Analysing the Arguments For and Against Legal Liability For Killing an Animal Without Proof of Unnecessary Suffering

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1. Introduction

For over a century, the law has prohibited unreasonable infliction of unnecessary suffering on non-wild animals.[2] For example, section 1(1)(a) of the Protection of Animals Act 1911 rendered it a criminal offence to cause unnecessary suffering to a protected animal by 'wantonly or unreasonably doing or omitting to do any act'.[3] However, no animal protection legislation has ever explicitly rendered it an offence to kill a non-wild animal when it could not be proved that the animal suffered unnecessarily before death.[4] It is explained below that the cruelty offence under section 1(1)(a) of the 1911 Act was expressly held not to apply to killing an animal without proof that the animal suffered unnecessarily before death. Crucially, suffering did not include suffering loss of life; physical or mental suffering whilst the animal was alive was required before the offence could be committed. If a person engaged in actions which led to the death of an animal in circumstances in which it could not be proved that the animal suffered before death, she would not be guilty of the offence, no matter how wanton or unreasonable her actions might have been. Although it is explained below that property law principles can be utilised to render a person criminally and/or civilly liable for killing an animal belonging to another, without need for proof of suffering, they can have no effect against killing done by or with the consent of an animal's owner. The Animal Welfare Act 2006 (AWA) has repealed and replaced most of the 1911 Act, including the section 1 offences, and has even established a legal duty on those responsible for an animal to take reasonable steps to provide for the animal's needs. However, it is argued below that this Act has not rendered it an offence to kill an animal without proof of unnecessary suffering. Therefore, an owner remains free to kill, or authorise others to kill, her animals, for whatever reason she chooses; no one can be liable for killing a non-wild animal, for any reason, if the owner consents; liability can only attach if it is proved that the animal suffered before death.

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This article first considers the extent to which the law protects non-wild animals' lives, by imposing sanctions for killing even when it is not proved that the animal suffered. The article then analyses whether a new

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[2] For the purposes of this article, 'non-wild animals' refers to animals of a commonly domesticated species, animals which are under the permanent or temporary control of some person and animals not living in a wild state. This mirrors the definition of 'protected animal' under Animal Welfare Act 2006, s 2.

[3] The offence applied to any animal 'which is tame or which has been or is being sufficiently tamed to serve some purpose for the use of man…[or] which is in captivity, or confinement, or which is maimed, pinioned, or subjected to any appliance or contrivance for the purpose of hindering or preventing its escape from captivity or confinement': Protection of Animals Act 1911, s 15.

[4] Conservation legislation, such as, e.g., the Wildlife and Countryside Act 1981, places limits on the killing of wild animals, but it does not apply to animals lawfully under human control and is primarily concerned with preserving species populations rather than with protecting individual animals. e.g., Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (OUP, 2001), 79; Robert Garner, *Political Animals* (MacMillan, 1998), 41.

offence[5] of unjustified killing, which would apply (i) without need for proof of suffering and (ii) to killing by an owner and one acting with an owner's consent, should be adopted. When killing will be (un)justified for these purposes is considered below.

Although the apparent incongruity of the law protecting animals from unnecessary suffering but not protecting them from unjustified killing has been noted by Radford,[6] and although there are a number of works considering animal welfare law, animal rights law and/or the ethical dimensions of animal protection and animal rights,[7] the issues addressed in this article have never been considered in depth. Nonetheless, it is contended that they are important issues to analyse, affecting both the protection the law affords animals and the question of how the law should balance people's rights and freedoms (particularly the rights and freedoms of owners of animals) with animal protection.

In addressing the degree to which the law protects animals' lives themselves, without need for proof of suffering, it is necessary to consider criminal and civil property law principles as well as animal protection legislation. After the current law has been analysed, whether the law should prohibit unjustified killing of animals, without the need for proof of suffering, is addressed. Before addressing either of these issues, it is important to consider the historical development of animal protection law in England, to determine how it reached the position of protecting animals from unnecessary suffering but not protecting them from even unjustified killing unless it could be proved that they suffered before death.

2. The Historical Development of Animal Protection Law

As Radford notes,[8] the historical attitude towards animals in Western society was based upon the concept of man's dominion over the lower creatures. Thomas explains that, 'in the early modern period…[f]or most persons beasts were outside the terms of moral reference.'[9] As legislation which would have had the effect of protecting animals began to be proposed, it was put forward for the purpose of protecting human society by maintaining public order and promoting the morals of man. For example, Bills introduced into Parliament in the early 1800s sought to prohibit animal-baiting and -fighting and to offer some basic general protection for animals. These measures were, however, primarily justified on the basis that animal-baiting and -fighting caused much

> **witnessing cruelty to animals tended to lower the morals of those involved and led to violence towards people**

public disorder and that inflicting and/or witnessing cruelty to animals tended to lower the morals of those involved and led to violence towards people.[10]

As scientific evidence began to establish that animals were capable of experiencing pleasure and pain, attitudes towards them began to develop; people began to be concerned to protect animals for the animals' sake, and arguments in favour of protection were based also upon animal sentience. These developments inevitably led to a focus on limiting people's freedom to inflict suffering on animals, even animals which they owned and which they had, thus, previously been free to treat as they wished.[11] As the law developed, it was recognised that limiting people's freedom to inflict suffering upon animals was not necessarily incompatible with man's dominion over the lower creatures. It was argued instead that such limitations were a recognition that the 'dominion [was] a moral trust'.[12] This reasoning implicitly accepted that people were entitled to use animals for their own purposes, but

[5] S 4 AWA imposes criminal liability for acting or failing to act so as to inflict unnecessary suffering on a protected animal, when one knew or should have known that this would be, or would be likely to be, the consequences of one's act/omission. S 9 AWA renders it a criminal offence unreasonably to fail to provide for the needs, according to good practice, of an animal for which one is responsible. It is argued below that, if liability for unjustified killing is to be imposed, it should require proof of intentional or reckless killing. A *mens rea* of intention or recklessness requires greater mental blameworthiness than (i) actual or constructive knowledge that one's actions are at least likely to cause the prohibited harm and (ii) an unreasonable failure. Moreover, the prohibited harm (death) is likely to be at least as severe as the harm of unnecessary suffering and deprivation of an animal's needs. (T Regan, *The Case for Animal Rights* (2nd edn., University of California Press, 2004), 100) argues that 'death is the ultimate harm…[but] it may not be the worst harm there is', as prolonged severe suffering can be a greater harm.) Therefore, it is contended that, if liability is to be imposed for unjustified killing, it should *prima facie* be criminal, to fit with the existing scheme of animal protection law and to reflect the seriousness of the *mens rea* and *actus reus*. (cf, Douglas Husak, 'The Criminal Law as Last Resort' (2004) 24 OJLS 207.)

[6] Radford (*supra* note 3), 243-244.

[7] See, e.g., *ibid*.; Gary Francione, *Animals, Property and the Law* (Temple University Press, 1995); Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Perseus, 2000) and *Drawing the Line: Science and the Case for Animal Rights* (Perseus, 2002); Peter Singer, *Animal Liberation* (2nd edn., Pimlico, 1995); Regan (*supra* note 4).

[8] Radford (*supra* note 3), 15-95.

[9] Keith Thomas, *Man and the Natural World: Changing Attitudes in England 1500-1800* (Penguin, 1983), 148. For general discussion of modern thinking on ethical issues related to human treatment of animals, see, e.g., Lori Gruen, *Ethics and Animals: An Introduction* (CUP, 2011) and Regan, (*supra* note 4).

[10] Radford (*supra* note 3), 33-35. See also, Richard Martin, MP (HC Deb vol 12 col 657, 24 February 1825), William Smith, MP (HC Deb vol 12 col 1009, 11 March 1825) and Sir Francis Burdett, MP (HC Deb vol 12, col 1013, 11 March 1825). As Radford (*supra* note 3, e.g., pp 33-59) notes, those arguing in favour of the Bills were generally concerned to protect animals for the animals' sake but recognised that there was a need also to focus on human-centred benefits, to garner widespread support for the measures.

[11] See, e.g., Lord Erskine's Cruelty to Animals Bill, discussed by Radford (*supra* note 3, 35-38).

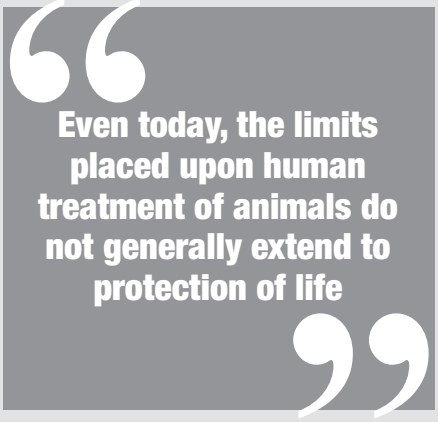
[12] HL Deb vol 14 col 554, 15 May 1809, per Lord Erskine.

that there should be limits to the negative consequences which could be inflicted upon animals in satisfying these purposes. As Lord Erskine put it, animals 'are created indeed for our use, but not for our abuse.'[13] Similarly, Richard Martin, MP, argued that animals 'were entitled, so far as was consistent with the use which was given to [men] over the brute creation to be treated with kindness and humanity.'[14]

The notion that people were free to use animals for their own purposes, with the role of the law being to impose limits on the negative consequences which could be inflicted upon animals in seeking to achieve these purposes, supports the idea that the law was not concerned with protecting animal life *per se*. For millennia, society had accepted the killing of animals for human goals; the law stepped in to regulate the treatment of animals during their lives, but it did not seek to prohibit killing itself. Even today, the limits placed upon human treatment of animals do not generally extend to protection of life *per se*. Millions of animals are killed annually for food, in scientific research, hunting or shooting, or for disease or pest control. There are important legal protections for such animals,[15] but the majority of society accepts that it is legitimate for animals to be used and killed for certain human purposes.[16]

The law's apparent lack of concern for killing itself is illustrated by the courts' interpretation of section 1(1)(a) of the Protection of Animals Act 1911. Case law in both England and Scotland established that killing an animal, without proof that one's actions caused the animal to suffer before death, did not satisfy the elements of this offence. In Scotland, the offence was embodied in section 1(1)(a) of the Protection of Animals Act (Scotland) 1912. The cruelty offences under the Scottish version of the Act were, however, identical to the English Act. In *Patchett v. Macdougall,* the defendant shot and killed a dog with a semi-automatic twelve-bore shotgun, and the Scottish High Court accepted 'that he did so wantonly and unreasonably' and that, if it had been proved that suffering had been caused to the dog, the defendant would have been guilty of the offence.[17] However, the sheriff who heard the case at first instance made no finding as to whether the dog had been killed instantly, without suffering, or had suffered before death. Therefore, the Court held that the offence had not been proved.

