

ARTICLES

THERE IS VALUE IN STATING THE OBVIOUS: WHY UNITED STATES LEGISLATURES SHOULD EXPLICITLY RECOGNIZE ANIMAL SENTIENCE IN THEIR LAWS

Jane Kotzmann & Morgan Stonebridge***

Over the past few decades, public concern for the interests of animals has grown. This concern is rooted in the capacity of animals to feel. Animal sentience research has made clear that many animals are sentient; they do experience pain and accordingly, human treatment towards them matters. State legislatures acknowledge this to varying degrees through the enactment of legislation that regulates and restricts human treatment of animals. This acknowledgement, however, is only implicit in most jurisdictions. This Article contends that the explicit recognition of animal sentience in animal welfare legislation would better serve to protect the interests of animals. In this respect, it advocates for animal welfare laws in all United States jurisdictions to expressly recognize animal sentience. While animal sentience is obvious to most humans, expressly acknowledging such in legislation will have important consequences, including implications for statutory interpretation of animal welfare legislation, providing animal welfare legislation with a scientific foundation, and promoting the intrinsic worth of animals.

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* Dr. Jane Kotzmann is a Senior Lecturer in International Law, Deakin University Law School, Melbourne, Victoria, Australia.

** Morgan Stonebridge is a research assistant in the area of animal law, Deakin University Law School, Melbourne, Victoria, Australia, email: m.stonebridge@deakin.edu.au.

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INTRODUCTION

“Sentience” has become somewhat of a buzzword in animal welfare and animal advocacy circles. People use the term to refer to the capacity to have feelings, including the capacity to experience pain and suffering.¹ For example, according to writer and director of the 2018 documentary *Dominion*, the most important message of the film is that animals are “individual, *sentient* beings—they think, they feel, they hurt, they suffer.”² In 2017, Sentient Media—a media organization dedicated to fostering media coverage of animal rights and animal welfare issues—was founded.³ Sentient Media focuses on sentience because most ethical systems agree that “suffering is negative and that it would be the morally right thing to do to reduce suffering.”⁴ Similarly, the 2005 documentary

¹ See Donald M. Broom, *Considering Animals’ Feelings*, 5 ANIMAL SENTIENCE 1, 2, 5 (2016).

² About the Film, FARMS TRANSPARENCY PROJECT, <https://www.dominionmovement.com/about> (last visited Oct. 2, 2020) (emphasis added).

³ Marc Bekoff, *An Interview with Mikko Järvenpää*, PSYCHOLOGY TODAY (Nov. 17, 2019), <https://www.psychologytoday.com/au/blog/animal-emotions/201911/interview-mikko-j-rvenp-founder-sentient-media>.

⁴ *Id.*

Earthlings argues for better treatment of animals because they are sentient:

Granted, these animals do not have all the desires we humans have; granted, they do not comprehend everything we humans comprehend; nevertheless, we and they do have some of the *same desires* and do comprehend some of the same things. The desires for food and water, shelter and companionship, freedom of movement and *avoidance of pain*[.]⁵

The concept of animal sentience has also grounded many academic arguments for animal protection and animal rights. Peter Singer, for example, argues for equal consideration of human and animal interests on the basis that animals are sentient.⁶ Gary Francione, a leading advocate for animal rights, contends that the only characteristic that animals need in order to be entitled to the right not to be treated as property is sentience.⁷ Similarly, Tom Regan asserts that animals have moral rights because they are “subjects of lives,” which broadly means that they are “conscious, sentient beings.”⁸

Alongside this increase in reference to animal sentience have been scientific advances suggesting that animals are far more sentient than previously thought. In the past, there was significant disagreement in relation to the question of whether any (non-human) animals are sentient at all. Rene Descartes, for example, is often credited with propounding the view that animals are unfeeling “automata” that are incapable of pleasure or suffering.⁹ In recent years, however, a consensus has developed that many animals are sentient.¹⁰

In 2012, an international group of scientists published “The Cambridge Declaration on Consciousness,” asserting that scientific evidence indicates that many animals possess “neurological substrates that gener-

⁵ *Earthlings Transcript (Intro)*, VEGANISE ME (Dec. 5, 2011), http://www.veganise.me/earthlings_transcript (emphasis added).

⁶ PETER SINGER, PRACTICAL ETHICS 49–50 (3rd ed. 2011).

⁷ See GARY L. FRANCIONE & ROBERT GARNER, THE ANIMAL RIGHTS DEBATE: ABOLITION OR REGULATION? 1, 4, 7 (2010).

⁸ Nathan Nobis, *Tom Regan on “Kind” Arguments against Animal Rights and for Human Rights*, in THE MORAL RIGHTS OF ANIMALS 65, 65 (Mylan Engel Jr. & Gary Comstock eds., 2016).

⁹ See Peter Harrison, *Descartes on Animals*, 42 PHIL. Q. 219, 219–21 (1992).

¹⁰ See generally DONALD M. BROOM, SENTIENCE AND ANIMAL WELFARE 127 (Sarah Hulbert & Julia Killick eds., 2014) [hereinafter SENTIENCE]; Robert C. Jones, *Science, Sentience, and Animal Welfare*, 28 BIOLOGY & PHIL. 1, 6 (2013); Donald M. Broom, *Animal Welfare and Legislation*, in WELFARE OF PRODUCTION ANIMALS: ASSESSMENT AND MANAGEMENT OF RISKS 339 (F. J. M. Smulders & B. Algers eds., 2009) [hereinafter *Animal Welfare and Legislation*].

ate consciousness.”¹¹ Animal consciousness would suggest some degree of sentience. Further, there is wide-ranging agreement that vertebrate animals are sentient.¹² More specifically, scientific research shows that farmed animals, companion animals, laboratory animals, wild mammals, and birds are sentient.¹³ Studies regarding other animals including “amphibians, reptiles, fish, cephalopods and decapod crustaceans” also suggest that they are sentient.¹⁴ Thus, there is overall agreement that most animals are sentient.

While animal advocacy and scientific advances have led to numerous foreign jurisdictions expressly recognizing animal sentience in their laws,¹⁵ both federal and state legislation in the United States (US) contain only very limited recognition. Federal legislation, including the Animal Welfare Act of 1966¹⁶ (AWA) and the Humane Methods of Slaughter Act of 1958,¹⁷ acknowledges that some animals can feel pain and suffer, yet is extremely limited in terms of the animals to which it applies.¹⁸ State legislation is also limited in scope and inconsistent as between states.¹⁹

In the case of *State v. Fessenden*, the Supreme Court of Oregon stated that, “we do not need a mirror to the past or a telescope to the future to recognize that the legal status of animals has changed and is changing still”²⁰ Against the backdrop of this change, this Article argues that US legislatures ought to explicitly recognize animal sentience in their laws. By exploring the international trend towards the legal recognition of animal sentience and advocating for the adoption of similar amendments in US legislation, this Article contributes to the literature in relation to animal welfare and law. This Article argues that the objects of relevant animal protection legislation should be to expressly recognize animal sentience and to link that recognition to substantive legal obligations on humans to protect animals. One of the main benefits of such

¹¹ *Cambridge Declaration on Consciousness*, FCM CONFERENCE (July 7, 2012), <http://fcmconference.org/img/CambridgeDeclarationOnConsciousness.pdf>.

¹² Jones, *supra* note 10, at 6.

¹³ See Broom, *supra* note 1, at 5.

¹⁴ *Id.* at 8; See also Jones, *supra* note 12, at 8.

¹⁵ See, e.g., Animals Act 2011 (Neth.) art. 1.3; *Code civil* [Civil Code] (Fr.) art. 515–14; *Animal Welfare Act 2008* (Tanz.) Part. I § 4(b)(i); Bill 54, *An Act to Improve the Legal Situation of Animals*, 1st Sess, 41st Leg. Quebec, 2015 (assented to Dec. 4, 2015); *Civil Code 2016* (Colom.) art 655; *Animal Welfare Act 1999* (NZ); *Consolidated Version of the Treaty on the Functioning of the European Union*, 2012 O.J. (C 326/01, art. 13.

¹⁶ 7 U.S.C. § 2131 (2018).

¹⁷ 7 U.S.C. § 1901 (2018). This Act was further amended and passed in 1978, and is now more commonly known as the Humane Methods of Slaughter Act of 1978.

¹⁸ *United States of America: Animal Protection Index*, WORLD ANIMAL PROTECTION (Nov. 24, 2014), https://api.worldanimalprotection.org/sites/default/files/api_us_report.pdf.

¹⁹ *Id.*

²⁰ *State v. Fessenden*, 333 P.3d 278, 284 (Or. 2014).

legal amendments is that they would recognize the intrinsic value of animals and provide a scientific foundation for animal protection laws. In doing so, such recognition would likely also require legislators to provide better justifications for legal provisions that permit other concerns to override animal interests in avoiding pain and suffering. Legal recognition of animal sentience would also have an impact on subsequent statutory interpretation, which should result in more animal-friendly interpretations of animal protection legislation.

The next part of this Article explains the meaning of sentience, the scientific evidence for animal sentience and the trend in foreign jurisdictions expressly recognizing animal sentience in their legislation. This is followed in Part II by a discussion of the animal protection laws currently in force in different jurisdictions of the US, and some emerging case law in which US courts have made reference to animal sentience. Part III examines the purposes and likely consequences of expressly recognizing animal sentience in legislation, namely: the impact on statutory interpretation, circumventing the property versus person divide, providing a scientific foundation to animal protection law, and prompting increased public awareness and further change. Part IV acknowledges that there are some limits to how far the legal recognition of animal sentience can progress animal protection law. In particular, the methods by which animal welfare science measures animal sentience are fundamentally anthropomorphic, and the recognition of animal sentience in animal protection legislation may have the inadvertent (or advertent) effect of excluding some animals from legal protection. Nevertheless, this Article argues that legal recognition of animal sentience in US legislation would constitute a positive step forward for the protection of animal interests and accordingly sets out recommendations for reform in Part V.

I. CONTEXT

A. *Sentience Within the Rights Versus Welfare Debate*

As the animal advocacy movement has grown, a divergence in ideology between its proponents has become palpable.²¹ The publication of Peter Singer's *Animal Liberation* in 1975 stimulated a movement²² based upon recognizing the interests of animals. The extent to which animal interests should be recognized is the main divergence within the movement, with some advocating for animal welfare and others advocating for animal rights. Animal welfare advocates seek to improve the welfare of

²¹ See e.g., Steven Best, *Chewing on the Rights vs. Welfare Debate: Do Corporate Reforms Delay Animal Liberation?*, 22 THE ANIMALS AGENDA 14, 14–16 (2002).

²² See Jane Kotzmann & Nick Pendergrast, *Animal Rights: Time to Start Unpacking What Rights and for Whom*, 46 MITCHELL HAMLINE L. REV. 158, 158 (2019).

animals while continuing to utilize them for human benefit.²³ Conversely, animal rights advocates challenge the use of animals for human ends and seek to attribute rights to animals to ensure their protection.²⁴ The rights advanced are fundamental, designed to protect animals from human encroachment.²⁵ In this respect, Gary Francione proposes that “the right not to be treated as the property of humans” is the sole right that animals would require.²⁶ Animal rights ideology asserts that this is justified because an animal’s interest in not suffering should surpass human interest in using animals.²⁷ In contrast, animal welfare advocates seek to balance the interest of animals in living a good life free from exploitation with the interests of humans in using animals.²⁸ For example, where welfare advocates may support banning battery cages, rights advocates will challenge the legitimacy of raising and killing chickens for consumption.

The legal recognition of animal sentience is, however, not aligned to either ideology. Such recognition will not serve to attribute legal rights to animals or curtail human use of animals. However, legal recognition of animal sentience may serve animal interests in other respects. Recognizing and legitimizing an animal’s experience of pain and pleasure may strengthen animal protection under the law and ultimately reduce animal suffering at the hands of humans. Legal recognition of animal sentience will provide for increased animal protection without requiring legislators to recognize animals as legal persons, while also better reflecting scientific consensus and providing a scientific foundation to the legal protection of animal welfare. Public awareness would also benefit from legal change in favor of animal interests, potentially spurring further progress and demands for better protection. This Article will discuss the likely consequences of expressly recognizing animal sentience in US animal protection legislation.

B. *The Meaning of “Sentient”*

The term sentient is ordinarily used to indicate the ability to experience feelings.²⁹ Dictionary definitions of the word include “responsive to or conscious of sense impressions,”³⁰ “able to experience feelings,”³¹

²³ See Best, *supra* note 21, at 14–16.

²⁴ *Id.*

²⁵ See *id.*

²⁶ Gary Francione, *One Right For All*, 188 *NEW SCIENTIST* 24 (2005).

²⁷ Best, *supra* note 21, at 15.

²⁸ *Id.*

²⁹ Broom, *supra* note 1, at 2.

³⁰ *Sentient*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sentient> (last visited July 31, 2020).

³¹ *Sentient*, CAMBRIDGE ENGLISH DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/sentient> (last visited Jul 31, 2020).

and “capable of experiencing things through its senses.”³² The etymology of the word also provides some guidance as to its meaning. “Sentient” derives from the Latin verb *sentire*, which means “to feel,” and is related to the Latin noun *sensus*, meaning “feeling” or “sense.”³³ The first four letters “sent” denote a relationship with the senses, and thus the word is related to common English words including sentiment, sensual, and sensation.³⁴ The types of feelings that might be felt by a sentient being include negative ones like pain, fear, and grief, as well as positive ones such as happiness.³⁵ Most human beings are considered sentient,³⁶ and many animals are generally considered sentient as well.³⁷ Thus, the term sentient is commonly used as an adjective for human beings and for animals. For example, a recent news article posted to an Alabama website makes reference to “sentient apes.”³⁸ Similarly, an article published by the Chicago Tribune late last year asserts that the recitation of “White House talking points” is an “insult [to] the intelligence of any sentient adult.”³⁹

The concept of sentience has been widely discussed in academic literature. According to DeGrazia, a sentient being is one that is capable of having feelings.⁴⁰ Similarly, Kirkwood views sentience as the ability to feel something.⁴¹ While there are many complex and abstract definitions of sentience and no universally accepted definition, fundamentally sentience is concerned with the subjective states of beings.⁴² Broom provides a detailed and coherent definition. He details the abilities that a being must have in order to have the capacity to have feelings, or senti-

³² *Sentient*, COLLINS ENGLISH DICTIONARY, <https://www.collinsdictionary.com/dictionary/english/sentient> (last visited July 31, 2020).

³³ MERRIAM-WEBSTER, *supra* note 30.

³⁴ *Id.*

³⁵ See Broom, *Animal Welfare and Legislation*, *supra* note 10, at 340.

³⁶ See generally A.D. (Bud) Craig, *The Sentient Self*, 214 BRAIN STRUCTURE & FUNCTION 563–64 (2010) (describing humans’ sensory functions).

³⁷ Jones, *supra* note 10; Broom, *supra* note 1, at 8.

³⁸ Tribune Media Services, *Alabama Researchers Find Torture in Movies of all Kinds – Even Cartoons*, AL.COM (Feb. 10, 2020), <https://www.al.com/news/2020/02/alabama-researchers-find-torture-in-movies-of-all-kinds-even-cartoons.html>.

³⁹ Steve Chapman, *Trump Makes Life Miserable for Republicans in Congress, and a Second Term Would Be Even Worse*, CHICAGO TRIBUNE (Oct. 30, 2019), <https://www.chicagotribune.com/columns/steve-chapman/ct-column-trump-house-republicans-2020-chapman-20191030-yamnjg5zdzaw7g3d6k32yajb2e-story.html>.

⁴⁰ DAVID DEGRAZIA, *TAKING ANIMALS SERIOUSLY: MENTAL LIFE AND MORAL STATUS* 75 (1996).

⁴¹ James K. Kirkwood, *The Distribution of the Capacity for Sentience in the Animal Kingdom*, in ANIMALS, ETHICS AND TRADE: THE CHALLENGE OF ANIMAL SENTIENCE 12 (Jacky Turner & Joyce D’Silva eds., 2006).

⁴² Helen S. Proctor, Gemma Carder, & Amelia R. Cornish, *Searching for Animal Sentience: A Systematic Review of the Scientific Literature*, 3 ANIMALS 882, 882–84 (2013).

ence.⁴³ According to Broom, “[a] sentient being is one that has some ability: to evaluate the actions of others in relation to itself and third parties, to remember some of its own actions and their consequences, to assess risks, to have some feelings and to have some degree of awareness.”⁴⁴

C. *Scientific Evidence that Animals are Sentient*

A review of the scientific literature in relation to animal sentience makes it clear that there is general agreement about what animals can feel.⁴⁵ In this respect, most scientific research has been concerned with the negative experiences of animals,⁴⁶ in particular, the experiences of fear, stress, pain, anxiety, and depression.⁴⁷ Further, most research has related to the experiences of mammals in particular, and more broadly to vertebrates.⁴⁸ This is likely because these animals are more similar to humans and are more commonly used in scientific experiments and animal agriculture.⁴⁹

The scientific consensus is that many animals are sentient.⁵⁰ In particular, vertebrate animals—meaning those animals that have a spine—are considered by scientific researchers to be sentient.⁵¹ More particularly, “[a] substantial body of research on parrots, dogs, pigs, cattle, and other farm animals and companion animals shows . . . that they are sentient.”⁵² Research in relation to wild mammals, birds, amphibians, reptiles, fish, cephalopods, and decapod crustaceans is also suggestive of sentience.⁵³ While there has been recent research in relation to spiders, gastropods and insects, the extent to which they may be sentient remains unclear.⁵⁴ Overall, it is clear that the scientific community accepts that many animals are sentient.

