First, there are many countries pursuing progressive initiatives on topics relevant to animal law, from which U.S. animal law can learn. Second, international environmental law has secured a very strong place over the past few decades, while animal law isn't nearly there in establishing a global presence under the law. So, there's a lot that animal law can learn regarding how the field can achieve an impact under international law.

Primarily, the focus for today will be three discussions within the broader framework of the connection between the fields. We're going to hear first from Liz Hallinan, an

1. *WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW?* (Randall S. Abate ed., ELI Press 2015).

environmental lawyer and an animal lawyer, regarding some dimensions of history and politics and law as ways that environmental law may have paved the way for animal law to grow. Then Prof. Joan Schaffner of The George Washington University Law School will discuss how environmental law has had a firm foundation in the notion of valuation of damages on an intrinsic value basis and how that's something that can be quite valuable as a foundation for animal law, which currently recognizes merely market or replacement value damages for animals. Third, we will hear from Bruce Myers, a Senior Attorney here at ELI, who co-authored a chapter with an individual who's fondly known as the mother of animal law, Joyce Tischler. Bruce will be discussing methods and opportunities to move forward with animal law and environmental law working together.

Liz Hallinan: When I was a 2L in law school taking environmental law, we covered the Clean Air Act (CAA).² I remember my professor saying something that really struck me at the time, which was that the automotive industry had supported the passage of the 1970 CAA. As an animal advocate, it blew my mind that an industry might actually support federal regulation of its own activities, and I stored that little nugget away. I always wanted to delve into the story and find out how that happened, because I think if we can figure out how to get industry to support regulation of itself, we can make strides in animal law in a way that we're not even close to doing yet. That's what I'm going to talk about today.

I'm going to give you a very brief history of the CAA and focus on how industry came to support the regulation on its own initiative. I'm going to talk about the lessons we can take from that story, and then I'm going to apply it to two different areas: how we can use this to help farmed animals, and how we can use it to help circus elephants. My discussion of the statute will have to be vastly oversimplified. I recommend that if you're interested in the history of air pollution control in this country, read a book called *Pollution and Policy*,³ which will give you more information than you ever wanted to know.

Air pollution had been an issue for several decades at the beginning of the 20th century. But the move to regulate air pollution really coalesced in California by mid-century, because southern California in particular was having such difficulty with their visible air pollution. California did what you might expect a state would do. It started by establishing standards, but made the implementation of those standards voluntary. Several counties decided not to regulate, which didn't help the counties that were regulating because pollution does not stay within county boundaries.

By 1960, California was feeling the pressure to do something more, so it set mandatory air quality standards. In particular, it set technology standards for cars. California

figured out early that cars were one of the major contributors to pollution. I think it is important to realize that the automotive manufacturing industry has never been based in California; it's been based in Michigan. As you can imagine, it's much more tempting for state politicians to regulate industries that are not in their own state because then they can look like a champion of their citizens without hampering any in-state industries. We'll come back to this point later.

By 1965, California wasn't the only state trying to regulate air pollution. New York and Pennsylvania had also either proposed or passed emission standards. New York's standards were actually more strict than what California had passed. The federal government for the first couple of decades took the position that air pollution was a local problem and therefore it was not the federal government's role to regulate it. The federal government decided that its role was limited to providing research and perhaps policy guidelines.

But then we get to 1965, and several states, not only California, are regulating air pollution. The automotive industry sees the writing on the wall. What they are worried about is not just that California is setting certain standards, but that New York and Pennsylvania are also doing so, with different requirements. Think about being a car manufacturer at this point in history. You make cars in Michigan. You do not want to make one car for New York, another car for California, and another car for Pennsylvania. So, although the car industry would rather not be regulated at all, what they don't want most of all is to have inconsistent state standards, where they have to make different cars for different states.

So, the industry went to the U.S. Congress and said we're okay if you regulate us, but we want one standard, a federal standard that applies to the entire country, because we'd rather have one consistent standard than have to meet all of these different state standards. Also, the industry probably felt that it could better control federal standards because they have powerful lobbyists at the national level.

In 1965, with the support of President Lyndon Johnson, Congress passed the Motor Vehicle Air Pollution Control Act⁴ of 1965, which set vehicle emission standards. California wasn't happy about this because California did not want a federal law that preempted the state's own standards. Remember, southern California has a particularly bad pollution problem. The California congressional delegation tried to ensure that the state standards would be exempted from the federal standards, so that the state could keep ratcheting up the pollution control if they wanted to without being hampered by the federal standards.

The car industry resisted the California delegation's approach because the whole reason the industry went to Congress was to ensure a consistent standard across the country. The result was a battle between those two groups. California won and kept its exemptions, thereby enabling it to set higher standards than the national standard.

2. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

3. JAMES E. KRIER & EDMUND URSIN, *POLLUTION AND POLICY: A CASE ESSAY ON CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION, 1940-1978* (Univ. Cal. Press 1977).

4. Pub. L. No. 89-272 (1965).

This was great progress, but 1969 really represents “the year of the environment.” There was a big push to have massive federal environmental regulation in 1969. The car industry’s reputation was at absolute rock bottom. They were being investigated on an anti-trust charge; Ralph Nader’s group had gone after them; and there was some evidence that the industry had been pressuring the states for a race to the bottom, that is, that they were pushing some states to engage in as little regulation as possible.

Then in stepped two champions of the environment, one obvious champion and one very non-obvious one. Sen. Edmund Muskie (D-Me.) decided that he was going to be *the* champion of the environment, pushing for the strongest federal regulations possible. But President Richard Nixon (surprisingly to my generation) didn’t want to be outdone on the environment. While Congress was writing the 1970 CAA, each politician kept one-upping the other on how strict they could be. Senator Muskie would propose one version of federal regulation and Nixon would come back and propose something more strict. As of result of the one-upping, we got this amazing environmental regulation that not only set emission standards for cars and for other things, but also provided in the statute that you couldn’t take into consideration costs to the industry or car technology and availability when setting standards.

We ended up with what I think is quite an incredible law for its time, the 1970 CAA. At the end of the day, industry still lost out because California was allowed to keep its key exemption, enabling it to set higher standards than the rest of the country if it feels that it needs to.

Why do I think this is an interesting story? There are several lessons we can take from it. One is that you should start local if possible because often advocates for change, particularly animal advocates, have more power at the local or state level than at the federal level. What the CAA story tells us is that even local initiatives can move progress significantly, even if your goal ultimately is to reach the national level.

Another part of the story is that if you start local, it’s helpful if the industry that you are opposing is based out of state, because it is much easier to convince local politicians to impose costs on industries that are not located within their own state. If you can get several local or state legislative initiatives going, that can really help build momentum. Once you get one locality to pass laws, you can get other localities to jump on board. It is much harder just to go straight to Congress to get this stuff done.