In the English case of *Isted v. CPS*,[18] the Divisional Court implicitly applied the same reasoning. In this case, the defendant shot and injured, but did not kill, a dog who had allegedly been worrying livestock kept by the defendant. At trial, the Justices convicted the defendant of the section 1(1)(a) offence under the 1911 Act but stated that, if 'the dog had been killed and had there been evidence to show that she had not suffered unnecessarily we would not have found the case proved'. The defendant argued that, if no offence would be committed if a person killed an animal outright, with no proof of suffering, it would be inappropriate to hold that an offence is committed if the animal does not die but experiences (potentially minor) suffering, when all other facts are identical. As such, he argued that the Justices' statement demonstrated that they had held that the action of shooting the dog to get it away from the livestock had been reasonably necessary and thus could not have amounted to wanton or unreasonable infliction of unnecessary suffering. The Court held that, whilst there was logical force to the argument that it might seem inconsistent to hold that the offence is not committed if an animal dies outright but is committed if the animal experiences minor suffering, the distinction was explicable if one accepted that loss of life did not itself amount to suffering for the purpose of the offence. Indeed, in *Patchett v. Macdougall,* Lord Wheatley expressly stated that '[t]he purpose of the statute generally is to protect animals from cruelty. The purpose of [section 1(1)(a)] is to prevent any unnecessary suffering to animals'. His Lordship then accepted the dictionary definition of suffering as '[t]he bearing or undergoing of pain' and rejected the argument that suffering loss of life would fall within the offence, asserting that 'the…purport of the Act [does not open] the door to that view'.[19]



It can be seen that, whether for the sake of animals or for human society,

[13] *ibid.*, c 555.

[14] HC Deb vol 10 col 487, 26 February 1824.

[15] See, e.g., the AWA, the Welfare of Farmed Animals (England) Regulations 2007 and the Animals (Scientific Procedures) Act 1986.

[16] cf, Francione (*supra* note 6).

[17] (1984) SLT 152.

[18] [1998] Crim LR 194.

[19] *Supra* note 16, 153.

the law has historically been concerned to protect animals from suffering which was deemed unnecessary, but it has not sought to protect animal lives themselves. Indeed, it has always been perfectly legal to kill an animal for a reason which society deems to be legitimate, such as farming, scientific research, hunting, shooting and disease and pest control, provided that the killing is performed in accordance with the particular rules regulating the relevant activity. The mere fact that society accepts as legitimate the killing of animals for certain human goals does not, however, suggest that animals' lives should not themselves be valued and protected by the law. The law did not (under the Protection of Animals Act 1911), and does not (under the AWA), actually prohibit causing suffering to animals; it prohibits (unreasonably) causing *unnecessary* suffering. Similarly, whilst the lawful large-scale killing of animals for farming, scientific research, hunting, shooting and disease and pest control establishes that the law does not universally protect animals' lives above human interests, these activities involve killing animals for human purposes which are deemed legitimate. The law could still prohibit killing animals in the absence of legitimate justification without departing from the fundamental notion that humans are entitled to use animals for our own ends. Indeed, Fudge suggests that, even in the early ethical considerations of animals, it was generally 'acceptable to kill animals for [human] use…, [but] animals [were] not to be…killed for no practical reason.'[20] Whilst the historical development of societal attitudes towards animals therefore explains the interpretation of the Protection of Animals Act 1911 adopted in *Patchett v. Macdougall* and *Isted v. CPS,* whether the position to which it led was, and remains, appropriate is a different question. If the defendant in *Patchett* had been found guilty, this could have been justified on the basis, not that killing an animal is prohibited *per se,* but on the basis that the court had found the defendant's conduct to be wanton and unreasonable, such that the killing was unjustified. Of course, as a matter of statutory interpretation, this would have required the court to hold that 'suffering' included suffering loss of life, and it is accepted that, given the development of animal protection law in the UK noted above, this probably would not have reflected the will of Parliament. The point is not that the cases wrongly established that killing without causing suffering did not amount to an offence under section 1(1)(a); as a matter of statutory interpretation, they can certainly be justified on this point.[21] However, it can also be argued that there would have been nothing, and still is not anything, inconsistent with the development of society's attitudes towards animals in holding that unjustifiably killing an animal, without causing suffering, is legally prohibited. This, of course, is not sufficient to establish that an offence of unjustified killing, without proof of suffering, *should* be adopted; much more is needed in order to analyse the legal, practical and moral dimensions of the debate. Nonetheless, the preceding analysis does establish that liability for unjustified killing itself would not require a fundamental shift in society's attitudes towards animals. Indeed, in the next section, it is explained that property law principles can be utilised to impose liability for killing an animal, without the consent of the animal's owner, regardless of suffering. This could be argued to demonstrate that the law is concerned to protect animal lives themselves. Yet it is contended below that the law's true concern in such cases is protection of an owner's property rights, not protection of an animal's life.

The law did not (under the Protection of Animals Act 1911), and does not (under the AWA), actually prohibit causing suffering to animals

3. Property-based Liability for Killing an Animal without Proof of Suffering

a) Introduction

Although the courts in *Patchett v. Macdougall* and *Isted v. CPS* held that killing an animal without causing suffering was not an offence under section 1(1)(a) of the Protection of Animals Act 1911 or Protection of Animals (Scotland) Act 1912, both courts stressed that this did not mean that, in such cases, a defendant cannot be guilty of a criminal offence. In Patchett, their Lordships suggested that the defendant would have been guilty of the Scottish Common Law offence of malicious mischief had he been charged with that offence. In Isted, although the defendant was guilty because the evidence established that the dog suffered, Brooke LJ stated that, had the defendant killed the dog outright, without proof of suffering, 'he would have been liable to be convicted of an

[20]Erica Fudge, 'Two Ethics: Killing Animals in the Past and the Present', in *Killing Animals* (University of Illinois Press, 2006), 109

[21]E.g., Radford (*supra* note 3), 244.

offence under Section 1(1) of the Criminal Damage Act 1971', subject to the potential defences under section 5 of that Act.[22] Indeed, the status of an animal as property ensures that, if a person kills another's animal, she will have committed an act of property damage/destruction, thereby potentially being criminally and civilly liable. As Garner notes, it has been suggested that, 'due, in particular, to their status as property, [animals'] interests are almost always overridden in favour of the promotion of human interests.'[23] Yet, in this instance, the status of animals as property[24] is capable of offering some legal protection.

First, the offence of criminal damage is considered. Thereafter, liability in tort, under the principles of conversion, negligence and trespass to goods, is analysed. Finally, the potential defence, under section 9 of the Animals Act 1971, to civil liability for killing or injuring a dog is discussed.

b) Criminal Damage

Section 1(1) of the Criminal Damage Act 1971 renders it an offence intentionally or recklessly to damage or destroy property belonging to another, without lawful excuse. Under section 10 of the Act, 'property' includes all tangible property. As it has for centuries been clear that animals can be property,[25] any animal which is owned by another clearly falls within the scope of the section 1(1) offence.[26] Therefore, if A intentionally or recklessly kills an animal belonging to B, she *prima facie* commits the section 1(1) offence, subject to the section 5 lawful excuse defences, regardless of whether it can be proved that the animal suffered.[27] A person has a lawful excuse, first, under section 5(2)(b) of the Act, if she destroyed or damaged property in order to protect property (or a right or interest in property) belonging to herself or another, honestly believing '(i) that the property, right or interest was in immediate need of protection; and (ii) that the means of protection…were…reasonable having regard to all the circumstances.' Second, under section 5(2)(a), if she damaged or destroyed the property honestly believing that she (i) had the consent of the person(s) she honestly believed was/were entitled to consent to the damage or destruction, or (ii) would have had such consent if the relevant person(s) had known of the circumstances.

Isted v. CPS illustrates what is probably the most common situation in which the former defence might apply to killing another's animal. In this case, the dog which was shot had allegedly been worrying livestock. If A intentionally or recklessly kills an animal belonging to B in order to protect livestock (or other property), she can argue that she destroyed B's property in order to protect other property. In order to succeed, she would have to prove that she honestly believed (i) that the livestock (or other property) was in immediate need of protection and (ii) that the actions she took which killed the animal were reasonable.

