Fido Goes To The Lab: Amending The Animal Welfare Act To Require Animal Rescue Facilities To Disclose Pound Seizure Practices To Pet Owners

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I. INTRODUCTION

> With more people owning pets than ever before and a deepening appreciation of the human-animal bond, it has become increasingly difficult to separate the lab animal from the family pet.[1]

The Humane Society of the United States ("HSUS") estimates that approximately six to eight million animals are turned in or surrendered to animal pounds and shelters[2] every year. Of those animals, approximately thirty percent of dogs and between two to five percent of cats are reunited with their owners.[3] The future for the remaining seventy percent is not so certain. Three to four million animals are adopted to new homes.[4] Another three to four million are euthanized.[5] What many people do not realize is that there is a third alternative. In many states, impounded animals that are neither adopted nor euthanized may be sold to research laboratories and subject to lives of unregulated experimentation.[6] Today, around 70,000 dogs and 20,000 cats are used for research each year in the United States.[7]

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[1] Douglas Starr, *A Dog's Life, When Scientists at the Tufts Veterinary School Fractured the Legs of Six Dogs to See How they Healed, and Then Euthanized the Dogs, All in the Name of Research, the Ensuing Outcry Reopened the Argument Over How Far is Too Far When it Comes to Using Animals to Advance Medicine*, Boston Globe, Apr. 18, 2004, at 20.

[2] It should be noted that the terms "pound" and "shelter" are today used interchangeably. Originally, pounds were established and financed by local municipalities while shelters were run by humane societies. F. Barbara Orlans, In the Name of Science: Issues in Responsible Animal Experimentation 210 (1993). The HSUS estimates that there are between 4,000 and 6,000 pounds and shelters in the United States. HSUS PET Overpopulation Statistics, *available at* http://www.hsus.org/pets/issues_affecting_our_pets/pet_overpopulation_and_ownership_statistics/hsus_pet_overpopulation_estimates.html,(last visited January 22, 2009).

[3] HSUS Pet Overpopulation Statistics, *available at* http://www.hsus.org/pets/issues_affecting_our_pets/pet_overpopulation_and_ownership_statistics/hsus_pet_overpopulation_estimates.html, (last visited January 22, 2009).

[4] *Id*.

[5] *Id*.

[6] An animal may spend between 7 days and 5 years at a pound before its death. Orlans, *supra* note 2, at 212. The Animal Welfare Act regulates husbandry but does not regulate the ways animals are used in experiments. Shigehiko Ito, *Beyond Standing: A Search for a New Solution in Animal Welfare*, 46 Santa Clara L. Rev. 377, 403 (2006).

[7] USDA, Animal Care Annual Report of Activities 38 (2007), *available at* http://www.aphis.

The Animal Welfare Act ("AWA") was enacted in 1966 to regulate animal experimentation, but the Act did not directly address pound seizure; the process whereby pounds and shelters sell or otherwise release unwanted dogs and cats to research laboratories for experimentation, research or teaching, until it was amended in 1990.[8] The 1990 amendments, dubbed the "Pet Theft Act," create holding period requirements for shelters and certification requirements for dealers but do not require pounds and shelters to disclose pound seizure practices to pet owners. In this way, the AWA fails to adequately protect both the animals and the owners of animals subject to pound seizure.

This paper relies on both traditional property concepts as well as the inherent value of household pets in arguing that the AWA should be amended to require pounds and shelters to disclose to pet owners surrendering their animals the possibility of seizure under state law. On the one hand, an owner's property interest in her emotional well-being is damaged when her pet is sold for research without her knowledge. On the other hand, the vulnerable household pet, that has come to depend on humans, both physically and psychologically, is sent off for research.

The first part of this paper summarizes the history of pound seizure. The second part discusses its prevalence in the United States today. The third section examines the AWA as it stands today, while the fourth section identities its gaps in protection. The paper then proposes an amendment to the AWA based on an analysis of current pound seizure legislation pending in Congress as well as state law statutes regarding notice and disclosure. The proposed amendment includes both a notice provision, which requires signage at shelters, and an affirmative consent provision, which allows owners to exempt their surrendered pet from research. After a discussion of the positive and negative implications of the proposed amendment, the paper concludes that the proposed amendment should be adopted. By arguing in favor of a disclosure provision, this note in no way intends to legitimize or accept the practice of pound seizure. Nor does it conclusively present that purpose-bred animals should be favored in animal research over pound animals. Rather, it attempts to provide one mechanism to ameliorate the unjust effects of pound seizure for as long as the practice continues.[9]

II. HISTORY OF POUND SEIZURE

The origins of modern pound seizure can be traced to the National Society for Medical Research ("NSMR"), which was founded in the mid-1940s by Dr. A.J. Carlson, Dr. Andrew C. Ivy, and Dr. George Wakerlin in the aftermath of World

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usda.gov/publications/animal_welfare/content/printable_version/2007_AC_Report.pdf.

[8] Nancy Goldberg Wilks, *The Pet Theft Act: Congressional Intent Plowed Under by the United States Department of Agriculture*, 1 Animal L.. 103, 103 (1995).

[9] Starr, *supra* note 1, at 20 ("We look forward to the day when we can put an end to using animals in research…but for now we're focusing on achievable goals.") (quoting Andrew Rowan).

War II.[10] In response to the Government directing greater grants towards medical science,[11] the NSMR devoted its efforts to enacting state laws, which would create a plentiful supply of laboratory animals. Now commonly referred to as "pound seizure" laws, the laws required animal shelters and public pounds to surrender dogs and cats to scientific institutions for use in experiments.[12] One justification for such laws was that dog dealing and stealing would cease if animals were made available from shelters.[13] The NSMR was successful in its mission and pound seizure would soon create an ongoing battle between medical science and animal welfare.

The first pound seizure laws were of various types. The first forced surrender law, passed in Minnesota in 1948, required the release of animals impounded at pounds and shelters receiving funds from taxes.[14] Another pound seizure law, passed in Wisconsin in 1949 was more severe, requiring the release of any stray animal, whether from a private or public shelter.[15]

The animal welfare groups found themselves at an extreme disadvantage in fighting pound seizure laws. To begin, they were too understaffed and underfunded to wage successful legislative battles. In fact, the humane organizations were unaware that the first pound seizure law had been introduced until it had gone through both Houses and been signed by the Governor of Minnesota.[16] Additionally, the public sentiment seemed to support the medical community.[17] In the mid 1940s, city ordinances requiring pound seizure passed by public referendum in both Baltimore and Los Angeles.[18] Lastly, the NSMR sought to undermine any hopes the humane organizations had of negotiating with the medical community.[19] When Robert Sellar, the President of the American Humane Association ("AHA"), arranged to meet with the NSMR, the NSMR alerted anti-vivisection groups who brought the issue to national attention. The national attention backfired and encouraged state legislatures, such as South Dakota, Oklahoma, Connecticut, Ohio and Iowa to enact statutes mandating that pounds and shelters release at least some impounded animals for experimentation.[20]

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[10] Christine Stevens, *Laboratory Animal Welfare, in* ANIMALS AND THEIR LEGAL RIGHTS 67 (The Animal Welfare Institute ed., 4th ed. 1990); Cecile C. Edwards, *The Pound Seizure Controversy: A Suggested Compromise in the Use of Impounded Animals for Research and Education*, 11 J. ENERGY. NAT. RESOURCES & ENVTL. L. 241, 242 (1991).

[11] Federal funding disbursed through the NIH was $0.7 million in 1945; $98 million in 1956, and $2,000 million in 1988. Orlans, *supra* note 2, at 212.

[12] ANDREW N. ROWAN, OF MICE, MODELS AND MEN: A CRITICAL EVALUATION OF ANIMAL RESEARCH 150 (1984); Stevens, *supra* note 10, at 67.