So, the CAA story would suggest that once you get a couple of legislative pieces in place at the local or state level, industry is then going to be driven to lobby for a national solution. This is because they would rather have a single (and preferably lower) federal standard than have to deal with inconsistent state standards. This strategy has been labeled by some scholars as the Defensive Preemption Theory, in that industry would be attempting to defensively

preempt state or local standards.⁵ The theory is particularly relevant if the manufacturing industry is centralized in one location or otherwise standardized, such as in the car manufacturing case. We make the same car for every state; so if you have differing state standards, centralized manufacturing is going to be particularly vulnerable to different state standards calling for differing products.

And then of course (tongue in cheek) the easiest part is to convince national politicians that your agenda is the most important one and that they should stake their political career on what you want to happen.

I used to be a scientist; so now, we’re going to test this theory on two different areas in animal law. First, farmed animals: The current state of farmed animal regulation is very similar to where pollution control was in the 1960s, which is to say that several states have started to regulate how farmed animals are treated on the farm, but there is no federal legislation on point. Several states have banned gestation crates for pigs (where a pregnant pig is put in a very tiny cage so that she cannot turn around); banned battery cages for egg-laying hens (where 4-10 hens are kept in cages about the size of a file drawer); and banned veal crates. A few states have banned tail docking for dairy cows.

Now, you can see that farmed animal regulation is following the pattern of the CAA story. The first states to have banned these production methods for farmed animals tend to be states with almost no agricultural base. For example, the first sow gestation crate ban was in Florida, where I think they had two pig farms. This pattern of regulation is known as cost externalization. If you don’t have a big agricultural industry in your state, it’s much easier to regulate that industry without much pushback.

The one exception to this rule for farmed animal cost externalization has been California. California is in fact quite a large agricultural state. However, in 2008, a ballot initiative called Proposition 2 in California banned gestation crates, battery cages, and veal crates. This initiative came directly from the voters, which I think is one reason it passed. Once these bans passed in California, the California Legislature then additionally banned several of the products coming out of these production methods. The state now bans the sale of eggs that come from battery cages, and the production and sale of foie gras. So, now in California, we see *product* regulation, not just *production* regulation.

What would the Defensive Preemption Theory predict next for farmed animals? Well, now that we’ve gotten a couple of states to regulate farmed animals’ treatment, you might expect that the farmed animal industry would now lobby Congress to try to get national regulation that is less strict, so that the industry will only have to deal with one lower standard.

In fact, a couple of years ago, the United Egg Producers (the industry group representing egg farmers) and the Humane Society of the United States (a nongovernment-

5. See, e.g., J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1500 (2007).

tal organization) got together and agreed that they would together lobby for federal legislation on how egg-laying hens could be housed and treated on a farm. Not much has come out of that so far, but that type of cooperative development is exactly what the Defensive Preemption Theory would predict: The United Egg Producers decided they were worried about inconsistent state standards and preferred that Congress step in and give the industry one national standard with which to comply.

There are various reasons why we haven't seen more of this national lobbying and legislation for farmed animals, but basically the Commerce Clause and preemption issues pose problems for getting more state legislation on these issues (see the book chapter for an in-depth explanation of these barriers). However, I think that what we've seen so far is a good first step to getting to the national level.

The second subject I want to test the Defensive Preemption Theory on is circus elephants. One of the main concerns we have with circus elephants is the use of something called the bullhook. It's basically a wooden baton with a metal hook on the end. The elephant handler hooks it into soft tissue or skin, such as behind the ears or behind the legs of the elephant. That's painful to the elephant, so they'll do what the handler tells them to do. It's a very cruel method of training elephants.

The situation for circus elephants right now is slightly different than it was for air pollution in the 1960s because there are existing federal laws that should protect elephants and should in theory prohibit the use of these bullhooks. The Endangered Species Act (ESA)⁶ and the Animal Welfare Act⁷ both require that elephants be treated in humane ways. The problem is that the bullhook is still in use all over the country and there's very little enforcement of these laws. Litigants have tried to use the ESA to obtain a judicial ban on bullhooks, but various procedural issues have prevented them from doing so. The lack of protective enforcement from existing federal laws is unforgivable.

There is also an argument that state anti-cruelty laws technically prohibit use of bullhooks on elephants. But again, efforts to use those laws for that purpose haven't been successful. So recently, animal advocates have decided to go even more local. Advocates have started to get local ordinances passed specifically mentioning the bullhook and banning its use in any way. The first ordinance passed was in Fulton County, Georgia, followed by small towns in Florida, Indiana, Kentucky, and Oregon. This development fits the pattern we saw with the CAA, in that small counties took it upon themselves to make local laws banning a specific practice. Generally, these counties are places where the circus didn't conduct animal training or even visit, so it was easy to get local politicians on board.

The real turning point came when Los Angeles banned the bullhook a couple of years ago. It was a turning point because Los Angeles is a big city where circuses, particularly Ringling Brothers, visit several times every year. If

Ringling can't use the bullhook in Los Angeles, then they can't even bring their elephants to the city at all. That's an entire city that's off Ringling's tour schedule. Quickly following Los Angeles, Oakland banned the bullhook for the same reason. Once Los Angeles took action, other cities suddenly were open to the idea of banning the bullhook.

So, this was the state of the law when Jeffrey Pierce and I were writing the chapter for Randy's book. But, I remember waking up one day during that time and my e-mail inbox was just blowing up because Ringling had announced in March that they were eliminating elephants from all of their shows. We had been wondering if Ringling intended to go to Congress to try to get the federal government to do something about these bullhook bans. But it turned out that Ringling just skipped over that entire step. Ringling said that (among other reasons) because there were inconsistent local ordinances regarding bullhook use that were wreaking havoc for their tour schedule, they were just going to take elephants out of their shows altogether. As a scientist, I thought, "yes, my data worked!" Ringling's action was another way of going for a national solution, even though it wasn't through federal legislation, because the inconsistent local standards were infeasible for them to follow.

These stories help pave a way for animal advocates to approach a situation in which national legislation seems infeasible and unreachable. We can use this template to say: We start here. We can pressure industry to actually end up supporting the kind of regulation that we've been fighting for all along. So, there's hope.

Joan Schaffner: When Randy asked me to contribute to the book, I was a bit skeptical. As one primarily involved in animal law, I particularly am interested in exploring the legal rights and protections for individual animals. My view of the environmental law approach was that it protects species only when they're near extinction rather than focusing on the protection of individual wildlife. However, I soon realized that the debate within environmental law to valuing nature and the approach to natural resource damages, both theoretically and in practice, is something from which animal law can learn quite a lot.

We respect and protect that which we value. Thus, the values that we place on nature and domestic animals are critical to their protection under the law. A key area of debate in the animal law context concerns what compensatory damages are available to an owner for the loss of a companion animal caused by the wrongdoing of another person. Specifically, whether the law will recognize the noneconomic (in other words, companionship) value of the animal to the owner and compensate for that loss. Although there has been some progress, generally courts and legislatures, viewing animals as personal property, limit damages to the economic value of the animal.

