

## The Uncertain Present and Future of the Hayden Shelter Reform Legislation of 1998

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### Introduction

Six years ago, then California State Senator Tom Hayden introduced legislation to move California's animal shelter system further in the direction of saving, rather than taking, animals' lives. The bill was complex and involved changes in three different California Codes: the Civil Code, the Food and Agricultural Code, and the Penal Code. As introduced, it included a number of new provisions such as statutes that would establish an official "policy preference" for adoption and expansion of the measure of damages available to people when their animals are harmed. It consolidated and restated requirements of shelters that were scattered in several different Codes, and it secured better means of dealing with government seizures of animals and penalties for conviction for animal abuse. As the bill progressed through the Legislature there were modifications and losses of some of the bill's provisions. However, it started and ended its passage through the Legislature with many of its most significant provisions intact, including making adoption of shelter animals the policy of the State of California.

There were several reasons to think that the time was right for the legislation. Grassroots activism had eroded the belief that homeless animals are, by definition, a public safety threat that justifies the animals' immediate destruction. The idea had taken root that, regardless of the circumstances that brought an animal to a shelter, the animal himself or herself deserves an opportunity to live.

Attitudes about people who lose animals were also beginning to shift. More people began to realize that a companion animal can be missing from home through no

fault of his/her owner/guardian.<sup>2</sup> In light of all the ways that animals can be lost, allowing people a meaningful opportunity to reunite with their lost animals is appropriate. Yet, in 1998, California had one of the shortest holding periods in the country; shelters were required to hold dogs and cats only 72 hours from the time of capture.<sup>3</sup> Even much poorer states were giving people more time to reclaim their animals. Moreover, the nonprofit sector animal rescue and adoption groups had inspired optimism that our shelter animals could, in fact, find new homes and that it was inhumane for our public shelters to deny them that opportunity.

Most of our public shelters were still acting like “pounds,” that is, places to dispose of animals. However, some of the controversial “low-kill” and “no-kill” shelters springing up around the state presented viable alternative models for responding to homeless animals. Most notably, the nonprofit San Francisco/SPCA’s Adoption Pact with San Francisco’s (public) Animal Care and Control had reduced that city’s homeless animal kill rate to about 25% of impounded animals while many animal shelters in the State were still killing about 75% of their impounded animals.<sup>4</sup> By 1998 many nonprofit animal rescue and adoption groups existed to find homes for animals who found their way to shelters, but not all shelters were readily releasing animals to those groups.<sup>5</sup>

In the context of changing public attitudes and the rise of viable alternatives to killing homeless animals, the statewide cost in 1998 of killing and disposing of homeless animals could properly and accurately be characterized as “high” and “unnecessary.” For all of these reasons Tom Hayden decided that the time was right to focus our animal shelters on activities that save animals’ lives. Realizing that shelter issues themselves are complex, he introduced Senate Bill 1785,<sup>6</sup> which provided for consolidation and restatement of existing provisions as well as introduction of new provisions so that

homeless animals in our animal shelters could have a meaningful opportunity to survive their stay in a shelter.

Hayden and the drafters aimed high. For example, the bill as introduced included a significant expansion of the measure of damages available to a person if someone harmed his/her animal. Hayden's bill proposed to amend California's Civil Code section 1840 to provide for payments of damages for non-economic harms suffered by people when their animals are harmed. Since animals are legally valued as mere items of replaceable property, people whose animals are harmed by shelter employees have been unable to receive awards of money in large enough sums to force shelters to take their care obligations seriously. This is a general problem in enforcing animal care obligations, so the legislation was broadly written so as to apply generally rather than specifically to shelters. The reasoning behind it is that, even if the legal obligations associated with care are extensive, if a negligent caretaker does not have to pay very much for his/her negligence, those extensive care requirements might not be met. If a caretaker's negligence results in a damages award of only the market value of the animal, there may be too little incentive to maintain appropriate standards of care. An animal might be old or in fragile health and, therefore, have no market value. In fact, many companion animals have little market value despite their great emotional value. Since many shelters were lax about keeping these older or fragile animals, it was important to create stronger incentives to keep these animals for the full holding period.

From February 18, 1998, until the very end of the legislative process, Civil Code section 1840 read, as amended by the Hayden legislation, as follows:

Except as provided in Section 1834, the liability of a depositary for negligence may not exceed the amount the depositary is informed by the depositor, or has reason to suppose, that the thing deposited is worth except as to

situations involving living animals. In those situations, the depositary may be held liable for the financial and emotional consequences to the owner of the depositary's failure to comply with this section and the anticruelty provisions of the Penal Code (language of Hayden proposal is emphasized).