"if a person kills another's animal, she will have committed an act of property damage/destruction"

As for the latter defence, A would not be guilty of criminal damage if she killed B's animal honestly believing that B (or any person A honestly believed to be the owner or to have authority to consent on the owner's behalf) consented or would have consented to her actions. The section 1(1) offence therefore offers no protection for an animal if the owner(s) consent(s) to the killing, or even if the defendant honestly believed that he, she or they consented or would have consented. The offence can also only be committed by intentional or reckless damage or destruction of property *belonging to another;* if the sole owner of an animal kills the animal, she cannot be guilty of a section 1(1) offence. Accordingly, liability on the basis of criminal damage (or, as is explained further below, property law generally) offers very little, if any, protection for an animal against actions done by, or with the consent of, the owner. So far as property law is concerned, it is still largely true that 'the owner himself [can] treat [his animals] howsoever he please[s], and authorize his employees[28] likewise'.[29]

c) Tortious Liability

It is difficult to define the tort of conversion, but, broadly speaking, anyone who, without lawful justification,[30] intentionally does to property any act inconsistent with the rights of an owner, depriving

[22] *Supra* note 17, 195.

[23] Garner (*supra* note 3), 13. See, e.g., Francione (*supra* note 6).

[24] If an animal is not owned by someone, criminal or civil liability for property damage is not possible.

[25] E.g., *Blades v. Higgs* (1865) 11 ER 1474; Radford (*supra* note 3), 28-30.

[26] An animal of a wild species cannot amount to property for the purpose of the Act if living in a truly wild state and not at least 'in the course of being reduced into possession': Criminal Damage Act 1971, s.10(1)(a).

[27] E.g., Radford (*supra* note 3), 244.

[28] Or anyone else.

[29] Radford (*supra* note 3), 101.

[30] E.g., *Lancashire & Yorkshire Railway v. MacNicoll* [1918] All ER Rep 537, 539, per Lawrence J.

that owner of her dominion over the property, is liable under this tort.[31] It is abundantly clear that there is no need to prove intent to interfere, or actual or constructive knowledge that the actions will interfere, with the rights of another.[32] Taking another person's animal so as to deprive her of possession or use of the animal is clearly capable of amounting to conversion.[33] Likewise, killing another's animal must be capable of amounting to conversion, as the act is clearly inconsistent with the rights of the owner, effectively destroying, and depriving the owner of any possession or use, of the property as an animal. Therefore, if a person intentionally does to an animal belonging to another an act which kills that animal, without lawful justification[34] or the other's consent, she will be liable in conversion.

In negligence, A is liable if she unreasonably causes damage to B's person or property when it was reasonably foreseeable that her actions might cause such loss to a person of a class to which B belonged, there is sufficient proximity between A and B, and it is fair, just and reasonable for there to be a duty of care.[35] Therefore, if A engaged in unreasonable actions which killed B's animal, when it was reasonably foreseeable that her actions might injure or kill an animal belonging to another, she will *prima facie* be liable in negligence, subject to proximity and policy considerations. If it was reasonably foreseeable that A's actions might kill an animal belonging to another and those actions were unreasonable and directly caused the death of B's animal in a reasonably foreseeable way, lack of proximity and other policy considerations would not normally prevent liability. The notable potential exception to this is if A accidentally killed the animal whilst performing lawful actions in a place in which she had the right to perform those actions when the animal was not permitted to be there. In these circumstances, it could be argued that it would not be fair, just and reasonable for A to owe a duty to the animal's owner. For example, if (i) A was shooting (or performing any other actions) on land on which the animal killed was allowed to be, (ii) it was reasonably foreseeable that an animal belonging to another might be killed as a result of her actions, and (iii) those actions were deemed unreasonable, there would be no sound reason for the law not to accept a duty of care. A would be liable in negligence. Conversely, if A unreasonably killed B's animal whilst lawfully doing something on land on which the animal killed was not allowed to be, it could be argued that it would not be fair, just and reasonable to deem that she owed a duty of care to B, even if her actions were unreasonable and it was reasonably foreseeable that those actions might kill an animal belonging to another.

> **a person will be liable unless the damage 'may be judged utterly without his fault'**

A person will be liable in trespass to goods for any damage her actions cause to another's property if that damage was wilfully or negligently inflicted. Indeed, a person will be liable unless the damage 'may be judged utterly without his fault'.[36] It is contended that negligence, in this context, does not require *legal* negligence, with proof of a duty of care. It requires merely that the conduct which caused the damage was unreasonable. This would surely require it to be reasonably foreseeable that one's actions might cause damage to, or destruction of, property, but trespass to goods could apply where it would not be reasonably foreseeable that any person might suffer loss as a result of the damage, because, for example, it was not reasonably foreseeable that anyone might own, or have any interest in, the property. In the context of liability for killing animals, if A unreasonably killed B's animal but believed, and the reasonable person would have believed, that the animal was truly wild, owned by no one, there could be no liability in negligence, because it would not be reasonably foreseeable that A's actions might cause damage to any person. It is submitted that there could, however, be liability on the basis of trespass to goods in such circumstances.

As noted above, section 5 of the Criminal Damage Act 1971 exempts a person from liability in criminal damage if she proves that she

[31]E.g., *Kuwait Airlines v. Iraqi Airlines* [2002] 2 AC 883; [2002] UKHL 19.

[32]*ibid*.

[33]E.g., *Sorrell v. Paget* [1950] 1 KB 252. Francione (*supra* note 6), 61-62, cites the US case of *Fredeen v. Stride*, 525 P.2d 166 (Or. 1974), in which a veterinarian was liable for conversion on the basis of failing to comply with the owner's instruction to destroy a dog and instead rehoming the animal.

[34]Killing an animal to protect persons or property would surely be a lawful justification, by analogy with *Sorrell v. Paget* [1950] 1 KB 252.

[35]E.g., *Hayley v. London Electricity Board* [1965] AC 778, *Whippey v. Jones* [2009] EWCA Civ 452; The Wagon Mound (No.2) [1967] 1 AC 617; *Caparo Industries v. Dickman* [1990] 2 AC 605.

honestly, *but erroneously,* believed that the owner(s) had or would have consented to the property damage/destruction. *Actual* consent of the owner to the killing of her animal would likewise preclude liability in conversion, negligence or trespass to goods. However, an erroneous belief in such consent provides no defence to an action for conversion, it being irrelevant whether the defendant intended to interfere with the property rights of another.[37] Similarly, in *Morris v. Murray,* Stocker LJ suggested that the test in negligence of whether a claimant consented to the risk (for present purposes, the relevant risk is the risk of the animal being killed) is a subjective, not objective, one.[38] If this is correct, an erroneous belief that an owner consented to the killing of her animal will, even if reasonable, provide no defence to an action in negligence.[39] Although the issue has not been directly addressed in trespass to goods, it is submitted that there is no reason that the same rule should not apply. In these circumstances, tortious liability in conversion, negligence or trespass to goods for killing another's animal would be wider than liability for criminal damage.

d) Section 9 of the Animals Act 1971

Section 9 of the Animals Act 1971 provides a potential defence in any civil proceedings brought against a person for killing a dog. In order for the defence to apply, the defendant must prove that she (i) killed the dog 'for the protection of any livestock' which belonged to her or a person under whose authority she acted, or was on land which belonged to her or a person under whose authority she acted,[40] and (ii) that she reported the killing to the police within forty-eight hours. However, it is not enough for the defendant to prove that the dog was in the vicinity of the livestock; she must prove that she honestly and reasonably believed that 'the dog [was] worrying or [was] about to worry the livestock and there [were] no other reasonable means of ending or preventing the worrying' or that 'the dog ha[d] been worrying livestock, ha[d] not left the vicinity and [was] not under the control of any person and there [were] no practicable means of ascertaining to whom it belong[ed].'

Section 9 of the Animals Act has a specific, narrow focus, applicable only to killing dogs for the protection of livestock

The essential purpose of this defence is similar to that of section 5(2)(b) of the Criminal Damage Act 1971. Section 9 of the Animals Act has a specific, narrow focus, applicable only to killing dogs for the protection of livestock to which the defendant has some close connection, whereas section 5(2)(b) of the Criminal Damage Act applies to killing any animal for the purpose of protecting any property. However, broadly speaking, both provisions delineate circumstances in which it is deemed legitimate to kill an animal in defence of property. Whether or not one believes that the standards of these defences are appropriate, it surely must be accepted that killing an animal in defence of another animal (or, in extreme cases, perhaps even inanimate property) can in certain circumstances be justified.

On the other hand, the section 5(2)(a) Criminal Damage Act defence of consent of the owner of the property damaged or destroyed (ie, for present purposes, consent of the owner of the animal killed) is more contentious in its very rationale (as it applies to animals), giving the owner unfettered discretion to authorise the killing of her animal. This defence highlights an important limitation in the scope of protection that property-based liability can afford to animals. As a matter of property law, consent of the owner(s) to any damage to, or destruction of, property provides an absolute defence. Moreover, provided that the actions do not amount to arson, endanger the life or property of another person,[41] cause a nuisance or otherwise infringe civil or criminal law, the owner of property retains complete freedom to damage or destroy it.[42]

In summary, property-based liability affords some protection to animals' lives, without proof of suffering, but this protection works only against people not acting with the consent of the owner; it offers no protection against the owner or those acting with the owner's consent. Therefore, unless the AWA has changed the law, 'the owner [of an animal] retains complete discretion to decide for

[36] *Weaver v. Ward* (1616) Hobart 134; 80 ER 284, 284; cited with approval by the Court of Appeal in *National Coal Board v. JE Evans* [1951] 2 All ER 310.

[37] E.g., *Lancashire & Yorkshire Railway v. MacNicoll* [1918] All ER Rep 537; *Caxton Publishing v. Sutherland Publishing* [1939] AC 178, 202, per Lord Porter; *Marfani & Co. v. Midland Bank* [1968] 1 WLR 956, 970, per Diplock LJ; *Douglas Valley Finance Co. v. S. Hughes (Hirers) Ltd* [1969] 1 QB 738, 752; *Kuwait Airlines v. Iraqi Airlines* [2002] 2 AC 883; [2002] UKHL 19, at [424].