This debate has occurred largely in isolation from environmental law, with its arguably more progressive theories and approaches to natural resource damages having little influence in the animal law debate. Although the two

6. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

7. 7 U.S.C. §§2131 et seq.

regimes are quite distinct legally and socially, I believe that the environmental law approach to the valuation of natural resource damages may inform the animal law debate over the valuation of animals and damages awarded when they are harmed, and perhaps may even support recognizing not only the noneconomic companionship value of companion animals to their owners, but also the intrinsic value of all animals.

Why is valuation and its relationship to damages or sanctions important to the protection of individual animal well-being? Because legislation that regulates conduct affecting both the environment and animals' lives and sets sanctions for their violation generally is the result of utilitarian balancing of the costs and benefits of such conduct. In order to provide adequate protection, this balancing must properly reflect the value of nature and animals' lives and the cost to them when harmed. Judicially, the same balancing occurs when setting common-law standards of care and the damages imposed for their violation.

Thus, the level of incentive to comply with the legal standard primarily is a function of the damages that are imposed when the standards are enforced. Accordingly, to properly set incentives to comply with legal standards and to avoid harm to both nature and animals, the damages imposed for their loss must reflect their proper value. My thesis is that theories of valuing nature under environmental law can provide an analog for animal law and a basis for granting damages that will properly reflect the true value of animals.

To present my thesis today, I'll provide a very brief introduction to damages, then turn to environmental law theories on both identifying and quantifying nature's anthropocentric and biocentric values. Then, I'll turn to the animal-law debate over companion animal damages and demonstrate how lessons learned from environmental law may be used to rebut the arguments against allowing damages for noneconomic companionship value and support the recovery of such damages. And then, finally, I will end with a suggestion that the next step in the animal-law debate, informed by environmental law, should be to include damages for the intrinsic value of all animals in order to better protect their interests.

Damages are divided into three types: compensatory, restitutionary, and punitive. Each type serves a different function and thus is assessed differently. Compensatory damages are designed to make the victim whole and to regulate our daily affairs, and thus are assessed based on the harm suffered by the victim. Restitutionary damages serve to disgorge from the wrongdoer any profit realized by their wrong and thus are assessed based on the profit gained by the wrongdoer. Punitive damages are designed to punish and deter intentional and malicious conduct and are assessed based on how egregious the defendant's conduct is. My discussion focuses on compensatory damages because the purpose is both to accurately compensate the victim, whether the victim be society or the owner, for their loss to either nature or their individual animal, and

perhaps, more importantly, to set proper incentives to take care and avoid harm to nature and animals.

Environmental law recognizes that nature has both anthropocentric and biocentric values. Anthropocentric values are characterized by both the use and existence values of nature to human beings. Biocentric value is the intrinsic value of nature independent of its utility to humans. Anthropocentric use value is reflected by humans' behavior and may be economic and noneconomic, consumptive and nonconsumptive. For example, cutting down trees for lumber represents a consumptive economic use value of the trees to the lumber company. In contrast, whale-watching is a nonconsumptive use that has both an economic value to the whale-watching company and a noneconomic value to the individuals enjoying the whales.

Anthropocentric existence value is reflected attitudinally because it relates to future and potential use. Existence value is divided into three types: option, vicarious, and intertemporal. Option value depicts our interest in preserving nature for our future use. Vicarious value describes our interest in preserving nature from extinction independent of our potential future use. Intertemporal value denotes our interest in preserving nature for future generations. The Wilderness Act⁸ of 1964 exemplifies Congress' interest in preserving and protecting the various existence values of nature by designating the "preservation and protection [of designated wilderness areas] in their natural condition . . . to secure for the American people of present and future generations the benefits of an enduring resource of wilderness."⁹

Biocentric value reflects an appreciation that all living things have inherent value and moral significance independent of their use by human beings. Assessing biocentric value is controversial because its measure is predicated on informed human understanding of that intrinsic value and not necessarily on the value itself. Moreover, although some might argue that to try to commodify intrinsic value may in fact demean such value, I believe it's still necessary in our capitalistic society to at least estimate the intrinsic value of nature and assess such damages when nature is harmed. Otherwise, the value will be set as zero. There is no regulatory incentive to avoid harm to something of zero value.

There are several methods for quantifying nature's values. Market value, the price a willing buyer would pay to a willing seller, is the most common and least controversial method, but it captures only economic use value. Restoration cost does not directly assess value, but rather is based on the cost to fully restore the damage done to a natural resource. Since the result arguably, or at least theoretically, is to return the resource to its original condition, restoration cost arguably reflects all values—economic and noneconomic use, existence, and intrinsic values. However, restoration may be impossible. Replacement cost may be used instead, the cost to purchase a comparable site. Note, it does not address the unique aspect of the natural resource

8. 16 U.S.C. §§1131 et seq.

9. 16 U.S.C. §1131(a).

destroyed, nor does it account for the combined loss of the damaged site and its replacement.

Behavioral use, specifically travel cost, assesses nature's economic and noneconomic use values by calculating the expenses we would incur to travel to and enjoy the natural resource. Finally, contingent valuation assesses nature's existence and intrinsic values based on a survey of people's responses to questions exploring the values they would place on certain natural resources. This method is the most controversial for a variety of reasons, including that it is attitudinal and often influenced by the survey design and execution.

Examples under environmental law—the Fish and Wildlife Conservation Act,¹⁰ the 1989 D.C. Circuit decision in *Ohio v. Department of the Interior*¹¹ that remains a landmark decision on the proper methodology for valuing natural resource damages under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹² and the revised U.S. Department of the Interior CERCLA Damage Assessment Rules¹³—reflect an appreciation of all of nature's values and a commitment to at least attempt to assess damages to compensate for their loss. For example, the Fish and Wildlife Conservation Act expressly recognizes nature's ecological, educational, aesthetic, cultural, recreational, economic, and scientific values. While these are all anthropocentric, they do reflect both economic and noneconomic values to humans.

Also, these statutes, and the court in *Ohio*, state that they appreciate that efficiency in determining the proper measurement of damages means determining the chosen policy that will achieve the greatest value to society, not necessarily the least expensive policy. And because nature is not a fungible good, the cost to restore that resource may be awarded even if the restoration cost is greater than the market value. And finally, they allow for nonmarket methods to measure lost value of natural resources to both human and non-human services.

How may these lessons inform the animal-law damages debate? The traditional rule for compensating lost property is to assess damages for the loss based on market value. Since owned companion animals are deemed personal property under the law, damages for their loss generally are based on market value, the cost to purchase the companion animal. Companion animals typically have relatively little market value because it's relatively inexpensive to either adopt from a shelter or purchase from a pet store. However, the owner places great value on their companion animal based on the relationship that they develop with the animal, in other words, the companionship that they share. This value, however, is not reflected in market value.