The expanded damages provision lived a quiet, unthreatened life in the bill until the very end, when, shortly before the bill would be voted on for the last time, the provision was removed during negotiations between Hayden's office, the Governor's office, and local government representatives. In response to concerns about its own heightened liability for harm to animals in its care, local government requested and received removal of the entire provision.<sup>7</sup> Because economic incentives are important and because animals in many caretaking situations are at risk of negligent treatment, the drafters perceived this loss to be particularly significant. Yet, what remained was still a cohesive package of provisions that could give our shelter animals a more meaningful chance at surviving their stay in an animal shelter.

As the years have passed, critics have reduced the scope and significance of Hayden's legislation to "that legislation that only increased holding periods for shelter animals." And, from critics' points of view, extending the holding period from 72 hours to 4 or 6 business days merely delays the inevitable while exposing animals to illness, caretaker negligence, and animal fighting in the meantime. Indeed, if the Hayden legislation merely extended the holding period for animals in shelters, it could be seen as minimally helpful to animals in our shelters. More important than length of holding periods is the nature of the holding period. Can the public easily access the shelter? Are animals sufficiently cared for so that they can be reunited with their families?

The reality of the Hayden legislation, as enacted, lies somewhere in-between its optimistic starting point and current critical characterizations of it as a "mere holding

period bill.” The purpose of this article is to explore what of the Hayden legislation survives the legislative process, subsequent attempts to repeal it, and financial wrangling over whether the State owes local government agencies money with which to implement its provisions. In the end, some provisions that seemed to hold the least promise seem now to hold the most potential for change. Other provisions that seemed to hold the most promise have had, apparently, the least effect. Ultimately, perhaps the most important lesson to be gained from the Hayden bill is the value of humility in predicting the “success” or “failure” of different types of legislation to help animals.

Part I of this article describes what the Hayden legislation actually accomplished on paper as enacted. Listing its provisions is relatively easy, but the history of implementation has been fraught with conflict over how different provisions should be interpreted. Part II examines the financial controversies that arose when local governments contested the Legislature’s finding that the legislation was cost-effective and that State funding was not required or necessary. Those financial controversies have played out in two directions: (1) suspension of part of the legislation, and (2) litigation about whether the State is legally obligated to fund the legislation. Part III explains what parts of the Hayden legislation survived financial suspension. Anecdotal evidence suggests that the spotty understanding and implementation of the Hayden legislation that followed its enactment has only been worsened by the financial controversies that have surrounded the legislation since its inception. Indeed, some shelters are operating as though the entire Hayden legislative package has been repealed, not partially suspended. Finally, in Part IV, I conclude with thoughts about the legislation’s purpose and achievements in relation to the original intent of the

drafters and in relation to social acceptance of the idea of shelters as depositaries of animals who deserve a meaningful opportunity to leave those shelters alive.

Part I. Two Realities: One on Paper, One in the shelters.

A. The Hayden Legislation as Enacted

Before examining the implementation of its different provisions, it may be helpful to present in list format what was legally enacted as the Hayden legislation. The Hayden legislation, otherwise known as Chapter 752, Statutes of 1998, legally does the following:

a) creates a statewide policy preference for adoption and owner-redemption (Civil Code sec. 1834.4.; Food and Agricultural Code sec. 17005; Penal Code sec. 599d);

b) makes explicit that shelters, including public shelters, are “depositaries of living animals” (Civil Code secs. 1815, 1816) responsible for treating those animals “kindly” (Civil Code sec. 1834);

c) requires that each animal brought into a shelter be held for a minimum of six business days, unless the animal is available for adoption or owner-redemption on one weekend day or one weekday evening. In that case, the animal must be held only 4 days (Food and Agricultural Code secs. 31108, 31752, 31753);

d) describes required records that allow shelters (and their owners or rescue/adoption groups) to track animals in the system (Food and Agricultural Code sec. 32003);

e) requires shelters to give owner-relinquished animals who aren’t suffering irretrievably an opportunity for adoption or redemption instead of killing them immediately, although it does not require shelters to take in owner-relinquished animals (Food and Agricultural Code sec. 31754);

f) requires the same conditions of holding and care for animals other than cats and dogs (Food and Agricultural Code sec. 31753);

g) requires shelters to release animals to Internal Revenue Code sec. 501(c)(3) animal rescue and adoption groups that have requested an animal prior to his/her euthanasia (Food and Agricultural Code secs. 31108, 31752, 31752.5, 31753, 31754);

h) requires shelters to maintain lost/found lists and to provide the names and addresses of other shelters in the area (Food and Agricultural Code sec. 32001);

i) requires shelters to use all reasonable means of checking for owner-identification, including microchips, when animals come into the shelter (Penal Code sec. 597.1 (l));

j) allows involuntary gratuitous depositaries to accept freely offered rewards (Civil Code sec. 1846);

k) allows a judge to prohibit a convicted animal abuser from owning animals as a condition of probation (Penal Code sec. 597.1);

l) requires the provision of pre or post-seizure (of one's animal) hearings if an owner requests one (Penal Code sec. 597.1);

m) provides that a standardized protocol be used to determine whether a cat is truly feral before denying a cat the benefit of the longer holding periods enacted in the Hayden legislation (Food and Agricultural Code sec. 31752.5).