Research in relation to animal sentience has been subject to criticism. This is because, by definition, such research is concerned with understanding the subjective minds of animals, which are unknowable.⁵⁵ In

⁴³ Donald M. Broom, *The Evolution of Morality*, 100 APPL. ANIMAL BEHAV. SCI. 20, 26 (2006).

⁴⁴ *Id.*

⁴⁵ Proctor, Carder, & Cornish, *supra* note 42, at 882.

⁴⁶ *Id.* at 884.

⁴⁷ *Id.* at 890.

⁴⁸ *Id.* at 894.

⁴⁹ *Id.*

⁵⁰ BROOM, SENTIENCE, *supra* note 10; Jones, *supra* note 10; Broom, *Animal Welfare and Legislation*, *supra* note 10, at 339–40.

⁵¹ Jones, *supra* note 10, at 6.

⁵² Broom, *supra* note 1, at 8.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See, e.g., James D. Rose, *The Neurobehavioral Nature of Fishes and the Question of Awareness and Pain*, 10 REV. FISHERIES SCI. 1, 29 (2002); James D. Rose, Robert Arlinghaus,

this respect, there is no universal, incontrovertible, and objective measure for identifying and evaluating emotions such as pain.⁵⁶ As a result, it is difficult for scientists to conclusively determine that animals experience such emotions. Nevertheless, the experience of emotions is by definition subjective not only for animals, but also for humans.⁵⁷ This has not prevented researchers from drawing conclusions in relation to the existence of emotions like pain, fear, anxiety, happiness, and joy in humans in the field of human psychology.⁵⁸ Accordingly, it seems animal sentience research has been subject to a “scientific paradox” in which it is asked to provide unequivocal proof where other areas of study are not required to do so.⁵⁹ Not only does this approach lack logic, it is also likely to impede social interaction⁶⁰ and further research.

The following sections of this paper provide a brief outline of the existing research relating to animals’ experiences of physical and psychological pain. Note that this summary focuses primarily on the existence of negative emotional states in vertebrates because this has been the focus of the majority of the relevant research.⁶¹ While the assertion that animals feel physical and psychological pain may seem to be simple common sense, the case is presented here in some detail because the overall legal approach to animals in the US is to treat them as property.⁶²

1. Physical Pain

Existing research indicates that many animals feel physical pain.⁶³ This conclusion is supported by the presence in animals of similar anatomy and physiology that appear to be a requirement for pain in humans, and animal responses to pain stimuli suggesting the experience of pain. All animals share aspects of the human system for physical recognition and processing of pain, known as nociception.⁶⁴ In the human system of nociception, nerve ends, known as nociceptors, are located in various parts of the body.⁶⁵ When nociceptors receive a message of potential

Steven J. Cooke, B.K. Diggles, W. Sawynok, Don Stevens, & Clive Wynne, *Can Fish Really Feel Pain?*, 15 FISH & FISHERIES 97, 99–101 (2012).

⁵⁶ Proctor, Carder, & Cornish, *supra* note 42, at 882.

⁵⁷ *Id.* at 882–83.

⁵⁸ Helen Proctor, *Animal Sentience, Where Are We and Where Are We Heading?*, 2 ANIMALS, 628, 630 (2012).

⁵⁹ Proctor, Carder, & Cornish, *supra* note 42, at 883.

⁶⁰ *Id.*

⁶¹ *Id.* at 884–85.

⁶² *See supra* Part II.

⁶³ *See* Lynne U. Sneddon, Robert W. Elwood, Shelley A. Adamo, Matthew C. Leach, *Defining and Assessing Animal Pain*, 97 ANIMAL BEHAV. 201, 201 (2014).

⁶⁴ Lynne U. Sneddon, *Evolution of Nociception and Pain: Evidence from Fish Models*, 374 PHIL. TRANS. R. SOC. B. 1, 1 (2019).

⁶⁵ *See e.g.*, Adrienne E. Dubin & Ardem Patapoutian, *Nociceptors: The Sensors of the Pain Pathway*, 120 J. CLINICAL INVESTIGATION 3760, 3760 (2010).

pain, referred to as noxious stimuli, they communicate the message through the spinal cord to the brain where it is processed by the sensory cortex.⁶⁶ The brain then sends the message to other parts of the body, which display pain symptoms such as vocalization and movement.⁶⁷ Scientists believe all animals to be capable of nociception, or the “detection of potentially injurious stimuli.”⁶⁸ However, nociception is concerned only with the sensing of pain stimuli and not the conscious experience of pain.⁶⁹ Researchers establish which animals are capable of subjectively experiencing pain by reference to their behavioral responses to pain stimuli.⁷⁰

Scientific researchers utilize three broad methodologies to determine whether animals experience pain. Each of these methods is anthropomorphic in nature,⁷¹ as each involves the observation of animals to determine whether they experience similar physiological and behavioral reactions to pain stimuli that humans do. Accordingly, while the methods suggest that the animals in question do experience physical pain, the methods do not mean that animals that do not appear to feel pain in a similar way to humans do not have their own unique experiences of pain. The first method involves measuring animals’ bodily functions, such as their consumption of food and water or weight gain, in response to pain stimuli, and comparing them with the bodily functions of human subjects to the same stimuli.⁷² The second method entails observation of physiological responses, such as examination of the concentration of plasma cortisol in the animals’ bodies, in response to pain stimuli.⁷³ The third method requires observation of animal behavior, such as vocalization and physical movement, in response to pain stimuli.⁷⁴ From these methods,

⁶⁶ See *Id.* at 3760–62; Mirko Bagaric, Jane Kotzmann & Gabrielle Wolf, *A Rational Approach to Sentencing Offenders for Animal Cruelty: A Normative and Scientific Analysis Underpinning Proportionate Penalties for Animal Cruelty Offenders*, 71 S.C. L. REV. 385, 422 (2019).

⁶⁷ See Sneddon, Elwood, Adamo, & Leach *supra* note 63, at 204.

⁶⁸ Sneddon, *supra* note 64, at 1.

⁶⁹ Colin Allen, *Animal Pain*, 38 NOÜS 617, 617 (2004); Bagaric, Kotzmann, & Wolff, *supra* note 66, at 420–23.

⁷⁰ Sneddon, *supra* note 64 at 2; Sneddon, Elwood, Adamo, & Leach, *supra* note 63, at 202.

⁷¹ Anthropomorphic here refers to treating animals as if they had human qualities. An example of anthropomorphic conduct is a human pet “owner” referring to their pet cat’s paws as “hands.” See *Anthropomorphic*, OXFORD LEARNERS DICTIONARIES, https://www.oxfordlearnersdictionaries.com/definition/american_english/anthropomorphic (last visited July 31, 2020).

⁷² Daniel M. Weary, Lee Niel, Frances C. Flower, & David Fraser, *Identifying and Preventing Pain in Animals*, 100 APPLIED ANIMAL BEHAV. SCI. 64, 65 (2006).

⁷³ *Id.*

⁷⁴ *Id.*

and particularly from behavioral observations, scientific researchers have concluded that many animals do feel physical pain.⁷⁵

Research involving observations of animal behavior is particularly enlightening on the question of whether animals feel pain. When subjected to pain stimuli, animals exhibit three main classes of behavior. The first and most obvious pain-related behavior is pain-specific, such as writhing, calling out, bucking and attempting to escape.⁷⁶ The second is a decline in the frequency or magnitude of behavior, such as lethargy and reduced activity.⁷⁷ The third class of pain measure is animal choice or preference, including learning to avoid pain stimuli and self-medicating with analgesics.⁷⁸ There is a clear similarity between these types of pain-related behaviors and the types of behaviors exhibited by humans when subjected to pain stimuli, suggesting that many animals do consciously experience pain. Animals that scientific research indicates as capable of experiencing pain include vertebrates such as guinea pigs,⁷⁹ rats,⁸⁰ horses,⁸¹ and farm animals such as chickens, cows, and sheep.⁸² Further, there is strong research suggesting that various fish are able to experi-

⁷⁵ *Id.*

⁷⁶ *Id.* at 69.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Hilde Vermeirsch, Ria Biermans, Philip L. Salmon, & Theo F. Meert, *Evaluation of Pain Behavior and Bone Destruction in Two Arthritic Models in Guinea Pig and Rat*, 87 PHARMACOLOGY BIOCHEMISTRY & BEHAV. 349, 349 (2007).

⁸⁰ John V. Roughan & Paul A. Flecknell, *Evaluation of a Short Duration Behavior-Based Post-Operative Pain Scoring System in Rats*, 7 EUR. J. PAIN 397, 397 (2003).

⁸¹ Johannes P.A.M. van Loon, Willem Back, Ludo J. Hellebrekers, & P. Rene van Weeren, *Application of a Composite Pain Scale to Objectively Monitor Horses with Somatic and Visceral Pain under Hospital Conditions*, 30 J. EQUINE VETERINARY SCI. 641, 641 (2010); P.D. McGreevy, *The Fine Line Between Pressure and Pain: Ask the Horse*, 188 VETERINARY J. 250, 250–51 (2011).

⁸² M.J. Gentle, *Attentional Shifts Alter Pain Perception in the Chicken*, 10 ANIMAL WELFARE 187, 187 (2001), discussed in Weary, Niel, Flower, & Fraser, *supra* note 72, at 73; Kristen A. Walker, Todd F. Duffield, & Daniel M. Weary, *Identifying and Preventing Pain During and After Surgery in Farm Animals*, 135 APPLIED ANIMAL BEHAV. SCI. 259, 259 (2011); Ignacio Vinuela-Fernandez, Emma Jones, Elizabeth M. Welsh, & Susan M. Fleetwood-Walker, *Pain Mechanisms and Their Implication for the Management of Pain in Farm and Companion Animals*, 174 VETERINARY J. 227, 227 (2007); K. M.D. Rutherford, *Assessing Pain in Animals*, 11 ANIMAL WELFARE 31, 33 (2002); Andrew D. Fisher, *Addressing Pain Caused by Mulesing in Sheep*, 135 APPLIED ANIMAL BEHAV. SCI. 232, 232 (2011). *See also* S. Lomax, M. Sheil, & P.A. Windsor, *Use of Local Anaesthesia for Pain Management During Husbandry Procedures in Australian Sheep Flocks*, 86 SMALL RUMINANT RES. 56, 56 (2009); Kevin J. Stafford & David J. Mellor, *Addressing the Pain Associated with Disbudding and Dehorning in Cattle*, 135 APPLIED ANIMAL BEHAV. SCI. 226, 226 (2011); AMY SIMON, *TAIL DOCKING AND CASTRATION OF LAMBS* (2003), http://essays.cve.edu.au/sites/default/files/vein_essays/content_2708/SimonAmy.pdf.

ence pain,⁸³ and that invertebrates such as eels and crustaceans may also be able to feel pain.⁸⁴

The international scientific community—including scientists, veterinarians, and others who work with animals—clearly accepts that animals are capable of experiencing pain. Evidence of this includes the adoption, by numerous institutions, of codes of conduct and guidelines for working with animals, which require the use of methods that minimize animals' experience of pain. For example, in 2009, the National Research Council (US) Committee published a report on the recognition and alleviation of pain in laboratory animals, which states, "the goal of researchers, veterinary teams, and IACUCs should be to reduce and alleviate pain in laboratory animals to the minimum necessary to achieve the scientific objective."⁸⁵ Guidelines published by, among many others, the American Psychological Association,⁸⁶ the Australian National Health and Medical Research Council,⁸⁷ the Norwegian National Committee for Research

⁸³ Sneddon, *supra* note 64, at 6 (concluding that it is highly likely that fish experience pain); K.P. Chandroo, I.J.H. Duncan, & R.D. Moccia, *Can Fish Suffer?: Perspectives on Sentience, Pain, Fear and Stress*, 86 APPLIED ANIMAL BEHAV. SCI. 225, 225 (2004) (suggesting fish can experience affective states of pain, fear, and stress); VICTORIA BRAITHWAITE, DO FISH FEEL PAIN? 183 (2010) (concluding that fish feel pain); Lynne U. Sneddon, *Nociception or Pain in Fish*, in ENCYCLOPEDIA OF FISH PHYSIOLOGY: FROM GENOME TO ENVIRONMENT 714 (Anthony P. Farrell ed., 2011) (discussing potential for pain in fish); Ángel A. Rivas-Boyer, M. Javier Herrero-Turrión, Veronica Gonzalez-Nunez, Fatima Macho Sanchez-Simon, Katherine Barreto-Valer, & Raquel E. Rodriguez, *Pharmacological Characterization of a Nociceptin Receptor from Zebrafish (Danio Rerio)*, 46 J. MOLECULAR ENDOCRINOLOGY 111, 112 (2011) (noting pain in zebrafish); Jonathan A.C. Roques, Wout Abbink, Femke Geurds, Hans van de Vis, & Gert Flik, *Tailfin Clipping, a Painful Procedure: Studies on Nile Tilapia and Common Carp*, 101 PHYSIOLOGY & BEHAV. 533, 533 (2010) (observing pain in common carp and Nile tilapia); Lynne U. Sneddon, *Assessing Pain Perception in Fish from Physiology to Behaviour*, 146 COMP. BIOCHEMISTRY & PHYSIOLOGY S75, S78 (2007) (finding altered brain activity in carp after painful stimulation).

⁸⁴ E. Lambooi, J.W. van de Vis, R.J. Kloosterboer, & C. Pieterse, *Welfare Aspects of Live Chilling and Freezing of Farmed Eel (Anguilla Anguilla L.): Neurological and Behavioural Assessment*, 210 AQUACULTURE 159, 166 (2002) (observing responses to pain stimuli in eels); See G. Fiorito, *Is There "Pain" in Invertebrates?*, 12 BEHAV. PROCESSES 383, 386 (1986) (concluding that invertebrates possess a pain system); see also Stuart Barr, Peter R. Laming, Jaimie T. A. Dick & Robert W. Elwood, *Nociception or Pain in a Decapod Crustacean?*, 75 ANIMAL BEHAV. 745, 749–50 (2008) (asserting that prolonged rubbing and grooming are consistent with the idea of pain in crustaceans); Colin Barras, *Crustacean 'Pain Response' Gives Food for Thought*, NEW SCIENTIST, Nov. 10, 2007, at 14, 14; Robert W. Elwood, Stuart Barr, & Lynsey Patterson, *Pain and Stress in Crustaceans?*, 118 APPLIED ANIMAL BEHAV. SCI. 128, 134 (2009) (stating that crustaceans may experience pain).

⁸⁵ NAT'L RES. COUNCIL, RECOGNITION AND ALLEVIATION OF PAIN IN LABORATORY ANIMALS 27 (2009).

⁸⁶ AM. PSYCHOL. ASS'N, GUIDELINES FOR ETHICAL CONDUCT IN THE CARE AND USE OF NONHUMAN ANIMALS IN RESEARCH 3, adopted by the APA Council of Representatives on February 24, 2012, available at www.apa.org/science/leadership/care/guidelines.aspx (last visited on Aug. 1 2020).

⁸⁷ NAT'L HEALTH & MED. RES. COUNCIL, AUSTRALIAN GOV'T, AUSTRALIAN CODE FOR THE CARE AND USE OF ANIMALS FOR SCIENTIFIC PURPOSES 1 (8th ed. 2013).

Ethics in Science and Technology,⁸⁸ and the Scientific Committee on Antarctic Research (Antarctica)⁸⁹ include similar statements. Moreover, people who work with animals often try to minimize animal suffering with analgesics and anesthetics.⁹⁰

2. Psychological Pain

Similarly, the existing research also indicates that animals can experience psychological pain. While many would argue that this conclusion is “common-sense,”⁹¹ it has been challenging to reach. This is because the methods scientists employ to ascertain whether animals feel physical pain, as discussed earlier, are not necessarily suited to determining whether animals experience psychological pain. In order to feel psychological pain, an animal must be capable of experiencing emotions. However, non-human animals experience emotions internally and may thus lack any outward expression. In addition, animals may express emotions in ways unlike those adopted by humans. Despite these challenges, contemporary scientific research indicates “[a]natomical, physiological, and behavioral similarities across species demonstrate that animals experience pain and distress [including psychological pain and distress] in ways *similar* or *identical* to humans.”⁹² Further, similar factors appear to cause psychological pain in humans and other animals.⁹³

Anecdotal observations of animals experiencing psychological pain, and in particular grief, have been common. For example, Muschi the cat and Mäuschen the Asiatic black bear reportedly became inseparable in a Berlin zoo such that when separated, they appeared to become depressed.⁹⁴ Gana, a gorilla in the Münster Zoo in northern Germany, seemed to experience anguish as she held and caressed her dead young

⁸⁸ NAT’L COMM. FOR RES. ETHICS IN SCI. & TECH., *ETHICAL GUIDELINES FOR THE USE OF ANIMALS IN RESEARCH* 6-7 (2018).

⁸⁹ SCI. COMM. ON ANTARCTIC RES., *SCAR’S CODE OF CONDUCT FOR THE USE OF ANIMALS FOR SCIENTIFIC PURPOSES IN ANTARCTICA* 1 (2011).