[38] [1992] 2 QB 6, 28-29.

[39] If A accidentally kills B's animal, the fact that B consented to her animal being involved in the activity which led to the death, when subjectively appreciating the risk of death, would surely be sufficient to establish the defence of *volenti non fit injuria*.

[40] The defence does not apply if the livestock is on land occupied by the owner of the dog or land on which the presence of the dog was authorised by the occupier.

[41] Criminal Damage Act 1971, s 1(2) and (3).

[42] Francione (*supra* note 6), 44, notes that, insofar as property law is concerned, '[i]t has never been seriously questioned that the owners of animals can kill their animals with complete impunity'.

himself whether it should live or die';[43] people are free to kill, or authorise others to kill, their animals, for whatever reason they choose, provided that the killing does not cause the animal to suffer unnecessarily.

4. Is Killing an Animal without Causing Suffering an Offence under the Animal Welfare Act 2006?

The AWA does not explicitly render it an offence to kill an animal. Indeed, the Act only expressly deals with killing (i) by providing that the general offences under sections 4 and 9 (explained below) do not extend to 'destruction of an animal in an appropriate and humane manner',[44] and (ii) by providing various powers to inspectors to destroy, and courts to order the destruction of, animals, primarily in the interests of animal welfare.[45] Moreover, none of the debates, committee reports, government responses or oral or written evidence from interested parties, nor the explanatory notes to the Act,[46] expressly deals with whether killing itself, without proof of suffering, can be an offence under the Act.

Section 4(1) AWA replaces section 1(1)(a) of the Protection of Animals Act 1911 and renders it an offence to act or fail to act so as to cause a protected animal[47] to suffer unnecessarily, when the defendant knew or ought reasonably to have known that her act or omission would, or would likely, have that effect. It can be seen that section 4 explicitly requires proof of unnecessary suffering. Although the Crown Court in *Gray v. RSPCA* stated that the old case law (ie, that relating to the offences of cruelty under the 1911 Act) is no longer relevant,[48] it is contended that, if Parliament had intended loss of life itself to amount to suffering, contrary to the precedent established by *Patchett v. Macdougall* and *Isted v. CPS,* it would have made this expressly clear, which it did not.[49] Indeed, section 62(1) AWA states that '"suffering" means physical or mental suffering', with no reference to loss of life. It therefore seems impossible persuasively to argue that killing, without proof of physical or mental suffering beyond loss of life, can amount to an offence under section 4(1).

Section 9 AWA renders it an offence for a person unreasonably to fail to take such steps as are necessary 'to ensure that the needs of an animal for which he is responsible [[50]] are met to the extent required by good practice'. This provision does not require proof of suffering, and its elements could perhaps be interpreted to criminalise unreasonable (ie, unjustified) killing without proof of suffering, as it is strongly arguable that an animal's needs could, for the purpose of section 9, include the need for life.[51]

AWA states that '"suffering" means physical or mental suffering', with no reference to loss of life

Indeed, the explanatory notes to the Act state that section 9(4) 'clarifies that the killing of an animal is not in itself inconsistent with the [section 9(1)] duty to ensure [the animal's] welfare, *if done in an appropriate and humane manner*'.[52] This suggests that killing can be inconsistent with the welfare duty in other circumstances, which might not require proof of suffering. However, it is contended that interpreting section 9 to cover killing without proof of suffering would be strained and courts are unlikely to interpret it in this way[53] given the absence of reference, in any of the debates, reports, and other materials noted above, which preceded adoption of the AWA, (i) to whether killing itself can amount to an offence under the Act, and (ii) to the case law established by *Patchett v. Macdougall* and *Isted v. CPS.*

Even if section 9 were to be interpreted as criminalising

[43] Radford (*supra* note 3), 102.

[44] AWA, ss 4(4) and 9(4).

[45] E.g., *ibid.,* ss 18, 20, 33, 35, 37 and 38.

[46] E.g., 'Animal Welfare Act 2006 – Explanatory Notes' at http://www.legislation.gov.uk/ukpga/2006/45/resources, accessed 11th December 2014); DEFRA, 'Launch of the Draft Animal Welfare Bill', Cm 6252 (2004); House of Commons Environment, Food and Rural Affairs Committee, 'The Draft Animal Welfare Bill – First Report of Session 2004-2005', Volumes I and II, HC 52-I and 52-II (2004); 'The Draft Animal Welfare Bill – Government Reply to the Committee's Report', HC 385 (2005); House of Commons Library, 'The Animal Welfare Bill – Bill No. 58 of 2005-06' RP 05/87 (2005); House of Commons Environment, Food and Rural Affairs Committee, 'The Draft Animal Welfare Bill', HC 683 (2005); House of Lords Library, 'The Animal Welfare Bill – HL Bill No. 88 of 2005-06', LLN 2006/003 (2006).

[47] A 'protected animal' is any vertebrate other than man, not in its foetal or embryonic form, which is (i) of a kind commonly domesticated in the British Islands, (ii) under the permanent or temporary control of man, or (iii) not living in a wild state: AWA, ss 1 and 2.

[48] Aylesbury Crown Court, unreported, 6th May 2010.

[49] 'The Animal Welfare Act 2006 – Explanatory Notes' (*supra* note 45) state that AWA, s 4, 'is intended to replicate the protection provided by the 1911 Act, but to simplify and update the legislation.'

[50] A person is responsible for an animal if she (i) owns, (ii) is in permanent or temporary charge of, or (iii) has actual care and control of a child under the age of 16 who is responsible for, the animal: AWA, s 3.

[51] A person is responsible for an animal if she (i) owns, (ii) is in permanent or temporary charge of, or (iii) has actual care and control of a child under the age of 16 who is responsible for, the animal: AWA, s 3.

[52] A person is responsible for an animal if she (i) owns, (ii) is in permanent or temporary charge of, or (iii) has actual care and control of a child under the age of 16 who is responsible for, the animal: AWA, s 3.

[53] If an unreasonable failure to provide for the needs of an animal according to good practice leads to death, the s 9 offence could be committed, just as infliction of unnecessary suffering which leads to death can amount to a s 4 offence. The point is that unreasonable killing is not *itself* caught by s 9.

unreasonable killing without proof of suffering, it applies only to one who is responsible for an animal. Under section 3, a person is responsible for an animal if she (i) owns, (ii) is in permanent or temporary charge of, or (iii) has actual care and control of a child under sixteen who is responsible for, the animal. It seems difficult to argue that a defendant in a similar situation to that which arose in *Patchett v. Macdougall* or *Isted v. CPS* could be in charge of the animal she killed, unless the animal was confined at the time.[54] Therefore, although a new offence based upon section 9 AWA could close one lacuna in the law, rendering an owner potentially liable for unreasonably killing (and perhaps for unreasonably authorising the killing of) her animal, it would not address the issue highlighted by the facts of the two cases. Property-based liability would remain the only way to deal with such situations unless reform extended liability beyond those responsible for an animal. Of course, the combination of section 9 AWA and property-based liability could arguably cover all unjustified killing, but it is submitted that it would be inappropriate for two different regimes to apply. For example, the maximum sentence under section 9 AWA is six months' imprisonment and/or a level five fine, whereas the maximum sentence under section 1(1) Criminal Damage Act 1971 is ten years' imprisonment. Moreover, an offence under section 9 AWA could be committed by any unreasonable act or omission, whereas section 1(1) Criminal Damage Act 1971 requires intent or recklessness as to damage or destruction of property. Whilst the different standards of *mens rea* could arguably (i) be justified on the basis that responsibility for an animal imposes stricter duties on a person, and (ii) themselves justify the different maximum sentences, the fact that there has been no discussion of these issues adds further weight to the suggestion that Parliament did not intend section 9 AWA to criminalise killing without proof of suffering.

5. Should the Law Prohibit Unjustified Killing without Proof of Suffering?

a) Introduction

It has been demonstrated that animal protection law in England does not include liability for unjustifiably killing a non-wild animal without proof of suffering. Property law principles provide some protection for animals' lives in these circumstances, because a person might be guilty of criminal damage and/or can be civilly liable for conversion, negligence or trespass to goods when she intentionally, recklessly or negligently kills an animal belonging to another. Yet none of these principles protects an animal from the actions of the animal's owner, genuine consent of the owner negates the possibility of any property-based liability, and an honest (even if unreasonable) belief that the owner (or one with authority to consent on her behalf) consented or would have consented to the killing precludes liability for criminal damage. There is, therefore, a significant lacuna in the law, leaving owners free to kill, or authorise the killing of, their animals, for any reason they desire; whatever the reason(s) for killing the animal, or having it killed, no liability can attach unless it can be proved that the animal suffered in the process of killing. Whether the law should fill this gap by establishing a new offence of unjustified killing will now be analysed.

In this regard, it is important to consider when killing an animal will be unjustified, to define the scope of potential liability which is being assessed. As a preliminary point, it is contended that any new offence should apply only to intentional or reckless killing. The problem in the current law is that owners are free to kill, or to authorise others to kill, their animals, for whatever reason they choose. It is submitted that negligent killing itself does not have the distinctive blameworthiness to justify imposing criminal liability.[55] Nevertheless, if the offence applied only to intentional killing, a person could escape liability by proving that she intended to injure, rather than kill, the animal. If unnecessary suffering before death could be proved, the defendant would be guilty of the section 4 AWA offence on such facts, but her actions would not be caught by the new offence if intentional killing were required. If,

owners are free to kill, or to authorise others to kill, their animals, for whatever reason they choose

[54] In *Patchett*, the dog was 'tied up and in a pen' at the time of being shot (*supra* note 16, 153). The report does not state whether it was the defendant who confined the dog. If so, he would arguably have been in charge of, and thus responsible for, the dog, had AWA, s 3 been in force.