### B. The Top Four Controversial Provisions

While there was controversy about each of these provisions, some have resulted in much more conflict than others. Perhaps the greatest amount of conflict emerged with respect to four provisions: (1) the statewide policy preference for adoption and owner-redemption; (2) release of animals to nonprofit animal rescue and adoption organizations; (3) longer, restructured holding periods; and (4) holding periods for owner-relinquished animals.

#### 1. Statewide policy preference for adopting animals rather than killing them.

A policy preference for adoption was placed in three Codes: the Civil Code, the Food and Agricultural Code, and the Penal Code. Its placement in all three Codes emphasizes the fact that it is applicable to statutory interpretation of statutes in all three Codes. The policy statutes include the following language:

It is the policy of the state that no adoptable animal should be euthanized if it can be adopted into a suitable home. . . It is the policy of the state that no treatable animal should be euthanized. A treatable animal shall include any animal that is not adoptable but that could become adoptable with reasonable efforts.

The statewide policy preference for adoption was initially controversial because some shelters interpreted it to mean that they had to incur whatever medical costs were necessary to make each and every animal adoptable and to hold animals for however long it would take to place them in homes. However, the statutes contain no specific requirements on the part of shelters; no legal liability can flow solely from a statute that enacts a policy preference.<sup>8</sup> When that became clear, shelters and advocates reached the opposite conclusion: that the policy statutes are legally meaningless.

The effect of a policy statute is legally subtle but significant. Animal shelters must operate in light of the public policy in support of adoption, and, when there is ambiguity in a statute, it must be interpreted in accordance with this policy preference enacted by the People. A good example of the operation of the adoption policy preference to resolve ambiguity in a statute also illustrates the controversy associated with the release of animals to nonprofit animal rescue/adoption groups.

2. Release to nonprofit rescue/adoption groups those animals who are going to be euthanized, if requested by the nonprofit group. Prior to the Hayden legislation, some shelters were working effectively with nonprofit animal rescue/adoption groups in order to give animals longer than the minimum holding period to find a home. When the shelter's holding period was over, a nonprofit animal rescue/adoption group might take the animal out for a reduced adoption fee, thereby adding time to find the animal a home and saving the costs of killing an animal who could find a home if more time were available. However, some shelters resisted working with animal adoption groups. Our survey information suggested several reasons for this: shelter perspectives that these animals are better off dead than living for indefinite periods of time in low-kill or no-kill shelters; the belief that animals are easily replaceable so why focus on saving this



animal; dislike for animal rescue/adoption groups' criticism of shelter practices; few financial incentives to reduce the kill rate in their shelters; concerns about whether the animal rescue/adoption groups were placing animals in good homes or diverting them into dog-fighting or other cruel or exploitative uses; avoidance of the possible public perception that the shelter doesn't do an adequate job of finding homes for animals.

The Hayden legislation requires shelters to release animals requested by nonprofit animal rescue/adoption organizations, rather than incur the cost of killing the animals and disposing of their bodies.<sup>9</sup> The statute allows shelters to impose only two requirements: (1) that the animal rescue/adoption group have an Internal Revenue Code sec. 501(c)(3) status, and (2) that the animal rescue/adoption group pay an adoption fee for the animal. Many shelters have added their own requirements.<sup>10</sup> Some require groups to provide information about the group's veterinarian and about the individuals to whom each animal is adopted, for example. Some established rules that animals could be requested and released only within a certain number of hours of the ending of the animal's hold period, which is a type of rule that requires rescue groups to have volunteers on site all the time. Some decided that only those animals the shelter considers "adoptable" will be available for adoption. For example, some shelters deem pit bull or pit bull mixes categorically "unadoptable." They will not release a pit bull even to a pit bull rescue organization. This clearly violates Food and Agricultural Code sec. 31683, which prohibits breed specific dangerous dog regulation, let alone the Hayden law. Even many shelters that do comply with Food and Agricultural Code sec. 31683 conduct temperament tests and, on the basis of that temperament test, decide whether an animal is "adoptable." On the basis of that test, those shelters decide whether to release an animal for adoption, regardless of whether the adopting person is

a member of the public generally or a member of an I.R.C. sec. 501(c)(3) animal rescue/adoption organization.