In many jurisdictions, if the companion animal is injured but not killed, the owner often cannot even recover

the cost of reasonable vet expenses if they exceed the companion animal's market value. This is an economic disincentive for an owner to provide proper veterinary care to the companion animal, and arguably is inhumane. While some jurisdictions allow recovery of value to the owner, this value still only reflects the economic value to the owner, not the noneconomic companionship value.

Why is the lost companionship value of the animal to the owner not recovered in damages, even though most courts and legislatures recognize that companion animals actually serve companionship value? There are a variety of arguments, but the top three are these: First, it is inefficient for damages to exceed market value. This argument is based on a view that animals are fungible goods. Second, it would be anomalous for companion animals with market value to be deemed less valuable than companion animals with little market value. Third, and perhaps most important, the notion is that noneconomic damages are highly subjective, speculative, and not capable of measurement. Therefore, allowing damages for companionship value will result in excessive recovery and be detrimental to society, the animals, the animals' owners, and everyone else.

How might environmental law and the assessment of natural resource damages inform this animal law debate and its valuation of companion animals to include companionship value in compensatory damages when they are lost? I suggest that they provide a basis for challenging these arguments and assumptions. First, companion animals, like nature, are nonfungible goods with noneconomic value. Just as market value undervalues nature, it also undervalues companion animals because market value reflects only economic use value.

Second, efficiency simply means choosing a policy that dictates the greatest value to society—in this context, proper compensation to the owner and an incentive to care for an injured animal—not the least expensive alternative. Just as an accurate assessment of the value of nature and natural resource damages includes the sum of economic and noneconomic use, existence, and sometimes intrinsic value, the proper assessment of damages for loss of a companion animal can include the sum of the economic and noneconomic values of the animal to the owner. Thus, no anomaly will exist when comparing damages for a companion animal with or without market value. Third, and most importantly, natural resource methodologies such as restoration or replacement cost, behavioral, and contingent valuation may be used to objectively measure lost companionship value such that the recovery of this value as damages will not be excessive and detrimental to society.

How might we use these methodologies in this context? Restoration cost may be based on the expenses of veterinary services to heal the animal, whether successful or not. Behavioral travel cost methodology may be based on the average owner's expense to care for their companion animal. While companionship reflects a noneconomic bond, such bond has a significant economic impact on society. It is the primary reason that owners in the United States

10. 16 U.S.C. §§2901-2911.

11. 880 F.2d 432, 19 ELR 21099 (D.C. Cir. 1989).

12. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.

13. 43 C.F.R. pt. 11, Natural Resource Damage Assessments. See also U.S. Fish & Wildlife Serv., The Damage Assessment Process, available at <http://www.fws.gov/policy/nrda-2.pdf>.

in 2013 spent \$56 billion on their animals, according to the American Pet Products Association.¹⁴ Similar studies on what owners spend on their animals for each type of companion animal could provide useful estimates for how owners value their companion animals and form a basis for measuring damages for their lost companionship.

Finally, contingent valuation methodology may be used to survey companion animal owners and ask what monetary value they would place on their companion animal. Note that although behavioral and contingent valuation methods here will reflect average values and thus do not reflect the precise value of the animal to the individual owner in any specific case, the cost of such inaccuracy is offset by the benefit of providing an objective, non-speculative approach that cabins the damages awarded and provides notice to potential defendants.

I think that the next step in the animal law debate is to appreciate and compensate for the intrinsic value of all owned animals, based on these lessons from environmental law. Under current law, the value of an owned animal is a function of their use to their human owner. A rabbit, for example, will be valued differently if she's raised for food, used for experimentation, or treasured as a companion to the human owner. This result promotes the compensatory goal of damages—to make the human owner whole—over the regulatory goal—to protect the rabbit's interest in not being harmed. In fact, damages or sanctions for an owner's harm to an animal must include the animal's intrinsic value to set a proper regulatory floor to avoid harm to the animal.

Arguably, this may be already captured to some degree under the Animal Welfare Act when setting civil and criminal penalties assessed against owners for violation of the animal welfare act regulations, although I don't believe the quantification to date is accurate or that it is actively enforced. Under common law, allowing the owner to recover for the intrinsic value of the animal arguably gives a windfall to the owner because it exceeds the owner's use value of the animal. But successful plaintiffs in all types of litigation typically receive restitution or punitive damages, which arguably are windfalls for these plaintiffs in order to serve other public policy goals. On the other hand, one can argue that intrinsic damages are not really a windfall at all because the burden of proof of damages is on the plaintiff; measurement of compensatory damages is imprecise; and the plaintiff typically bears the cost of litigation, and thus it is proper for the owner to retain damages representing intrinsic value of the animal.

Alternatively, jurisdictions could place the damages representing the animal's intrinsic value into a fund to promote animals' interests in a similar manner as when they place punitive damages into a fund for future tort victims. The fund for animals established from the intrinsic value

damages could, for example, provide resources for spay/neuter services or cruelty investigations in the jurisdiction.

Finally, although quantifying intrinsic value of an animal is difficult, we could use environmental law's contingent valuation methodology to provide an estimate of such value. To reiterate, we respect and protect that which we value. Hopefully, soon we'll properly value all animals so that they may be properly respected and protected under the law.

Bruce Myers: I had two terrific co-authors for my two chapters. One, as Randy mentioned, is Joyce Tischler, who is known as the mother of animal law and is the founder and general counsel of Animal Legal Defense Fund. The other co-author is my colleague Linda Breggin, a senior attorney at the Environmental Law Institute. Linda and I worked on a chapter on concentrated animal feeding operations (CAFOs) and climate change. With Joyce, I worked on the chapter on the two movements and the future of the intersection of animal law and environmental law. That will be my focus here.

One of the first things we wanted to present is the idea that animal law and environmental law are not like other areas of law. This isn't contract law. These areas of law grow out of movements that have incredible energy and passion. I'm stating the obvious, but I think it's an important point in thinking about the law that emerges from these contexts and where it might be able to go in the future.

It's also useful to think of these movements—animal protection and environmental protection—as not necessarily consisting of only the nonprofits and other organizations that are associated with them, but really all of the people who are members of these organizations—all of the people who self-identify with these movements whether they work for government or industry or whatever they may do in any walk of life.

Something I want to try just as an illustration is to ask for a brief show of hands in the room. How many of you consider yourself an environmentalist, in whatever sense you choose to define the term? And now, how many of you view yourself as an animal welfare person, an animal protectionist? Most people in the room answered yes to both of those questions. If you look at a lot of our organizations, which all do amazing work, the overlap evidenced by this informal poll is usually not represented within the organizations themselves. But you see it more and more among individual people.

