

# JOURNAL OF ANIMAL LAW AND ETHICS

A PUBLICATION BY THE STUDENTS OF  
THE UNIVERSITY OF PENNSYLVANIA LAW SCHOOL

Volume 3

May 2009

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A Book Review of

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By Julie E. Lewin

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INTRODUCTION:

TIME TO GIVE ANTICRUELTY LAWS SOME TEETH—  
BRIDGING THE ENFORCEMENT GAP

*Penny Conly Ellison*

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## TIME TO GIVE ANTICRUELTY LAWS SOME TEETH— BRIDGING THE ENFORCEMENT GAP

PENNY CONLY ELLISON<sup>1</sup>

Animal law has come a long way in the last decade, in terms of both public awareness and academic interest. Penn Law has been at the forefront of this movement. Not only has Penn joined dozens of other law schools in offering a class in Animal Law and Ethics, it has established this Journal, as well as the Animal Law Project, a student-run service project enabling students to devote their mandatory pro-bono hours to nonprofit organizations that serve the interests of animals.

Although interest in animal law at law schools is increasing exponentially, progress in the legislatures and courts has not come close to matching that growth. In our class on Animal Law and Ethics at Penn, we discuss both the dearth of laws protecting animals as well as the lack of enforcement of the laws that do exist. Initially, the situation usually engenders a feeling of frustration in students, which matures over the semester into the desire to effect change. Thus, students frequently ask whether—in light of the paucity of advancement—they can actually make a living practicing animal law after graduating. Beyond mentioning the select few nonprofit advocacy organizations large enough to maintain an in-house legal staff, I am forced to paint a rather bleak picture for them. A small but growing number of lawyers in private practice take on tort cases involving animals or draft estate plans protecting companion animals, but most students are interested in protecting animals from abuse. Unfortunately, since state anticruelty statutes are—for the most part—within the purview of local prosecutors, and the Animal Welfare Act provides no private right of action, directly practicing animal-protection law is not an option for the vast majority of interested graduates.

Under the current regime, the primary protection for animals lies in state anticruelty statutes. Flawed as they are, in large part because of the inclusion of the common exemptions for farm and laboratory animals, on

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<sup>1</sup> Ms. Ellison is a Lecturer in Law at University of Pennsylvania Law School, faculty sponsor for Penn's Animal Law Project and Circuit Mediator for the United States Court of Appeals for the Third Circuit.

their face, they should preclude significant misery suffered by companion animals. However, as a general matter, criminal statutes are enforced only by prosecutors. As anyone who is active in animal advocacy knows, it can be difficult, if not impossible, to persuade a prosecutor to bring criminal animal cruelty charges, even when the animal(s) at issue are companion animals<sup>2</sup> and the violations are clear.<sup>3</sup> Prosecutorial discretion in determining whether to bring charges is virtually unreviewable.<sup>4</sup>

Several reasons for this “enforcement gap” exist. With limited resources, many prosecutors feel pressure to concentrate on cases they know they can win. In rural areas, the prevailing view of animals tends to be utilitarian in nature, giving the prosecutor little incentive to expend their limited resources prosecuting what is essentially viewed as a property crime. In addition, given that expert testimony is sometimes required to establish things like the extent of pain suffered by the animal, local prosecutors may believe that they lack not only the funds, but also the expertise to successfully prosecute cruelty cases. Finally, the prosecutor may not have the evidence needed to prove guilt beyond a reasonable doubt. The bar is set high and sometimes the investigation the police or prosecutors conduct may not yield sufficient evidence to prove their case.

A recent well-publicized case in Pennsylvania clearly demonstrates the reason for the frustration that animal advocates feel when they have no legal way to remedy open and obvious animal cruelty. Tammy Grimes, founder of Dogs Deserve Better, a nonprofit group that opposes the chaining and penning of dogs, learned from a third party about a neighbor’s dog that had been chained outdoors for so long without proper care that it could no longer stand. For the three days that she said that the dog had been lying in the mud and rain, the neighbor had tried unsuccessfully to contact the local animal control agency to assist the dog. Unable to get the attention of the authorities, the neighbor contacted Grimes who, after seeing the dog’s apparent misery, took an action that is a crime in Pennsylvania and probably every other state: she removed the chain from the emaciated dog’s neck and took him to a veterinarian. When she refused to give the dog back to the

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<sup>2</sup> Prosecutions of farm animal cruelty are even more difficult to obtain, both because of the blanket exceptions for “normal agricultural practices” contained in most state statutes and because, with or without that exception, evidence is hard to come by, the cases are expensive to prosecute and prosecutors therefore frequently view them as risky or not worth the trouble.