⁹⁰ See Sneddon, Elwood, Adamo, & Leach, *supra* note 63, at 205; Weary, Niel, Flower, & Fraser, *supra* note 72, at 64–65; P. Flecknell, *Analgesia from a Veterinary Perspective*, 101 BRIT. J. OF ANAESTHESIA 121, 121 (2008); Rashmi Shivni, *It Doesn’t Have to Hurt: Recently Updated Guidelines Seek to Improve Pain Management in Small Animals*, AM. VETERINARY MED. ASS’N, (Oct. 14, 2015), <https://www.avma.org/News/JAVMANews/Pages/151101a.aspx>.

⁹¹ David DeGrazia & Andrew Rowan, *Pain, Suffering, and Anxiety in Animals and Humans*, 12 THEORETICAL MED. 193, 193 (1991).

⁹² Hope Ferdowsian & Debra Merskin, *Parallels in Sources of Trauma, Pain, Distress and Suffering in Humans and Nonhuman Animals*, 13 J. TRAUMA & DISSOCIATION 448, 461 (July 2012) (emphasis added).

⁹³ *Id.*

⁹⁴ Elisha Ainsley, *Cat Enters Bear’s Pen at Zoo, Onlookers Freeze In Fear, But Then Realise What’s Really Going On*, HAPPIEST (Mar. 1, 2018), <https://www.happiest.net/cat-enters-bears-pen-zoo-onlookers-freeze-fear-realise-whats-really-going/>.

baby.⁹⁵ The academic literature is replete with similar anecdotes. For example, primatologist Jane Goodall provides the following powerful description of a chimpanzee experiencing grief:

Never shall I forget watching as, three days after Flo's death, Flint climbed slowly into a tall tree near the stream. He walked along one of the branches, then stopped and stood motionless, staring down at an empty nest. After about two minutes he turned away and, with the movements of an old man, climbed down, walked a few steps, then lay, wide eyes staring ahead. The nest was one which he and Flo had shared a short while before Flo died . . . in the presence of his big brother [Figan], [Flint] had seemed to shake off a little of his depression. But then he suddenly left the group and raced back to the place where Flo had died and there sank into ever deeper depression . . . Flint became increasingly lethargic, refused food and, with his immune system thus weakened, fell sick. The last time I saw him alive, he was hollow-eyed, gaunt and utterly depressed, huddled in the vegetation close to where Flo had died . . . the last short journey he made, pausing to rest every few feet, was to the very place where Flo's body had lain. There he stayed for several hours, sometimes staring and staring into the water. He struggled on a little further, then curled up—and never moved again.⁹⁶

Similarly, Nobel laureate Konrad Lorenz has described symptoms of grief in geese as comparable to that of young children.⁹⁷ Marc Bekoff provides numerous anecdotes of animal grief, including sea lion mothers squealing when their babies have been eaten by predator animals, and orphan elephants who have seen their mothers being killed waking up screaming.⁹⁸ However, while anecdotes are common, they do not provide indisputable evidence for animal pain.

Scientists differentiate between animals' capacity to feel primary and social emotions. Primary emotions are "basic inborn emotions"⁹⁹ in-

⁹⁵ Marcus Dunk, *A Mother's Grief: Heartbroken Gorilla Cradles Her Dead Baby*, DAILY MAIL (Aug. 19, 2008), <https://www.dailymail.co.uk/sciencetech/article-1046549/A-mothers-grief-Heartbroken-gorilla-cradles-dead-baby.html>.

⁹⁶ JANE GOODALL, *THROUGH A WINDOW* 224–25 (1990).

⁹⁷ KONRAD LORENZ, *HERE I AM—WHERE ARE YOU?: THE BEHAVIOR OF THE GREYLAG GOOSE* 251 (1990).

⁹⁸ MARC BEKOFF, *THE SMILE OF A DOLPHIN: REMARKABLE ACCOUNTS OF ANIMAL EMOTIONS* 114 (2000).

⁹⁹ Marc Bekoff, *Animal Emotions: Exploring Passionate Natures*, 50 *BIOSCIENCE* 861, 863 (2000).

cluding fear and surprise. These emotions are hardwired into the brain and operate like reflexes, which are critical to individual survival.¹⁰⁰ Many animals appear to have the capacity to experience primary emotions.¹⁰¹ Social emotions, on the other hand, are those emotions that require self-reflection and include sympathy, shame, and guilt.¹⁰² Animals that have higher mental capacity, for example chimpanzees and rhesus monkeys, appear to be capable of experiencing social emotions.¹⁰³

Recent research suggests that animals are able to experience psychological illnesses.¹⁰⁴ In this respect, Franklin McMillan asserts, “[a] rapidly proliferating literature provides extensive evidence supporting the existence of psychological trauma and its characterization in nonhuman species.”¹⁰⁵ For example, current studies suggest that some animals, including wolves, elephants, dogs, and chimpanzees, exhibit behaviors indicative of experiencing post-traumatic stress disorder.¹⁰⁶ Further, studies in relation to chimpanzees have observed behaviors suggesting that they may suffer from psychological illnesses including generalized anxiety disorders and obsessive-compulsive disorders.¹⁰⁷

Moreover, research suggests that similar circumstances lead to the development of psychological suffering in animals as in humans.¹⁰⁸ For example, research relating to dogs that were either sold in a pet store as a

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Klaus Wilhelm, *Do Animals Have Feelings?*, SCI. AM. MIND, Feb.–Mar. 2006, at 27.

¹⁰³ “Dominant gorillas swagger around to demand respect from their peers. Low-ranking wolves in packs make gestures of abasement. Dogs reprimanded by their owners for doing something wrong show clear signals of embarrassment. Yet even in such cases, as with primary emotions, some neuroscientists say these actions are largely automatic and inborn and count them among the routinized mechanisms animals use to help them survive.” *Id.* at 27–28; see also Bekoff, *supra* note 99, at 866.

¹⁰⁴ Shreya Dasgupta, *Many Animals Can Become Mentally Ill*, BBC (Sept. 9, 2015), <http://www.bbc.com/earth/story/20150909-many-animals-can-become-mentally-ill>.

¹⁰⁵ Franklin D. McMillan, *Psychological Trauma in Animals: PTSD and Beyond*, in Int’l Ass’n Animal Behav. Consultants Conf. 107 (2011); see also Marc Bekoff, *Animals Don’t Laugh, Think, Get Depressed, or Love Declares a Psychiatrist*, PSYCHOL. TODAY (Sept. 3, 2012), <https://www.psychologytoday.com/us/blog/animal-emotions/201209/animals-dont-laugh-think-get-depressed-or-love-declares-psychiatrist>; Marc Bekoff, *Do Wild Animals Suffer From PTSD and Other Psychological Disorders?*, PSYCHOL. TODAY (Nov. 29, 2011), <https://www.psychologytoday.com/us/blog/animal-emotions/201111/do-wild-animals-suffer-ptsd-and-other-psychological-disorders>.

¹⁰⁶ McMillan, *supra* note 105, at 107–09.

¹⁰⁷ Hope R. Ferdowsian, Debra L. Durham, Cassie Mere’ Johnson, Martin Brune, Charles Kimwele, Godelieve Kranendonke, Emily Oтали, Timothy Akugizibwe, J. B. Mulcahy, & Lilly Ajarova, *Signs of Generalized Anxiety and Compulsive Disorders in Chimpanzees*, 7 J. VETERINARY BEHAV. 353, 360 [hereinafter Ferdowsian, *Generalized Anxiety*]; Hope R. Ferdowsian, Debra L. Durham, Charles Kimwele, Godelieve Kranendonke, Emily Oтали, Timothy Akugizibwe, J. B. Mulcahy, & Lilly Ajarova, & Cassie Mere’ Johnson, *Signs of Mood and Anxiety Disorders in Chimpanzees*, PLOS ONE, June 2011, at 1, 9 [hereinafter Ferdowsian et al., *Signs of Mood and Anxiety Disorders*].

¹⁰⁸ McMillan, *supra* note 105, at 109.

puppy or born in a commercial breeding establishment, demonstrated increased behavioral and emotional difficulties, when judged against dogs from other sources.¹⁰⁹ Issues that may have influenced these difficulties included stress, deprivation of stimulus, and separation from the dogs' mothers.¹¹⁰ In research conducted in relation to chimpanzees, their experiences as the subjects of experimental research, including captivity, physical harm, and seclusion, may have caused subsequent behaviors related to depression, anxiety, obsessive-compulsive disorder, and post-traumatic stress disorder.¹¹¹ Researchers have also identified experiences including abuse, neglect, multiple re-homing, fighting, racing, armed conflict, and physical suffering and injury as likely causes of psychological pain in animals.¹¹²

In conclusion, contemporary research is clear that animals are able to experience both physical and psychological pain. The international scientific community accepts this research, as is evidenced by the existence of codes of conduct for working with animals and the use of analgesics and anesthetics in animals. The consensus in relation to the capacity of many animals in this respect has led to the legal recognition of animal sentience in many jurisdictions. The next section will discuss this trend in the law.

D. *Legal Recognition of Animal Sentience*

Almost all countries have animal protection laws in operation. These types of laws have a long history. The US was the first country in the world to pass laws designed to protect animals from cruelty when it enacted the Puritans of Massachusetts Bay Colony Code of 1641.¹¹³ In the US today, at the federal level, the AWA regulates the treatment of animals (excluding rats, mice, and livestock) in research, exhibition, and transport by dealers.¹¹⁴ The Twenty-Eight Hour Law (1873),¹¹⁵ the Hu-

¹⁰⁹ Franklin D. McMillan, *Behavioral and Psychological Outcomes for Dogs Sold as Puppies Through Pet Stores and/or Born in Commercial Breeding Establishments: Current Knowledge and Putative Causes*, 19 J. VETERINARY BEHAV. 14, 14 (2017).

¹¹⁰ *Id.*

¹¹¹ Hope R. Ferdowsian, *Generalized Anxiety*, *supra* note 107 at 360; *Chimps Used in Experiments Develop Psychological Disorders*, ARCUS FOUND. (June 11, 2008), <https://www.arcusfoundation.org/stories-of-impact/great-apes/chimps-used-experiments-develop-psychological-disorders/>.

¹¹² McMillan, *supra* note 105, at 107–08; *see also* Jessica Pierce, *Emotional Pain in Animals: An Invisible World of Hurt*, PSYCHOL. TODAY (Apr. 24, 2012), <https://www.psychologytoday.com/us/blog/all-dogs-go-heaven/201204/emotional-pain-in-animals-invisible-world-hurt> (discussing types of emotional abuse from which animals suffer).

¹¹³ Emily Stewart Leavitt & Diane Halverson, *The Evolution of Anti-Cruelty Laws in the United States*, in ANIMALS AND THEIR L. RTS. in a SURV. OF AM. LAWS FROM 1641 TO 1990 I (Animal Welfare Inst., 4th ed. 1990).

¹¹⁴ 7 U.S.C. § 2131 (2018).

¹¹⁵ Twenty-Eight Hour Law, 49 U.S.C. § 80502 (2000).

mane Methods of Slaughter Act of 1958,¹¹⁶ the Endangered Species Act of 1973,¹¹⁷ and the Preventing Animal Cruelty and Torture Act (2019)¹¹⁸ all provide some level of protection for some animals. Further, all fifty states have enacted animal protection legislation, although the protections that are provided vary significantly between states.¹¹⁹

The significance of these laws is that they implicitly recognize, at least to some extent,¹²⁰ that animals are sentient. In the Animal Welfare Act of 1966, for example, the expressed Congressional statement of policy is that animals used by humans in particular contexts “are provided *humane* care and treatment.”¹²¹ If animals were not sentient, then there would be no point in seeking to ensure that animals are treated and cared for humanely. To do so would be the equivalent of requiring that houses and furniture are treated and cared for humanely. In other words, it would make no sense. Accordingly, the reason why legislatures pursue humane care and treatment for animals is that animals are capable of experiencing feelings, including pain and suffering. Lora Dunn and David B. Rosengard express the implicit intention behind animal protection laws in this way: “[w]ithout being sentient, animals cannot suffer; sentience is therefore implicitly at the root of . . . animal protection laws.”¹²²

With that said, the implicit recognition of animal sentience is stronger in some laws than in others. In this respect, contrast the Animal Welfare Act of 1966 with articles 2(1) and 4(2) of the Swiss Animal Welfare Act (Schweizerisches Tierschutzgesetz, 2005).¹²³ Article 4(2) provides that “[n]o one shall unjustifiably cause animals pain, aches or damage, put them in a state of anxiety or otherwise harm their dignity.”¹²⁴ Article 2(1) defines animals as vertebrates.¹²⁵ It also provides the Federal Council with power to determine that the law applies to specific invertebrates.¹²⁶ In undertaking this function, the Federal Council

¹¹⁶ Humane Methods of Slaughter Act, 7 U.S.C. § 1901 (1958).

¹¹⁷ Endangered Species Act (ESA) of 1973, 16 U.S.C. § 1531 (2018).

¹¹⁸ Preventing Animal Cruelty and Torture Act 2019. Pub.L. No. 116-72, 133 Stat. 1151, 1151 (2019).

¹¹⁹ *Laws that Protect Animals*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/article/laws-that-protect-animals/> (last visited Jan. 23, 2020); Leavitt & Halverson, *supra* note 113, at 3–4.

¹²⁰ In relation to the United States, *see supra* Part II.

¹²¹ Animal Welfare Act of 1966, 7 U.S.C. § 2131 (emphasis added).

¹²² Lora Dunn & David B. Rosengard, *A Dog is Not a Stereo: The Role of Animal Sentience in Determining the Scope of Owner Privacy Interests Under Oregon Law*, 23 ANIMAL L. 451, 462 (2017).

¹²³ TIERSCHUTZGESETZ [TSCHG], LOI FÉDÉRALE SUR LA PROTECTION DES ANIMAUX [LPA], LEGGE FEDERALE SULLA PROTEZIONE DEGLI ANIMALI [LPAN] [ANIMAL WELFARE ACT] Dec. 16, 2005, SR 455, art. 2 (Switz.)

¹²⁴ *Id.* art 4(2).

¹²⁵ *Id.* art 2(1).

¹²⁶ *Id.*

refers to the results of scientific research carried out on the sensitivity of invertebrate animals.¹²⁷ While the Swiss provisions do not expressly refer to animal sentience, they do, however, reference animal suffering and dignity and clearly state that the animals to which the legislation applies will be those that are “sensitive,”¹²⁸ which in this case is used as a synonym for sentient.

Yet, while the enactment of animal protection legislation implicitly recognizes that animals are sentient, a recent international trend has emerged whereby many countries and jurisdictions have expressly recognized animal sentience in legislation.¹²⁹ The European Union, for example, first included the phrase “sentient beings” in a protocol to the Treaty of Amsterdam in 1997.¹³⁰ The following sections provide an overview of legislation enacted in foreign countries that implicitly recognizes animal sentience, and that expressly recognizes animal sentience.

1. Implicit Recognition

Reference to animal feelings or the capacity for such feelings, particularly pain and suffering, indicates an implicit recognition of animal sentience. For example, the Finnish Animal Welfare Act 1996 states that its objective is “to protect animals in the best possible way from suffering, pain and distress.”¹³¹ This statement of purpose demonstrates a clear belief that animals are *capable* of feelings. In other words, they are sentient. Similarly, section 1 of the German Animal Welfare Act 2006 asserts that “[n]o one may cause an animal pain, suffering or harm without good reason,”¹³² indicating an assumption that animals *can* experience pain and suffering. There are a number of analogous examples. The Indian Prevention of Cruelty to Animals Act 1960 aims at prevention of “the

¹²⁷ *Id.*

¹²⁸ *Id.* art 3.

¹²⁹ See, e.g., Wet Dieren 2011, Stb. 2011, 345, art. 1.3 (Neth.); CODE CIVIL [C. CIV] [CIVIL CODE] art. 515–14 (Fr.); Animal Welfare Act, 2008 (Act No. 19/2008) §4(b)(i) (Tanz); An Act to improve the legal situation of animals, S.Q. 2015, ch. 35, art. 1 (Can.); L. 1774 de 2016, DIARIO OFICIAL [D.O.] art. 1 (Colom.); Animal Welfare Act 1999, sched. 7, cl. a(i) (N.Z.); Consolidated Version of the Treaty on the Functioning of the European Union art. 13, *opened for signature* Dec. 13, 2007, 2012 O.J. (C 326) 1 (entered into force December 2009) [hereinafter Treaty on the Functioning of the European Union].

¹³⁰ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Protocol on Protection and Welfare of Animals, Oct. 2, 1997, 1997 O.J. (C 340) 1 (entered into force 1 May 1999) [hereinafter Treaty of Amsterdam].

¹³¹ Eläinsuojelulaki [Animal Welfare Act], 4/4/247/1996, § 1 (Fin.).