[13] Stevens, *supra* note 10, at 70. This argument, however, proved false. The very case that led to the passage of the Animal Welfare Act involved a New York hospital that purchased dogs from a Pennsylvania dog dealer even though it was entitled to free dogs form the ASPCA. Some laboratories prefer to buy from dealers rather than take advantage of pound seizure laws. *Id*.

[14] *Id*. at 67.

[15] *Id*.

[16] *Id*.

[17] Edwards, *supra* note 10, at 243; Rowan, *supra* note 12, at 150.

[18] Rowan, *supra* note 12, at 150.

[19] *Id*. at 151.

[20] Stevens, *supra* note 10, at 67-68.

It would not be until animal welfare groups were able to visit research labs in the 1960s, and document conditions of abuse and neglect, that public sentiment would begin to shift.[21] In 1960, for example, the Animal Welfare Institute documented gross filth, and a massive infestation of ticks, roaches and other insects at St. Vincent's Hospital in New York. In 1963, the Institute observed similar conditions at the New York University Dental school where feces were allowed to build up so long that there was nowhere to step foot in the dog runway and wild rodents ran about through the animals' cages.[22] Such knowledge soon led to many reform movements. In 1966, Congress passed the Laboratory Animal Welfare Act (now the "Animal Welfare Act").[23] By 1973, Hawaii, Maine and Pennsylvania had state laws prohibiting pound seizure.[24] Then in 1979, the New York legislature repealed the Hatch-Metcalf Act, which had required all pounds and humane societies receiving public funds to surrender animals to scientific institutions. Soon, Massachusetts, Connecticut and West Virginia followed suit, repealing similar acts.[25] Today, the nation remains split.

III. STATE POUND SEIZURE STATUTES: HOW PREVALENT IS THE PROBLEM TODAY?

While pound seizure is becoming less common, many pounds and shelters in various states around the nation still engage in the activity. At the National Institutes of Health ("NIH") research facilities in 1964, one-hundred percent of all animals used were random source, but by 1973 this number fell to eighty-five percent.[26] By 1989, it was estimated that nationally about sixty percent of all animals used were pound animals (approximately 94,000 dogs); while the remaining forty percent were purpose-bred. In 1991, 108,000 dogs and 35,000 cats were used in research nationwide. More recently, in 2007, the USDA reports a total of 1,027,450 animals were the subjects of experimentation.[27] Of those animals, 72,037 were dogs and 22,687 were cats.[28] These may appear small numbers contrasted with the three to four million animals that the HSUS estimates are euthanized each year, yet these numbers are significant given the lifetime of unregulated experiments to which the animals are subject. Most alarming is that the numbers appear to be on the rise: the number of dogs used in research rose 8 percent from 2006 to 2007.[29]

Currently, only fifteen states expressly prohibit the practice of pound seizure

[21] Edwards, *supra* note 10, at 243 (citing Niven, The History of the Humane Movement 130 (1967)).
[22] Stevens, *supra* note 10, at 69.
[23] *Id*. at 70.
[24] Rowan, *supra* note 12, at 151.
[25] Stevens, *supra* note 10, at 70.
[26] Orlans, *supra* note 2, at 209.
[27] USDA, *supra* note 7, at 38.
[28] *Id*.
[29] *Id*. at 10-11.

including the District of Columbia.[30] They are as follows: Connecticut;[31] Delaware;[32] Hawaii;[33] Illinois;[34] Maine;[35] Maryland;[36] Massachusetts;[37] New Hampshire;[38] New Jersey;[39] New York;[40] Rhode Island;[41] South Carolina [citation is S.C. Code Ann. § 47-3-60 (2002); Vermont;[42] West Virginia;[43]and Washington D.C. [citation is Act 17-493 (2008)]. Of the above, Massachusetts is the only state to prohibit both the sale of an impounded animal within its borders and the sale of an impounded animal brought across state borders.[44]

Conversely, three states require pound seizure. The first state that requires pound seizure was also the first state to enact a pound seizure law – Minnesota.[45] The other two states that still require pound seizure are Oklahoma[46] and Utah.[47] All of the three states that have statutes requiring pound seizure have enacted either a "right-to-know" or an "affirmative consent" based provision, or both.[48]

Additionally, eleven states allow pound seizure. They are: Arizona;[49]

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[30] Even in states prohibiting pound seizure, there are some ways around the law. For example, animal wardens will individually sell animals to dealers, who in turn sell them to research labs. This practice has greatly declined since the enactment of the AWA. Stevens, *supra* note 10, at 115.
[31] Conn. Gen. Stat. § 22-332a (2007).
[32] 3 Del. C. § 8001 (2003).
[33] Haw. Rev. Stat. § 143-18 (2003).
[34] 510 Ill. Comp. Stat. 5/11 (2005).
[35] 17 Me. Rev. Stat. § 1025 (2003).
[36] Md. Ann. Code § 10-617 (2002).
[37] Mass. Ann. Laws ch. 140, § 151 (2003).
[38] N.H. Rev. Stat. Ann. § 437:22 (2007).
[39] N.J. Rev. Stat. § 4:19-15.16 (2003).
[40] N.Y. Agric. & Mkts. Law § 118 (2003).
[41] R.I. Gen. Laws § 4-19-12 (2005).
[42] Vt. Stat. Ann. tit. 13, § 352(7) (2003).
[43] W. Va. Code § 19-20-23 (2008).
[44] Mass. Ann. Laws ch. 140, § 174D (LexisNexis 2003) ("no person, institution, animal dealer or their authorized agents shall transport, or cause to be transported, any animal obtained from any municipal or public pound, public agency, or dog officer acting individually or in an official capacity into the commonwealth for purposes of research, experimentation, testing, instruction or demonstration.").
[45] Minn. Stat. § 35.71 (2008).
[46] Okla. Stat. tit. 4, § 394 (2008); Okla. Stat. tit. 4, § 501 (2008).
[47] Utah Code Ann. § 26-26-3 (2008); Utah Code Ann. § 26-26-4 (2008).
[48] Minn. Stat. § 35.71 (2008); Okla. Stat. tit. 4 § 394 (A)(2)&(4) (2008); Utah Code Ann. § 26-26-3 (2008).
[49] Ariz. Rev. Stat. Ann. § 11-1013 (2007).

California;[50] Colorado;[51] Iowa;[52] Michigan;[53] Ohio;[54] Pennsylvania [citation is 3 PA. CONS. STAT. § 459-302 (2003) (pound seizure is prohibited in Pennsylvania for dogs but allowed for other animals); South Dakota;[55] Tennessee;[56] Wisconsin;[57] and Washington D.C. Only three of these eleven states have either "right-to-know" or "affirmative consent" based provisions in effect. They are California, Colorado, and Ohio.[58] Iowa used to require affirmative consent but that provision was repealed in 2008. Wisconsin, which only subjects dogs to pound seizure, also has protections in place so that former pets are not sold to research labs. Wisconsin limits those dogs that can be sold to labs to "unclaimed dogs" and excludes dogs surrendered by their owners from the definition.[59]

Lastly, there are twenty-two states that delegate decisions regarding pound seizure to municipalities, cities, or other local authorities. They are: Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oregon, Texas, Washington, and Wyoming. Given that at least 2000 of the 2500 animal control facilities in existence in this country in the early 1990s were run by towns and municipalities, and that publicly financed pounds are the most likely to voluntarily provide animals for experimentation,[60] the amount of pound seizure practiced in these twenty-two states could be a significant portion of that practiced nationwide.

Virginia is the only state without any legislation addressing pound seizure.

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[50] CAL. CIV. CODE § 1834.5 (2008); CAL. CIV. CODE § 1834.6 (2008); CAL. CIV. CODE § 1834.7 (2008). Although California state law allows the release of animals from shelter facilities, all California counties are currently exercising bans on pound seizure. *Id*.