<sup>3</sup> See Jennifer H. Rackstraw, *Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes*, 9 ANIMAL L. 243, 245–47 (2003) (arguing that animal cruelty offenses are seriously under-prosecuted).

<sup>4</sup> See *id.* at 244 (noting that “[a] prosecutor’s power to decide whether or not to charge an individual with the commission of a crime is virtually unchecked”).

owners, she was charged and convicted of theft and receiving stolen property. She was sentenced to one year's probation and 300 hours of community service.<sup>5</sup> Furthermore, the prosecutor sided with the dog's owners and exercised his discretion not to bring animal cruelty charges.<sup>6</sup> Some have suggested, as the defense argued, that there should be some type of justification defense to a theft charge when the property taken is a suffering, living being. However, such a solution clearly approaches the problem from the wrong end. Rather, the law should provide an *affirmative* avenue that can provide relief to visibly suffering animals, without forcing people to resort to lawlessness and the risk of jail time and fines.

North Carolina long ago implemented one solution to this problem. North Carolina law permits any "person" to bring a civil action to enjoin violations of the animal cruelty law. Although some other states permit private entities to conduct investigations or assist in criminal prosecutions,<sup>7</sup> and others have some type of civil remedy provision,<sup>8</sup> North Carolina has enacted by far the broadest such statute, allowing its animal cruelty statute to be civilly enforced by individuals and nonprofits, even in the absence of prosecutorial interest.<sup>9</sup>

For purposes of considering the efficacy of adopting similar provisions in other states, the key provisions of the North Carolina statute are worthy of discussion. First, the provision defines "person" broadly to include any

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<sup>5</sup> As part of her ten-page sentencing decision, the judge specifically required the community service to be to an organization that served humans rather than nonhuman animals. Grimes also must pay for the cost of her trial (~\$1700) and pay for the privilege of performing community service (~\$1500). The sentence also required the removal of all photos of the dogs from any websites Grimes controls and the cessation of sales of any merchandise with their image. As of press time, the sentence was on appeal.

<sup>6</sup> Ms. Grimes' story is set forth in detail at <http://www.dogsdeservebetter.com>.

<sup>7</sup> See William A. Reppy, Jr., *Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience*, 11 ANIMAL L. 39, n.2 (2005) (listing state laws that permit humane organizations to investigate or participate in the prosecution of criminal animal cruelty cases).

<sup>8</sup> Pennsylvania and New Jersey both have such provisions but Pennsylvania more narrowly defines who may bring such claims and New Jersey permits only civil actions for fines, not injunctive relief. See 18 PA. CONSOL. STAT. ANN. § 5511(i) (West Supp. 2004); N.J. STAT. ANN. § 4:22-26 (West 1998).

<sup>9</sup> Legislation is necessary to effect such a change. The Animal Legal Defense Fund has attempted to have courts read in a private right of action to cruelty statutes that do not expressly contain one but has met with no success. See *ALDF v. Mendes*, 2008 WL 400393 (Cal. App. 5 Dist. 2008) (rejecting ALDF's attempt to rely on California Penal Code Sec. 597t to sue calf ranchers for allegedly mistreating animals because the statute does not create a private right of action); *Animal Legal Defense Fund Boston, Inc. v. Provimi Veal Corp.*, 626 F. Supp. 278 (D.Mass.,1986); see also *Hammer v. American Kennel Club*, 803 N.E.2d 766 (N.Y. 2003) (holding that the statutory enforcement scheme of New York's anticruelty law was incompatible with implication of a private right of action).

individual or “bod[y] politic [or] corporate,” which includes any nonprofit entity.<sup>10</sup> In addition to permitting nonprofit organizations to help animals more directly than they are usually able, the inclusion of municipal entities also has the advantage of affording public bodies the option to pursue injunctive relief when they believe, for whatever reason, that a criminal prosecution is not warranted. This may be the case for some animal hoarders who are well-intentioned but ill-equipped—financially and/or mentally—to care for the animals they have taken in. Removal of the animals by injunction puts an immediate end to the suffering and is likely to be viewed as sufficient punishment by the hoarder to also serve a deterrent function. It also permits the public body to take the civil route where proving the case to the criminal standard of beyond a reasonable doubt is unlikely.

The North Carolina statute also permits preliminary injunctive relief to be obtained<sup>11</sup> and provides for the turnover of custody of the animals. This alleviates some of the expenses associated with shelters having to hold many animals for long periods of time while lengthy criminal proceedings play out. This financial and practical concern can discourage criminal prosecutions but, if a change in custody can be effected through a preliminary injunction in a parallel civil action, a nonprofit wishing to assist in a prosecution could relieve the public entity of that burden.