I'd like to read a few lines about animal protection from our chapter. This may be of particular interest to those of you who self-identify as an environmentalist, but haven't thought a lot about the animal protection perspective:

The animal protection movement is comprised of people who believe that the lives and interest of animals matter, if not always to human beings, then to the animals themselves. Animal advocates support the reduction or elimination of pain, suffering, abuse, and neglect, as

14. *Americans Spent a Record 56 Billion on Pets Last Year*, CBS Moneywatch, Mar. 13, 2014, <http://www.cbsnews.com/news/americans-spent-a-record-56-billion-on-pets-last-year/>.

well as eliminating the exploitation and unnecessary death of animals.¹⁵

There's not a lot there to disagree with. The devil is always in the details, but that's pretty straightforward language. That's how a lot of folks who do animal protection work think about it.

Anyone here who has worked at the overlap between animal law and environmental law is probably familiar in one form or another with the traditional narrative that these are two movements that have very different people with very different ideas trying to do very different things, and that there's not a lot of compatibility. Perhaps historically that's been the case. But based on the show of hands we just saw, things may be trending a little differently now, especially with millennials and the new generation.

Are the differences between environmentalists and animal protectionists truly irreconcilable? Whether you compromise or you're an absolutist, are you willing to do things in an incremental way? There are folks who do animal protection work who would view working hand-in-hand with environmentalists as some form of compromise, as not staying true to their values. And the reverse, of course, is also true for many environmentalists. Perhaps the biggest single perceived barrier is the idea of the ecosystem versus the individual. Joan really drove this home: the notion that on the one hand we care about the environment and ecosystem relationships; on the other hand, we care about an individual animal and his or her well-being. These sometimes feel like incompatible preferences. There is a tension.

Politics also is a tricky issue when it comes to animals and the environment. In many ways, the animal law or animal protection movement manages to be more bipartisan, or is perceived as more bipartisan overall, than the environmental movement. I will put in a plug for the Environmental Law Institute as a place that manages to be bipartisan and to bring everybody under the same tent. But this political tension is important because, for example, if you see yourself as part of an effort on the animal law side that's doing very nicely on Capitol Hill and in statehouses around the country, maybe you want to be a little cautious about working with environmentalists, depending on your issues. Environmental protection in 2015 carries political baggage.

Again, some of these are stereotypes. But let's get them out on the table, because there is some truth to them, right? The environmental movement has come to identify itself with the appeal to science. Good science, doing good science, is key. For example, the Clean Water Rule jointly promulgated by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers pursuant to the Clean Water Act (CWA)¹⁶ may be politically (and for many, legally) controversial, but the agencies

invested substantial time and effort grounding it in peer-reviewed science.¹⁷

With environmental law, we can and do debate what the science is and who's right and who's wrong about the answers, but the arguments are typically grounded in science. Traditionally, animal protection is grounded more in emotion, but that foundation is changing a bit. Animal protection and animal law are now moving more toward scientific claims and scientific appeal.

But just think of the Sarah McLachlan commercial, the angel commercial for the ASPCA. Do you not tear up when that comes on? Most people change the channel because it's so hard to watch. I know I do. This isn't to say that environmentalists don't play to emotions as well. The environmental movement does and should and will continue to do so, but nonetheless that science-versus-emotion tension is viewed by some as a kind of divide between movements. I'm going to touch briefly on some issue-specific differences.

Agriculture: There is a tension between the movements when it comes to agriculture and greenhouse gas emissions associated with agricultural operations. There's the notion of consumption. There's this sense that maybe we all agree that we want to do more to mitigate emissions, but perhaps from an animal perspective, we should all be vegans or vegetarians, right? Environmentalists often disagree. Reducing consumption of meat and dairy products thus becomes a point of tension, despite substantial agreement that something needs to be done on that aspect of greenhouse gas emissions. In any event, animal organizations are leading the charge on lawsuits aimed at reducing emissions attributable to animal agriculture.

Hunting and Trapping and Fishing: These are pretty obvious areas of significant difference between the movements.

Invasive Species: This presents perhaps the hardest case, seeming to call for that quintessential choice between the ecosystem and the individual. It's kill all the nutria and save the ecosystem; or it's save the nutria and what happens to the ecosystem happens to the ecosystem. It's the feral cats that are killing the songbirds. Which side should we be on? These are perhaps the hardest cases at the intersection of animal issues and environmental issues.

But another way of looking at this is to focus on the many commonalities between the two movements. We've got substantive areas of shared interest. For example, the food system and industrial agriculture: The polluting effects associated with our current system of food production in this country are centered around intensive confinement of animals. There is a lot for animal law to do there and for animal advocates to be concerned with. The same goes for environmental advocates and environmental law.

Species Extinction and Threatened and Endangered Animals: This area poses major concerns at both the species and individual levels. There are straightforward areas

15. Joyce Tischler & Bruce Myers, *Animal Protection and Environmentalism: The Time Has Come to Be More Than Just Friends*, in *WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW?*, *supra* note 1, at 389.

16. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

17. 80 Fed. Reg. 37053 (June 29, 2015). *See also* U.S. EPA, *CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE*, EPA/600/R-14/475F (2015).

of overlap between the two movements. Similarly, with native predators such as wolves, coyotes. These are issues on which many environmental advocates are going to agree with many animal advocates.

Chemical Regulation and Toxicity Testing: I've worked with Joyce and some of our other colleagues on issues surrounding much-needed reform of the Toxic Substances Control Act (TSCA),¹⁸ which has been a priority for many environmentalists and environmental lawyers. Underlying it is the actual scientific system that we use to do toxicity testing and determine the risks associated with different chemical compounds. There is a scientific wave coming through that is cresting now and looks at in-vitro and computer testing as opposed to using whole animal tests. So, when you look at animal testing, which is a major issue for animal protectionists, and you look at reforming our major toxics control law, which is a priority on the environmental side, you can see potential future overlap as the new testing systems come on line. However, there are some tensions there as well.

Next, the two movements must grapple with similar legal hurdles—although they bring to bear dissimilar legal toolboxes. The environmental movement has numerous federal environmental laws and its own federal environmental agency; it has citizen suits; and it has a history of common-law nuisance on which to build. Environmentalists have all these powerful tools. Animal law chiefly has, well, the Animal Welfare Act, which is extremely limited. The institutional and legal tools available to the environmental movement are in some sense the envy of the animal law movement. Yet, at the same time, there's a recognition that environmental law has hit middle age, it's in its 40s and trying to figure out what comes next. Are we doing all we can environmentally about climate change, about non-point source water pollution? Do we even have the tools for these crises? It's not entirely clear that we do, revealing a similarity between the two movements, looking forward.

Article III Standing: That's a challenge for all plaintiffs, to make a showing that they are properly in federal court. The strategy for making that showing has really developed in the crucible of environmental protection and environmental law. Animal advocates in public interest litigation now struggle with standing issues all the time. Much time is spent on that issue.