[51] COLO. REV. STAT. § 35-42.5-101 (2003).

[52] IOWA CODE § 162.20, 5(c) (2008) (A pound or animal shelter may transfer a dog or cat to a research facility without sterilizing it); IOWA CODE § 145B.2 (2002) (repealed 2008); IOWA CODE § 145B.3 (2002) (repealed 2008) ("A dog lawfully licensed at the time of its seizure shall not be tendered unless its owner consents in writing"); IOWA CODE § 145B.4 (2002) (repealed 2008); IOWA CODE § 145B.6 (2002) (repealed 2008).

[53] MICH. COMP. LAWS §§ 287.388, 287.389 (2003).

[54] OHIO. REV. CODE ANN. § 955.16(D) (2006) ("An owner of a dog that is wearing a valid registration tag who presents the dog to the dog warden or poundkeeper may specify in writing that the dog shall not be offered to a nonprofit teaching or research institution or organization, as provided in this section").

[55] S.D. CODIFIED LAWS § 40-1-34 (2008); S.D. CODIFIED LAWS § 34-14-8 (2008).

[56] TENN. CODE ANN. § 44-17-112 (2008).

[57] WIS. STAT. § 174.13 (2) (2008); WIS. STAT. § 174.13 (4) (2008).

[58] CAL. CIV. CODE §§ 1834.5, 1834.7 (2008); COLO. REV. STAT. 35-42.5-101 (1)(A)(I)&(III) (2003); IOWA CODE § 145B.3 (2002)(repealed 2008); OHIO. REV. CODE ANN. § 955.16 (D) (2006).

[59] WIS. STAT. § 174.13 (2) (2008) ("A dog left by its owner for disposition is not considered an unclaimed dog under this section").

[60] Orlans, *supra* note 2, at 210.

IV. EXISTING LAW: THE PROTECTION CURRENTLY AFFORDED BY THE ANIMAL WELFARE ACT

Beginning in 1880, animal welfare supporters in the United States sought to protect laboratory animals through federal legislation.[61] Because of American society's widespread belief that animal experimentation helps to improve the physical and psychological lives of humans, such experimentation often is exempted from state anti-cruelty statutes.[62] Not until 1966 did Congress enact the Laboratory Animal Welfare Act ("LAWA") to prevent companion animals from being stolen from their homes and sold to research facilities.[63] Perhaps because of the belief that pound seizure would cut down on pet theft, the Act, as originally enacted did not specifically address the issue. Congress would not begin to address pound seizure until 1990 despite several amendments in the interim.

The LAWA of 1966 had four main parts.[64] First, the Secretary was authorized to "promulgate standards and record-keeping requirements governing the purchase, handling, or sale of dogs and cats by dealers or research facilities."[65] The Secretary could also "promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers at research facilities."[66] Second, the Act required dealers to be licensed,[67] and research facilities to be registered.[68] The LAWA also required dealers to keep a dog or cat for at least five business days after acquiring one before selling it,[69] and prohibited research facilities from buying dogs or cats from anyone but a licensed dealer.[70] Third, the LAWA required research facilities to keep records of dogs and cats,[71] and dealers to mark or identify dogs and cats transported, delivered, purchased or sold in commerce.[72] Fourth, the Secretary was permitted to impose various penalties for violations, including suspension or revocation of a dealer's license and imprisonment of dealers.[73]

The LAWA became the Animal Welfare Act when it was amended in

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[61] *Id*. at 42.

[62] Daniel S. Moretti, Animal Rights and the Law 1 (Irving J. Sloan ed., Oceana Publications, Inc. 1984).

[63] Ito, *supra* note 6, at 380.

[64] Gary L. Francione, Animals, Property and the Law 192 (Temple University Press 1995).

[65] *Id*. at 192 (quoting Laboratory Animal Welfare Act, Pub. L. No. 89-544, § 12, 80 Stat. 350 (1966)).

[66] *Id*. (quoting Laboratory Animal Welfare Act § 13).

[67] *Id*. at 193 (citing Laboratory Animal Welfare Act §§ 3, 4).

[68] *Id*. at 193 (citing Laboratory Animal Welfare Act § 6).

[69] *Id*. (citing Laboratory Animal Welfare Act § 5). An animal may spend up to 30 days at a dealer's facility before being transferred to a research lab, Orlans, *supra* note 2, at 212.

[70] Francione, *supra* note 64, at 193 (citing Laboratory Animal Welfare Act § 7).

[71] *Id*. (citing Laboratory Animal Welfare Act § 10).

[72] *Id*. (citing Laboratory Animal Welfare Act § 11).

[73] *Id*. (citing Laboratory Animal Welfare Act § 19(a), (c)).

1970.[74] The Act was subsequently amended in 1976, 1985, 1990, and 2002.[75] The 1970 amendment expanded the scope of the AWA's coverage to include *any* "warm-blooded animal" that the Secretary of Agriculture ("Secretary") determined was "being used, or [wa]s intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet."[76] The Act was amended in 1976 to prohibit animal fighting and regulate the commercial transportation of animals. The amendment also imposed the same fines on research facilities as on exhibitors and dealers and set the same standards for government research facilities as for private ones.[77] According to the Congressional Statement of Policy to the 1976 Amendments,[78] the AWA had three purposes: 1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets receive humane care and treatment; 2) to assure the humane treatment of animals during transportation in commerce;[79] and 3) to protect animal owners from theft of their animals by preventing the sale or use of stolen animals.[80] These goals are sometimes referred to as the "Three R's-" "replacing or reducing animal experimentation wherever possible and refining the research to minimize suffering."[81]

Congress again amended the AWA in 1985 when it enacted the Improved Standards for Laboratory Animals Act ("ISLAA").[82] ISLAA requires each facility using test animals to create an Institutional Animal Care and Use Committee ("Committee") of at least three people. One member must be a veterinarian and one must be external to the organization. If the facility does not make the changes that the Committee advises, the Committee must report the facility to the Animal and Plant Health Inspection Service.[83] Aside from submitting Committee reports, animal-testing facilities must submit a report to the Secretary explaining any deviations from approved protocol.[84]

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[74] Ito, *supra* note 6, at 382; Moretti, *supra* note 62, at 42.

[75] Stephanie J. Engelsman, *"World Leader"-- At What Price? A Look at Lagging American Animal Protection Laws,* 22 Pace Envtl. L. Rev. 329, 332 (2005). It should be noted that the progress the AWA was slowly making amendment-by-amendment came to a halt in 2002. Despite the Act's original intent to protect all "warm-blooded laboratory animals," Congress passed an amendment excluding birds, mice, and rats – which comprise 95% of the animals used in research – from its protection, *id*. at 333. Thus, as of 2002, the Animal Welfare Act covered only 5% of animals used in federal research facilities, *id*.

[76] Ito, *supra* note 6, at 382-83. The effect of this amendment was short-lived. In 1972, the Secretary issued regulations specifically excluding birds, mice, rats, horses, and farm animals from coverage under the Act, Sonia S. Waisman, Pamela D. Frasch & Bruce A. Wagman, Animal Law: Cases and Materials, 375 (3d. ed. 2006).

[77] Waisman, *supra* note 76, at 375. Prior to the '76 Amendments, research facilities could only be fined if they violated a cease and desist order*, id*.

[78] 7 U.S.C. § 2131 (1976).

[79] *See* Moretti, *supra* note 62, at 95. "The AWA requires the Secretary Of Agriculture to promulgate regulations setting forth humane standards for animals transported in commerce."

[80] *See id*. at 43.

[81] Starr, *supra* note 1, at 20.

[82] Ito, *supra* note 6, at 384.

[83] *Id*.

[84] *Id*. at 384-85.