[55] Criminal liability generally does not attach to "mere" as opposed to "gross" negligence: *R v.. Adomako* [1995] 1 AC 171.

however, the defendant foresaw the risk of killing, even though she intended only to injure the animal,[56] and, in the circumstances known to her, her actions were unreasonable, reckless killing would be established.[57] Adopting intention and recklessness as the alternative *mens rea* elements of the offence ensure that liability cannot attach unless there is subjective advertence of the risk of death. This is important in establishing the defendant's conduct as sufficiently blameworthy to justify imposing criminal liability.

It is submitted that any new offence should expressly exclude killing which is the consequence of lawful performance of an activity which (when lawfully performed) routinely leads to the death of an animal and which is already subject to express legal regulation, namely, farming, scientific research, hunting and shooting, and disease and pest control. That is to say, killing in such circumstances should not be deemed unjustified for the purposes of the offence. Whilst some might argue that killing an animal for any purpose not essential to survival is not morally different from, for example, the killing of the dog in *Patchett v. Macdougall*, activities which are subject to express legal regulation are viewed as legally legitimate (if performed in accordance with that legal regulation), and any killing which is the routine consequence of lawful performance of such activities therefore cannot be *legally* unjustified.[58] Exclusion of these kinds of activities from the scope of any new offence is, therefore, a necessary step in seeking to define what amounts to *unjustified* killing. It is, however, not sufficient to define unjustified killing, and it is contended that killing an animal will also not be unjustified when the killing is done (i) to relieve suffering in the animal's best interests (that is, when the animal is in such a state of suffering that it is better for it to be killed than to continue to live), or (ii) in defence of a person or other animal. These exceptions all require further analysis. For example, by what standard is it decided whether an animal's suffering is such that it is in that animal's best interests to be killed, and when must a proper veterinary method be used? Similarly, how is it decided whether the person or other animal was in sufficient need of protection to justify the killing? In all cases, where does the burden of proof lie? These issues are addressed below. The crucial point is that, for present purposes, unjustified killing is any intentional or reckless killing of an animal which is not (i) the consequence of lawful performance of disease or pest control, hunting, shooting, farming or scientific research, (ii) performed in the animal's best interests, to relieve suffering, or (iii) done in defence of a person or other animal. Therefore, the issue to be analysed is whether the law should impose liability on a person who kills an animal in such circumstances even if it cannot be proved that the animal suffered.

> **imposing liability for unjustified killing would be in line with legal developments, in England and at EU level**

b) The Legal Position

It is contended that imposing liability for unjustified killing would be in line with legal developments, in England and at EU level, which establish significant concern for animal welfare and the value of animals' lives. For example, article 13 of the Treaty on the Functioning of the European Union expressly recognises that 'animals are sentient beings' and obliges the Union and Member States to 'pay full regard to the welfare requirements of animals' when 'formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies'. Whilst the article requires animal welfare to be balanced with the need to respect 'the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage', it establishes animal welfare as a central concern of the EU. Nonetheless, the Commission notes that '[n]o EU legislation exists on the welfare of pets'[59] and asserts that it is 'the enormous economic activity that drives the treatment of animals in the European Union',[60] suggesting that financial concerns can override animal welfare. Indeed, it cannot be sensibly claimed that article 13 directly supports an offence of

[56] Reckless killing could cover situations where the defendant did not even intend to injure the animal. However, if the defendant is criminally reckless, then she must have subjectively foreseen the risk of killing the animal by her actions and have unreasonably performed those actions in any event (*R v. G* [2004] 1 AC 1034; [2003] UKHL 50). This will ensure that truly accidental killing (e.g., running over an animal with one's car when one did not subjectively appreciate the risk of this and/or did not act unreasonably in driving as one did) will not be caught by the offence.

[57] *R v. G ibid*.

[58] The moral dimension to when killing is unjustified is considered below.

[59] 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015' COM (2012) 6 final, 3.

[60] *ibid*., 4.

unjustified killing without proof of suffering. The article does, though, represent an important symbolic recognition that animals' interests must be seriously considered. As the Commission states, '[a]nimal welfare is a societal concern that appeals to a wide public. Treatment of animals relates to ethics and is part of the Union's set of values.'[61] Van der Schyff also notes that article 13 'distinguish[es] animals from mere corporeal things.'[62] Whilst this does not change animals' status as property, it recognises that they are not to be treated purely as property, with no interests of their own to be considered in law.

The ban on fur farming, implemented in England by the Fur Farming (Prohibition) Act 2000, clearly establishes that society and the law values animals' lives above human pleasures in this regard. This directly supports the underlying rationale of a proposed offence of unjustifiably killing an animal, albeit in a limited area. Although debate preceding adoption of the Act demonstrates that the welfare of fur-farmed animals whilst alive was a significant concern,[63] the very act of killing animals solely or primarily for their fur was deemed unjustifiable and thus banned. In short, it was determined that, regardless of suffering and overall welfare, animals should not be killed for their fur. The ban is an example of a prohibition on killing an animal for a reason which is deemed unjustified.

The development in animal protection law which perhaps provides the greatest support for a new unjustified killing offence is section 9 AWA. It has been argued above that section 9 cannot properly be interpreted to criminalise killing without proof of suffering, and it might be thought that the fact that Parliament did not address this issue when fundamentally updating animal protection law in England suggests that it was not deemed an issue of significant importance. However, the fundamental change which section 9 AWA did introduce, the duty on those responsible for an animal to take reasonable steps to provide for the animal's welfare, itself supports establishing liability for unjustified killing. It is surely inconsistent to say that a person has a positive legal welfare duty to an animal if she can escape that duty by killing the animal for no legitimate reason provided that it cannot be proved that the animal suffered unnecessarily. For the law to allow this would effectively be to hold that the section 9 welfare duty is ultimately concerned only with prevention, or at least minimising the risk, of suffering, rather than with overall welfare. On its terms, section 9 could be viewed as ultimately being concerned with avoidance of suffering, allowing the law to intervene when an animal is being treated in such a way as is *likely,* if it continues, to lead to suffering, without the need for proof of actual suffering.[64] On this interpretation, the provision would still be a positive development in animal protection law in England, which, prior to the AWA, required proof of actual unnecessary suffering, unless it was proved that

the very act of killing animals solely or primarily for their fur was deemed unjustifiable and thus banned

an owner (or some other person in charge or control of the animal) abandoned an animal[65] in circumstances likely to lead to unnecessary suffering.[66] However, on this interpretation, section 9 would not be a true welfare duty,[67] because animal welfare is about far more than avoidance of suffering; it is about the full range of negative *and positive* experiences an animal can have.[68] To kill an animal is to end any chance that animal has of ever again experiencing any pleasures and is thus one of the most significant anti-welfare acts possible, unless done in the animals' best interests. For the law to allow unjustified killing by a person responsible for an animal, or to allow such a person to authorise unjustified killing of the animal, would, therefore, be to abrogate any true welfare duty which section 9 AWA provides. Conversely, to establish liability for unjustified killing would go hand-in-hand with the provision. Indeed, as Sweeney states, prohibiting unjustified killing of an animal other than in her best interests 'would preserve the legal duty of care [created by section 9 AWA] with the animals' welfare in remaining alive…and [would accord] with the aim of the AWA'.[69]

Unlike section 9, section 4 AWA is directly concerned with prevention of suffering, requiring proof that an animal suffered unnecessarily. It has

[61] *ibid.,* 10.

[62] Gerhard van der Schyff, 'Ritual Slaughter and Religious Freedom in a Multilevel Europe: The Wider Importance of the Dutch Case' (2014) 3 *OX J Law Religion* 76, 99.

[63] E.g., HC Deb vol 326 col 1331-33, 5 March 1999. See, in particular, Patrick Nicholls, MP, HC Deb vol 326 col 1340-48, 5 March 1999.

[64] Unreasonable failure to provide for the needs of animal according to good practice is likely eventually to lead to suffering.

[65] In *Hunt v. Duckering* [1994] Crim LR 678, it was held that abandonment required the defendant to have 'relinquished, or wholly disregarded, or given up his duty to care for the [animal]', rather than simply that he had left, and failed adequately to provide for the needs of, the animal (679, per Evans LJ).

[66] Abandonment of Animals Act 1960, s 1.

[67] Although AWA, s 9 does not use the word 'welfare', it is entitled 'Duty of person responsible for animal to ensure welfare' and 'Animal Welfare Act 2006 – Explanatory Notes' refer to it as '[t]he welfare offence' (*supra* note 45, at [48]).

[68] E.g., Micahel C. Appleby et al (eds), *Animal Welfare* (2nd edn., CABI, 2011).

[69] Noel Sweeney, *Animals-in-Law* (Alibi, 2013), 14.

> **an animal's status as property should not render its life extinguishable, without justification, at the hands of its owner**

been explained above how attitudes towards animals developed to reach the position that animal protection law was concerned to regulate the treatment of animals during their lives but was not concerned with their death, provided that death did not entail any unnecessary suffering. Section 4 AWA could be seen as the modern encapsulation of this view. Nonetheless, it is contended that the desire of the courts in *Patchett v. Macdougall* and *Isted v. CPS* to note that property law principles could be used to protect the lives of animals unreasonably killed without the consent of their owners, in circumstances in which it could not be proved that they suffered unnecessarily, highlights the fact that, in modern times, it seems inappropriate for the law to protect animals during their lives but not to be concerned with animals' deaths (beyond ensuring that no unnecessary suffering is occasioned when they are killed). Alternatively, one might argue that the true concern in cases such as *Patchett* and *Isted* is protection of property rights, not protection of animals' lives. It must, therefore, be considered whether the law should interfere with an owner's property rights by removing her right to kill, or authorise killing of, her animal even when the animal does not suffer.