¹³² Tierschutzgesetz [TierSchG] [Animal Welfare Act], BGBL I, last amended by Verordnung [V], June 19, 2020, BGBL I at 1328, § 1 (Ger.), <http://hirnforschung.kyb.mpg.de/en/the-law/the-german-animal-welfare-act.html>.

infliction of unnecessary pain or suffering on animals.”¹³³ Poland’s Law Regarding Animal Protection recognizes that animals are “capable of suffering.”¹³⁴ Further, Slovenia’s Animal Protection Act 1999 provides that “[n]o one shall cause animal suffering, illness or death without good cause.”¹³⁵

Similarly, defining what constitutes an animal by reference to sentience, or by reference to animal feelings, indicates an implicit recognition of animal sentience. For example, section 2 of the Norwegian Animal Welfare Act 2009 (NAWA) states that the Act applies to “mammals, birds, reptiles, amphibians, fish, decapods, squid, octopi and honey bees.”¹³⁶ The following sentence indicates that the NAWA also applies to animals in “development stages” where “the sensory apparatus is equivalent to the developmental level in living animals.”¹³⁷ This means that where a prenatal animal is sufficiently sensitive—or sentient—it will also enjoy the protection provided under the NAWA. Similarly, the Slovenian Animal Protection Act 1999 (SAPA) provides that animals that “have developed senses to receive external stimuli and a developed nervous system to feel painful external influences” are protected.¹³⁸ Moreover, the SAPA is to be “strictly enforced on vertebrate animals and on other animals according to their level of sensitivity, in accordance with established experience and scientific knowledge.”¹³⁹ Like the NAWA then, the SAPA determines, to some extent, which animals are protected by reference to their “level of sensitivity,” or sentience.

¹³³ Prevention of Cruelty to Animals Act, No. 59 of 1960, INDIA CODE <http://www.indiacode.nic.in>.

¹³⁴ Ustawa o Ochronie Zwierząt [Animal Protection Act], Oct. 25, 1997, art. 1 (1) (Pol.).

¹³⁵ Zakon o Zašèiti živali [ZZZiv] [Animal Protection Act], May 18, 2007, URADNI at no. 43/2007 art. 3 (Slovn.). For further examples, see Hayvanlari Koruma Kanunu [Animal Protection Bill Law] June 24, 2004, No. 5199 art. 1, Resmî Gazete, July 1, 2004, No. 25509 (Turk.) art 1, which provides that “the purpose of this law is to ensure that animals are afforded a comfortable life and receive good and proper treatment, to protect them in the best manner possible from the infliction of pain, suffering and torture, and to prevent all types of cruel treatment”; see also Pro Zakhyst Tvaryn Vid Zhorstokoho Povodzhennya [On the Protection of Animals from Cruelty], No. 3447–IV, preamble, (Ukr.) (2006), which states that it is the purpose of the law “to protect animals from suffering and death as a consequence of being cruelly treated, to protect their natural rights, and to reinforce morality and compassionate behavior in society”; Animal Welfare Act 2006, ch. 45 § 1 (U.K.), of which sections 1(3) and 1(4) provide for the appropriate national authority to extend the Act to cover invertebrates or prenatal animals where they are satisfied, on the basis of scientific evidence, that animals of the kind concerned are capable of experiencing pain or suffering; Bundesgesetzblatt für die Republik Österreich [Animal Welfare Act] BUNDESGASETZBLATT [BGBL] No. 118/2004, § 5(1) (Austria), mandates that “[i]t is prohibited to inflict unjustified pain, suffering or injury on an animal or expose it to heavy fear.”

¹³⁶ Dyrevelferdsloven [Animal Welfare Act] July 10, 2009, No. 97 § 2, (Nor.) (2009).

¹³⁷ *Id.*

¹³⁸ Zakon o Zašèiti živali [ZZZiv] [Animal Protection Act], May 18, 2007, URADNI at 43/2007 art. 1 (Slovn.).

¹³⁹ *Id.*

2. Express Recognition

The European Union expressly recognizes animal sentience in a number of legal documents. It recognized animal sentience in 1997 in a protocol to the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (“Treaty of Amsterdam”), which referred to animals as “sentient beings.”¹⁴⁰ In 2010, Directive 2010/63/EU of the European Parliament and of the Council on the Protection of Animals Used for Scientific Purposes came into force.¹⁴¹ This directive states that “[a]nimals have an intrinsic value which must be respected. . . . [Thus] animals should always be treated as sentient creatures.”¹⁴² Further, Article 13 of the Treaty on the Functioning of the European Union 2016,¹⁴³ supersedes the relevant provision of the Treaty of Amsterdam, and mandates that:

In formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, *since animals are sentient beings*, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.¹⁴⁴

A number of European countries have also recognized animal sentience in their domestic laws. For example, the Netherlands formally recognizes animal sentience in the Animals Act (2011).¹⁴⁵ Article 1.3(2) provides that “[r]ecognition of the intrinsic value . . . mean[s] recognition of the self-worth of animals, being sentient beings.”¹⁴⁶ Similarly, in France law number 214-1 of the *Code rural et de la Pêche Maritime* provides that “[a]ny animal being a sentient being must be placed by its owner in conditions compatible with the biological imperatives of its

¹⁴⁰ Treaty of Amsterdam, *supra* note 130, at 110. This provision has been superseded by express recognition of animal sentience in article 13 of the *Treaty on the Functioning of the European Union*. Treaty on the Functioning of the European Union, *supra* note 129, art. 13.

¹⁴¹ Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the Protection of Animals Used for Scientific Purposes, 2010 O.J. (L 276) 33.

¹⁴² *Id.* at § 12.

¹⁴³ Note that the Treaty on the Functioning of the European Union 2016 acts as the Constitution of the European Union. See Consolidated Version of the Treaty on the Functioning of the European Union Art. 1, June 7, 2016, 2016 O.J. (C 202) 1 (“The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union.”)

¹⁴⁴ *Id.* Art. 13 (emphasis added).

¹⁴⁵ Wet Dieren [Animals Act], (Neth.) (2011) Art. 1.3(2) *translation at* <https://wetten.overheid.nl/BWBR0030250/2013-01-01> (Google Chrome translation).

¹⁴⁶ *Id.*

species.”¹⁴⁷ France also amended its Civil Code in 2015 to change the categorization of animals from “moveable property” to “living beings endowed with sensitivity.”¹⁴⁸ Brussels recently adopted a similar change in November 2018.¹⁴⁹ Under its new legislation, an animal is categorized as “a living being endowed with sensitivity, interests of its own and dignity, that benefits from special protection.”¹⁵⁰ In Lithuania, article 1[a] of the Law on Welfare and Protection of Animals provides that “[t]his law shall lay down the remit of state and municipal authorities in ensuring the welfare and protection of animals as sentient beings.”¹⁵¹

A number of South American countries have also amended their legislation to recognize animal sentience. Entered into force in 2016, Peru’s Animal Protection and Welfare Law 30407 states that all species of domestic and wild vertebrate animals kept in captivity are sentient beings.¹⁵² Similarly, Colombia has enacted Ley 1774—which modifies the Animal Protection Statute Ley 84, 1989—by modifying the Civil Code and the Criminal Code.¹⁵³ Ley 1774 declares that all animals are “sentient beings” and “will receive special protection against suffering and pain.”¹⁵⁴ Chile has also passed laws that recognize the sentience of animals. Law 20380 on the Protection of Animals of 2009 states that animals should be “respected and protected as living sentient beings that are part of nature.”¹⁵⁵

Legal recognition of animal sentience is also common outside of Europe and South America. For example, in 2015 New Zealand amended its Animal Welfare Act (1999) to include in the long title recognition “that animals are sentient.”¹⁵⁶ In the same year, Quebec passed Bill 54, titled “An Act to Improve the Legal Situation of Animals.”¹⁵⁷ This Act amended the Civil Code of Quebec 1991 to formally recognize animals

¹⁴⁷ CODE CIVIL [C. CIV.] [CIVIL CODE] art. 214-1 (Fr.).

¹⁴⁸ *Id.* art. 515-14 (Fr.).

¹⁴⁹ Christopher Vincent, *Brussels Parliament Adopts Crucial Animal Rights Bill*, BRUSSELS TIMES (Nov. 23, 2018), <https://www.brusselstimes.com/brussels/52089/brussels-parliament-adopts-crucial-animal-rights-bill/>.

¹⁵⁰ *Id.*

¹⁵¹ Gyvūnu Gerovės ir Apsaugos Ástatymas [Law on Welfare and Protection of Animals], No. XI-2271, Valstybės žinios, 20 October 2012 No. 122–6216 (Lith.) (2012), art. 1[a].

¹⁵² Animal Protection and Welfare Law 30407, art. 14, *discussed in Peru*, ANIMAL PROTECTION INDEX (March 10, 2020), <https://api.worldanimalprotection.org/country/peru>; *see also* Michigan State University, *Ley 30407, 2015*, ANIMAL L. & HIST. CTR. (June 2018), <https://www.animallaw.info/statute/ley-30407-2015>.

¹⁵³ Michigan State University, *Ley 1774 de 2016*, ANIMAL L. & HIST. CTR. (last updated Jan. 2018), <https://www.animallaw.info/statute/colombia-ley-1774-2016>.

¹⁵⁴ *Id.*

¹⁵⁵ *Chile*, ANIMAL PROTECTION INDEX (March 10, 2020), <https://api.worldanimalprotection.org/country/chile>; Michigan State University, *Chile Angie Vega (2018)*, ANIMAL L. & HIST. CTR. (last visited Oct. 6, 2020), <https://www.animallaw.info/intro/chile>.

¹⁵⁶ Animal Welfare Act 1999 (N.Z.), sched. 7(a)(i).

¹⁵⁷ An Act to Improve the Legal Situation of Animals, Bill 54 (2015).

as sentient beings, and accordingly article 898(1) now provides that “[a]nimals are not things. They are sentient beings and have biological needs.”¹⁵⁸

The above discussion demonstrates the international trend towards recognizing animal sentience in the law. In some instances, this recognition is clear but not expressly stated. In other cases, the law expressly acknowledges that animals are sentient beings, and that they can accordingly feel emotions including wanted ones like happiness and joy, and unwanted ones such as pain and suffering.

II. CURRENT LAW IN THE US

A. Introduction

Most animal protection legislation in the US does not expressly recognize that animals are sentient. Indeed, some US animal protection legislation does not even *implicitly* recognize animal sentience. By way of example, at the federal level, the key pieces of animal protection legislation are the AWA,¹⁵⁹ the Twenty-Eight Hour Law of 1873,¹⁶⁰ the Humane Methods of Slaughter Act 1958,¹⁶¹ the Endangered Species Act 1973¹⁶² and the Preventing Animal Cruelty and Torture Act 2019.¹⁶³ While, on the face of it, these laws appear to constitute an implicit recognition of animal sentience, closer analysis shows that the recognition they provide is negligible. For example, the AWA is the primary piece of animal protection legislation in the US. As noted above, it governs the treatment of animals in research, exhibition, and transport and by dealers.¹⁶⁴ However, the legislation excludes birds, rats, and mice bred for use in research; all cold-blooded animals; horses (except those used for research purposes); and other farm animals including livestock and poultry.¹⁶⁵ Birds, rats, mice, many cold-blooded animals, horses and other farm animals are all vertebrate animals and accordingly the scientific consensus is that they are sentient.¹⁶⁶ This exclusion means that the AWA actually fails to cover 95% of the animals used for research pur-

¹⁵⁸ *Id.*

¹⁵⁹ 7 U.S.C. § 2131 (2018).

¹⁶⁰ 49 U.S.C. § 80502 (2018).

¹⁶¹ 7 U.S.C. § 1901 (2018).

¹⁶² 16 U.S.C. § 1531 (2018).

¹⁶³ Pub. L. 116-72, § 1 (2019).

¹⁶⁴ 7 U.S.C. § 2131 (2018).

¹⁶⁵ *Id.*

¹⁶⁶ *See supra* Part I.B.

poses.¹⁶⁷ In other words, the AWA fails to recognize, expressly or implicitly, that these animals are sentient.

In many U.S. jurisdictions, the existence of animal protection legislation constitutes some degree of implicit recognition that some animals are sentient. For example, the Idaho Code prohibits cruelty to animals.¹⁶⁸ The Code defines cruelty as including the subjection of an animal to “needless suffering.”¹⁶⁹ The capacity to suffer is one aspect of sentience, and so the provisions here constitute an implicit acceptance that animals (defined in the Code as vertebrates, except for human beings)¹⁷⁰ are sentient. Similarly, the Minnesota Statutes prohibit human cruelty to animals,¹⁷¹ with cruelty defined as “every act, omission, or neglect which causes or permits unnecessary or unjustifiable *pain, suffering, or death.*”¹⁷² Missouri’s anti-cruelty statutes prohibit purposely or intentionally causing injury or *suffering* to an animal.¹⁷³ Thus, while these type of laws do not expressly recognize animals as sentient, they do provide some degree of implicit recognition that some animals are sentient.

A small number of US jurisdictions have recognized animal sentience in legislation or in case law. Oregon is the most prominent jurisdiction in this respect, having worked with the Animal Legal Defense Fund to draft and enact legislation recognizing animal sentience in 2013.¹⁷⁴ Other jurisdictions that have recognized animal sentience include Vermont, the District of Columbia, Maine, Illinois, Colorado, Connecticut, Montana, Massachusetts, and California.¹⁷⁵ The next section discusses the ways in which these jurisdictions have recognized animal sentience.

1. Recognition of Animal Sentience in US Jurisdictions

a. Oregon

Oregon is the most progressive jurisdiction in the US in terms of the legal recognition of animal sentience. Legislation in Oregon expressly

¹⁶⁷ Charlotte Blattner, *The Recognition of Animal Sentience by the Law*, 9 J. ANIMAL ETHICS 121, 126–127 (2019); F. Barbara Orland, *The Injustice of Excluding Laboratory Rats, Mice, and Birds from the Animal Welfare Act*, 10 KENNEDY INST. ETHICS J. 229, 229 (2000).

¹⁶⁸ Idaho Code § 25-3504 (2020).

¹⁶⁹ *Id.* § 25-3502(5)(c).

¹⁷⁰ *Id.* § 25-3502(2).

¹⁷¹ Minn. Stat. § 343.21(7) (2019).

¹⁷² *Id.* § 343.20(3) (emphasis added).

¹⁷³ Mo. Ann. Stat. § 578.012(1(2)) (2011) (emphasis added).

¹⁷⁴ Nicole Pallotta, *Brussels Recognizes Animals as Sentient Beings Distinct from Objects*, ANIMAL LEGAL DEF. FUND (Dec. 8, 2018), <https://aldf.org/article/brussels-recognizes-animals-as-sentient-beings-distinct-from-objects/>.

¹⁷⁵ 13 V.S.A. § 351 (2020); D.C. Code § 22-1013 (2020); 17 M. R. S. A. § 1011 (2020); *People v. Robards*, 2018 IL 150832, ¶ 3 (Ill. App. Ct. 2018); *People v. Harris*, 405 P.3d 361 (Colo. App., 2016); *State v. Hearl*, 190 A.3d 42, 48 (Conn. App. Ct. 2018); *State v. Stone*, 92 P.3d 1178 (Mont. 2004); *Commonwealth v. Duncan*, 7 N.E.3d 469 (Mass. 2014); *Martinez v. Robledo*, 147 Cal.Rptr.3d 921, 926 (Cal. Ct. App. 2012).

recognizes that animals are sentient. The Oregon legislature, with assistance from the Animal Legal Defense Fund, drafted and passed legislation in this respect in 2013. The legislation provides that “[a]nimals are sentient beings capable of experiencing pain, stress and fear”¹⁷⁶ and that “[a]nimals should be cared for in ways that minimize pain, stress, fear and suffering.”¹⁷⁷ Nevertheless, while the legislation recognizes animal sentience, property laws continue to apply to animals.¹⁷⁸

The Oregon Supreme Court (OSC) has considered the implications of animal sentience in a number of cases. In particular, the cases of *State v. Fessenden*,¹⁷⁹ *State v. Nix*,¹⁸⁰ and *State v. Newcomb*¹⁸¹ “stand as an important jurisprudential trilogy” of cases demonstrating how the OSC has managed to achieve more just outcomes for animals, within the legal boundaries of property classification.¹⁸² In each of these cases, the OSC was required to consider the extent to which animals, although legal property, require different treatment to non-sentient property. In *Nix*, police officers found dozens of emaciated animals on the defendant’s farm.¹⁸³ Following a guilty verdict in relation to twenty counts of animal neglect, the OSC had to determine whether the court should record twenty separate criminal counts or merge the guilty verdicts into a single conviction.¹⁸⁴ This determination turned on whether animals count as victims for the purposes of ORS 161.067(2).¹⁸⁵ The OSC noted that a “tradition of protecting individual animals themselves from suffering” provides the foundation for Oregon’s animal protection laws.¹⁸⁶ Additionally, analysis of the relevant legislative scheme reveals that the laws are “predicated on preventing the suffering of animals.”¹⁸⁷ In the language of the Court of Appeals of Oregon, “the legislature’s primary concern was to protect individual animals as *sentient* beings”¹⁸⁸

¹⁷⁶ Or. Rev. Stat. §167.305(1).

¹⁷⁷ *Id.* §167.305(2).

¹⁷⁸ *See, e.g., Id.* § 609.020 (declaring dogs to be personal property); Or. Rev. Stat. § 167.310(4) (describing domestic animals as “owned or possessed by a person”); Or. Rev. Stat. § 167.310(9) (describing minimum care that must be provided by an animal’s “owner”); Or. Rev. Stat. § 167.312(5) (providing for damages payable to an animal’s “owner” for interference with research animals). *See also* JAMES CHARLES SMITH & EDWARD J. LARSON, PROPERTY: CASES AND MATERIALS 308–315 (2018).