On November 28, 1990, Congress amended the AWA again to include provisions aimed to prevent the theft and sale of pets.[85] Due to these amendments, commonly referred to as the "Pet Theft Act," the AWA now regulates pound seizure in two ways: 1) it establishes holding period requirements for entities; and 2) it establishes certification requirements for dealers. The holding period section of the 1990 amendments requires an entity to hold and care for a cat or dog for at least five days (including at least one weekend day) before selling it to a dealer so that the pet has time to be claimed by its original owner or adopted by a new owner.[86] An "entity" is a publicly owned pound or shelter, a private shelter or organization that has contracted with the state or local government to release animals, and a research facility licensed by the Department of Agriculture.[87] The holding requirements require no notice be given to a person surrendering an animal that after the five day holding period an animal may be sold for research.

The certification requirements, on the other hand, are particularly important for this discussion because they do require and acknowledge a limited need for disclosure. The certification section requires a dealer to provide any individual or entity acquiring a *random source* dog or cat from it with a valid certification.[88] "Random sources" include "dogs and cats obtained from *animal pounds or shelters*, auction sales, or from any person who did not breed and raise them on his or her premises."[89] Because animal pounds and shelters are included in the definition of "random source," they fall within the ambit of the amendment's certification requirements.

To be valid, a certification must state the following: 1) the dealer's name, address, and Department of Agriculture license and registration number (if such number exists); 2) the recipient's signature, along with his or her name, address, and Department of Agriculture number if he or she has one; 3) a description of the dog or cat being provided, including the species and breed, sex, date of birth if known, colors and markings, and any other information the Secretary determines is appropriate; 4) the name and address of the person, pound or shelter from which the dealer acquired the dog, "*and an assurance that such person, pound, or shelter was notified that such dog or cat may be used for research or educational purposes*;" 5) the date the dog or cat was transferred from the dealer to the recipient; 6) a statement by the pound or shelter that it complied with the holding requirements if the dealer acquired the pet from a pound or shelter; and 7) any other information the

[85] Wilks, *supra* note 8, at 103, 108.

[86] *Id*. at 103; 7 U.S.C. § 2158(a)(1) (1990). In 2004, Sacramento County Animal Shelter was sued under the AWA for not following the Act's holding requirements. *See e.g.,* Julian Guthrie, *Shelter Sued by Animals' Friends; County Accused of Untimely Killing of Dogs and Cats*, S. F. Chron., Mar. 25, 2004, at B1.

[87] 7 U.S.C. § 2158(a)(2) (1990).

[88] 7 U.S.C. § 2158(b)(1) (1990).

[89] 9 C.F.R. § 1.1 (2003) (emphasis added).

Secretary of Agriculture shall determine is appropriate.[90] Research facilities must hold the original certificate and dealers must hold onto a copy of the certificate for at least one year following the transfer of an animal from the dealer to the research facility.[91] A copy of the certificate should also accompany any subsequent transfers of animals between research facilities.[92]

V. GAPS IN THE ANIMAL WELFARE ACT: THE NEED FOR A TIGHTER DISCLOSURE REQUIREMENT

a. The Current Disclosure Requirement Does Not Apply to Public Pounds, Shelters, and Research Facilities Because They Are Not "Dealers" under the AWA

The disclosure requirement included in the 1990 amendments is ineffective because the USDA promulgated regulations interpreting it so that it does not apply to public animal pounds and shelters. In order to understand why the disclosure requirement does not apply to public pounds and shelters, it is necessary to examine how the USDA reached its conclusion.

First, the USDA looked to the text of the amendments. The certification requirements of the 1990 amendments require that all *dealers* provide a valid certification to the recipient of a random source animal. That certification, among other things, must include: "an assurance" that the *person, pound, or shelter* from which a dog or cat was acquired was notified that such dog or cat may be used for research or educational purposes.[93] In other words, all dealers must certify that the entity or individual from which they acquired an animal was put on notice that the animal could be used for research. Thus, if pounds and shelters were "dealers" within the meaning of the AWA, the amendment would be sufficient to require animal pounds and shelters to notify owners surrendering their pets that the pets could be sold for research. Whether owners would be required to receive notice in this regard would depend on the meaning the USDA would ascribe to "dealers." Looking at the text of the amendments, the term "dealer" is left undefined. The amendments only define "entity," which is defined as including both pounds and shelters, and research facilities licensed by the USDA.[94] To define "dealer," the USDA would have to search elsewhere.

In looking elsewhere, the USDA turned to the definition of "dealer" as it is defined elsewhere in the AWA. The Act states that:

[90] 7 U.S.C. § 2158(b)(2) (1990) (emphasis added).
[91] 7 U.S.C. § 2158(3) (1990).
[92] 7 U.S.C. § 2158(4) (1990).
[93] 7 U.S.C. § 2158(b)(2)(D) (1990) (emphasis added).
[94] Looking at the text of the 1990 amendments, the USDA could have found strength in the argument that because pounds, shelters, and research facilities fit into the definition of "entity," they do not fall within the definition of "dealer."

> [t]he term 'dealer' means *any person* who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase of sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include —
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> (i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or
> (ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year.[95]

Because the above definition limits the term "dealer" to a "person," the definition of dealer depends on what constitutes a "person" under the AWA.

The USDA had two places it could have looked to define "person:" 1) the text of the Act itself; and 2) the Act's legislative history. The Act defines "person" as "any individual, partnership, firm, joint stock company, corporation, association, trust, estate or other legal entity."[96] Under this expansive definition, public pounds, shelters, and research facilities would likely qualify as "persons" under the Act. Nevertheless, the USDA chose to rely instead on a House of Representatives Report in defining "person" within the context of the AWA. The report, relied on by the USDA, reads as follows:

> The term "person" is limited to various private forms of business organizations. It is, however, intended to include nonprofit or charitable institutions, which handle dogs and cats. It is not intended to include public agencies or political subdivisions of State or municipal governments or their duly authorized agents. It is the intent of the conferees that local or municipal dog pounds or animal shelters shall not be required to obtain a license since these public agencies are not a "person" within the meaning of section 2(a).[97]

Utilizing this report, the USDA determined that public pounds, shelters, and research facilities were not "persons" within the AWA, and thus were not "dealers" within the meaning of the 1990 amendments. Therefore, such operations are exempt from the amendment's certification requirements. As such, public pounds,

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[95] 7 U.S.C. § 2132(f) (1985) (emphasis added).
[96] 7 U.S.C. § 2132(a) (1985).
[97] Statement of Managers on the Part of The House accompanying H.R. Conf. Rep. No. 1848, 89th Cong., 2d Sess. 9 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2649, 2652, *quoted in* Letter from Richard L. Crawford, USDA to Chris S. Smith, University of Texas (Mar. 19, 1993)(on file with author).

shelters, and research labs are under no obligation to notify people from whom they acquire dogs or cats that those animals may be used for research. This is particularly troublesome given that publically financed pounds are the most likely to provide animals for experimentation, and that a majority of the animal control facilities in this country are public.[98]

b. Even if the Current Disclosure Requirement Applied to All Animal Pounds and Shelters it is Too Vague to be Enforceable

Even if the certification requirements applied to public pounds, shelters, and research facilities, the amendment's "right-to-know" provision is too vague to be enforceable. The amendment requires that for a certification to be valid it include, among six other requirements:

> 4) the name and address of the person, pound or shelter from which the dealer acquired the dog, and *an assurance* that such person, pound, or shelter was notified that such dog or cat may be used for research or educational purposes;

The amendments require no specific guidelines for notifying the person, pound, or shelter from which the dealer acquired the dog. The amendments do not specify the manner in which the person, pound, or shelter must be informed. They neither specify whether the notification need be oral or written, nor mention the form the notice should take or the information it should contain in either instance. Perhaps most troubling is that the amendments require a mere "assurance." The dealer need not produce any proof that the person, pound, or shelter was notified. Assurance of notification is based on the dealer's word alone. In an industry notorious for its deceitful tactics,[99] such an assurance is likely to be anything but assuring.

c. The Current Disclosure Requirement is Unenforced

The 1990 amendment of the AWA provides that dealers who fail to provide certification or include false information in the certification shall be subject to fines and/or imprisonment.[100] Any dealer who violates the certification requirements more than once shall be fined $5,000 for each dog or cat acquired or sold in violation of the requirements.[101] Moreover, any dealer who violates the section three or more times

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[98] Orlans, *supra* note 2, at 210.