Ensuring Public Access to Information: This is critically important to both movements. Both legal regimes benefit from being able to tell the public what's actually going on, and why it's going on, and having access to science and information to communicate those concerns. Both movements face certain barriers, legal and institutional, to being able to do so. I co-teach as an adjunct at American University Washington College of Law a course on agriculture and sustainability. It seems as if every week we come back in some fashion to transparency and secrecy and access to information for public participation. The problem of barriers to this opportunity to communicate

and encourage public participation is, unfortunately, an all-too-common one.

Practical Barriers Posed by Ideology and Industry: Many nonprofits and others doing public interest work in this space run into ideological and industry opposition. That's not necessarily a bad thing. There are different ideologies, there are different views on the proper reach of regulation and the proper scope of personal property rights. An antiregulation, pro-property-rights stance is not necessarily intended to be anti-environment or anti-animal. The same holds true for a developer simply trying to secure permits for activities that can harm animals and the environment. Yet, as a practical matter, it is a reality that these viewpoints cause major headwinds for environmentalists and animal protectionists.

Limited Resources: Certainly for all nonprofits, that's an obvious one.

Internal Debates: How much do you compromise? Are you an incrementalist? Is it all or nothing? How much are you willing to get into bed with folks whose views you might not entirely share? Both movements have these internal debates. At times, it's very easy to dismiss animal advocates and environmental advocates as being obstructionists, or as deploying the red tape, not really focusing on the things that matter. Effective communication, again, remains incredibly important for both of these areas.

Happily, there is some evidence that a generational shift is occurring. When I meet law students and recent law graduates at conferences or festivals like VegFest or Earth Day, there are a lot of people who now embrace and identify with both movements. Maybe they signed up with certain organizations, but they see themselves as being in all of it.

Ultimately, there is a special kinship between these two movements that are focused, at their core, on ensuring the protection of the *nonhuman other*. Something that's got a property status. It's not yours, but you really care about it. That's a major similarity. It's usually someone else's property, and there is a bigger challenge when it's privately owned instead of publicly owned. This similarity brings hope for merging the narratives. The movements are two peas in a pod, with similar purpose. Yet, one is angry because they're not always on the same page. But hey, they're in the same pod, so that's a start.

Trends and Opportunities: There is enhanced and increased collaboration between the movements. It's like being in a marriage. Whatever might be going wrong, you've just got to talk, you've got to keep communicating. Maybe we're not big on communications, but it's better than not communicating. On the subject of communication, there are numerous shared educational and research efforts going on across animal and environmental lines, a lot of shared initiatives in the public interest litigation space and the impact litigation space. Significant collaboration is already happening in many different ways, and from my perspective, happening at increasing levels.

A Shared Future: What are the goals that might be shared among ourselves? How do we frame that? In getting

18. 15 U.S.C. §§2601-2692, ELR STAT. TSCA §§2-412.

there, we laid out some principles in our chapter. These include the mutual well-being of animals in the environment and people. Science has got to be in there. And you have to think about the economics. Sometimes, it may feel distasteful to value these things that are so priceless to us, but you just have to do it to be part of the conversation. Transparency and public engagement are critical. We think we'd be willing to accept incremental changes, but what does that look like? Agriculture and the food system are key: this is the poster child for overlap between animal law and environmental law, and between the environmental movement and the animal movement. It's about people wanting to know more about their food and where it comes from and what was done in its production.

Institutional Structures and Legal Regimes: We have multiple federal agencies with environmental mandates. We don't have the same strong animal mandates. Are there accommodations that can be made? Are there opportunities on the animal side, even being willing to have conversations about increased incremental rights involving resources or animals—without everyone getting very upset that this is an “animal rights” conversation and we're all going to shut down? Being willing to talk openly and honestly about how existing legal structures are failing our animals and our environment is part of this shared future.

Randall Abate: We're ready for audience questions now. This one's for Joan: It seems that you were talking about how to do valuations for animals in a tort sense. I think for some people in the room, the connection there might've been clearer. Could you expand on how changing the way we value animals in tort cases could affect the movement in a broader sense? Or am I mischaracterizing your thesis?

Joan Schaffner: It's true that the current animal-law damages debate is primarily in the torts context and involves only companion animals—which is arguably narrow and appears as if it's all about compensating the owner and not about protecting the animal. However, the focus on properly valuing companion animals in the tort context also promotes greater protection for the animal, as the damages will better reflect the value of the animal and in turn establish a higher standard of care for third parties, such as pet products and pet food manufacturers, veterinarians, and others. So, within the tort context, the idea of setting damages that would recognize the full value, and particularly the companionship value of a companion animal, is going to not only help the owner, but also serve the interests of the individual animals by creating an incentive of care for all these various industries that affect animals.

Moreover, what I suggest is that this relatively narrow focus on seeking companionship value for injury to a companion animal ultimately will promote all animals' interests. First, it sets the stage to recognize that all animals have noneconomic value. I think that when the law recognizes that pet cats and dogs have companionship value and that folks now have pigs and other types of animals as

pets, then the law will start recognizing and viewing animals as something other than personal property with only economic value; in other words, animals are more than mere economic commodities. Second, and more broadly, the idea is that if we start recognizing that animals have other than use value but also have intrinsic value, this will provide for greater legal protection for all animals, independent of their use by humans.

For example, the rabbit I mentioned doesn't have a different intrinsic value just because she is living in someone's home versus being used for research or raised for food. The rabbit has intrinsic value, which in turn sets the floor with respect to the care that we should give that rabbit, no matter where the rabbit lives or how the rabbit is used. Ultimately, if the intrinsic value of an animal is set appropriately, many of our current uses of animals will be deemed improper, because the benefits to humans of their use will not exceed the harm/cost to the animal.

My hope is that we start importing, not only within the tort or common-law context, but also within the legislative statutory framework, an understanding of the intrinsic value of these animals such that we set the standards higher to give greater protection to all animals.

Audience Member: My question builds on that question, and I'm open to anyone's thoughts on this. I definitely agree about the separation between the animal and environmental movements. I'm in the environmental camp. I think a big separation that environmentalists see is that domesticated animals, at least, are kind of separate from the ecosystem. They've been removed from it and, therefore, the effects on it are not as much as if you remove a keystone species. But one success of the environmental movement through science, maybe through ecosystem services valuation, has been to look at how much value bees or bats or sharks give to the environment, to farmers. They've found a number. For example, Bat Conservation International has found numbers in the billions of dollars of how much money bats save farmers. I don't know if this is possible from the opposite standpoint or if anyone has done this kind of work to look at how much total negative effect the CAFOs have had on the environment and maybe to use that argument as a way to oppose CAFOs rather than focusing on the welfare and suffering of the cows. I believe that the use of science either way is beneficial to both movements.