¹⁷⁹ *See State v. Fessenden*, 333 P.3d 278 (Or. 2014).

¹⁸⁰ *See State v. Nix*, 334 P.3d 437 (Or. 2014). While *Nix* was subsequently vacated on procedural grounds, its reasoning was adopted in the case of *State v. Hess*, 359 P.3d 288, 293 (Or. Ct. App. 2015).

¹⁸¹ *See State v. Newcomb*, 375 P.3d 434 (Or. 2016).

¹⁸² *Dunn & Rosengard, supra* note 122, at 457; *See Blattner, supra* note 167, at 126–27.

¹⁸³ *See State v. Nix*, 334 P.3d at 438.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 447.

¹⁸⁷ *Id.*

¹⁸⁸ *State v. Nix*, 283 P.3d 442, 449(Or. App. 2012) (emphasis added).

Accordingly, the OSC concluded that animals do count as victims for the purposes of ORS 161.067(2),¹⁸⁹ rejecting the defense's argument that because animals are property they cannot share an attribute, like victim status, that has been historically associated with humans.¹⁹⁰ The references to animal sentience and suffering highlight that this outcome turned, in large part, on the fact that animals are sentient.

The Court of Appeals of Oregon adopted a similar approach in *State v. Crow*,¹⁹¹ decided in 2018. The Court rejected the defendant's argument that for the purposes of ORS 167.332(1)(a), which prevents a person convicted of crimes against animals from possessing animals, the victim was the collective public.¹⁹² Instead, the court stated that the legislature's purpose in enacting ORS 167.332(1)(a) was "to protect the individual animals from suffering."¹⁹³ Accordingly, the Court of Appeals confirmed the trial court's decision to enter thirteen separate convictions for unlawful possession of an animal as each animal constituted a separate victim.¹⁹⁴ Again, the court emphasized the capacity of animals to suffer, a characteristic that differentiates them from other forms of property.

In *Fessenden*, an officer, acting on information that a horse at a neighboring property was starving, attended and entered the property without a warrant, seized the emaciated horse, and took her to a veterinarian.¹⁹⁵ The defendants argued that the officer's entry to the property and seizure of the horse violated state and federal constitutions.¹⁹⁶ The OSC, however, agreed with the state, finding that the exigent circumstances exception to warrantless entry applied because the officer had probable cause to believe that a crime had occurred and that the action was necessary to prevent further serious harm to the horse.¹⁹⁷ In this respect, the officer had been concerned that the horse might fall, which may have been fatal for a horse in her emaciated condition.¹⁹⁸ As Dunn and Rosengard assert, the court rejected "the argument that just because animals are property they are somehow incapable of having the sort of intrinsic value that might justify a warrant exception—a kind of value already associ-

¹⁸⁹ See *State v. Nix*, 334 P.3d at 448.

¹⁹⁰ *Id.* at 438–39; See also Dunn & Rosengard, *supra* note 122, at 461 (2017).

¹⁹¹ See *State v. Crow*, 429 P.3d 1053 (Or. App. 2018).

¹⁹² *Id.* at 1054.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See *State v. Fessenden*, 333 P.3d at 279.

¹⁹⁶ *Id.* at 279, 281.

¹⁹⁷ *Id.* at 279.

¹⁹⁸ *Id.* at 280.

ated with humans.”¹⁹⁹ It was the horse’s capacity to suffer—or sentience—that led the court to their justification of the warrant exception.²⁰⁰

The OSC’s decision in *Newcomb* is perhaps its most important yet in detailing the legal relevance of animal sentience. In *Newcomb*, an officer attended a property and seized a dog, Juno, in the belief that he had been criminally neglected.²⁰¹ Once in custody, Juno’s blood was drawn and tested for diagnosis and treatment.²⁰² The defendant argued that the blood draw violated the owner’s private property interest in Juno, because the dog was personal property akin to a stereo or vehicle, and the blood draw constituted a warrantless search of that property.²⁰³ The OSC rejected the defendant’s argument, stating that the fact that the seized property was a dog, and not other insentient property, makes a legal difference.²⁰⁴ As Juno had been lawfully seized, and as humans have obligations to ensure the basic welfare of animals that are in their custody,²⁰⁵ the owner held no private property interest in Juno that could be violated.²⁰⁶ In coming to this decision, the OSC granted legal significance to Juno’s “sentience” being the key differentiating factor between animals and other forms of property.

These cases, together with the express recognition of animal sentience in the Oregon Revised Statutes, are likely to have significant consequences for the ways in which the law affects animals in Oregon. In particular, the legislation and case law provide scope for prosecutors to ground arguments around animal sentience and suffering in animal cruelty cases.²⁰⁷ Accordingly, there will be increased opportunities for courts to decide such cases in ways that ensure positive outcomes for animals. Further, the OSC decisions constitute “a jurisprudence that approaches the legal status of animals critically, rejecting absolutist constructs that insist animals must either be situated analogous to any other property or analogous to humans.”²⁰⁸ This should operate to remove, for both advocates and courts, the constraints imposed by traditional binary categorizations of animals as being either property or persons.²⁰⁹

¹⁹⁹ Dunn & Rosengard, *supra* note 122, at 460–61.

²⁰⁰ *Id.* at 462.

²⁰¹ State v. *Newcomb*, 375 P.3d at 437.

²⁰² *Id.*

²⁰³ *Id.* at 437–38.

²⁰⁴ See *id.* at 441; Dunn & Rosengard, *supra* note 122, at 476.

²⁰⁵ *Newcomb*, 375 P.3d at 441.

²⁰⁶ *Id.* at 442.

²⁰⁷ Dunn & Rosengard, *supra* note 122, at 476.

²⁰⁸ *Id.* at 451.

²⁰⁹ *Id.* at 474.

b. Vermont

Legislation in Vermont is not as explicit as that in Oregon in terms of recognizing animal sentience. Nevertheless, Vermont legislation that prohibits cruelty to animals defines animals as “all living sentient creatures, not human beings.”²¹⁰ Thus, the legislation recognizes animals as sentient and prohibits many human acts that would cause animals to suffer.

Courts in Vermont have taken a similar approach to animal related cases as the OSC. In the case of *State v. Sheperd*,²¹¹ an animal control officer had attended the defendant’s home after receiving a complaint concerning his dogs. Based on her observations at the defendant’s home, she obtained a search warrant to search for and seize any animals inside or outside the home.²¹² Because of the evidence seized, prosecutors brought multiple counts of cruelty to animals against the defendant in relation to the treatment of his dogs.²¹³ On appeal to the Vermont Supreme Court (VSC) from convictions recorded in the Superior Court, the defendant challenged the Superior Court’s denial of his motion to suppress evidence obtained during the search.²¹⁴ In this respect, the defendant argued that the warrant was not supported by probable cause, was overly broad, and that the execution of the warrant was improper because no veterinarian had attended.²¹⁵

The VSC rejected the defendant’s arguments. In discussing the issue of whether the warrant was unconstitutionally broad, the VSC drew a distinction between the search and seizure of insentient property and animals.²¹⁶ The VSC stated that, “[a]dditional considerations come into play when a warrant calls for the search for and seizure of animals” as “animals occupy a unique legal status in that they have traditionally been regarded as property but are nonetheless ‘different from other property.’”²¹⁷ According to the VSC, this differential treatment constitutes “a recognition that animals are living, *sentient* beings to which the law may provide protections in their own right.”²¹⁸ The VSC stated that cases decided in other states established that “a defendant’s property rights over animals are limited when animal welfare is at risk, and we must take the animals’ welfare into consideration when determining the legality of a

²¹⁰ 13 V.S.A. § 351 (2020). This section was added in 1989, No. 270 (Adj. Sess.), § 2.

²¹¹ 170 A.3d 616, 619 (Vt. 2017).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 622.

²¹⁵ *Id.*

²¹⁶ *Id.* at 623.

²¹⁷ *Id.*

²¹⁸ *Id.* (emphasis added).

search or seizure.”²¹⁹ Accordingly, the VSC determined that “the warrant’s language was sufficiently particular”²²⁰ and, after disposing of the defendant’s alternative arguments, affirmed the trial court’s order as to his motion to suppress.²²¹

The VSC took the same approach in *State v. Ferguson*,²²² which concerned an appeal from convictions for animal cruelty and a judgment for animal forfeiture.²²³ The VSC stated that in determining whether probable cause to search existed, authorities must consider animal welfare.²²⁴ Further, in relation to searches and seizures more generally, the VSC quoted its judgment in *Sheperd* with approval: “‘the treatment of animals is different from that of other types of property,’ because ‘animals are living, *sentient* beings to which the law may provide protections in their own right.’”²²⁵

Nevertheless, courts in Vermont have indicated that noneconomic damages are not available in relation to the death of an animal. In *Scheele v. Dustin*,²²⁶ the defendant intentionally killed the plaintiffs’ pet dog. The plaintiffs recovered economic damages for destruction of their property, but failed in their claim for noneconomic damages.²²⁷ The court stated that “Vermont law has traditionally viewed animals, including pets, as a form of personal property.”²²⁸ Noneconomic damages are not available in property actions, even when the property is a pet.²²⁹ The court also declined to extend the common law to recognize a new cause of action for the wrongful killing of a pet dog, indicating that the issue is more suitable for resolution by the legislature.²³⁰

c. Other Jurisdictions

A number of other states and districts in the US have expressly recognized animal sentience in their legislation or in case law. For example, like Vermont, the District of Columbia and Maine both define animals in law by reference to sentience. The Code of the District of Columbia states that “[i]n §§ 22-1001 to 22-1009, inclusive, and § 22-1011, the word ‘animals’ or ‘animal’ shall be held to include all living and sentient

²¹⁹ *Id.* at 624. Note that the cases referenced included both *State v. Newcomb*, 375 P.3d 434, 444-45 (Or. 2016) and *State v. Fessenden* 310 P.3d 1163, 1169 (Or. 2013). *Id.* at 623-624.

²²⁰ *Sheperd*, 170 A.3d at 622.

²²¹ *Id.* at 628.

²²² *State v. Ferguson*, 2020 WL 2791855, at *3 (Vt. May 29, 2020).

²²³ *Id.* at *1.

²²⁴ *Id.* at *3.

²²⁵ *Id.* (emphasis added).

²²⁶ 998 A.2d 697, 699 (Vt. 2010).

²²⁷ *Id.* at 698.

²²⁸ *Id.* at 700.

²²⁹ *Id.*

²³⁰ *Id.* at 704; *see also* *Goodby v. Vetpharm, Inc.* 974 A.2d 1269, 1273 (Vt. 2009).

creatures (human beings excepted).”²³¹ The Maine Revised Statutes states that, “in every law relating to or affecting animals, unless the context indicates otherwise” the term animal “means every living, sentient creature not a human being.”²³²

While Illinois does not recognize animal sentience in legislation, the Appellate Court of Illinois has used the term “sentient creature” in relation to animals. In *People v. Robards*,²³³ prosecutors charged the defendant with four counts of aggravated cruelty to a companion animal. The charges related to the defendant’s acts in depriving her two dogs of adequate water, which resulted in their deaths.²³⁴ At first instance, the court convicted the defendant.²³⁵ The Appellate Court affirmed the conviction.²³⁶ In their reasons, the Appellate Court took issue with the circuit court finding “as a factor in mitigation that the ‘defendant’s conduct did not cause or threaten serious physical harm to another *person*.’”²³⁷ The Appellate Court pointed out that whether the relevant conduct harmed a human being was irrelevant to the offense and it made no sense to consider the absence of harm to a human being as a mitigating factor.²³⁸ The Appellate Court stated, “[t]here can be no doubt that the defendant’s acts caused serious physical harm and death to two *sentient creatures* that suffered greatly from terminal starvation and dehydration, which the defendant callously inflicted on them.”²³⁹ The Appellate Court’s recognition that the animals in question were sentient appeared to influence their view that the initial sentence was “unjustly and inexplicably lenient.”²⁴⁰ As Kasten notes, the Appellate Court’s use of the term “‘sentient creature’ could open the door for a recognition that creatures, beyond human beings, are entitled to more protections under the law.”²⁴¹

As has been the case in Oregon, animal sentience has led to courts in other US states recognizing animal victim status. In the case of *People v. Harris*,²⁴² the Colorado Court of Appeals articulated the consequences of this recognition:

If we view animal cruelty as primarily an offense against property, then Harris committed a single offense by in-

²³¹ D.C. Code § 22-1013 (2020).

²³² 17 M. R. S. A. § 1011 (2020).

²³³ 2018 IL 150832, ¶ 3 (Ill. App. Ct. 2018).

²³⁴ *Id.*

²³⁵ *Id.* ¶ 10.

²³⁶ *Id.* ¶¶ 21, 22.

²³⁷ *Id.* ¶ 19 (emphasis added).

²³⁸ *Id.*

²³⁹ *Id.* (emphasis added).

²⁴⁰ *Id.*

²⁴¹ Chelsea E. Kasten, *Survey of Illinois Law: Animal Law*, 43 S. ILL. U. L. J. 827, 832 (2019).

²⁴² 405 P.3d 361 (Colo. App. 2016).

juring or destroying the animals, much like the defendant who commits a single offense by destroying various items of personal property of another. But, if we view animal cruelty as an offense against a sentient being that the legislature is trying to protect from needless pain and suffering, Harris committed twenty-two separate offenses.²⁴³

In the circumstances of the case, the discovery of dozens of malnourished animals on the defendant's property led to convictions for fifteen counts of animal cruelty and two counts of aggravated animal cruelty, which were affirmed by the Court of Appeals.²⁴⁴ The Court of Appeals determined that the relevant unit of prosecution in animal cruelty cases is each abused or killed animal.²⁴⁵ This was based on the language and purpose of the relevant legislation and the evolution of animal cruelty laws in the United States to reflect, "society's acceptance of the idea that animals had an inherent right to be free from unnecessary pain and suffering and that the legal system should recognize that right."²⁴⁶ Thus, recognition of animal sentience had some influence on this statutory interpretation.

Courts have taken a similar approach to categorizing animals as potential victims in Connecticut. *State v. Hearl*²⁴⁷ concerned an appeal from conviction on nineteen counts of animal cruelty. The defendant argued that conviction and sentencing on nineteen counts of animal cruelty violated the constitutional prohibitions against double jeopardy,²⁴⁸ because the term "any animal" in the relevant legislation referred to a species of animal rather than an individual animal.²⁴⁹ The defendant's convictions related to nineteen goats. The Appellate Court of Connecticut disagreed, however, stating that "[t]he trend associated with animal cruelty statutes—from no liability at common law to criminalizing animal cruelty to protect *sentient* animals in the interests of morality" supported a statutory interpretation of the phrase "any animal" as referring to an individual animal.²⁵⁰

As has been the case in Oregon, US courts in other states have also drawn on animal sentience to justify the application of the exigent circumstances exception to the warrantless search and seizure of animals. In

²⁴³ *Id.* at 370.

²⁴⁴ *Id.* at 366, 378.

²⁴⁵ *Id.* at 372.

²⁴⁶ *Id.* at 370–71.

²⁴⁷ 190 A.3d 42, 48 (Conn. App. Ct. 2018).

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 64.

²⁵⁰ *Id.* at 68 (emphasis added).

the case of *State v. Stone*,²⁵¹ the Supreme Court of Montana decided that the public interest in preventing unnecessary animal suffering created exigent circumstances that justified a warrantless search for and rescue of dying rabbits on the defendant's property.²⁵² Similarly, in *Commonwealth v. Duncan*²⁵³ the Supreme Judicial Court of Massachusetts determined that the exigent circumstances exception extended to police action to render emergency assistance to animals.²⁵⁴ This was because public policy sought to minimize animal suffering and the ability to provide assistance without a warrant supported the existing legislative framework for preventing cruelty to animals.²⁵⁵

Moreover, some US state courts have expressly spoken in favor of the law recognizing animal sentience. In *Bueckner v. Hamel*,²⁵⁶ the Court of Appeals of Texas stated that “[t]he law should reflect society’s recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live.”²⁵⁷ In a similar vein, the Court of Appeal of California stated that the Californian legislature “has recognized since 1872 that animals are special, sentient beings, because unlike other forms of property, animals feel pain, suffer and die.”²⁵⁸

III. PURPOSES AND CONSEQUENCES OF RECOGNIZING SENTIENCE

A. *Impact on Statutory Interpretation*

In legal terms, the most significant impact of recognizing animal sentience is that it will likely influence the statutory interpretation of other provisions. Courts are required to interpret legislation in order to ascertain its meaning. When courts come across provisions for which there is more than one possible interpretation, they are required to interpret the provision in light of its purpose. This process is well expressed by Kim, who writes:

In analyzing a statute’s text, the Court is guided by the basic principle that a statute should be read as a harmonious whole, with its separate parts being interpreted within their broader statutory context in a manner that furthers statutory purpose. The various canons of inter-

²⁵¹ 92 P.3d 1178 (Mont. 2004).

²⁵² *Id.* at 1183–84.

²⁵³ 7 N.E.3d 469 (Mass. 2014).

²⁵⁴ *Id.* at 474–75.

²⁵⁵ *Id.* at 474.

²⁵⁶ 886 S.W.2d 368 (Tex. App. 1994).

²⁵⁷ *Id.* at 378.