[99] Dealers have gained bad publicity from their "Free to a Good Home" scandals, in which they promise an owner that they will give an animal a good home but sell it for research instead. *See* Stevens, *supra* note 10, at 70.

[100] 7 U.S.C. § 2149 (1985); 7 U.S.C. § 2158(c)(1) (1990).

[101] 7 U.S.C. § 2158(c)(2) (1990).

shall have its license permanently revoked.[102] Nevertheless, enforcement of the certification provision is "woefully inadequate."[103] Laboratory animal veterinarian Brian Gordon, for example, says he has encountered Class B dealers who presented incomplete paperwork regarding where they obtained the animals they sold.[104] Additionally, the number of convictions for violations of humane standards show that bunchers (people who collect animals to sell to dealers), puppy mills, and dealers are more likely to treat animals inhumanely than commercial breeders.[105]

d. The AWA's Disclosure Requirement is Inadequate

The proof that public pounds and shelters do not fall within the confines of the 1990 amendments is evident by examining state law. Of the eleven states that allow pound seizure, only three have either "right-to-know-" or "affirmative consent-" based provisions in effect.[106] This means that at least seven states may release former pets to laboratories without notifying the person that surrendered them. This is not including the twenty-two other states that leave pound seizure issues to local municipalities. With so many municipalities in a given state, pound seizure absent disclosure could occur in all twenty-two states.

The drafting of the disclosure provision in the 1990 amendment is also inadequate. The disclosure provision is crouched at the end of a different requirement, requiring the name and address of the person, pound, or shelter from which the dealer acquired the animal. The disclosure provision is easily lost and glossed over as a secondary matter rather than an element of primary importance.

e. The State Statutes in Place are Insufficient

Even if every state in the country practicing pound seizure had legislation requiring disclosure, it would still fall short of adequately protecting the animals and their owners. For one, a state could amend its pound seizure statute at anytime to do away with the disclosure requirement. Moreover, the disclosure provisions would be inconsistent across state lines. Pet owners in one state may benefit from more restrictive disclosure requirements while pet owners in another state may arbitrarily be less protected.

[102] 7 U.S.C. § 2158(c)(3) (1990).
[103] Orlans, *supra* note 2, at 211.
[104] Janice Francis-Smith, *Pound seizure bill in Okla. Dies in Committee*, J. Rec. Legis. Rep., Feb. 28, 2008.
[105] Orlans, *supra* note 2, at 211-12.
[106] *I.e.,California, Colorado, and Ohio*: Cal. Civ. Code §§ 1834.5 & 1834.7 (West 2008); Colo. Rev. Stat. § 35-42.5-101(1)(A)(I)&(III) (2003); Ohio Rev. Code Ann. § 955.16(D) (West 2006), respectively.

f. The AWA's Current Disclosure Requirement is Out of Line with the Act's Purpose and Goals

> The 1990 amendment's disclosure requirement, as it stands today, is not in tune with the purpose and goals of the AWA. The purpose and goals of the AWA are to insure that animals intended for use in research facilities receive humane care and treatment, to assure the humane treatment of animals during transportation in commerce, and *to protect animal owners from the theft of their animals by preventing the sale or use of stolen animals*.[107] Thus, as originally enacted, the AWA's purpose was to protect a pet owner's property rights in his or her animal. This is still the purpose today. Commenting on the 1990 amendments, Congress reiterated its intent to, "prohibit the use of stolen pets in research."[108]

The question then becomes whether an owner's property rights in his or her animal (specifically, the owner's property interest in his or her emotional well-being) are violated if that owner voluntarily surrenders an animal to an animal care facility on the mistaken assumption that the animal will be either adopted or humanely euthanized, but that animal is instead sold for research. The answer to this question is undoubtedly "yes." Consider the following illustration, with which we are dealing:

> The pet owner, P, gives her pet to an animal shelter, A, in the belief that A will either adopt the pet or humanely euthanize it. Then, D, a dealer, seizes the pet from A and sells it to a research facility.

In the above scenario, the animal's owner would likely have a cause of action for conversion; both civilly and criminally. Criminal conversion is a lesser included offense of *theft*.[109] It occurs when a person knowingly or intentionally exerts unauthorized control over the property of another:

> The essential element of the crime of criminal conversion is that the property must be owned by another and the conversion thereof must be without the consent and against the will of the party to whom the property belongs, coupled with a fraudulent intent to deprive the owner of the property.[110]

Civil conversion, on the other hand, is "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to

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[107] *See* Moretti, *supra* note 62, at 43 (emphasis added).

[108] *See, e.g.*, S. Rep. No. 101-357, at 276 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 4656, 4930.

[109] 18 Am. Jur. 2d *Conversion* § 158 (2008).

[110] *Id.*at § 156.

control it that the actor may justly be required to pay the other the full value of the chattel."[111] Under modern law, the plaintiff need not be in possession of the chattel at the time of the conversion.[112] Thus, the conversion can occur when an animal is sold for research even though the owner has relinquished possession to the shelter.

Consent, however, is a defense to conversion. If the person entitled to the future possession of the chattel consented to the conversionary act, that person cannot recover for any harm done to his interest in the chattel.[113] Therefore, the animal shelter is likely to assert that the animal's owner consented to the animal's seizure when she willingly gave up all rights to her pet upon surrender. Nonetheless, the defense of consent in a conversion action can be overcome by a showing of fraudulent non-disclosure. Such a showing requires that a duty to disclose exist in the first place:

> [The] duty to disclose and [the] corresponding liability for [a] failure to disclose [may] arise[] when[a] party fails to exercise reasonable care to disclose a material fact which may justifiably induce another party to act or refrain from acting, and the non-disclosing party knows that [] failure to disclose such information to the other party will render a prior statement or representation untrue or misleading.[114]

Although never litigated, a court could likely find that an animal shelter has a duty to disclose to a pet's owner that a surrendered pet may be used for research. Often times, when an owner surrenders a pet to a shelter that engages in pound seizure, but does not notify owners of the practice, the owner relies on a misleading representation that the animal will be treated humanely. Sometimes, such a misrepresentation can stem from an entity's name alone (e.g., "humane society"). Based on such representations, an owner justifiably surrenders her pet. The owner will argue that had she known of the pound seizure practice, she would not have surrendered her pet. Thus, the pound seizure practice becomes a material fact, of which the shelter ought to have known failure to disclose would render any representations of humane care untrue.

In summary, an owner surrendering a pet to a pound or shelter, who is not notified that her pet could be used for research, and whose pet is used for research, will likely have a claim for conversion, either criminal or civil. Because conversion is a lesser offense of theft, failure to disclose pound seizure policies leads to a form of theft, or at the very least, the impairment of one's property rights. Considering that one of the main purposes of the AWA is to "protect animal owners from the theft of their animals," the proposed amendment is a way to effectuate the purposes and goals of the Act.

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[111] Restatement (Second) of Torts § 222A (1965).

[112] *Id*.

[113] *Id*.