Shelters argue that they must prevent any dangerous dogs from being adopted, period. Advocates of the Hayden legislation are also concerned about dangerous dogs entering the stream of adoptions. However, they prefer the judgment of animal rescue/adoption groups as to whether an animal is adoptable. They argue that shelters have erred too long on the side of killing animals and that shelters too readily label animals “unadoptable” through the use of nonprofessional standards applied by insufficiently trained kennel staff whose biases might well interfere with their ability to assess an animal’s temperament. Moreover, the animals being tested are very likely to exhibit atypical behaviors due to the shelter environment itself. Too many actually adoptable dogs and cats have been dying as a result. Nonprofit rescue/adoption groups are more likely to have better training, to have incentives to do careful assessments of the animals, and to provide socialization training for the animals, if necessary.

Animal rescue/adoption groups read the law as allowing shelters to impose only two requirements (I.R.C. sec. 501(c)(3) status and payment of an adoption fee). Shelters claim that the statute does not forbid additional requirements, so they should be able to impose additional requirements. The adoption preference statute helps to resolve conflicts such as this. Every time a shelter places a new restriction or requirement on the release of an animal to a rescue/adoption group, there will be fewer releases to animal rescue/adoption groups than would have been made otherwise. Because the People of California have an explicit preference for adoption instead of killing these animals, statutes that have more than one possible interpretation should be interpreted in accordance with the preference for adoption. Unless there is another

policy that overrides the policy for adoption or unless it can be shown that an extension of the rule enhances adoption, the shelter cannot extend the rule beyond the requirements that the animal rescue/adoption group be an I.R.C. sec. 501(c)(3) organization and pay an adoption fee.

Shelters have consistently argued that there is another policy that overrides the policy preference for adoption. They contend that their role as enforcers of the anticruelty statutes gives them the right and the obligation to ensure that the groups to whom they release animals meet their standards. However, their standards do not necessarily match up with prevention of cruelty. Giving rescue groups a window of only 4 hours to adopt an animal scheduled for death does not advance an interest in cruelty prevention, for example.

Does the Hayden legislation result in “adoptions at any and all cost to public safety?” Advocates of the Hayden legislation say that the policy preference for adoption operating in the context of required release to requesting nonprofit animal rescue/adoption groups only creates a hierarchy of acceptable judgments about an animal. Because a shelter can say “no” to anyone except a qualified Internal Revenue Code sec. 501(c)(3) animal rescue/adoption organization, the shelter’s judgment about an animal will prevail over the judgment of a member of the public. However, a nonprofit animal rescue/adoption organization’s judgment will prevail over the judgment exercised by the shelter.

Most importantly, both policies of adoption and cruelty prevention can be met without harming either policy. If there is evidence that a group actually does violate the animal cruelty statutes, then legal action can be taken against that group to stop the violation. Precisely because humane officers and government shelter officers have the

legal power to address cruelty directly, there is no reason for shelters to use release rules as a substitute for anti-cruelty statute enforcement.<sup>11</sup> If there is no violation of the anti-cruelty statutes, the mere possibility of a violation in the future does not justify loading the release rule with additional requirements.

3. Holding period requirements that include public access hours. As in the case of adoption policies, some shelters have resisted the implementation of longer holding periods. However, since many shelters were already holding some animals longer than the required 72 hours,<sup>12</sup> the greatest number of objections seems to relate specifically to two related issues: (1) the loss of flexibility to decide which animals should receive a longer holding period, and (2) the desire to establish their own public access hours rather than to have to comply with the requirement that, in order to hold an animal for the shorter period of 4 business days, the shelter must be open hours when working people can visit the shelter to reclaim their animals or to adopt. Yet, the fact is that the shelters could not have established an accurate sense of which animals should be held longer based on their experience with owner redemptions or public adoptions. Even old, objectively unattractive, or disabled animals might have loving families trying to get to those animals before the 72-hour hold period expires. Seventy-two hours is too short particularly when the shelter is not open during the time that working people can go to the shelter to look for their lost animals or to adopt animals.

Many shelters have considered their public service as a lost/found/adoption resource marginal to their law enforcement responsibilities (e.g., dog-catching, cruelty investigations), so it is not surprising that they prefer to structure their public access hours at their own convenience. Shelter managers who misread the law as requiring the shelters to be open at least one weekend day and one weekday evening have missed

the point that, for any particular animal to be held four business days instead of 6 business days, the shelter had to make the animal available on a weekday evening or a weekend day. The difference is admittedly subtle; in order for a shelter to hold all animals only 4 days, it turns out that the shelter must have later hours on one weekday and one weekend day. Nevertheless, the difference, while subtle, is meaningful. It focuses on the opportunities to be accorded animals, not mere regulation of hours simply in order to “control” shelters.