²⁵⁸ *Martinez v. Robledo*, 147 Cal.Rptr.3d 921, 926 (Cal. Ct. App. 2012). Note that while legislation in California protects animals, its recognition of animal sentience is implicit rather than express.

pretation and presumptions as to substantive results are usually subordinated to interpretations that further a clearly expressed congressional purpose.²⁵⁹

Waiting for courts to interpret statutes in a way that produces better outcomes for animals, however, is likely to result in very slow change. This is because courts cannot commence cases or decide on their own initiative to determine legal issues.²⁶⁰ It is only once a plaintiff or prosecutor has brought a case to the court and the parties have asked the court to consider issues of interpretation that the court is able to engage in statutory interpretation. In this respect, prosecutors are limited in their ability to prosecute animal cruelty offences because of issues including limited funds and public perception regarding the importance of prosecuting animal related offences.²⁶¹ The costs of litigation and the lengthy and time-consuming processes involved in court proceedings also restrain plaintiffs in their ability to bring legal action.²⁶²

Nevertheless, it is evident that the legal recognition of animal sentience has had an impact on statutory interpretation in a number of US jurisdictions. In particular, it is clear that some US courts are recognizing animals as victims of crimes for sentencing purposes, which entails including each animal subjected to cruel treatment as a separate crime “victim.”²⁶³ As discussed above, in *Nix*, the OSC’s decision to record twenty separate criminal counts rather than merge the guilty verdicts into a single conviction depended on the interpretation of the word “victim” in ORS 161.067(2).²⁶⁴ Even in the absence—at that time—of legislative amendments expressly recognizing animal sentience, the OSC determined that the overarching objective of the legislation was the prevention of individual animal suffering. That purpose informed their interpretation

²⁵⁹ YULE KIM, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS vii (2009).

²⁶⁰ See, e.g., U.S. CONST. art. III, § 2, cl. 1.

²⁶¹ See e.g., Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1339 (2000).

²⁶² Jane Kotzmann & Gisela Nip, *Bringing Animal Protection Legislation into Line with Its Purported Purposes: A Proposal for Equality Amongst Non-Human Animals*, 37 PACE ENVTL. L. REV. 247, 315 (2020); Nicole Pallotta, *New Animal Cruelty Prosecution Unit Created in Florida*, ANIMAL LEGAL DEF. FUND (July 30, 2016) <https://aldf.org/article/new-animal-cruelty-prosecution-unit-created-in-florida/>.

²⁶³ *People v. Harris*, 405 P.3d 361, 371–72 (Colo. App. 2016); *State v. Hearl*, 190 A.3d 42, 66 (Conn. App. Ct. 2018).

²⁶⁴ *State v. Nix*, 334 P.3d 437, 443 (Or. 2014).

of “victim” as including individual animals.²⁶⁵ In *State v. Crow*,²⁶⁶ in which the Oregon 2013 amendments were relevant, the Court of Appeals of Oregon took a similar approach. The Court interpreted a provision preventing people with “convictions for crimes against animals from possessing animals” as being directed towards the prevention of individual animal suffering.²⁶⁷ Accordingly, the Court determined that each unlawfully possessed animal was a separate victim.²⁶⁸ In coming to this conclusion, the Court observed that in 2013 the legislature had explicitly found and declared, “[a]nimals are sentient beings capable of experiencing pain, stress and fear.”²⁶⁹ This recognition influenced the Court’s interpretation of the relevant legal provision.

As discussed above, courts in Colorado and Connecticut have also drawn on the implicit recognition of animal sentience in legislation to define animals as crime victims. In *People v. Harris*,²⁷⁰ the Court identified the evolution of animal cruelty laws—from a focus on the protection of property to focusing instead on the prevention of animal suffering—as a factor in determining the relevant unit of prosecution.²⁷¹ Similarly, in *State v. Hearl*,²⁷² the Appellate Court of Connecticut pointed to the development of animal cruelty laws, such that their aim is to protect sentient animals from suffering, as supporting their interpretation of the phrase “any animal” as denoting any individual animal.²⁷³ Of these cases, courts decided *Nix*, *Harris*, and *Hearl* in a context in which the legislative recognition of animal suffering was only implicit. Expressly recognizing animal sentience in legislation is likely to result in more state jurisdictions recognizing animals as potential victims of crime.

The above discussion also demonstrates that the legal recognition of animal sentience has influenced the interpretation of statutory provisions

²⁶⁵ Note that the Court included the following footnote in their judgment:

ORS 167.325 was amended in 2013. Or. Laws 2013, ch 719. The new law includes findings that “[a]nimals are sentient beings capable of experiencing pain, stress and fear” and that “[a]nimals should be cared for in ways that minimize pain, stress, fear and suffering.” *Id.* § 1. It also increases the penalty for second-degree animal neglect if, among other things, “the offense was part of a criminal episode involving 11 or more animals.” *Id.* § 4(3)(b). The amendments do not apply to this case, and we refer to the 2009 version of the law—the law that applied when defendant committed the offenses—throughout this opinion. We also express no opinion about the effect of the 2013 amendments on the issue presented in this case.

See id. at 438 n.1.

²⁶⁶ 429 P.3d 1053 (Or. Ct. App. 2018).

²⁶⁷ *Id.* at 1054.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 1055.

²⁷⁰ 405 P.3d 361 (Colo. App. 2016).

²⁷¹ *Id.* at 371–72.

²⁷² 190 A.3d 42 (Conn. App. Ct. 2018).

²⁷³ *Id.* at 68.

relating to search and seizure.²⁷⁴ While a warrant is generally required in order to search and seize property, some exceptions apply.²⁷⁵ In this respect, courts have interpreted the exigent circumstances exception as applying to animals. This is most evident from the VSC judgment in *Sheperd*: “[in relation to search and seizure] the treatment of animals is different from that of other types of property,’ because ‘animals are living, sentient beings to which the law may provide protections in their own right.’”²⁷⁶ Similarly, in *State v. Fessenden* the warrant exception applied to seize an emaciated horse,²⁷⁷ in *State v. Stone* the warrant exception applied to search for and rescue dying rabbits,²⁷⁸ and in *Commonwealth v. Duncan* it applied to the provision of emergency assistance to animals.²⁷⁹ Moreover, in *State v. Ferguson* the VSC indicated that in ascertaining whether probable cause to search existed, authorities must consider animal welfare.²⁸⁰ Further, in terms of determining whether a warrant is unconstitutionally broad, *State v. Sheperd* indicates that it makes a difference that the property in question is a sentient animal.²⁸¹ Finally, *Newcomb* suggests that where an animal is lawfully seized and in need of medical assistance, the animal’s owner will hold no private property interest in the animal.²⁸²

Legal recognition of animal sentience is likely to affect the legislative interpretation of other provisions in the future. Where the legal recognition of sentience is express and the relevant legislation states that recognition of animal sentience is one of its objects, it is more likely to have influence, as judges seek evidence of the legislature’s intention when undertaking statutory interpretation. That this is so can be seen in cases decided in New Zealand and Quebec. In 2015, the New Zealand legislature amended the long title of the Animal Welfare Act 1999 to affirm that the legislation is intended “to recognise that animals are sentient.”²⁸³ Cases including *Erickson v. Minister for Property Industries*,²⁸⁴ *Police v. Witehira*,²⁸⁵ *McCartney v. Canterbury Society for the Preven-*

²⁷⁴ See *State v. Sheperd*, 170 A.3d 616, 623 (Vt. 2017).

²⁷⁵ See, e.g., U.S. CONST. amend. IV.

²⁷⁶ *State v. Ferguson*, 2020 VT 39, ¶ 12 (Vt. 2020) (citing *State v. Sheperd*, 170 A.3d at 623).

²⁷⁷ *State v. Fessenden*, 333 P.3d 278, 279 (Or. 2014).

²⁷⁸ *State v. Stone*, 92 P.3d 1178, 1183 (Mont. 2004).

²⁷⁹ *Commonwealth v. Duncan*, 7 N.E.3d 469, 470 (Mass. 2014).

²⁸⁰ *Ferguson*, 2020 VT 39, ¶ 12 (Vt. 2020).

²⁸¹ *State v. Sheperd*, 170 A.3d 616, 623 (Vt. 2017).

²⁸² *State v. Newcomb*, 375 P.3d 434, 442 (Or. 2016).

²⁸³ Animal Welfare Act 1999, sch 7, cl(a)(i) (N.Z.), long title (emphasis added); Marcelo B. Rodriguez Ferrere, *Codes vs Regulations: How Best to Enforce Animal Welfare in New Zealand?*, 43 ALTERNATIVE L. J. 250, 252 (2018).

²⁸⁴ *Erickson v. Ministry for Property Industries* [2017] NZCA 271 at [32] (N.Z.).

²⁸⁵ *N. Z. Police v. Hanuere Paul Witehira* [2017] NZDC 16476 at [7] (N.Z.).

tion of Cruelty to Animals,²⁸⁶ and *Wallace v. The Royal Society for the Prevention of Cruelty to Animals Auckland*²⁸⁷ demonstrate that the expressed legislative purpose is relevant when interpreting the legislation. Similarly, in 2015, Quebec passed legislation to amend its Civil Code and to enact the Animal Welfare and Safety Act (AWSA) in 2015.²⁸⁸ That “animals are sentient beings and have biological needs” is expressly stated in the AWSA as a reason for the enactment of the legislation.²⁸⁹ The cases of *Trahan v. City of Montreal*²⁹⁰ and *Road to Home Rescue Support v. Ville de Montréal*²⁹¹ indicate that this recognition will influence statutory interpretation. In particular, the Quebec Court of Appeal in *Road to Home Rescue Support v. Ville de Montréal* suggested that the legal recognition of animal sentience operates as a behavioral standard that regulates the manner in which humans interact with animals and may have a direct impact on the content of legal provisions.²⁹²

1. Circumventing the Property vs. Person Debate

Recognition of animal sentience carries a key benefit in that it should result in improvements to animal welfare without legislators taking the contentious, and in political terms unlikely, step of recognizing animals as legal persons. Recognition of animal sentience does not involve recognizing animals as legal persons, which means that in legal terms, human society would continue to treat animals as personal property. At the same time, recognizing animal sentience does carry symbolic meaning—it suggests that animals are distinct from other forms of insentient property.²⁹³ Moreover, recognition of animal sentience may, over time, result in the development of a third legal category, distinct from persons and property,²⁹⁴ or pave a pathway towards recognition of animals as legal persons.

In a manner somewhat aligned with the animal rights versus animal welfare debate,²⁹⁵ there has been an ongoing discussion amongst animal

²⁸⁶ *McCartney v. Canterbury Society for the Prevention of Cruelty to Animals* [2018] NZHC 2624 at [50], [108] (N.Z.).

²⁸⁷ *Wallace v. Royal Society for the Prevention of Cruelty to Animals Auckland* [2019] NZHC 1599 at [23]–[24] (N.Z.).

²⁸⁸ An Act to Improve the Legal Situation of Animals, S.Q. 2015, c B-3.1 (Can. Que. 2015).

²⁸⁹ *Id.* at Part I, § 898.1.

²⁹⁰ Q.C.C.S. 4607 para 29 (Can. Que. 2019) (recognizing the importance of the recent passage of the AWSA which emphasizes sentience in animals).

²⁹¹ [2019] Q.C.C.A. 2187 (Can. Que.).

²⁹² *Id.* at para 57.

²⁹³ Jean-Marc Neumann, *The Legal Status of Animals in the French Civil Code*, 1 GLOBAL J. ANIMAL L. 1, 3, 12-13 (2015); Dunn & Rosengard, *supra* note 122, at 476.

²⁹⁴ For an example of a sentient-property category, see Kayla A. Bernays, *We’ve Still Got Feelings: Re-Presenting Pets as Sentient Property*, 60 ARIZ. L. R. 485 (2018).

²⁹⁵ See Kotzmann & Pendergrast, *supra* note 22, at 159.

advocates as to whether animals should continue to be classified as property or whether they should be recognized as legal persons.²⁹⁶ Property is distinct from persons in that property owners can buy and sell property as they wish and can generally deal with property as they see fit (subject only to legal restrictions). Moreover, property is not able to bring or be party to legal actions.²⁹⁷ Accordingly, if someone beats a dog to death and the prosecutor decides not to bring charges, neither the dog nor anyone else is able to pursue justice in this respect.²⁹⁸ While there have been attempts in recent times to obtain legal standing— or the ability to initiate a legal claim—and recognition for animals, these attempts have to date been unsuccessful.²⁹⁹ These reasons help to explain why many animal advocates argue that the current legal property status of animals is the key obstacle to obtaining greater legal protections for animals.³⁰⁰

Law in the US currently classifies animals as property.³⁰¹ One of the ways in which animal property status has manifested—perhaps unsatisfactorily—in the US is through the damages available where the intentional or reckless actions of another cause the death of a companion animal. For example, in *Petco Animal Supplies, Inc. v. Schuster*,³⁰² the Texas Court of Appeals held that, when estimating damages, animals are considered property. In the circumstances of the case, this meant that the dog owner was not able to recover “mental anguish damages, counselling costs, “intrinsic value” loss of companionship,’ lost wages and exemplary damages.”³⁰³ The Texas Court of Appeals took a similar approach in *Medlen v. Strickland*,³⁰⁴ and stated that the sentimental value of a dog should be recoverable within the context of their status as personal property—however, only in the manner that the sentimental value of other personal property is able to be recovered.³⁰⁵ Similarly, in the case of *Shera v. N.C. State University Veterinary Teaching Hospital*,³⁰⁶ the

²⁹⁶ See *id.* at 167–72.

²⁹⁷ Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 535 (1998).

²⁹⁸ *How Animals Differ from Other Types of “Property” Under the Law*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/article/how-animals-are-treated-differently-from-other-types-of-property-under-the-law/> (last visited Aug. 1, 2020).

²⁹⁹ *Confronting the Core Issue of Nonhuman Animals’ Legal Thinghood*, NONHUMAN RTS. PROJECT (2020), <https://www.nonhumanrights.org/litigation>.

³⁰⁰ See GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 5, 14 (1995); Meg Good, *Animals: Things or Persons? Voiceless in Conversation with Professor Steven Wise*, VOICELESS: THE ANIMAL PROTECTION INST. (Oct. 11, 2018), <https://voiceless.org.au/animals-things-or-persons-voiceless-in-conversation-with-professor-steven-wise/>.

³⁰¹ *Animals’ Legal Status*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/issue/animals-legal-status/>.

³⁰² 144 S.W.3d 554, 561 (Tex. App. 2004).

³⁰³ *Id.* at 568.

³⁰⁴ *Medlen v. Strickland*, 353 S.W.3d 576, 579 (Tex. App. 2011).

³⁰⁵ *Id.* at 580.

³⁰⁶ 723 S.E.2d 352 (N.C. Ct. App. 2012).

North Carolina Court of Appeals held that an Industrial Commission decision awarding damages for the death of a companion animal based on replacement value, rather than the intrinsic value, was correct.³⁰⁷ In such examples, the intrinsic value of a companion animal does not count. Instead, it is only the market or replacement value of an animal that is considered by courts. This approach may seem unsatisfactory to many people that live with companion animals, who may feel that their animal cannot simply be replaced by another animal.

Nevertheless, while many people do support legal personhood status for animals, such a development appears unlikely to occur any time soon. Opponents argue that attributing legal person status to animals would result in an opening of the floodgates to legal claims.³⁰⁸ Cases initiated by the Nonhuman Rights Project have been met with statements from courts including that,

[U]nlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights—such as the fundamental right to liberty protected by the writ of habeas corpus—that have been afforded to human beings.³⁰⁹

While some scholars have advocated for the creation of a third legal category in order to recognize the distinctions between animals and non-sentient property,³¹⁰ it would take time for policymakers and legislatures to develop the law in this way.

In contrast, the legal recognition of animal sentience has international precedent and there is clarity around how to effect the change. Recognizing the sentience of animals in law goes some way towards recognizing that animals have intrinsic value beyond their usefulness to humans and is able to achieve improved conditions for animals.³¹¹ As Pallotta states, “[b]arring the creation of a comprehensive new status for animals, at the very least their classification as property should be modi-

³⁰⁷ *Id.* at 358; see also *Repin v. State*, 392 P.3d 1174, 1185 (Wash. App. 2017).

³⁰⁸ See e.g., Richard L. Cupp, Jr., *Focusing on Human Responsibility Rather than Legal Personhood for Nonhuman Animals*, 33 PACE ENVTL. L. REV. 517, 537 (2016).

³⁰⁹ *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 152 (N.Y. App. Div. 2014).

³¹⁰ See e.g., Bernays, *supra* note 294, at 485.

³¹¹ Jane Kotzmann & Cassandra Seery, *Dignity in international Human Rights Law: Potential Applicability in Relation to International Recognition of Animal Rights*, 26 MICH. STATE INT’L L. REV. 2, 28–30 (2017).

fied to acknowledge their sentience, and that their interests deserve recognition and respect based on this fact.”³¹²

2. Providing a Scientific Foundation to Animal Welfare Laws

The movement for animal protection is often accused of being emotionally charged and anti-intellectual.³¹³ Animal welfare laws themselves are subject to biases which favor human interests and emotional connections, which is evident in the disconnect between the sentience of farmed animals and their level of protection under the law.³¹⁴ Yet, as Proctor, Cardner, and Cornish state, “[a]nimal sentience forms the foundation of animal welfare science and it is why animals need protection.”³¹⁵ Animal sentience is important because it presents a science-based standard of animal protection. Placing the focus on an objective and scientific foundation for animal welfare law may, over time, serve to detach our emotional and cultural feelings about animals from their treatment, and instead align animal protection to a scientific standard.