Before adoption of animal protection legislation, a person could treat her animal as she wished, because that animal was her property.[70] However, well over a century ago, the law recognised that an animal's status as property should not prevent it from being protected from unnecessary suffering at the hands of its owner and that inflicting unnecessary suffering on another's animal was not merely an issue of property damage. Furthermore, with adoption of the AWA, the law went further, recognising that an animal's property status should ensure that at least its owner has a legal duty to provide for its welfare. Surely, it is a natural progression to recognise that an animal's status as property should not render its life extinguishable, without justification, at the hands of its owner, as long as suffering is not caused. To insist on an owner's property rights automatically trumping the value of an animal's life when they no longer entitle an owner to inflict unnecessary suffering on the animal, and actually impose a welfare duty on the owner, is to pose a rather strange conundrum.[71]

It is contended that the above analysis establishes that the law is *ready* for a new offence of unjustified killing,[72] because such an offence would be in keeping with important developments in animal protection law. In particular, the law recognises that animals, whilst capable of being owned, are more than mere items of property: it recognises that animals have interests of their own to be protected and that these interests can outweigh an owner's property rights; it recognises that animals can have positive and negative experiences and that those responsible for an animal should have a duty to take reasonable steps to provide for the animal's needs. Yet when it comes to liability for killing, without proof of suffering, an animal is treated merely as property, with liability attaching only to protect an owner's property rights and not extending to killing by or with the consent of the owner. It is submitted that this creates tension and conflict in the law. However, the above analysis is not sufficient to establish that the law *should* establish a new offence of unjustified killing. It is important to consider also, first, the ethical dimension to the debate, and, second, an important potential practical objection to a new offence.

c) The Moral Position

Analysis of whether there should be a new offence of unjustified killing has so far centred around legal arguments. However, one cannot escape the moral dimension of this issue. Indeed, Harrop suggests that 'animal welfare law…[is] founded on moral…assumptions'.[73] It is submitted that, although

legal and moral duties are distinct[74] *…[because] a legal duty can legitimately be amoral, and it is perfectly acceptable to have no legal duty where there is a moral duty…, it can be equally appropriate for a moral duty to form the basis of a*

[70]E.g., Radford (*supra* note 3), 28-30.

[71]As Deborah Rook ('Who Gets Charlie? The Emergence of Pet Custody Disputes in Family Law: Adapting Theoretical Tools from Child Law' (2014) 28 Int J Law Policy Family 177, 179) notes, '[t]he legal status of…animals [may be] that of property, but they constitute a unique type of property; animals are living and sentient property and this is the crucial factor' in the law's treatment of them.

[72]Interestingly, a number of American states and Australian territories criminalise unjustified killing, without the need for proof of suffering. E.g.,, Florida (F.S.A, § 828.12), Illinois (Humane Care for Animals Act, § 302), New York (N.Y. Rev. Stat. ch. 682, § 26 (1881)), California (CA Penal § 597), New South Wales (Prevention of Cruelty to Animals Act 1979, ss 4 and 5). However, other jurisdictions criminalise killing only if the animal suffers in the process of being killed. E.g., South Australia (Animal Welfare Act 1985, s 13), Western Australia (Animal Welfare Act 2002, s 19), Northern Territory (Animal Welfare Act, s 9), Queensland (Animal Care and Protection Act 2001, s 18).

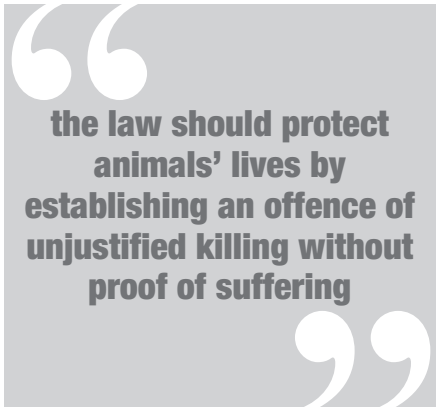
[73]Stuart Harrop, 'The Dynamics of Wild Animal Welfare Law' (1997) 9 JEL 287, 289. See also Kimberley K. Smith, 'Governing Animals: Animal Welfare and the Liberal State' (OUP, 2012), 83

[74]Regan (*supra* note 4), 267-71.

legal duty, or the absence of a moral duty to form the basis of the absence of a legal duty'.[75]

In short, 'morality is not enough to make law, but it is a relevant consideration.'[76]

There are a number of important works considering the ethical implications of treatment of animals, arguing, for example, for (i) moral rights for animals,[77] (ii) a change in the property status of animals,[78] or (iii) utilitarian-based equal respect for the interests of animals.[79] The arguments put forward in these works consider much more general and far-reaching ethical questions than the one considered here, which is simply whether the law should protect animals' lives by establishing an offence of unjustified killing without proof of suffering. However, the arguments advanced by the authors of the works cited clearly support the moral basis of a new offence. For example, Regan characterises as 'seriously deficient' the view 'that so long as animals are put to death painlessly, so long as they do not suffer as they die, we should have no moral objection.'[80] Similarly, Francione's central objection to the law's treatment of animals is that the property status of animals ensures that human interests will always trump animal interests. Establishing liability for unjustified killing of an animal, including by, or with the consent of, the owner, obviously addresses this objection, in one area of the law. For Singer, whether killing is unjustified would be determined on a utilitarian balance (with commensurate human and animal interests counting equally), but, if it were not justified, he would object to the killing.



It is accepted that ethical arguments in favour of animal rights/animal liberation are extremely contentious, and the grounds for adopting a new offence should not be based solely, or even mainly, on them. However, as already noted, consideration of whether the law should impose liability for unjustifiably killing an animal has far narrower implications than consideration of whether animals have extensive moral rights, whether their status as property should be changed, or whether their interests should count equally with human interests. That is to say, the moral arguments made by the authors cited above support a new offence of unjustified killing, but support for the offence does not necessitate acceptance of the general moral theories put forward by those authors. Consideration of the full extent of those arguments is outside the scope of this article; it is only the ethical basis of a new offence of unjustified killing, without proof of suffering, which is relevant for present purposes.

It is contended that, if a new offence is adopted, it should extend only to those animals which fall within the section 1 AWA definition of 'animal': *viz.*, any vertebrate other than man, not in its foetal or embryonic form. Adopting this definition would ensure that the offence extends only to those animals which scientific evidence has established are sentient, capable of having both positive and negative experiences.[81] Animals which are capable of positive experiences have an inherent interest[82] in not having their lives, and thus their chances of future positive experiences, ended. The question then becomes whether people should have a legal duty to respect that interest and thus be prohibited from killing such animals without legitimate justification, whether or not the animal suffers.

Section 9 AWA imposes a positive obligation on one responsible for an animal to take reasonable steps to provide for that animal's needs, according to good practice. The provision does not expressly state that an animal's needs include the need for positive experiences, but it is entitled 'Duty of person

[75]Gareth Spark, 'Protecting Wild Animals from Unnecessary Suffering' (2014) 26 JEL 473, 479.

[76]*ibid*.

[77]Regan (*supra* note 4).

[78]Francione (*supra* note 6).

[79]Singer (*supra* note 6).

[80]Regan (*supra* note 4), 99. Regan limited his argument for moral rights for animals to normal mammalian animals a year or older, based on the availability at the time of scientific evidence as to the capacities of animals.

[81]'Animal Welfare Act 2006 – Explanatory Notes' (*supra* note 45), at [11]. AWA, ss 1(3) and (4), give the Secretary of State power to extend the definition of 'animal' to include invertebrates, from any stage of their development, and vertebrates in their foetal or embryonic form, if she 'is satisfied, on the basis of scientific evidence, that animals of the kind concerned are capable of experiencing pain or suffering'.

[82]It is contended that sentience, the ability to have positive and negative experiences, is enough to establish an animal's *interest* in maximising positive, and minimising negative, experiences. The ability actively to pursue choices consciously designed to maximise positive experiences should not be a prerequisite; 'interest' is not here being used to refer to a conscious choice but, instead, to what can reasonably be determined, on an objective basis, to be best for the animal.

> **Killing in an animal's best interests is clearly morally distinct from killing an animal at the whim of another**

responsible for animal to ensure *welfare*', the explanatory notes to the AWA refer to it as '[t]he *welfare* offence',[83] and it is abundantly clear that animal welfare is equally concerned with animals' positive and negative experiences.[84] Moreover, the non-exhaustive list of indicative needs referred to in section 9(2) AWA includes specific needs which animal welfare science has established are equally concerned with ensuring the possibility of positive experiences as with avoiding negative experiences.[85] Therefore, the law already imposes, albeit only on one responsible for the animal, a duty to take reasonable steps to provide an animal with everything it needs, according to good practice, in order to be able to have positive experiences.

It is not suggested that a person who is not responsible for an animal should have any duty to act so as provide that animal with positive experiences. Prohibition of unjustified killing would impose merely a negative duty not intentionally or recklessly to kill an animal, without justification, so as to end that animal's chances of positive experiences. It is accepted that such a duty would effectively be to ascribe a limited, qualified moral right to certain animals (a right not to be intentionally or recklessly killed by a person without justification), but it is contended that it is appropriate to grant such a right to a class of animals which scientific evidence has firmly established are sentient: if a sentient animal's chances of future pleasure are to be intentionally or recklessly taken from it, there should be a legitimate justification for this. If this argument is accepted, it then becomes necessary to analyse the moral validity of the definition of when killing will be legally justified.