Shelters were also resentful about changes they perceived to be for the benefit of people who seem, as a group, to be irresponsible. First, if their animals are out on the streets as strays, aren't these people obviously irresponsible and uncaring? Second, are such people likely to reclaim their animals? In many of our shelters a self-fulfilling prophecy that most animals won't be reclaimed or adopted had resulted in minimal, if any, public access hours when working people could come to the shelter. That, in turn, had actually decreased people's ability to reclaim/adopt animals. It is difficult to reclaim animals or to adopt animals when a shelter provides public access hours only from 10 a.m. to 2 p.m. on some but not all work days, for instance. Some small public shelters had no established public access hours at all!

In structuring public access opportunities with working people's schedules in mind, Hayden's legislation was an attempt to break the spiral of decreased public access, which reduced opportunities for reuniting animals with their families, which in turn resulted in unnecessary killings of animals who would have been reclaimed. The spiral also resulted in shelter perceptions of owners as irresponsible and uncaring. After a certain point, increase in the number of days an animal is held becomes less important than the particular hours a shelter is open to the public. Public access, not some magical

number of public access days beyond five business days, is key to public and rescue group opportunities to identify animals and to take them out of the shelter. For instance, it is more important for a shelter to have reasonable access hours in relation to the length of commutes most people have in the area and their distance from home than it is to have a longer holding period without attention to public access hours.

4. The requirement to hold owner-relinquished animals. A provision that definitely makes the “top four” in terms of controversy is the Hayden legislation’s requirement that, if a shelter takes in owner-relinquished animals, the shelter must hold the animal for the same length of time as “strays.” While some shelters might have held some of these animals for some period of time, most shelters were killing these animals as soon as the animals were turned over to the shelter. This was true even when owners wanted and expected the animals to have an opportunity to be adopted. There was no legal requirement that the shelters kill these animals, even if requested to do so by the owners. But, as soon as a shelter became the legal owner of an animal, the shelter as “owner” could destroy its “property.” Shelter managers asked the question, “If no one is going to claim the animal as “lost,” why should the shelter hold an animal?” Shelter employees asked similarly pessimistic questions. Why should they engage in time-consuming and costly care of animals who are “goners” at the end of a hold period in any case? In some shelters it was never really a matter of whether the animal would stand a real chance of adoption; if an employee is paid the same whether cages are empty or full, employees will keep cages as empty as possible. Tom Hayden was determined that these animals be given a chance to be adopted, that they not come into a “shelter” merely to be killed.

Two issues surfaced with respect to owner-relinquished animals when the legislation was moving through the Legislature. Both concerned owner rights; neither concerned the very real problem that some of our most adoptable animals have been denied opportunities for adoption and have been killed immediately at taxpayer expense and without taxpayer approval through their elected representatives. First, there was testimony about the prevalence of an angry neighbor or family member or roommate or friend turning in an animal as “owned.” If killed immediately, an owner could not find her/his animal, even if s/he looked, because the animal was not being held. Also, shelters could mistake a situation of turning in a stray for a situation of an owner-relinquishment. While that seemed implausible to some of the shelter directors involved in discussions about the legislation, the fact that it actually had happened to someone in the Governor’s Office meant that the shelter directors could not deny its possibility.

Second, shelters argued that their failure to take in and kill these animals results in the animals ending up abandoned on the street. If shelters don’t comply with owner turn-in requests, owners will abandon animals to cruel fates, and shelters will have additional costs associated with catching strays. Advocates of Hayden’s legislative proposal raised the flipside of that argument: if people cannot keep their animals and they know that a shelter will kill those animals, they will abandon the animals on the street in order to give the animals some chance at life.

It is very difficult to know what is true as a matter of fact. Do owners abandon animals if they think shelters are going to kill the animals after a short or no holding period? Even if we knew the answer to this, isn’t it time to think about the animals independently of what their owners will or won’t do? To take an animal in and then

give the animal absolutely no opportunity to be taken out by a rescue group or adopted by a member of the public is a terrible disservice to the animal, regardless of how one judges the animal's owner. Studies had shown that owner-relinquished animals are among the most adoptable animals entering our shelters.<sup>13</sup> In the end, Hayden's legislation, as enacted, states that if a shelter takes in an owner-relinquished animal the shelter must give that animal the same opportunity as other homeless animals to be adopted.

### C. What Effect Has the Hayden Legislation Had?

We don't know how well any of these provisions is working. Arguably, some things have changed: more shelters are being reconfigured in animal-friendly ways, and more animals are being released to adoption groups, for example. It is difficult to determine the role of legislation when an entire no-kill movement was already well underway when the legislation was enacted. There is much anecdotal evidence that shelters have chosen selectively what, if any, of the Hayden legislation to follow. Owner-relinquished animals are still being killed immediately in some shelters,<sup>14</sup> some shelters never adjusted their hours, and rescue groups are still hindered from taking out animals from many of our shelters. Many animals are still not being given the veterinary care required by law; so they suffer, are not adopted, and die in greater numbers than they would have. While there is occasional talk of lawsuits seeking compliance with the Hayden legislation, much of that talk has not advanced. Such litigation is dependent on sworn testimony, under penalty of perjury, that sufficiently documents shelter violations of the laws. Casual users of the shelter system are not likely to know that rules are being violated. Rescue group members and volunteers and shelter employees may well know about violations, but those people are not likely to jeopardize their



position in the shelter and their ability to help animals in the shelter by publicly accusing the shelter of violating the law.