[114] *Glassner v. R.J. Reynolds Tobacco Co*., 223 F.3d 343, 352 (6th Cir. 2000) (applying Ohio law).

g. The Current Disclosure Requirement Ignores the Inherent Rights of Household Pets

When a pet is transferred for research, the uninformed owner is not the only one harmed; the inherent rights of her pet are harmed as well. By subjecting former household pets to research, the AWA lags behind the law's growing trend to recognize the inherent worth of household pets. As early as 1979, a New York court held that, "a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property."[115] Although a New York court later refused to follow this logic, the court still acknowledged that, "[t]here is no doubt that some pet owners have become so attached to their family pets that the animals are considered members of the family. This is particularly true of owners of domesticated dogs who have been repeatedly referred to as 'Man's Best Friend' and a faithful companion."[116] At least two states, Tennessee[117] and Illinois,[118] have acknowledged that pets are more than mere property, and have enacted statutes allowing for recovery of non-economic damages, such as the loss of the reasonably expected companionship, love, and affection of a pet resulting from the intentional or negligent killing of a pet.[119] Ironically, Tennessee is a state that allows pound seizure. This means that in Tennessee, the AWA allows the state to transfer pets in direct contradiction of the inherent rights accorded them by state law. Therefore, the AWA should require disclosure to pet owners not only to protect an owner's property rights but the inherent rights of household pets who have been raised in such intimate settings as to form deep physical and psychological bonds with humans.

VI. RECOMMENDED LANGUAGE

In proposing a statutory revision to the AWA that would require disclosure to persons, pounds and shelters surrendering animals for research, it may be helpful to refer to the language of two sources. The first is the Pet Safety and Protection Act, a piece of legislation last introduced in Congress in 2007. The second are state statutes that contain, or at one time contained, disclosure requirements. In drafting the statutory provision, it is necessary to keep in mind the purpose of the amendment: to prevent former pets from being used for research absent any knowledge or consent from their owners.

On February 28, 2007, Senator Daniel Akaka (D-HI) introduced the "Pet Safety and Protection Act of 2007" in the United States Senate. The next day,

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[115] *Corso v. Crawford Dog and Cat Hospital, Inc.,* 415 N.Y.S.2d 182,183 (1979); *see also LaPorte v. Associated Independents, Inc*., 163 So.2d 267 (1964).
[116] *Johnson v. Douglas,* 723 N.Y.S.2d 627,628 (2001).
[117] Tenn. Code Ann. § 44-17-403 (2008).
[118] 510 Ill. Comp. Stat. 70/16.3 (2005).
[119] Frasch, *supra* note 76, at 77.

Representatives Michael Doyle (D-PA) and Phil English (R-PA) introduced a companion bill, H.R. 1280, in the House of Representatives. The bill proposes the Animal Welfare Act be amended to ensure that all dogs and cats used by research facilities are obtained legally.[120] On its face, the Pet Safety Act favors purpose-bred animal research over random source. The Act allows commercial breeders to provide animals to laboratories and research facilities to breed animals themselves.[121] The Act also prohibits "Class B" dealers from selling dogs and cats to laboratories and seeks to prevent stray animals (who may be lost family pets) from being sold to laboratories.[122] On the other hand, the Act does not favor purpose-bred research alone. The Act allows individuals to donate their own animals to laboratories for research purposes and *permits registered public pounds and shelters to turn over animals surrendered by their owners*.[123] Unfortunately, the bill does not contain any language mandating that the public pounds and shelters notify owners surrendering their animals that the animals may be used for research. Therefore, even if a similar bill were to pass, an additional amendment to the AWA requiring notice would still be necessary. Such a bill, however, does not appear to be moving anywhere fast. Congress failed to consider similar legislation introduced by Senator Akaka in 1996, 1999, 2001, 2004, 2005, and 2006.[124] For that reason, rather than alter the Pet Safety and Protection Act to include a notice provision to be reintroduced during the next Congress, a stand-alone amendment requiring disclosure would be more appropriate. The Pet Safety Act has a long history of lying dormant in Congress and it contains many more controversial issues, such as the debate between random-source and purpose-bred animal research. A notice provision, on its own, would be less controversial, more logical and easier to gain support for given the existing text and purpose of the AWA.

Many states that require or allow pound seizure have developed ways to protect an owner surrendering his or her animal. Some states have "right-to-know" provisions, others have provisions requiring "affirmative consent," and some states have both. A few states also have creative mechanisms in place to ensure that someone's pet is not turned over for research without the owner's knowledge. Depending on how a given state has utilized the above protections, some are much more effective than others.

The states that seek to protect an owner from unknowingly subjecting his or her pet to a life of experimentation are Minnesota, Utah, Oklahoma, Ohio, California, Colorado, and Wisconsin. Utah requires affirmative consent. Its statute provides that, "[o]wners of animals who voluntarily provide their animals to an establishment may, by signature, determine whether or not the animal may be

[120] Pet Safety and Protection Act of 2007, H.R. 1280,110th Cong. § 1 (2007).
[121] *Id*.
[122] *Id*.
[123] *Id*.
[124] Office of Legislative Policy and Analysis, 109th Congress, Legislative Updates, *available at* http://olpa.od.nih.gov/legislation/109/pendinglegislation/petsafety.asp.

provided to an institution or used for research or educational purposes."[125] Iowa used to require affirmative consent but recently repealed this protection in its 2008 Acts. Prior to its repeal, Iowa's statute provided that, "[a] dog lawfully licensed at the time of its seizure shall not be tendered unless its owner consents in writing."[126] Both the Utah statute and the repealed Iowa statute have strengths and weaknesses. The Iowa statute is clear that an animal could not have been transferred unless the owner consented to the transfer but it did not specify that the consent be informed. In other words, pet owners in Iowa could have been jeopardized under the statute if the pound seizure consent provision was inconspicuously hidden in a five page long document. This would have been especially true where owners surrendering pets signed quickly in order to hasten the painful process of giving up a pet. This concern also applies to the Utah statute, which also leaves it unclear whether the owner need sign or not sign to prohibit the pet from being transferred. An additional concern with the Iowa statute is that it only protected "lawfully licensed" pets. An owner may not realize that his or her pet's license has expired or even that a license was required in the first place. This requirement punishes the pet at the expense of its owner's actions.

California and Colorado both take a "right-to-know" approach. California requires there, "be a notice posted in a conspicuous place, or in conspicuous type in a written receipt given, to warn each person depositing an animal at [an] animal care facilit[y],"[127] that the animals could be sold for research under state law. California specifies the form and content of said notice as follows:

> Notice requirements that animals turned into a shelter facility may be used for research purposes —
>
> In any pound or animal regulation department of a public or private agency where animals are turned over dead or alive to a biological supply facility or a research facility, a sign (measuring a minimum of 28 x 21 cm- — 11 x 8 1/2 inches — with lettering of a minimum of 3.2 cm high and 1.2 cm wide — 1 1/4 x 1/2 inch — (91 point)) stating: "Animals Turned In To This Shelter May Be Used For Research Purposes or to Supply Blood, Tissue, or Other Biological Products" shall be posted in a place where it will be clearly visible to a majority of persons when turning animals over to the shelter.[128]

Colorado's "right-to-know" provision is not as specific. It provides that, "[i]f a pound or shelter provides dogs or cats to facilities for experimentation, such pound or shelter shall inform an owner who is relinquishing his dog or cat to the

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[125] Utah Code Ann. § 26-26-3 (2008).

[126] Iowa Code § 145B.3 (2002) (repealed 2008).

[127] Cal. Civ. Code §§ 1834.5, 1834.7 (2008).

[128] Cal. Civ. Code § 1834.7 (2008) (this statement shall also be included on owner surrender forms).

pound or shelter of such practice."[129] California's notice requirement is far superior to Colorado's. Colorado's statute is vague and requires only that an owner be informed. It does not specify exactly what an owner must be told or in what matter; oral or written. California's statute, on the other hand, is sufficiently definite and sets out the appropriate form and manner of notice line by line. California's signage requirement actually goes above and beyond protecting an owner surrendering an animal, by providing notice not only to such owners, but to the members of the public at large visiting the shelter. Not surprisingly, California appears to have one of the highest levels of public awareness regarding the practice of pound seizure. It is undoubtedly for this reason that all counties in California ban pound seizure even though it is allowed under state law. Under the California notice statute, an owner surrendering an animal arguably gives implied consent after viewing the sign. Nevertheless, a provision also requiring affirmative consent would insure that any owners, outside of the majority of those who by statute must be able to view the sign, do not fall through the cracks. Lastly, the California provision could be improved by increasing the size of the sign, increasing the size of the lettering on the sign or requiring additional signs. Nevertheless, California likely has the best protections in place regarding notice overall.