It must be remembered that killing will not be unjustified if it is (i) the consequence of lawful hunting, shooting, farming, scientific research or disease or pest control, (ii) performed to relieve suffering in the animal's best interests (as explained above), or (iii) undertaken to protect a person or other animal. Analysing the final two exclusions first, how the law determines whether an animal's suffering is sufficiently severe to justify ending the animal's life, or whether the risk to a person or other animal is serious enough to justify the killing, is vital in analysing the morality of these exceptions. It is submitted that killing should not be deemed legally unjustified if done in the honest belief that it was (i) in the animal's best interests because the animal was suffering to such an extent that it was better for it to killed than to continue to suffer, or (ii) reasonable and necessary in order to protect a person or other animal from death or serious injury. It is contended that, in these circumstances, the rationale of the final two exclusions can fit with the moral arguments outlined above. In principle, there is nothing morally inconsistent with a general duty not unjustifiably to kill an animal in allowing killing in the animal's best interests or in defence of another. Killing in an animal's best interests is clearly morally distinct from killing an animal at the whim of another. Similarly, although the final exclusion would involve killing an animal in the interests of another, this can much more readily be morally justified when done to protect the health and/or life of another living being.

On the other hand, killing animals for scientific research, food, hunting, shooting or disease or pest control is arguably in a different moral category. Killing animals in scientific research which actually provides some direct health benefit to humans or animals can be seen as morally similar to killing in defence of the health or life of a person or other animal. However, even though there are tight regulations on scientific research involving animals,[86] proposed research need not promise even the likelihood of direct benefits to human or animal health.[87] Similarly, it might once have been necessary for human (or animal) health to eat animals, but it no longer is, so killing animals for food cannot be said to be commensurate with killing in order to protect the health or life of a person (or animal). Killing animals for disease control is primarily concerned with protecting human and/or animal health,[88] and killing for pest control[89] will often have this as its primary concern. Conversely, although killing animals in the lawful performance of hunting or shooting arguably might provide some benefits to human and/or animal health,[90] the primary purpose of such activities is often human pleasure. It could, therefore, be argued that universal exclusion of killing as a consequence of lawful

[83] 'Animal Welfare Act 2006 – Explanatory Notes' (*supra* note 45), at [48] (emphasis added).

[84] Appleby et al (*supra* note 67).

[85] *ibid*.

[86] E.g., Animals (Scientific Procedures) Act 1986, especially ss 5B and 5C.

[87] E.g., *ibid*.

[88] E.g., Animal Health Act 1981.

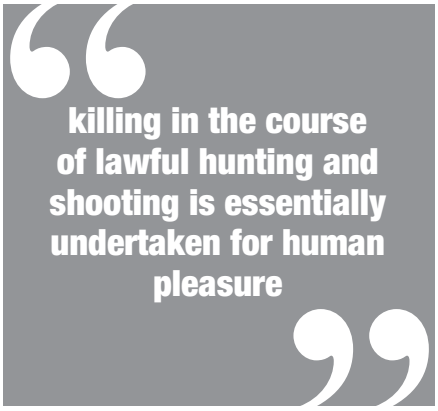
[89] E.g., Protection of Animals Act 1911, s 8, and AWA, s 7.

[90] E.g., it might stop the spread of disease or help to manage sustainable wild populations.

performance of hunting, shooting, farming, scientific research or disease or pest control, rather than exclusion only in pursuit of protection of human or animal health, conflicts with the moral basis of a potential new offence. That is to say, it could be contended that it is arbitrary to deem killing as a consequence of lawful performance of these activities as necessarily amounting to killing for a legitimate purpose and thus as legally justified but to deem all other intentional or reckless killing legally unjustified and thus as an offence. This argument could then be extended to undermine a new offence, as it could be suggested that permitting these universal exceptions, regardless of the activities' individual moral bases, is hypocritical. Yet, if it is accepted that a new offence is legally and morally justified but felt that these exclusions conflict with its moral basis, the problem lies in the exceptions, not in the offence. Indeed, to accept the appropriateness of a new offence if these exclusions do not exist but not to accept it because of the exclusions is to accept the need for the offence but to object because it does not go far enough.

As such, it is contended that the (im)morality of the exclusions does not call into question the morality of the offence, unless it can be established that there are activities morally equivalent to the exclusions which are nonetheless caught by the offence. For example, it could be argued that killing in the course of lawful hunting and shooting is essentially undertaken for human pleasure, and that, if this is deemed legitimate, any killing for human pleasure should be equally legitimate. It is, however, undoubtedly true that, no matter how controversial it might be, lawful hunting and shooting has a deep cultural heritage and can thus arguably be distinguished from killing performed purely for the killer's pleasure. Certainly, killing in lawful performance of scientific research, farming, and disease and pest control is morally distinct from killing for pleasure. Similarly, killing simply to escape one's responsibility for an animal, or, say, to ease boredom, is morally distinct from killing as a consequence of one of the exclusions.

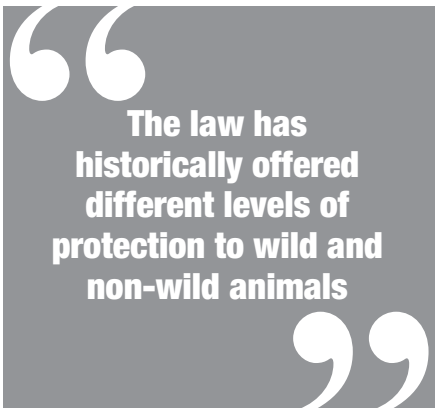
It is accepted that, if a person kills an animal for food, or in performance of shooting, hunting, scientific research or disease or pest control, but outside of the legal regulation of these activities, this can be argued not to be morally distinct from killing in the course of lawful performance of one of the activities. Such actions would fall outside the express legal regulation, and thus outside of the legal protection, of such activities and can thus appropriately be treated as *legally* distinct. They would, though, undoubtedly be morally similar to lawful performance of one of the activities, if genuinely done for a similar purpose. A comparable potential conflict exists in the current law, as section 4(3)(b) AWA states that 'whether the conduct which caused the suffering was in compliance with any relevant enactment or any relevant provisions of a licence or code of practice issued under an enactment' is relevant in determining whether that suffering is unnecessary. Similarly, section 9(3) AWA states that, in applying the section 9 offence, 'it is relevant to have regard…[to] any lawful purpose for which the animal is kept, and…any lawful activity undertaken in relation to the animal.' Therefore, particular actions could amount to an offence under section 4 or 9 AWA in certain circumstances, but identical actions might not be an offence if performed as part of lawful performance of some expressly legally regulated activity. Sections 4(3) and 9(3) give the court discretion to take lawful performance of a legally regulated activity into account, rather than automatically excluding such from the scope of the offences. It is contended that, under a potential new offence of unjustified killing, an absolute exclusion for lawful performance of hunting, shooting, farming, scientific research and disease and pest control would be preferable, for the avoidance of doubt. However, if it is felt that the potential for arbitrary distinctions in the exclusions give rise to cause for concern, a similar approach to that which exists in the current law could be taken under the new offence in respect of activities undertaken for the same purpose as, but outside the scope of, one of the exclusions. That is to say, if the defendant proves that she killed the animal for food or in performance of shooting, hunting, or disease or pest control, but not subject to the legal regulations governing such activities, this could be a relevant factor for the court to consider when determining whether the killing was unjustified.



It will be noticed that the section 2 AWA definition of 'protected

animal'[91] has not been adopted, such that the new offence would apply equally to wild animals. This raises the important question of whether it is appropriate to provide wild and non-wild animals with the same level of protection from unjustified killing. *Prima facie,* if a wild animal is sentient, the argument made above with regards to preservation of an animal's interests in having positive experiences applies equally to the wild animal. It is therefore contended that, ethically, sentient wild animals should be equally protected from unjustified killing. Whether such a change in the law would be appropriate in practice is another issue.

The law has historically offered different levels of protection to wild and non-wild animals. For example, it is an offence to act or fail to act so as to cause a protected animal to suffer unnecessarily when the defendant knew or should have known that her actions would, or would likely, have that effect.[92] However, the law does not offer wild animals the same level of protection from unnecessary suffering: it is only an offence if one 'mutilates, kicks, beats, nails or otherwise impales, stabs, burns, stones, crushes, drowns, drags or asphyxiates any wild mammal with intent to inflict unnecessary suffering'.[93] Conversely, the law has traditionally offered, in one sense, greater protection to the lives of wild animals than to non-wild animals, as wildlife protection legislation renders it an offence to kill various wild animals in certain circumstances without the need for proof that the animal suffered.[94] If a new offence of unjustified killing extended to wild animals, it would change this trend of bifurcation in the levels of protection afforded to wild and non-wild animals. It could also lead to the possibility of duplicate offences, as a person who killed a wild animal could potentially be liable under the new offence and wildlife protection legislation. Furthermore, certain invertebrate wild animals are protected from killing under wildlife protection legislation,[95] so extending the new offence only to vertebrate wild animals would create a distinction in the levels of protection for wild animals which is not currently found in wildlife protection law. Whilst it is maintained that, ethically, it is appropriate to offer sentient wild animals the same level of protection from unjustified killing as non-wild sentient animals, the practical effect on wildlife protection law must be considered. Nonetheless, if it is felt that wild animals should be excluded from the scope of a new offence, this would not undermine the arguments in favour of protection for non-wild animals, and it could be done by adopting the section 2 AWA definition of 'protected animal'.



d) A Potential Practical Objection

If it is accepted that the law is ready for a new offence of unjustified killing, it must be considered whether an owner should be liable for having her animal killed other than in the animal's best interests *if she ensures that the animal is killed by a proper veterinary method performed by a qualified vet* (hereinafter, 'a proper veterinary method'): ie, whether such killing should be legally unjustified. This issue is vital in determining, not merely the practical scope of liability for killing an animal without proof of suffering, but the very rationale of such liability. If an owner can lawfully decide to have her animal killed for any reason she chooses, provided that a proper veterinary method is used, the law cannot be said truly to be concerned to protect animals' lives. Rather, the law would be concerned to minimise the risk of suffering when an animal is killed. If this were the case, it would be inappropriate to render a person liable for killing an animal other than by a proper veterinary method when it could not be proved that the animal suffered.