Another problem with litigation aimed at compliance is the problem that the water has been significantly muddied by questions about which provisions are enforceable. Financial controversies about the legislation have resulted in temporary suspension of some but not all provisions of the Hayden legislation. In order to understand which of the provisions were suspended, it is necessary to explain some of the financial issues that underlie the suspension.

## Part II. Financial Controversies

### A. The Legislature's Finding that the Hayden Legislation is Cost-Effective

The Hayden legislation was reviewed by the Appropriations Committees of both houses of the California Legislature. Both found that the legislation was cost-effective and did not require funding from the State. Killing animals and disposing of their body's costs money without bringing in any offsetting revenue; opportunities to get adoption fees or "owner-redemption" fees/fines are lost along with the animals' lives. It is "revenue-negative" to run a shelter for animal disposal purposes. On the other hand, adoption and owner-redemption are "revenue-positive." By statute, shelters can collect the costs of maintaining an animal when s/he is reunited with her/his human family,<sup>15</sup> and shelters can charge adoption fees that more than cover the costs of maintaining an animal.<sup>16</sup> This does not mean that a shelter will operate "in the black" if it aggressively pursues adoption/owner-redemption strategies. It means only that shelters will use fewer funds and bring in more funds to the extent that they aggressively pursue adoption and owner-redemption strategies. This is significant because opponents

claimed that the legislation was not cost-effective if it did not bring the shelter as a whole into a revenue-positive position.

This is not unique to the fight over reducing shelter killing in California. For instance, critics of a Las Vegas “no-kill” policy pointed out that the shelter was still killing 33% of the animals impounded there. But, in the period before committing to “no-kill,” 52% of the animals were killed.<sup>17</sup> A reduction from 52% to 33% represents large savings in terms of animals’ lives and funds used to kill and dispose of animals, even if the shelter could not operate as a totality “in the black.”

Although it seems that animal shelter managers would automatically implement all cost-effective means of running their shelters, that is not necessarily the case. There are many reasons why a shelter would fail to adopt cost-effective management methods. In this particular case, to adopt policies that reduce the rate of killing suggests that the previous policies were inhumane and that animals were being killed unnecessarily. It is not necessarily the case that shelters previously had the perspectives or the visible options that they have now to increase adoptions and owner-redemptions, and so the criticism that “they should have and could have been saving lives all along” might not be fair or accurate. But demonstrating the feasibility of adoption/owner-redemption now unfortunately tends to give rise to the criticism that animals were killed unnecessarily and, in turn, to some shelter managers’ justifying the former practice as having current utility.

Some resistance to adoption/owner-redemption surely must be connected to shelter identification with “law enforcement” rather than a purpose such as “helping animals find their old or new homes.” Sometimes such resistance is the product of long careers in animal shelters in which traditional methods of “animal control” were not

questioned. And, sometimes there is pessimism about the possibility of actually reaching the goal of “no more homeless animals.”

All of these explanations probably have some validity, and they were raised at different times in the legislative process and after enactment of the Hayden legislation. However, I believe that the most important determinant of whether adoption/owner-redemption strategies are pursued is how shelter employees are compensated and how animal shelter budgets are calculated. As noted earlier, if shelter employees are paid the same regardless of whether cages are empty or full or animals are sick or well, then what incentive is there to aggressively pursue life-saving strategies? If a shelter’s budget is based on a shelter’s apparent need to dispose of unwanted animals, and the shelter cannot divert unused funds into other programs (such as adoption, spay/neuter, and “owner education” programs), then shelters will lose budgetary resources if their operations change in ways that reduce their apparent need for funding. Eventually, for life-saving legislation to be fully effective, individual employees will have to be rewarded for pursuing life-saving strategies and performance-based budgeting in which “performance” means “saving lives” will have to be implemented by those supervising and funding animal shelters. Shelters will have to be given financial room to experiment with ways of meeting that performance goal. Individual shelter experimentation with increasing adoption/owner-redemption will provide models for other similar shelters to incorporate.

Since “performance-based budgeting” at this point means budgeting to “get rid of unwanted animals,” it is not surprising that the picture of economic rationality embedded in the Hayden legislation seemed very odd to shelter managers. Shelter managers denied that adoption/owner-redemption-based shelter operation could be

revenue-positive. While it might result in savings for government as a whole, in fact, it would probably reduce budget allocations to shelters.