Of course, owners are afforded full due process before any permanent action can be taken. If—as in the Grimes case—the owners claim that they were providing adequate care for the dog, even at the preliminary injunction stage, the owners receive notice and are able to offer evidence of such care, in response to the plaintiff’s evidence of cruelty.

Admittedly, the class of animals whose suffering might be relieved through civil cruelty enforcement actions would be limited to those animals covered by a state’s anticruelty statutes, which would not include hundreds of millions of farm and lab animals nationwide.<sup>12</sup> Even in states without a broad agricultural exemption, uncovering violations in commercial livestock operations would require access to well-guarded private or government

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<sup>10</sup> N.C. GEN. STAT. § 19A-1(3) (2003).

<sup>11</sup> It formerly provided for ex parte temporary restraining orders, a provision which could, with careful drafting, be included in civil enforcement laws to be enacted in other states. See Reppy, *supra* note 7, at 49–53.

<sup>12</sup> The North Carolina law has had its opponents and has been weakened over the nearly 40 years since its enactment through, *inter alia*, the adoption of exemptions for commercial livestock, hunting and trapping activities. This weakening, however, only mirrors similar exemptions enacted in other states without civil enforcement provisions and therefore cannot be blamed on fear of overly zealous animal advocates bringing baseless civil claims.

property. New federal laws such as the USA PATRIOT Act<sup>13</sup> and the Animal Enterprise Terrorism Act<sup>14</sup> as well as a growing number of animal and ecological terrorism acts passed at the state level are likely to deter all but the most stouthearted of activists from entering private property for the purposes of filming or otherwise gathering evidence of cruelty. Thus, for the most part, the alleged abuse would need to be evident to an outsider in order to be prosecuted. Still, adoption of such statutes would reach many cases of animal hoarding, breeding kennels, or dog fighting training facilities whose operations are visible from neighboring public property, as well as situations like the Grimes case where dogs are left outdoors—ignored, tethered, underfed, and suffering from untreated medical conditions.

The fact that a civil enforcement mechanism would not reach much of the worst animal suffering is not a good reason not to pursue an amendment that *would* add a significant weapon to animal advocates' currently-meager arsenal. In fact, it may be one reason that an effort to pass such an amendment does stand a realistic chance of success. Since—in most states—a private enforcement provision would not permit enforcement against commercial agricultural entities or hunters, because those entities are exempt from anticruelty statutes, the well-funded interest groups that lobbied to limit the coverage of anticruelty laws would have neither standing nor significant interest to oppose such an amendment that would allow any person to bring an action for injunctive relief.

Opponents may also argue that a civil enforcement remedy could reduce the chances of later repealing some of the current exemptions that remove large swaths of animals from protection. Lobbyists could argue that the existence of a civil remedy gives rise to a rational fear that animal advocates would harass commercial entities with meritless claims. Of course, there are many solutions to this hypothetical problem, including—but certainly not limited to—the availability of sanctions for frivolous suits. In addition, one could foresee a compromise where the criminal statute would reach more broadly than the civil remedy.

The availability of a civil remedy for injunctive relief also effectively, if temporarily, merges the interests of animal welfarists and adherents to an animal rights approach. Although admittedly, private civil enforcement does nothing to undermine the notion of animals as property that can be

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<sup>13</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 1004, 115 Stat. 272.

<sup>14</sup> 18 U.S.C. § 43 (2007) (formerly known as the Animal Enterprise Protection Act, amended by Pub. L. No. 109-374 (Nov. 27, 2006)).

subjected to any treatment not deemed “unnecessarily” cruel, it also cannot be argued that it in any way *advances* the interests of the animal industry. Laws seeking to impose specific restrictions on conditions for farm animals, such as bans of the use of gestation crates or battery cages for laying hens, are vulnerable to attack when justified—as they frequently are—by arguments that they actually promote the efficient production of animal products. Animal rights theorists argue that, as long as welfare measures make animal production more efficient, they will never lead to any meaningful reduction in the number of animals living in suffering. An action permitting private entities to initiate and fund cruelty cases undoubtedly removes some animals from deplorable situations but has no effect, positive or negative, on the situation of farm animals (except where not exempted from cruelty laws). True, it would not prevent the vast majority of animal suffering because it can only reach as far as the anticruelty laws themselves do, but it should be an achievable victory for at least some animals that reduces suffering without encouraging, supporting or assisting animal industry interests.

Much has been said about the divergent interests and strategies among animal advocates and whether such differences amounts to “divisiveness” or just healthy debate. Regardless of the opinion one might have on that topic, pushing for mechanisms that enable private citizens to bring cruelty claims is a cause that could unite advocates of various philosophies, because it would provide a cost-effective, non-controversial means of ensuring more vigorous enforcement of such laws.