Lastly, Minnesota, Oklahoma, Ohio, and Wisconsin employ methods other than signage or informed consent to prevent pets from being transferred to research labs. Minnesota, Oklahoma and Ohio specifically do so by prohibiting any dogs or cats from being transferred if they are "tagged."[130] Minnesota's statute provides that, "if a tag affixed to the animal or a statement by the animal's owner after the animal's seizure specifies that the animal may not be used for research, the animal must not be made available to any institution …"[131] Similarly, Oklahoma's statute provides that:

> [a]ny owner of an animal who voluntarily delivers the possession of it to a public pound shall have a right to specify that it shall not be used for scientific research, and if an owner so specifies, it shall be the duty of the pound superintendent to tag such animal properly and to make certain that such animal is not delivered to an institution for scientific purposes.[132]

Ohio's statute provides that, "[a]n owner of a dog that is wearing a valid registration tag who presents the dog to the dog warden or poundkeeper may specify in writing that the dog shall not be offered to a nonprofit teaching or research institution or organization..."[133]

The above statutes, including the tagging requirements, are laudable at first

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[129] Colo. Rev. Stat. 35-42.5-101 (1) (a) (III) (2003).
[130] Oklahoma also requires that an owner be notified. Okla. Stat. tit. 4, § 501 (2008).
[131] Minn. Stat. § 35.71 (2008).
[132] Okla. Stat. tit. 4, § 394 (2008).
[133] Ohio Rev. Code Ann. § 955.16 (D) (2006).

glance but raise red flags for several reasons. First, although the statutes state that an owner may specify that his or her pet not be used for research, they do not specify if or how an owner be notified of the practice in the first place. Surely an owner would not know to exempt his or her pet from animal research if he or she did not know the practice was occurring. Second, the tagging requirements are subject to human error. The superintendant under Oklahoma's statute might mis-tag or fail to tag a dog.[134] Under Minnesota's statute, an owner may not know to tag his or her pet so as to exempt it from research if the owner does not know the practice exists. Likewise, under Ohio's law, an owner may turn over a dog with a registration tag that is invalid or expired. Here, as was previously the case in Iowa, this leads to unfortunate results for both owner and pet. Lastly, in regards to identification tags, not all pet owners require their pets to wear tags all of the time. A pet could escape in a moment in which it is not wearing its tags or a pet could lose its tags before it arrives at a shelter. Even worse, an owner could remove a pet's tags to save as a keepsake of the animal upon surrender. While in practice, the shelter would likely notify the owner that it needs the pet's tags; the shelter is under no obligation to notify the owners in accordance with the above statutes. Tagging may be one effective means to protect pets from pound seizure, but it should not be the only means.

Lastly, Wisconsin, which only allows the release of dogs, takes an alternate measure. It provides that only unclaimed dogs may be turned over to research labs and states simply that, "[a] dog left by its owner for disposition is not considered an unclaimed dog..."[135] Because all dogs surrendered by owners are unclaimed dogs, such dogs cannot be turned over to research labs. This provision is so effective that it eliminates the need for disclosure to pet owners. As such, it is desirable but beyond the scope of this note.

In light of the strengths and weaknesses of the Pet Safety and Protection Act and state pound seizure laws, the following legislation should be adopted to adequately protect pet owners surrendering animals to pounds and shelters in the United States:

A BILL

> To amend the Animal Welfare Act to ensure owners surrendering dogs and cats to animal pounds and shelters practicing pound seizure are notified that their animals could be turned over to research facilities.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

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[134] Some shelters do not have enough funding in place to adequately keep track of every animal. *See e.g.*, Guthrie, *supra* note 86, at B1 ("Our computer system does not have safeguards in place to keep track of every animal").

135 Wis. Stat. § 174.13 (2) (2008).

SECTION 1. SHORT TITLE.

This Act may be cited as the `Pound Seizure Disclosure Act of 2008'.

SEC. 2. PERSONS.

(a) Section 2 of the Animal Welfare Act (7 U.S.C. 2132(a)) is amended by adding the phrase, "including any animal pound, shelter or research facility," after the phrase, "or other legal entity."

SEC. 24. EFFECTIVE DATE.

The amendments made by section 2 take effect on the date that is 60 days after the date of enactment of this Act.

SEC. 30. DISCLOSURE REQUIREMENTS FOR OWNERS SURRENDERING PETS TO POUNDS AND SHELTERS.

The Animal Welfare Act (7 U.S.C. 2131-59) is amended to read as follows:

(a) Definition of Animal Care Facility- In this section, the term "animal care facility," means any animal pound or shelter, whether public or private.

(b) Notice- All animal care facilities that sell, donate, or transfer dogs and cats to research facilities in any way, shall post a notice in a conspicuous place, or in conspicuous type in a written receipt given, to warn each person depositing an animal at such animal care facilities that said animal may be sold, donated or otherwise transferred to a research facility.

(c) Conspicuous Notice- In any animal facility where animals are turned over to a research facility, two signs shall be posted in such a place that they will be clearly visible to a majority of persons when turning animals over to the shelter, and shall —

(1) measure a minimum of 42 x 28 cm (17 x 11 inches);
(2) contain letters of at least a 105 point font; a minimum of 4.5 cm high and 1.9 cm wide (1.75 x .75 inch);
(3) state in clear bold letters: "Animals Turned In To This Shelter May Be Used For Research Purposes;" and
(4) be of contrasting font and background colors – either light lettering on a dark background or dark lettering on a light background to be easily read.

(d) Affirmative Consent- Dogs and cats surrendered to animal care facilities may only be provided to an institution or used for research or educational purposes if the dog or cat's owner

consents to the transfer. Consent will be effective when the owner places his or her signature on a writing that adequately declares on one 8.5 x 11 sheet of paper in 12 point font that the owner hereby consents, agrees, and understands that the animal she or he is surrendering may be turned over for research purposes.

(f) Penalties

(1) IN GENERAL- A person that violates this section shall be fined $1,000 per day for each violation of subsection (b) and $1,000 for each violation of subsection (d).
(2) ADDITIONAL PENALTY- A penalty under this subsection shall be in addition to any other applicable penalty.

The above language borrows the structure of the 2007 Pet Safety and Protection Act as well as the substantive aspects of both California's signage statute and Iowa's repealed disclosure statute. First, the proposed amendment declares itself the "Pound Seizure Disclosure Act of 2008." Next, the proposed amendment alters the definition of the word "person" to include "any animal pound, shelter or research facility," not just public ones. This change could also be achieved by convincing the USDA to revise their regulations. Nevertheless, changing the definition of "person" alone would not be enough protection due to the 1990 amendment's other deficiencies such as its vagueness, inadequacy and unlikelihood of being enforced.

The fourth section of the proposed amendment incorporates but improves upon California's conspicuous notice provision requiring signage. The proposed amendment requires the shelter to put up two signs rather than just one, increases the size of the sign and its lettering, and states that the lettering and the background of the sign must be of contrasting colors to be easily read. Lastly, the proposed amendment incorporates and improves upon Iowa's repealed affirmative consent provision. Like Iowa's repealed statute, it allows an owner to exempt his or her pet from research by refusing to consent. Unlike Iowa's statute, it requires that the consent be given on one piece of eight-and-a-half by eleven inch sheet of paper with twelve point font, so as to provide clear notice and avoid unconscionability.