B. Testing the Claim that the State should pay local government money for implementing the Hayden Legislation.

The County of Los Angeles took the lead in bringing a “test claim” to dispute the Legislature’s finding that the Hayden bill is cost-effective.<sup>18</sup> The County’s argument, as opposed to shelter managers’ argument, is that the Hayden bill causes costs to be incurred without offsetting revenue gains. The overt position government took was that the number of animals killed would not fall due to adoption and/or owner-redemption; animals would be impounded, sit in cages for longer periods of time, receive higher levels of care, and then be killed at taxpayer expense.<sup>19</sup>

Test claims are filed with the Commission on State Mandates. The Commission on State Mandates is a quasi-political body in that it includes elected officials, bureaucrats, and members appointed by the Governor.”<sup>20</sup> That is important because the Commissioners need not have specialized training in law or the subject of a particular “test claim.” Also, they are politically sensitive to how their decisions will be characterized. The Commission is also a quasi-judicial body in that it hears evidence that the Legislature was wrong about its finding that money is not owed to local government, and it is empowered to decide that money is owed and, if so, how much.<sup>21</sup> In this case, the County of Los Angeles claimed that the State, in enacting shelter reform legislation, must pay annually to the tune of millions of dollars. Other local governments joined the test claim and submitted claims for State reimbursement of costs associated with the Hayden legislation.

California's Department of Finance opposed the local governments' test claim. Finance took the position that the State had no funding requirements associated with the Hayden legislation, with the possible exception of the public shelters' duty to post lost/found animal listings.<sup>22</sup> However, Finance did not rest exclusively on a claim that the legislation is cost-effective; it grounded its claim on the legal definition of a "reimbursable state mandate." Relying on the California Supreme Court's 1987 decision of County of Los Angeles v. State of California, Finance argued that a law that applies generally does not constitute a "reimbursable state mandate;" reimbursable state mandates "uniquely" burden local government with obligations not shared with private entities.<sup>23</sup> Since the Hayden legislation explicitly applies to all shelters in the State, including non-governmental shelters, Finance took the position that the legislation does not uniquely burden local government.

The second argument Finance made concerned reimbursement of a state mandate when the local government entity has sufficient fee authority with which to raise the money associated with the state mandate. If the State has given local government the ability to raise funds directly, in this case through dog licensing and fees paid by owners and adopters of animals, then the State does not owe local government money for implementation of the program.<sup>24</sup>

Neither of these sources of funds is insubstantial. Dog licensing is highly problematic as a legal device for "animal control purposes," but it is true that millions of dollars are lost when shelters fail to use that fee authority. According to the Animal Care and Control Department of Los Angeles County, for example, in fiscal year 2002 \$7,500,000 was collected for the cost of collection of \$3,500,000 (including personnel costs and the production of licenses records). That resulted in a net of \$4 million

dollars. Even so, the General Manager of the Department acknowledged that accounted for only about 43% of owned dogs. Still, it is one of the best records in the State. For example, San Francisco licenses only about 19% of dogs, and the City of Los Angeles collects only about 23% of the revenues it could collect from dog licensing.<sup>25</sup>

It is a similar story with adoption fees and owner-redemption fines/fees. Survey data collected at the time of the Hayden legislation revealed that many jurisdictions were, in fact, able to collect fees and fines from owners who reclaimed their animals. Although it may be true that some owners will not reclaim their animals if they are required to pay fees/fines, many shelters reported considerable compliance and redemption rates even when fines were assessed in addition to the costs of maintaining the animals at the shelter. Similarly, we don't have data that supports the contention that shelters will lose adoptions if they assess fees that more than cover the costs of making the animal available for adoption. For example, the City of Santa Rosa increased the adoption fee to \$130 per dog and yet has not reported fewer adoptions.<sup>26</sup> The City of Los Angeles adoption fees have increased for dogs by about 25% (to nearly \$100), but representatives for the Department of Animal Regulation report that adoptions have been increasing.<sup>27</sup> Far from burdening local government uniquely, the Hayden legislation burdens both private and public shelters, but only public shelters have the full panoply of state-authorized fees and fines available to fund themselves.

The Commission on State Mandates disagreed with Finance on both issues: general application of the law to all private and public shelters and the adequacy of fee authority.<sup>28</sup> As to the first, the Commission decided that only public shelters were actually required to follow the new laws because only public shelters were actually required to take in stray animals. In the Commission's opinion, the Hayden legislation

uniquely burdens public shelters. As to the second issue (fee authority), the Commission decided that the fee authority held by public shelters is insufficient to raise the money necessary to implement the Hayden legislation.