Yet it is possible that prohibiting the act of proper veterinary destruction for any reason other than an animal's best interests would actually have negative consequences for animal welfare. On the one hand, it can be argued that a person should only be able lawfully to have an animal she owns killed in the animal's best interests,[96] because she should not be able escape legal responsibility to that animal by killing it. On the other hand, it can be argued that, if owners cannot lawfully humanely kill unwanted animals, such animals might be kept by people who do not have the will or resources to care for them properly, abandoned, or taken in by animal shelters which might not

[91] Any animal which is (i) commonly domesticated in the British Isles, (ii) under the permanent or temporary control of man, or (iii) not living in a wild state.

[92] AWA, s 4.

[93] Wild Mammals (Protection) Act 1996, s 1.

[94] E.g., Wildlife and Countryside Act 1981, Deer Act 1991, Protection of Badgers Act 1992, and Conservation of Habitats and Species Regulations 2010.

[95] E.g., Wildlife and Countryside Act 1981, s 9 and sch 5.

[96] Or for some other justified reason, as explained above.

be able to cope with the extra numbers of animals for which they would have to care. All of these circumstances might lead to significant suffering.[97]

It is accepted that there is no easy solution to this issue. As the law currently stands, there has never been any suggestion that an owner deciding to have her animal killed by a proper veterinary method can be an offence. Indeed, it seems that the sections 4(4) and 9(4) AWA exclusions of 'destruction in an appropriate and humane manner' were intended to cover killing by a proper veterinary method, whatever the reason for the killing. Certainly, none of the reports, debates, or other materials noted above which preceded adoption of the AWA suggested that the Act would criminalise such conduct. Nonetheless, it is contended that, if it is believed that prohibiting proper veterinary destruction other than in an animal's best interests would cause significant problems in practice, leading to more animals being subjected to poor standards of welfare at the hands of owners who do not care for them properly, or abandoned, the appropriate response would be to enforce more robustly the existing laws which already criminalise this behaviour, such as section 9 AWA (and section 4, if it is proved that the animal suffered unnecessarily). Only if there is compelling evidence to establish that this is not feasible or would not work, and that animal welfare would be significantly adversely affected without an exclusion for proper veterinary destruction other than in an animal's best interests, should such an exception be permitted.

6. How would a New Offence work?
If a new offence of unjustifiably killing an animal, without proof of suffering, is to be adopted, it is necessary to consider how it would work. First, it has already been noted that the offence should apply the section 1 AWA definition of 'animal' outlined above. Second, the offence would apply equally to unjustified killing by an owner or a non-owner, as it has been argued that the law should not be primarily concerned with protection of property rights when dealing with the killing of animals,[98] in the same way that it is not primarily concerned with such when dealing with unnecessary suffering and promotion of welfare.[99] Third, it should also be an offence for an owner to authorise the unjustified killing of an animal she owns, so that owners cannot escape liability by having someone else kill their animals. This would reflect a similar purpose to that behind section 4(2) AWA, by which a person responsible for an animal is liable if another inflicts unnecessary suffering on that animal and she permitted or unreasonably failed to prevent this. Fourth, it has been argued above that intent and recklessness should be the alternative *mens rea* elements of the offence.

Therefore, if the prosecution proves that a person intentionally or recklessly killed (or, being the owner, authorised the killing of) an animal other than by a proper veterinary method, after a qualified vet had certified that the killing was in the animal's best interests, that person should *prima facie* be guilty of an offence. As the offence would be concerned with *unjustified* killing (as defined above), first, if the defendant raises evidence which might reasonably suggest that she killed the animal in lawful performance of hunting, shooting, farming, scientific research or disease or pest control, the prosecution should have to prove that this was not the case. Second, the offence should include two affirmative defences. The first defence should apply if the defendant proves that she killed the animal honestly believing that the action was reasonable and necessary in order to protect a person or other animal from death or serious injury. The second defence should apply if the defendant proves that she killed the animal in an emergency situation, to relieve the animal's suffering. It is submitted that the wording of section 18(4) AWA should be utilised to delineate this defence. That provision empowers an inspector or constable to kill an animal without veterinary certification 'if it appears to him…(a) that the condition of the animal is such that there is no reasonable alternative to destroying it, and (b) that the need for action is such that it is not reasonably practicable to wait for a veterinary

"it should also be an offence for an owner to authorise the unjustified killing of an animal she owns"

[97] For discussion of the killing of unwanted animals by shelters, see Clare Palmer, 'Killing Animals in Shelters', in *Killing Animals* (University of Illinois Press, 2006), 170-187.

[98] An owner's property interests would be protected by the Powers of Criminal Courts (Sentencing) Act 2000, ss 130 and 131, which give the court power to award compensation to a person who suffers loss as a consequence of a crime.

[99] If the new offence applies also to killing by a non-owner, there would be a possibility of overlap with the Criminal Damage Act 1971. This could be resolved by amending the 1971 Act to clarify that it does not apply to killing another person's animal, to ensure that there is a single regime to deal with unjustified killing. A similar potential conflict exists between criminal damage and AWA, s 4, as intentionally or recklessly injuring another's animal could be an offence under s 4, if it caused unnecessary suffering, and an offence of property damage under Criminal Damage Act 1971, s 1. However, this has apparently not caused problems, as there have been no reported cases in which the potential conflict has been noted.

> **if a new offence is to be adopted, there must be consultation on the appropriate maximum sentence**

surgeon.' These conditions could be adapted for present purposes, such that no offence would be committed if the defendant killed the animal in the honest belief that the two conditions referred to in section 18(4) were satisfied.[100]

It is contended that the maximum sentence for the new offence should be greater than that applicable to section 4 AWA (six months' imprisonment and/or a £20,000 fine).[101] First, the *mens rea* element of the new offence is more serious, intent or recklessness as to killing, rather than an act or omission done with actual or constructive knowledge that it would, or would likely, cause an animal to suffer. Second, the harm inflicted under the new offence (death) will normally be more serious. Beyond this, if a new offence is to be adopted, there must be consultation on the appropriate maximum sentence. It is tentatively suggested that the offence could perhaps be triable either way, with a maximum sentence of a year's imprisonment and/or an unlimited fine if tried on indictment and a maximum sentence of six months' imprisonment and/or an unlimited fine if tried summarily.

It is submitted that, if the arguments in favour of the proposed new offence of unjustified killing are not accepted, it is worth considering an alternative offence which would increase practical protection for animals' lives but would be based upon prophylactic protection from unnecessary suffering. The biggest practical objection to the proposed offence is, as noted, likely to be the problems which could be caused by criminalising killing an animal by a proper veterinary method other than in the animal's best interests. Yet to allow such killing would undermine the very rationale of the proposed offence, as it would suggest that the law's true concern is to minimise the risk of suffering.

If it is felt that potential practical problems warrant an exception for proper veterinary destruction, for a reason other than an animal's best interests, an alternative offence, reversing the burden of proof with regard to suffering, could be adopted. This offence would require the prosecution to prove that the defendant intentionally or recklessly killed an animal other than by a proper veterinary method, with the defendant being guilty unless she can prove on a balance of probabilities that (i) the animal did not suffer, (ii) she killed the animal for emergency relief of suffering (as explained above), or (iii) she honestly believed that the killing was reasonable and necessary to protect a person or other animal (as explained above). Such an offence would cover cases like *Patchett v. Macdougall* and cases in which an animal is killed by, or with the consent of, the owner but suffering cannot be proved, without extending the law's concern beyond the desire to minimise the risk of unnecessary suffering.

7. Conclusion

Patchett v. Macdougall and *Isted v. CPS* highlighted a potential gap in animal protection law, with it being an offence unreasonably to inflict unnecessary suffering on animal but not an offence unjustifiably to kill an animal if it could not be proved that the animal suffered before death. The AWA has, since these cases were decided, updated animal protection law, placing a legal duty on anyone responsible for an animal to take reasonable steps to provide for its needs. However, it has been argued that the AWA has not changed the law as to killing without proof of suffering. Moreover, although the judges in *Patchett* and *Isted* noted that property-based liability fills this gap to a degree, analysis of property law concepts highlighted another significant gap, because neither the owner(s), nor one who kills an animal with the consent of the owner(s), can be liable on the basis of property principles. As such, it has been suggested that a new offence of unjustifiably killing an animal, without need for proof of suffering, should be created, applying equally to owners and non-owners. It has been argued that this new offence would fit with developments in animal protection law and is morally and practically justified. Furthermore, the elements of the offence have been outlined.

[100] The second condition should be adapted to make it clear that the defendant must prove that she believed it was not reasonably practicable to wait for, *or to wait to take the animal to,* a veterinary surgeon.

[101] AWA, s 32. S 85(1) Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into effect on 12th March 2015 and has the effect of rendering unlimited any fine of £5,000 or more which can be imposed on summary conviction.