Bruce Myers: People are thinking about that and are doing it; it's important from a communications perspective and, frankly, it's just important. One of the issues when it comes to CAFOs and food production is what is often described as the true cost of food as opposed to the cost of food that you pay at the cash register. For example, to what extent are there externalized impacts from the nontherapeutic use of antibiotics and potential antibiotic resistance, and from groundwater pollution, surface water pollution, and localized air pollution?

If you're protective of animal welfare, that, too, would pose an increased cost. All of these costs (and I'm using a very broad brush here) are externalized to the extent that these things can be valued and you find out there's a price being paid. You may not be paying it at the register, but it's being paid societally. It's being paid with the dead zone in the Gulf of Mexico, which is due in significant part, although not exclusively, to agriculture. People are thinking about and working on those issues, and that is a point of focus because it resonates with people beyond the sentiments of "save the animals" and "save the environment."

One other quick thing: You made the initial point about seeing companion animals as being separate. I think it's a fair point that if you drew a Venn diagram with two circles representing animal protection and environmental protection, there's a lot of overlap, but there are certainly things that are not directly related. You can argue over where the lines are, but I think that's right. It's not a perfect set of concentric circles, so that's a fair point.

Liz Hallinan: There are groups that are bringing CWA lawsuits against CAFOs. In that case, even if the plaintiffs wanted to argue for the intrinsic value of the animals inside the CAFO, it's just not contemplated by the CWA. So, there are animal groups bringing environmental suits where the only argument they can make is to the intrinsic value of the water outside the CAFO.

Randall Abate: One theme that runs through the book is that this is an opportunity where linking a problem like CAFOs to humans rather than looking at it as an animal welfare problem can go much further in many ways. I think the documentary *Cowspiracy* did a good job of conveying the environmental impact from CAFOs. That's going to get more attention from people than, "oh, those poor animals," and the public health implications are significant as well in terms of the impacts of the use of antibiotics in meat production and the impacts of a meat-based diet. Ultimately, if it's harmful to humans, we're likely going to care more. That's the latest thing we've inherited from the environmental movement, that it wasn't our crusade to protect rivers for their own sake or air for its own sake that was successful. It was because pollution of those resources was having profound impacts on human health that the environmental movement really took off. I think that's a really valuable lesson from which animal law can learn.

Joan Schaffner: Prof. David Favre, during a workshop this past weekend, said we should refer to ourselves as animalists. So, we've got environmentalists, and we've got animalists.

The theme raised by the question is that environmentalists should focus on the benefits to humans as a way of gaining greater protection for the animals. I think part of the reason animalists are focused more on companion animals is the linkage between animal harm and human harm; for example, the link between animal cruelty and

violence against humans. It's a way to incentivize going after people who harm animals because those same people will harm or are harming humans. In the end, the animals gain greater protection, but the incentive to provide greater protection is rooted in protecting human interests.

Also, companion animals are the animals with whom we connect. If we focus within the companion animal framework first to achieve protections, we set the stage for protecting other animals once we recognize that there's not that much difference between our pet cat and dog and the pig on the farm or the deer in Rock Creek Park in D.C. But when you have a connection with the animal, you're much more interested and willing to protect and value him/her. So, we start by valuing and protecting our companions and then extend this interest to other animals.

Bruce Myers: I'm thinking of invasive species. They create an uneasy tension between the two movements, particularly when it comes to control. When it comes to prevention, though, there's actually a lot of agreement between the movements. Everybody agrees that to the extent we can prevent the arrival of invasive, non-native species, that's a good thing. We find some overlap among environmental and animal NGOs in that prevention space.

Joan Schaffner: I actually think there is some agreement even in the area of "control." I don't know if people are aware of the feral cat issue here in D.C. The D.C. Department of Energy and Environment drafted a report proposing that D.C. revisit their trap-neuter-release (TNR) program because the feral, e.g., free-roaming, community cats allegedly are harming some of the native species here. The agency said that instead of the TNR program it would just round up the cats and place them in adoption facilities. Anyone who understands feral cats understands that's not going to work because the shelters will just kill them all since they are not socialized to humans and thus cannot be "adopted." All of us animalists got upset at the environmentalists, and it seems like there's this disconnect.

However, we all agree we don't want millions of feral cats running around D.C. The disconnect concerns the manner by which we're going to control the cats (or the deer for that matter) not whether they should be controlled. TNR is designed to reduce the number of community free-roaming cats, which is the environmentalists' goal, just as using contraceptive methods for the Rock Creek deer is designed to reduce the number of deer and protect all animals in the District. The disconnect is that the animalists promote humane nonlethal methods rather than the lethal methods often proposed by the environmentalists.

Randall Abate: Do any of the panelists think that the animal rights movement will or can use the public trust doctrine to limit private rights to exploit animals?

Liz Hallinan: We're trying. There are several groups that I've worked with that are trying to use that doctrine. Peo-

ple are trying, but it's a difficult doctrine to use for reasons I don't fully understand.

Randall Abate: I had contracted a chapter on that topic for the book, but it didn't come through. Another important chapter that didn't come through would have addressed animal testing. Hopefully, we can get those authors on board for the second edition. Basically, the public trust doctrine adopts a kind of stewardship notion with respect to protection of resources. It's grounded in the notion that, for example, the wet sand areas of our coasts are held in trust by the state for the benefit of the people, so we don't see private ownership of wet sands. That's been the common-law tradition we inherited from England.

There's now more of a connection of that notion to wildlife as well, not just limiting it to wet sands, but public trust extending to water resources inland and to wildlife that rely on those water resources, and most recently to a notion that's known as atmospheric trust litigation, which provides that the states are custodians of the atmosphere within the state and they have a duty to protect the integrity of the atmosphere for the benefit of the people. There are certainly opportunities for using this theory as a way to protect animals in addition to the environment they inhabit.

Bruce Myers: Touching on part of the premise of the question, I think there was a reference to animal rights. I think the shorthand for animalists is usually animal rights, and there are a lot of gradations. I typically speak in terms of animal protection, which can represent either the entire spectrum or the middle range. At one end, there's animal welfare. At the other end, there's a more robust animal rights scheme where certain animals have enforceable legal rights in court, or some person whose status is of whatever sort is necessary for standing.

Randall Abate: A trustee.

Bruce Myers: A trustee, exactly. There are different flavors of this. I personally support some version of this. It's an important area of nuance underlying our larger conversation.

Audience Member: I have a couple of comments. You were talking about how the animal welfare or animal rights movement needs to be brought more into the conversation. I think they're trying, but there are also hurdles like ag-gag laws and the Animal Enterprise Terrorism Act (AETA)¹⁹ to overcome. I also wanted to mention statistics about the horrors of CAFOs and trying to bridge the gap between the environmental movement and the animal rights movement. I also have a comment to Liz about going local with the movement. I just got back from Massachusetts. There's a ballot initiative there to ban inhumane cages and crates.

Liz Hallinan: Yes, we're very excited.