While the social conscience regarding animal welfare will inform the development of animal protection laws, enshrining a scientific standard in the law may also serve to influence societal attitudes towards animals.³¹⁶ This may gradually make animal welfare resistant to biases that favor animals that are similar or appealing to humans. Currently, human cognitive biases affect the value of certain species “even when beliefs about intelligence and sentience are accounted for.”³¹⁷ In contrast, laws founded on sentience base inclusion on scientific findings,³¹⁸ breaking animal protection into objective categories of sentient and non-sentient. Animal sentience as a standard of protection therefore removes human emotion and avoids a system of protection that is based on appeal and similarity to humans.³¹⁹ For example, there is a scientific consensus surrounding the sentience of birds.³²⁰ However, their lack of relatable stimuli and vast difference to human beings in looks, behaviors and loco-

³¹² Nicole R. Pallotta, *Chattel or Child: The Liminal Status of Companion Animals in Society and Law*, 8 SOC. SCI. 1, 24 (2019).

³¹³ Harold A. Herzog, Jr., “*The Movement Is My Life*”: *The Psychology of Animal Rights Activism*, 49 J. SOC. ISSUES 103, 107 (1993).

³¹⁴ See, e.g., 7 U.S.C. § 2132(g) (2018) (“The term ‘animal’ . . . excludes . . . (3) other farm animals, such as, but limited to livestock or poultry. . .”).

³¹⁵ Proctor, Carder, & Cornish, *supra* note 42, at 897.

³¹⁶ Blattner, *supra* note 167, at 126; See Virginia C. Armstrong, *Law, Politics, and the Social Sciences – A Troubled Trinity*, 4 SIMON GREENLEAF L. REV. 121, 175–76 (1984–1985).

³¹⁷ Lucius Caviola, Jim A. C. Everett, & Nadira S. Faber, *The Moral Standing of Animals: Towards a Psychology of Speciesism*, 116 J. PERS. SOC. PSYCHOL. 1011, 1011 (2019).

³¹⁸ Blattner, *supra* note 167 at 121–22.

³¹⁹ *Id.* at 125.

³²⁰ See *The Cambridge Declaration on Consciousness*, FCM CONFERENCE (July 7, 2012), <http://fcmconference.org/img/CambridgeDeclarationOnConsciousness.pdf>; Orleans, *supra* note 167, at 231 (“Perception of pain in birds is well-recognized.”).

motion fails to garner societal compassion.³²¹ They are therefore denied the legal protections awarded to other animals which evoke greater levels of empathy, such as companion animals.³²² Implementing sentience as a legal standard for assessing protection will help to prevent human biases from shaping animal protection, and the law.

Creating a scientific standard of inclusion that is adhered to as a principle in animal welfare law will serve to bring animals that are often neglected inside the circle of protection. Anthropocentric bias,³²³ in favoring things that serve human interests, has left farmed animals on the outskirts of protection despite their level of sentience. Robert Garner argues that “the level of protection afforded to an individual animal depends, not just—if at all—upon its needs and interests, but upon the institutional and legislative structure governing the particular use to which it is being put.”³²⁴ This is evident in the “internal inconsistency”³²⁵ of current animal welfare law, which allows exclusion where animals are involved in certain activities that benefit human interests.³²⁶ This inconsistency remains, despite the fact that sentience forms, implicitly or explicitly, the basis of most animal welfare legislation. Recognizing animal sentience in law is not a guarantee that legislatures will not disregard sentience in favor of human interests. However, it may gradually link animal protection legislation to a scientific understanding of animal interests. A scientific foundation to animal welfare law may gradually remove human biases, which favor animals based on emotional connection and disfavor animals where it serves human interests.

3. Public Awareness and Further Change

Legal recognition of animal sentience could further serve to improve the situation of animals through increased public awareness and by instigating further legal change. The explicit recognition of animal sentience in Oregon and the consideration of animal sentience by the OSC represent an incremental shift in the perception of animals under the law, which is representative of changing community values.³²⁷ Scientific and corresponding ethical advances regarding animal sentience are stimulat-

³²¹ See Blattner, *supra* note 167, at 122; See also Marissa Harrison & A.E. Hall, *Anthropomorphism, Empathy, and Perceived Communicative Ability vary with Phylogenetic Relatedness to Humans*, 4 J. SOC., EVOLUTIONARY, & CULTURAL PSYCHOL. 34 (2010).

³²² See, e.g., 7 U.S.C. § 2132(g) (2018) (including dogs, excluding birds); Orlans, *supra* note 167, at 229 (The Animal Welfare Act includes dogs but excludes birds.).

³²³ Blattner, *supra* note 167, at 128.

³²⁴ ROBERT GARNER, *POLITICAL ANIMALS: ANIMAL PROTECTION POLITICS IN BRITAIN AND THE UNITED STATES* 21 (1998).

³²⁵ SIOBHAN O’SULLIVAN, *ANIMALS, EQUALITY AND DEMOCRACY* 9–24 (2011).

³²⁶ *Id.* at 9–10.

³²⁷ See Dunn & Rosengard, *supra* note 122, at 470–71.

ing a significant growth in public concern for animal welfare.³²⁸ However, despite this increase in public interest, the legal reality of human-animal relations remains a knowledge gap for the public,³²⁹ which could be the cause of inconsistencies evident between attitudes and practices.³³⁰ Education is vital to ensure that the legal position of animals accurately reflects community values.³³¹ The slight shift in the legal position of animals has generated an increase in academic commentary and media attention,³³² with the potential to increase public awareness, elevate respect for animal sentience, and inform social outcomes.³³³

Recognizing the value of animal sentience has also provided an increased discourse surrounding the legal position of animals while still keeping within the perimeters of the status quo.³³⁴ As most people within the community are tied to animal industries either directly or indirectly as consumers, such changes have the potential to involve a wider cross-section of the community in the broader movement for greater animal protection. This may increase public awareness of the scientific foundation for animal welfare and the way in which some laws are developing in response to that science, which in turn may change the way people treat animals.

The recognition of animal sentience in Oregon makes the state one of the most progressive jurisdictions in the US in terms of animal protection. This recognition is likely to generate further legal changes in other US jurisdictions, especially considering the changes in other states influenced previously by progressive Oregon laws.³³⁵ The result may be in-

³²⁸ Amelia Cornish, David Raubenheimer & Paul McGreevy, *What We Know about the Public's Level of Concern for Farm Animal Welfare in Food Production in Developed Countries*, 6 ANIMALS 1, 3 (2016); Geeta Shyam, *Is the Classification of Animals as Property Consistent with Modern Community Attitudes?*, 41 UNSW L. J. 1418, 1443 (2018).

³²⁹ Shyam, *supra* note 328, at 1443.

³³⁰ Chris Degeling & Jane Johnson, *Citizens, Consumers and Animals: What Role do Experts Assign to Public Values in Establishing Animal Welfare Standards?*, 28 J. AGRIC. ENVT'L ETHICS 961, 972 (2015); David Harvey & Carmen Hubbard, *Reconsidering the Political Economy of Farm Animal Welfare: An Anatomy of Market Failure*, 38 FOOD POLICY 105, 112 (2013).

³³¹ Shyam, *supra* note 328, at 1420.

³³² See Aimee Green, *Pets not 'mere' Property: Oregon Supreme Court Upholds Dog-starvation Conviction*, THE OREGONIAN (June 16, 2016), https://www.oregonlive.com/portland/2016/06/pets_arent_just_property_orego.html.

³³³ James Gacek & Richard Jochelson, *'Animal Justice' and Sexual (Ab)use: Consideration of Legal Recognition of Sentience for Animals in Canada*, 40 MANITOBA L. J. 337, 343 (2017).

³³⁴ See e.g., Peter Sankoff, *The Animal Rights Debate and the Expansion of Public Discourse: Is it Possible for the Law Protecting Animals to Simultaneously Fail and Succeed?*, 18 ANIMAL L. 281, 286 (2012).

³³⁵ See Bernays, *supra* note 294, at 499 n.151. (providing that Oregon has led other states in passing progressive laws before, such as the legislative legalization of physician-assisted suicide).

creased recognition of the intrinsic worth of animals within legislation, even in states without explicit recognition of animal sentience. For instance, while not having explicitly recognized animal sentience through legislation, Connecticut enacted a Courtroom Animal Advocate Program (CAAP) in 2016.³³⁶ This legislation allows court appointed volunteer lawyers or supervised law students to advocate for the interest of animal victims in criminal cruelty cases.³³⁷ The implementation of CAAP Laws is a form of implicit recognition of animal sentience and a step in the right direction, appearing to elevate the importance of animal interests and representing further legal change.

B. Limitations

While legal recognition of animal sentience would constitute a positive step forward for the protection of animal interests, the concept is not without limitations. The key drawbacks include the potential for legislative recognition of animal sentience to exclude some animals from protection, either inadvertently or intentionally for human benefit, and scientific biases that may affect the attribution of mental states to animals. This section outlines these limitations and discusses how these shortcomings may be overcome in order to progress animal protection law.

1. Scientific Bias

While utilizing sentience as a yardstick for animal protection may reduce emotional and cultural biases, sentience itself may remain subject to scientific biases. Sentience in animals that do not possess human-like traits, such as fish and insects, has been the cause of much debate.³³⁸ Beings with stimuli similar to our own can trigger an anthropomorphic reaction in animal research.³³⁹ Anthropomorphism presents as a source of bias, as animals that display feelings in a manner similar to humans may be more likely to be recognized as sentient.³⁴⁰ Animals are thus at risk of “anthropomorphism by omission,”³⁴¹ where it is assumed that the capacities of nonhuman animals are a subset of our own³⁴² and animal

³³⁶ CONN. GEN. STAT. § 54-86n (2017).

³³⁷ Nicole Pallotta, *Unique Connecticut Law Allows Court-Appointed Advocates to Represent Animals*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/article/unique-connecticut-law-allows-court-appointed-advocates-to-represent-animals/> (last visited Oct. 30, 2020).

³³⁸ Blattner, *supra* note 167, at 123.

³³⁹ Mike Dacey, *Anthropomorphism as Cognitive Bias*, 84 PHIL. SCI. 1152, 1157 (2017).

³⁴⁰ Blattner, *supra* note 167, at 129.

³⁴¹ Jesús Rivas & Gordon M. Burghardt, *Crotalomorphism: A Metaphor to Understand Anthropomorphism by Omission*, in THE COGNITIVE ANIMAL: EXPERIMENTAL AND THEORETICAL PERSPECTIVES ON ANIMAL COGNITION 9–17 (Marc Bekoff, Colin Allen & Gordon M. Burghardt eds., 2002).

³⁴² *Id.* at 10.

sentience is considered through a lens of human sentience. Understanding non-human animals through human analogy could result in the exclusion of animals, like fish and invertebrates, who may experience suffering through “nonhuman-like structures”³⁴³ and therefore cannot benefit from the privilege of shared expression.

Consideration of the moral consequences inherent in affirming or rejecting the hypothesis of an animal’s mental state can attenuate this limitation. Jonathan Birch outlines the risk of what he calls “underattribution” as it relates to an animal’s capacity to experience pain and where a hypothesis on an animal’s mental state is uncertain.³⁴⁴ As animal research informs animal welfare policy, the possible negative effects that may follow a finding of no sentience in animals where that sentience is highly contested creates a unique situation where avoiding the risk of underattribution should be prioritized.³⁴⁵ Birch approaches this through a welfare maximization framework and emphasizes the importance of understanding the causal connection between animal sentience and animal welfare in order to set appropriate burdens of proof in attributing mental states to animals.³⁴⁶ Incorporating such a framework as a guiding principle in animal cognition research would alleviate the effect of scientific biases, thus gradually remedying this limitation.

Animal welfare science has also been subject to bias towards negative states.³⁴⁷ Historically, the primary concern regarding animal welfare has been on attenuating or eliminating negative experiences³⁴⁸ and animal welfare legislation has reflected this concern.³⁴⁹ More recently, however, the concern has shifted towards fostering positive mental states within animals. David Mellor observes this increase in recognition “that good animal welfare requires the presence of positive affective states, as well as the absence of negative ones.”³⁵⁰ The Federal Animal Welfare Regulations,³⁵¹ which require that non-human primates be provided with enriched environments that allow them to express species-typical activities within their enclosures, are, to some degree, reflective of this shift.

³⁴³ Blattner, *supra* note 167, at 129.

³⁴⁴ Jonathan Birch, *Animal Cognition and Human Values*, 85 PHIL. SCI. 1026, 1028 (2018).

³⁴⁵ *Id.* at 1029.

³⁴⁶ *Id.* at 1032–36.

³⁴⁷ Proctor, Carder, & Cornish, *supra* note 42, at 890.

³⁴⁸ DAVID J. MELLOR, EMILY PATTERSON-KANE, KEVIN J. STAFFORD, *THE SCIENCES OF ANIMAL WELFARE* (2009); David Mellor, *Animal Emotions, Behaviour and the Promotion of Positive Welfare States*, 60 N.Z. VETERINARY J. 1, 1 (2012).

³⁴⁹ See Frida Lundmark, C. Berg, O. Schmid, D. Behdadi, H. Röcklinsberg, *Intentions and Values in Animal Welfare Legislation and Standards*, 27 J. AGRIC. ENV’T L. ETHICS 991, 993 (2014).

³⁵⁰ Mellor, *supra* note 348, at 2.

³⁵¹ Animal Welfare Regulations, 9 C.F.R. § 3.81 (2020).

Promotion of positive mental states in non-human primates is an encouraging indicator that research in relation to the positive affective states of other animals will continue. Further research and an improved understanding of the positive aspects of sentience in all animals will assist in influencing positive welfare outcomes, as opposed to aspiring for neutral states.

2. Capacity to Measure Sentience

Animal sentience is further limited by the subjective nature of the experience and the corresponding difficulty in measuring it. There is no definition of sentience that is universally accepted.³⁵² This inherent subjectivity means that sentience cannot be measured directly, and it cannot be conclusively established that any being is sentient.³⁵³ The uncertainty in attributing mental states to animals has made the science contentious, resulting in “paralytic perfectionism” where absolute certainty regarding an animal’s sentience is demanded, despite the demand not being levelled in other areas of science.³⁵⁴ However, human psychology is open to the same subjectivity³⁵⁵ and necessarily involves assumptions regarding the mental states of other human beings.³⁵⁶ Further, despite the subjectivity and difficulty in measuring sentience, the sentience of many animals relies upon animal research undertaken for human benefit. Animals are utilized as models for disorders that afflict human beings as a result of human sentience, including depression and anxiety,³⁵⁷ and an animal’s capacity to feel pain is required for analgesia studies.³⁵⁸ Thus, the inability to find conclusive and unquestionable proof should not serve to discredit the attribution of mental states in animals.

3. Sentience as a Tool for Exclusion

Animal research has largely neglected invertebrates,³⁵⁹ resulting in a “dearth of invertebrate knowledge.”³⁶⁰ A systematic review of the sci-

³⁵² Proctor, Carder, & Cornish, *supra* note 42, at 884.

³⁵³ Ian J.H. Duncan, *The Changing Concept of Animal Sentience*, 100 APPLIED ANIMAL BEHAV. SCI. 11, 14 (2006); Stephanie Yu Cottee, *Are Fish the Victims of ‘Speciesism’? A Discussion About Fear, Pain and Animal Consciousness*, 38 FISH PHYSIOL. BIOCHEM. 5, 7 (2012).

³⁵⁴ Proctor, Carder, & Cornish, *supra* note 42, at 883.

³⁵⁵ *Id.*

³⁵⁶ Helen Proctor, *supra* note 58, at 630.

³⁵⁷ Proctor, Carder, & Cornish, *supra* note 42, at 894.

³⁵⁸ *Id.* at 884.

³⁵⁹ See Jennifer A. Mather, *Ethics and Care: For Animals, Not Just Mammals*, 9 ANIMALS 1, 1 (2019); Kelsey Horvath, Dario Angeletti, Giuseppe Nascetti & Claudio Carere, *Invertebrate Welfare: an Overlooked Issue*, 49 ANN IST. SUPER SANITÀ 9, 9–10 (2013); Proctor, Carder, & Cornish, *supra* note 42, at 883.

³⁶⁰ Simon R. Leather, *Institutional Vertebratism Threatens UK Food Security*, 24 TRENDS IN ECOLOGY & EVOLUTION 413, 413 (2009).

entific literature regarding animal sentience found that Mammalia comprised 91.89% of the animals used in each article.³⁶¹ Invertebrates constitute around 98% of all animals;³⁶² thus, the focus on mammals in animal research means that there is a bias towards the animals that constitute just 0.2% of the species on the planet.³⁶³ Human actions affect invertebrates on a mass scale and in a variety of ways including research, pest control and consumption.³⁶⁴ Considering that the science of animal sentience informs ethics,³⁶⁵ the disregard of invertebrates has the potential to exclude them from protection and will have harmful consequences for their welfare. However, this bias can be corrected by further research in line with the welfare maximization framework suggested by Birch.³⁶⁶ Education on the positive contributions that invertebrates offer to humans may assist in sparking public interest and concern.³⁶⁷ In turn, this may encourage further research and ensure that their mental states are not erroneously rejected.