In light of the fallacies of the AWA's current disclosure requirement, the proposed amendment should be adopted for many reasons. First, the suggested language falls in line with goals and purpose of the AWA. It puts a pet owner on notice and avoids any misrepresentations that may result in a "theft" of his or her pet. Second, the proposed amendment is easily enforceable. Such right-to-know and affirmative consent provisions are low cost and easily implemented. Third, the proposed amendment would create a national baseline that would lend consistency to the current diversity of state approaches, and ensure that protection remained in

place nationwide. Lastly, the proposed legislation addresses a concern Congress expressed in its original legislation. When Congress drafted the 1990 amendment, one of its states purposes was to, "require[] notification of persons that dogs and cats obtained by dealers may be used for research."[136] Congress could not foresee that the USDA would interpret the Act in such a way that it would not apply to all pounds and shelters. This is Congress' opportunity to fix it.

VII. IMPLICATIONS OF THE PROPOSED AMENDMENT

a. Negative Implications

The biggest issue that the proposed legislation raises is what owners, who refuse to surrender a pet to a shelter because of its pound seizure policy, will do with their animals. The biggest fear is that the pet owners will simply let their animals loose, which would pose a danger to the animals, exacerbate the pet overpopulation problem, and increase public expenditures for animal control.[137] It would also convert many pets into strays exposing them to eligibility for pound seizure in states where they would otherwise be exempted.[138] These concerns, however, are unlikely to be large problems as a result of the proposed legislation. The legislation allows owners to surrender their animals to facilities practicing pound seizure even though the owner has refused to consent to her animal being used for research. Many owners will feel satisfied with these protections. Those that do not may find a place for the animal at a private shelter not practicing pound seizure, a no-kill shelter, or with a friend or family member.[139]

A secondary consideration is that if fewer pets become eligible for pound seizure, dealers and research facilities may have to turn to different sources to acquire animals. This could mean either an increase in animals procured legally from commercial breeders, or worse yet, an increase in animals procured illegally via theft

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[136] H.R. Rep. No. 101-916, at 761 (1990) (Conf. Rep.), *as reprinted in* 1990 U.S.C.C.A.N. 5286-5763.

[137] Julian Guthrie, *Bill seeks to bar selling cats, dogs for research; Proposed state Assembly measure would apply to animal shelters across California*, S. F. Chron., Feb. 25, 2003, at A13 ("When the public learns that a family dog or cat may end up as research fodder, the animals will be abandoned in public instead, creating more work and increasing the cost of taxpayer-funded animal control.") (quoting Paul Koretz, a West Hollywood city councilman who introduced a 2003 bill to prohibit pound seizure in California); Sacramento County enacted an animal overpopulation ordinance that required a higher fee for registering an unfixed animal to encourage pet owners to have their pets spayed or neutered to deal with this problem. Ed Fletcher, *County to Stop Selling Shelter Animals to Labs*, Sacramento Bee, Aug. 9, 2006 at B2..

[138] For example, in Wisconsin, a dog let loose would become an unclaimed dog subject to use for research. Wis. Stat. § 174.13 (2) (2008).

[139] Judy Dynnik, *Voice of the People; Don't Blame Volunteers for Animal Problems*, Jackson Citizen Patriot, Aug. 14, 2007, at A7 (stating that a high unemployment rate and the time of year led to an increase in the number of pets in shelters, not the ban on pound seizure in Jackson County, Michigan).

or bunchers. Nevertheless, the AWA's licensing and certification requirements for dealers have since their enactment provided a means to regulate such activities.

b. No Implications

The statute could have no implications depending on the mindset of animal owners. An animal owner that is willing to surrender an animal to an animal care facility in the first place may be unconcerned about the animal's future fate. This owner might consent to animal research and believe that medical research is more valuable than the pet's quality of life. This owner might be in a hurry to surrender the pet and leave the shelter as quickly as possible. The owner could also believe that it is standard practice for owners surrendering animals to consent to such a provision. On the other hand, an owner may be concerned but hope for the best; such is currently the case with euthanasia. Just as pet owners who surrender pets to kill shelters generally convince themselves that their pet will get adopted and not euthanized, owners will convince themselves that the pet will be adopted or at worst euthanized, not sold for research. Luckily, with the proposed consent provision, the owner can insure that that is the case.

c. Positive Implications

The proposed amendment could likely have many positive implications. The most important of these is that it would raise public awareness of pound seizure. Owners surrendering animals who disagree with the practice are likely to voice their opinions among friends and colleagues. Additionally, the notice signage would be visible not only to the pet owners surrendering animals but to members of the public at large, visiting the shelter. Many such people who are looking to adopt a pet from a shelter are aware of and concerned with the pet overpopulation issue in this country and are likely to be the same people who would have a problem with pound seizure. The hope is that eventually public awareness surrounding pound seizure will raise to a level that will encourage legislatures to pass additional laws banning the practice. California provides a good model for what may happen if notice requirements are tightened via the proposed amendment. As discussed earlier, California is the only state with a statute like the proposed amendment requiring a shelter to post a sign warning pet owners that animals surrendered may be used for research. It is not surprising that California also appears to have among the highest levels of public discussion on the subject. So much so that even though state law allows pound seizure, every county in California has banned the practice.[140] The citizens have in effect taken the matter in their own hands and overruled state law. It would not be a surprise to see the state legislature soon follow suit. It is hard to say exactly whether California's pound seizure statute is the cause of the state's awareness of the issue but there is no denying that the two are heavily correlated.

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[140] Sacramento County was the last county to ban pound seizure in California in August of 2006. Sacramento County's pound seizure laws were said to hurt its shelter's image and its ability to recruit volunteers. Fletcher, *supra* note 137.

Peering even further into the future, the same notice requirement that led to public awareness and the demise of pound seizure may one day mark the demise of animal experimentation altogether. As states repeal pound seizure laws, more and more labs are forced to buy expensive animals from commercial breeders. Facilities can pay as much as $800 for each of these animals, compared to as little as $15 for a pound animal.[141] The higher costs associated with purpose-bred animal research make it less appealable to the medical community and have already led to the decline in the number of animals used in research today.[142] In this way, the proposed amendment works to *reduce* animal experimentation, one of the "Three R's," and main goals outlined in the AWA.[143]

Given the potential of what the proposed requirement might achieve, including greater public awareness, increased legislation prohibiting pound seizure, and changing attitudes toward animal experimentation on the whole, the benefits of the amendment far outweigh its costs. Not only is the amendment easy to implement and cost effective, but it provides protections against any risk of an increased number of stolen or abandoned pets. The benefits of the amendments are likely to be great while the costs are likely to be low. Therefore, the proposed amendment should be adopted.

VIII. CONCLUSION

The Animal Welfare Act does not require every animal pound and shelter practicing pound seizure to disclose to pet owners that a surrendered pet may be used for research. The 1990 amendments to the Act, which require a dealer to assure any individual or entity to which it sells an animal that the person or entity from which it acquired the animal was notified the animal could be used for research, do not apply to public animal pounds and shelters because they are not "dealers" according to regulations promulgated by the USDA. Accordingly, pet owners may surrender pets to a shelter in the mistaken belief that the pet will be dealt with humanely, only to have the pet sold for research.
Therefore, without a disclosure requirement, the AWA fails to adequately protect both the property interests of the animals and the owners of animals subject to pound seizure.

This paper has shown that the AWA should be amended to, at the very least, require all pounds and shelters engaging in the practice of pound seizure to disclose

[141] Francis-Smith, *supra* note 104; Rowan, *supra* note 12, at 155.
[142] Douglas Starr, *supra* note 1, at 20.
[143] *Id*.

their activities to pet owners prior to surrender. Until we can eliminate the practice of pound seizure, or animal experimentation on the whole, such limited protection is more than appropriate.