Bruce Myers: I'm glad that you mentioned ag-gag laws because they are where a lot of this comes together in the food and CAFO context, where environmental issues and animal issues converge. For those who are not familiar with ag-gag laws, they are state laws (I think there are 6-10 of them actually on the books, but many more have been introduced around the country over the years and have not succeeded) that criminalize the act of providing recorded information without the permission of an agricultural facility owner.²⁰ Typically, this information has taken the form of investigative videos that have shown clear animal abuse in agricultural settings. You're aware of them; you've seen them. A response to these videos has, to the surprise of many, often been: let's criminalize the ability to get this information out, which absolutely runs against the fundamental view of transparency and public participation for environmentalists. And for animalists, it's like, hey, we're showing you the reality of what's happening—and *we're* the bad guys?

There are variations in these state ag-gag laws. For example, they limit the ability to record something and publish it without the permission of the facility owner, or to be hired under false pretenses if you're really an investigative reporter or someone who wants to do this to find wrongdoing. Some of the laws provide that you have to report any wrongdoing you found within 24 to 48 hours because that's helpful for law enforcement. But you think, wait a minute, how many long-term drug stings can you immediately report within 24 hours? The idea is that you want to be immersed for some period of time and be able to get information. Ag-gag laws and the AETA are an important space at the nexus of the animal and environmental movements.

Liz Hallinan: This would be the first topic on what can environmental law learn from animal law. Wyoming recently passed a version of this law and it wasn't because of an animal investigation. It was because of, I think, the CWA or water pollution. So, now in Wyoming you can't go on to certain lands and collect water data, you can't test the waters, because the industry in Wyoming is worried that that data will be used against them in court.²¹

Audience Member: Another separation that comes up sometime is veganism for all, veganism for the world. The first of the contrasts was livelihoods and impoverished

19. Pub. L. No. 109-374.

20. For more on ag-gag laws, see Lewis Bollard, *Ag-Gag: The Constitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ELR 10960 (Mar. 2012). See also ASPCA, *Ag-Gag Legislation by State*, <https://www.aspc.org/animal-protection/public-policy/ag-gag-legislation-state>.

21. See *Western Watersheds Project v. Michael*, No. 15-CV-169, 46 ELR 20023 (D. Wyo. Dec. 28, 2015) (environmental and animal rights groups' lawsuit survived motion to dismiss in case challenging the constitutionality of two trespass statutes, one civil and one criminal, that allegedly prevented them from collecting and submitting data relating to land and land use to governmental agencies, as they had done in the past in efforts to protect and advocate for animals and the environment).

nations or communities that rely solely on fish for protein or something like that. So, right now, until we get to the true cost of food, which we haven't gotten to yet—true cost of the environment, true cost of animals—what do you think about that argument that the whole world should go vegan? How much advantage or disadvantage does it bring to the movement? The recent incidents of PETA, for example, telling some of the Detroit residents that if they go vegan then PETA would pay their water bill, obviously generated some backlash. Where do you stand on that and how viable an approach do you think that is for the world or for Americans based on livelihoods and income inequality?

Randall Abate: Something we haven't had an opportunity to get into is the international dimensions of these issues. We have a member of the audience, Sabine Brels, who authored Chapter 15 in this book. She is the co-founder of the Global Animal Law Project, and is an active advocate of global veganism as a way of addressing these issues.

Sabine Brels: As a United Nations report²² said, it's a direction to go to be more environmentalist, to be more humanist, to fight against world hunger and thirst and pollution, and to be also more animalist. It's more about this huge meat overconsumption and overproduction than about the local communities who rely only on fish to survive in a small neighborhood in lesser developed countries. It's now the biggest impact. The priority now is if we want to save the world or have the chance to limit the crash we're rushing toward, we should consume less, produce less, and encourage less overdestruction of nature, the animals, and the humans themselves.

With human problems, I think we have all the scientific data now and all the conclusions to know what is the best path forward. For now, it's still a question of individual morals, whereas it should be a global political concern. So, yes, for the moment, it's the direction to go. It's a way everyone can go as far as we have with more incentive politically and economically, and also more awareness about all the problems out there being interconnected, and how we can do our best to move on to a better future.

Randall Abate: Next question: Can the panel point to any environmental law section within the state bar associations or law organizations that has worked closely with an animal law section? Is there synergy within the bar? And if so, what came from those partnerships?

Bruce Myers: It's been my experience that the animal law section often exists within the broader environmental law section. The animalists can take issue with that, if you like, but that's typically where it is. Certainly, that's the case in Washington, D.C. However, I spoke on a panel a number

of years ago in Louisiana for an animal law section that I think was a freestanding section within the state bar association. Some of the animal bar sections and committees are quite active. You can find them, and related resources, online without too much trouble.

Joan Schaffner: I have to make a plug for the American Bar Association (ABA). I think we are somewhat unique in this regard. The Animal Law Committee resides in the Tort Trial and Insurance Practice Section of the ABA. The Environment, Energy, and Resources Section of the ABA has an endangered species committee, but that is the only committee focused on animals. The Science and Technology Law Section has a committee on animals and research, but their focus is not on protecting the animals in research; it's more focused on issues that relate to our use of animals in research. But in the Tort Trial and Insurance Practice Section, we look at all the various issues related to animals and the law. In contrast, I think that in D.C. and other state bars, the animal law committees are often found in the environmental sections with several states now having established stand-alone animal law sections, which I think is wonderful.

Liz Hallinan: My comment is not about bar associations, but that I'm starting to see a cross-pollination where individual environmentally trained lawyers will go work for an animal group or vice versa. What that means is that inside public interest groups, you will get prodding toward either more environmental or more animal work. For example, I know someone who wanted to focus on animal work within the Natural Resources Defense Council and so she spearheaded their farmed animal antibiotics campaign. As an insider at an environmental group, she could say, hey, you should care about animal production. Additionally, the animal groups are starting to pick up on environmental claims and bringing in people who had done environmental law in law school to figure out how to use environmental laws to promote animal interests. I see this as an employment-based move toward cross-pollination and collaboration between the environmental and animal movements.

Randall Abate: Bruce made reference to a generational shift. One thing that I'm seeing in academia is that the vast majority of the students who are in the Environmental Law Society are also in the Student Animal Legal Defense Fund. I'm currently on a book tour for this book, and virtually all the schools that have hosted me have jointly hosted the talk between the Environmental Law Society and the Student Animal Legal Defense Fund, perhaps in part because of the title of the book, but also because there is a growing awareness of the interconnections between these movements. It's the new generation of lawyers that can really tighten those links.

22. UNITED NATIONS ENVIRONMENT PROGRAMME, ASSESSING THE ENVIRONMENTAL IMPACTS OF CONSUMPTION AND PRODUCTION (2010), http://www.unep.org/resourcepanel/Portals/24102/PDFs/PriorityProductsAndMaterials_Report.pdf.