Scientific evidence supports a finding of sentience in fish,³⁶⁸ and the majority of the literature suggests that fish experience pain and fear in a way meaningful to them.³⁶⁹ Despite this, their sentience has been highly contested and often denied,³⁷⁰ and they have been denied protection on the assumption that they are not sentient.³⁷¹ This is concerning given the large-scale exploitation of fish. It is estimated that in 2018, 179 million tonnes of fish were harvested globally.³⁷² Activities that exploit fish—including aquaculture, wild harvesting, and catch-and-release fishing by amateurs³⁷³—raise significant welfare concerns. Key concerns include the handling and transport of fish;³⁷⁴ poor environmental conditions and overcrowding in aquaculture;³⁷⁵ and slaughter techniques including removal from water, asphyxiation in ice or CO₂ saturated water; and gill

³⁶¹ Proctor, Carder, & Cornish, *supra* note 42, at 888.

³⁶² Mather, *supra* note 359, at 1.

³⁶³ *Id.*

³⁶⁴ Proctor, Carder, & Cornish, *supra* note 42, at 894.

³⁶⁵ Jones, *supra* note 12, at 1.

³⁶⁶ Birch, *supra* note 344, at 1032–33; Mather, *supra* note 359, at 1.

³⁶⁷ Horvath, Angeletti, Nascetti & Carere, *supra* note 359, at 15.

³⁶⁸ K.P Chandroo, Duncan, & Moccia, *supra* note 83, at 225, 241; Lynne U. Sneddon & Matthew C. Leach, *Anthropomorphic Denial of Fish Pain*, 35 ANIMAL SENTIENCE 1 (2016).

³⁶⁹ Proctor, *supra* note 58, at 633.

³⁷⁰ See e.g., Rose, *supra* note 55, at 1, 33; Brian Key, *Why Fish Do Not Feel Pain*, 3 ANIMAL SENTIENCE 1(2016).

³⁷¹ Blattner, *supra* note 167, at 125.

³⁷² *The State of World Fisheries and Aquaculture: Sustainability in Action*, FOOD & AGRICULTURE ORG. OF THE U. N. 121 (2020), <http://www.fao.org/3/ca9229en/CA9229EN.pdf>.

³⁷³ Mather, *supra* note 359, at 7.

³⁷⁴ Jones, *supra* note 12, at 19–20.

³⁷⁵ Mather, *supra* note 359, at 7.

cutting.³⁷⁶ As Jennifer Mather outlines, “[p]erhaps it is because there are such clear consequences to providing for fish welfare in these situations that there is so much heat in the debate about whether the fish actually feel pain.”³⁷⁷ Where sentience is the basis of protection, the unwillingness to recognize sentience in animals that do not share an experience similar to humans will result in the exclusion of animals from protection that may experience pain through non-human like structures. Again, utilizing the framework suggested by Birch will assist in alleviating this concern.

Human interest may result in some animals, such as research animals and farmed animals, not having their sentience properly recognized and thus being excluded from protection. The AWA,³⁷⁸ which regulates the use of animals in research, explicitly excludes birds, rats, and mice bred for use in research, all cold-blooded animals, horses not used for research purposes, and other farm animals from the definition of ‘animal’ under the AWA.³⁷⁹ The AWA therefore excludes 95% of all animals used in research.³⁸⁰ The AWA’s policy is to “ensure that animals intended for use in research facilities . . . are provided humane care and treatment.”³⁸¹ This is achieved by requiring researchers who use the named species to register with the USDA,³⁸² be open to inspection,³⁸³ comply with humane provisions,³⁸⁴ and minimize or eliminate animal pain and distress where possible.³⁸⁵ The exclusion of 95% of all animals used in laboratory research³⁸⁶ runs contrary to the purpose of the AWA. This disregards the sentience of the excluded animals and is instead based on furthering human interests and research expediency.

There is further flexibility of perception surrounding the sentience and value of animals whose exploitation benefits human interests.³⁸⁷ People “de-mentalize” animals classified as food, which allows farmed animals to be categorized separately from companion animals despite their comparable levels of sentience.³⁸⁸ This contributes to the “meat-

³⁷⁶ Paul J. Ashley, *Fish Welfare: Current Issues in Aquaculture*, 104 APPLIED ANIMAL BEHAV. SCI. 199, 209–10 (2007); Jones, *supra* note 12, at 20.

³⁷⁷ Mather, *supra* note 359, at 7.

³⁷⁸ 7 U.S.C. § 2131 (2018).

³⁷⁹ 7 U.S.C. § 2132(g) (2018).

³⁸⁰ Blattner, *supra* note 167, at 126–27.

³⁸¹ 7 U.S.C. § 2131 (2018).

³⁸² 7 U.S.C. § 2136 (2018).

³⁸³ 7 U.S.C. § 2146(a) (2018).

³⁸⁴ 7 U.S.C. § 2143(a) (2018).

³⁸⁵ *Id.*

³⁸⁶ Blattner, *supra* note 167, at 126–27.

³⁸⁷ Caviola, Everett & Faber, *supra* note 317, at 1023–24.

³⁸⁸ Brock Bastian, Steven Loughnan, Nick Haslam, & Helena R. M. Radke, *Don’t Mind Meat? The Denial of Mind to Animals Used for Human Consumption*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 247, 253–54 (2011).

paradox,” where strategies of moral disengagement are utilized to justify behavior.³⁸⁹ Blattner outlines that as humans are the beneficiaries of animal exploitation and the arbiters of how humans treat animals, judgments made about the treatment of animals are self-judging obligations that are vulnerable to biases.³⁹⁰

These biases uniquely disadvantage farmed animals, as their sentience is selectively excluded and even weaponized against them. Likely caused by an intention to stay ahead of an increasing concern for animal welfare, farmed animals are often represented as “happy” in marketing.³⁹¹ Grossblatt describes this representation as “suicide-food,”³⁹² where animals appear partial to their own consumption. Here, sentience is selectively conceded in a way that benefits human interests and allows consumers to continue “de-mentalizing” the animals they consume.³⁹³ Cultural and social biases produce this distortion of beliefs and values, and allow the selective recognition of sentience and corresponding exclusion based on sentience. As argued by Jones, “[t]he time for bringing welfare policy for farm animals in line with data from our best science is well-overdue.”³⁹⁴ Enshrining sentience as a standard of protection would broadcast these biases. States should then review their laws to ensure consistency of protection for comparable sentient animals.³⁹⁵ Any variations of protection for animals recognized as sentient through exemptions based on biases or convenience would demand justification.

C. Reform Recommendations

Animal welfare science has been clear for some time that most animals are sentient. Recent international trends in expressly acknowledging this sentience in the law do more than provide lip service to the intrinsic worth of animals. Rather, such developments have a significant impact on statutory interpretation, ground animal welfare legislation in science and have the potential to improve public awareness of the situation of animals and instigate further legal protections for animals. Moreover, legislatures are able to expressly recognize animal sentience without needing to engage with the ongoing property versus person debate” that remains so contentious. This part of the Article sets out recommenda-

³⁸⁹ Benjamin Buttler & Eva Walther, *Dealing with the Meat Paradox: Threat Leads to Moral Disengagement from Meat Consumption*, 137 *APPETITE* 73, 73–74 (2019).

³⁹⁰ Blattner, *supra* note 167, at 128.

³⁹¹ See Ben Grossblatt, *SUICIDE FOOD*, <http://suicidefood.blogspot.com/> (last visited Oct. 10, 2020) (specifically, Grossblatt defines “suicide food” in his blog’s sidebar).

³⁹² *Id.*

³⁹³ Bastian, Loughnan, Haslam, & Radke, *supra* note 388, at 253–54.

³⁹⁴ Jones, *supra* note 12, at 20.

³⁹⁵ Blattner, *supra* note 167, at 130.

tions for the reform of animal welfare laws to expressly recognize animal sentience.

1. Explicit Recognition of Animal Sentience

All US states should expressly recognize animal sentience in their respective animal protection laws. While some US states do recognize animal sentience in this manner, the majority do not.³⁹⁶ Those states that do not should amend their laws to explicitly acknowledge that animals are sentient. In terms of form, the international trend towards recognizing animal sentience in law provides many instances of explicit recognition. Oregon provides a local example of how to acknowledge animal sentience in law.³⁹⁷ Internationally, New Zealand,³⁹⁸ Quebec,³⁹⁹ and the Australian Capital Territory,⁴⁰⁰ amongst many others, may provide a guide as to how explicit legislative recognition of animal sentience may be best undertaken.

2. Sentience as the Purpose of Protection

To the extent that US state legislation expressly states the purposes or objects of animal welfare legislation, sentience should be included as one of these objects. Explicitly acknowledging animal sentience as one of the purposes of animal protection will serve more than a symbolic purpose. As outlined in Part III, an express statement that animal sentience is a reason for animal protection and the reason that animal welfare matters may influence subsequent statutory interpretation. Such a statement would increase the potential for the explicit recognition of animal sentience to have a positive impact on the welfare of animals. This is evidenced by the cases outlined in Part III, which utilized the explicit acknowledgement of animal sentience to recognize animals as victims of crime for sentencing purposes.

A clear expression that sentience is the root of welfare protection will also provide clarity on the human-animal relationship. As Sunstein outlines, “[o]ften law’s ‘statement’ is designed to move norms in fresh directions.”⁴⁰¹ This benefit cannot be understated, given that respective social groups differ markedly on what they believe constitutes acceptable behavior towards animals.⁴⁰² For example, while hunting may be the

³⁹⁶ See *supra* Part II.1.

³⁹⁷ See OR. REV. STAT. § 167.305(1) (2019).

³⁹⁸ See Animal Welfare Act 1999, § 1 (N.Z.).

³⁹⁹ See An Act to Improve the Legal Situation of Animals, S.Q. 2015, c 35 (Can.).

⁴⁰⁰ See Animal Welfare Act 1992 (ACT) § 4.1 (Austl.).

⁴⁰¹ Cass R. Sunstein, *On the Expressive Function of the Law*, 144 U. PA. L. REV. 2021, 2051 (1996).

⁴⁰² Bagaric, Kotzmann & Wolf, *supra* note 66, at 426; Pallotta, *supra* note 312, at 1, 35–36.

norm in one social group, another group may not consider hunting in to accord with their values. Expressly stating that sentience is one of the reasons for animal welfare should slowly raise the standing of animals in human communities and serve as a signal of what constitutes acceptable treatment of animals. This effect would be incremental, thus avoiding the abrasive effect that recognizing animals as legal persons would have. Yet acknowledging animal sentience and basing their need for protection on sentience will still likely improve their standing both legally and socially.⁴⁰³ As Bucchieri argues, “integrating the protection of animals into the heart of the [American] criminal justice system will broadcast the relationship that animals and humans share as sentient beings capable of suffering and will, as a result, elevate the respect they are afforded.”⁴⁰⁴

3. Inclusion of all Sentient Animals

As animal sentience is the reason that animal welfare matters, animal protection legislation in all state jurisdictions should apply to *all* sentient animals. As outlined in Part I, the scientific consensus is that vertebrate animals are sentient and thus they should be covered by animal protection legislation. In navigating the gateway to protection for animals whose sentience is contested, animal welfare researchers and legislatures should adhere to a framework, such as the framework suggested by Birch and outlined in Part IV, which prioritizes the risk of under-attribution of an animal’s mental state.⁴⁰⁵ This will alleviate the risk of excluding animals from legal protection that may experience pain in unfamiliar ways on the basis that they are not sentient. Thus, approaching inclusion on the basis of sentience should also result in the protection of birds, amphibians, reptiles, fish, cephalopods, and decapod crustaceans.⁴⁰⁶

Where legislatures consider it desirable to exempt some animals from animal protection legislation, regulations that apply to the excluded animals should also be underpinned by a recognition of animal sentience. Exemptions may be considered desirable for the purposes of providing certainty and predictability to people that work with animals that their actions are within the law. For example, currently the Missouri anti-cruelty statute provides that “[t]he provisions of section 574.130, sections 578.005 to 578.023 shall not apply to: (8) With respect to farm animals, normal or accepted practices of animal husbandry.”⁴⁰⁷ As Wolfson

⁴⁰³ Bagaric, Kotzmann & Wolf, *supra* note 66, at 439.

⁴⁰⁴ Rebecca L. Bucchieri, *Bridging the Gap: The Connection Between Violence Against Animals and Violence Against Humans*, 11 J. ANIMAL & NAT. RESOURCE L. 115, 130 (2015).

⁴⁰⁵ Birch, *supra* note 344, at 1032–36.

⁴⁰⁶ Jones, *supra* note 12, at 6–8.

⁴⁰⁷ MO. REV. STAT. § 578.007 (2016); Lane K. Bogard, *An Exploration of How Laws Tend to Maintain the Oppression of Women and Animals*, 38 WHITTIER L. REV. 1, 41 (2017).

aply states, “there is a significant trend within states to remove legal protection from animals raised for food or food production altogether; if a farming practice is viewed by the agriculture industry as ‘accepted,’ ‘common,’ ‘customary’ or ‘normal,’ the anticruelty statute will not be applied.”⁴⁰⁸ In such circumstances, regulations must still govern human interaction with exempted animals to ensure that they are humanely treated, and the relevant regulations should be underpinned by an understanding that the animals are sentient.

Where legislatures elect to exempt sentient animals from animal protection legislation, greater transparency and justification for the reasons for exemption is required. The goal here is to create an objective baseline that applies to all animals impacted by human interaction. For example, where a law requires that an animal be given a certain amount of space, this requirement should apply consistently to all sentient animals.⁴⁰⁹ If a state seeks to deviate from this standard, this bias should be acknowledged and justified. In having to so justify, the position of the legislature is made clear to the public. Greater transparency in this respect will allow those seeking to challenge biases that negatively affect exploited animals to better target their advocacy.⁴¹⁰ This may serve to create targeted public discourse surrounding the treatment of animals that may have otherwise been ignored.⁴¹¹

CONCLUSION

The exploitation of animals by humans is a common feature of contemporary society. Legislation that seeks to reduce and regulate this cruelty exists in every US state jurisdiction.⁴¹² Each anti-cruelty statute implicitly recognizes that animals are sentient by attempting to ensure their humane treatment. Some US jurisdictions have built on this implicit recognition by explicitly stating that animals are sentient beings, recognizing to varying degrees that animal sentience is the reason that animal protection matters. This Article has established that express recognition of animal sentience is likely to improve outcomes for animals and therefore contends that all US jurisdictions that have not yet done so should pursue legislative reform to recognize animal sentience.

Animal welfare laws acknowledge, whether implicitly or explicitly, that animals are sentient and seek to prevent human conduct that causes

⁴⁰⁸ David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 *ANIMAL L.* 123, 132 (1996).

⁴⁰⁹ O’SULLIVAN, *supra* note 325, at 9–10.

⁴¹⁰ Sankoff, *supra* note 334, at 305.

⁴¹¹ *Id.*

⁴¹² *Laws That Protect Animals*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/article/laws-that-protect-animals/> (last visited Oct. 10, 2020).

animals' unnecessary pain or suffering. This approach accords with scientific findings regarding the mental states of animals, which indicate that many animals have the capacity to experience both physical and psychological pain. In particular, animal sentience research is clear that vertebrate animals are sentient,⁴¹³ and research suggests that some invertebrate species are sentient.⁴¹⁴

The developing scientific consensus that most animals are sentient has prompted an international trend of expressly recognizing animal sentience in animal protection laws. In the US, Oregon has amended its animal protection legislation to recognize animals as sentient beings.⁴¹⁵ This recognition has influenced court decisions in a number of cases, which has highlighted the impact that expressly recognizing animal sentience can have on subsequent statutory interpretation. Further legal recognition of animal sentience in other US states is likely to have a similar positive influence on the determination of animal cruelty cases.

Recognition of animal sentience also serves a purpose in distinguishing animals from other forms of insentient property. Animals are categorized as property in contemporary legal systems and are unlikely to be recognized as legal persons in the near future. In this context, the express recognition of animal sentience permits courts to distinguish between sentient and non-sentient property without taking a position in relation to the person versus property debate.

Recognizing animal sentience as a scientific standard of protection may also gradually remove social biases that favor animals based on emotional relationships and human interests. Animals are currently subject to inconsistent protection. Some are favored on the basis of appeal and emotional connections, and others are largely disregarded as their exploitation serves human objectives. Building an objective and scientific basis for animal protection may gradually erode these biases, and instead build a system of inclusion based on sentience.

This Article argues that amendments to legislation to expressly recognize animal sentience should adhere to a number of principles. First, each US animal protection statute should explicitly recognize animal sentience. Second, where animal protection legislation includes a statement of objects or purposes, sentience should be identified as a legislative object. Third, the gateway to protection under these statutes should be regulated by sentience, with all sentient animals being included under the protections. Where exceptions are required, regulations that cover the exempted animals should also be underpinned by sentience. These recommendations would better protect the interests of animals in living a

⁴¹³ Jones, *supra* note 12, at 6.

⁴¹⁴ *Id.* at 7–9.

⁴¹⁵ OR. REV. STAT. § 167.305(1) (2019).

life free from suffering and would also provide animal protection laws with a scientific basis and a sense of consistency.