Finance has filed a lawsuit contesting the Commission's decision.<sup>29</sup> First, Finance argues that there are, in actual fact, many private shelters in California that are legally obligated to take in animals. Moreover, even if a particular animal shelter is not bound to take in a particular animal, an animal shelter is fully obligated to obey the Hayden legislation as to the animals it takes in. Accordingly, the legislation burdens private shelters just as it burdens public shelters.

Second, Finance contests the Commission's interpretation of the law regarding the fee authority public shelters have available to meet the financial costs of running shelters. Finance claims that local government cannot prevail on an abstract argument that the income generated from fees wouldn't be enough.<sup>30</sup>

The issues of what constitutes "unique" burdening of local government and "sufficient fee authority" are of general importance in state mandate law. While the lawsuit asks the Court specifically to order the Commission to find that the Hayden legislation is not a reimbursable state mandate, the lawsuit's general purpose is clarification of these two issues. The lawsuit is pending. Until it is resolved, the Commission's decision remains intact.

Although the Commission disagreed with the Legislature's original finding that the Hayden legislation does not require State funding, the Commission did not find that all of the Hayden legislation requires State funding. The Commission's Statement of Decision, effective February 2, 2001, identifies some provisions of the Hayden legislation as "reimbursable state mandates" and other provisions as not "reimbursable

state mandates.” For those provisions deemed to be “reimbursable state mandates,” the Commission submitted a cost estimate to the Legislature for State funding of local government entities’ compliance with those “mandated” provisions.

### Part III. Fiscal Suspension of Parts of the Hayden Legislation

The Legislature has not disbursed money to local government entities, and, most recently, the Legislature suspended those “mandated” provisions by failing to make budgetary allocations for those provisions during the current fiscal year.<sup>31</sup> It is important that “suspension” does not mean that those provisions have been repealed. Separate legislation would have to be brought to repeal the provisions. However, suspension does mean that, as to those particular provisions, the previous provisions will be in effect until the Legislature allocates funds for implementation of the Hayden provisions that replaced them.

#### A. Parts of the Hayden Legislation that the Commission deemed to be a reimbursable state mandate and that the Legislature has suspended for the current fiscal year

The Commission on State Mandates found the following to be in total or in part, state mandates that require reimbursement from the State:

a) the requirement that each animal brought into a shelter be held for a minimum of six business days, unless the animal is available for adoption or owner-redemption on one weekend day or one weekday evening. In that case, the animal must be held only 4 days (Food and Agricultural Code secs. 31108, 31752, 31753);

b) some of the records that allow shelters (and their owners or rescue/adoption groups) to track animals in the system (Food and Agricultural Code sec. 32003);

c) the requirement that animals other than cats and dogs receive the same conditions of holding and care as cats and dogs (Food and Agricultural Code sec. 31753);



d) the requirement that shelters maintain lost/found lists and to provide the names and addresses of other shelters in the area (Food and Agricultural Code sec. 32001);

e) the required use of a standardized protocol be to determine whether a cat is truly feral before denying a cat the benefit of the longer holding periods enacted in the Hayden legislation (Food and Agricultural Code sec.31752.5).

The Commission on State Mandates decided that the holding period for stray cats and dogs that is in excess of the previous holding period of 72 hours is reimbursable to local governments by the State.<sup>32</sup> While the Commission did not agree with local government that the cost to them was holding animals 6 days instead of the minimum 4 days, the Commission did decide that local governments were owed money for the costs to them of holding animals for 4 days instead of 72 hours. Local government was allowed to claim the costs of new construction for housing the animals as well as employee costs for caring for the animals. After that allowance was made and a total dollar amount was decided as owed to the local governments by the State, the Bureau of State Audits found that local governments had not applied an accurate measure of costs associated strictly with the Hayden legislation as opposed to costs associated with animal population increases or with refurbishing old buildings, for example.<sup>33</sup> It found large overstatements of claimed costs. However, before that audit report was published, the Legislature had already decided to suspend the reimbursable mandate provisions of the Hayden legislation. Therefore, the holding period for stray cats and dogs is legally now only the 72 hours it was previous to enactment of the Hayden legislation. A shelter may decide voluntarily to hold stray cats and dogs longer than 72 hours, but such a shelter may not make a claim to the State for any costs it incurs in doing so. In fact, many shelters were holding animals significantly longer than the 72

hours, and many are continuing to hold animals for the longer period. Some, however, have returned to the 72 hour holding period.

The Commission on State Mandates found that the entire holding period for stray animals other than cats and dogs constituted a reimbursable state mandate.<sup>34</sup> On the basis of that finding, the entire holding period for stray animals other than cats and dogs has been suspended. State law prior to the Hayden legislation required the holding of stray animals other than cats and dogs. Penal Code sec. 597f required shelters to hold “animals” until their owners could redeem them; the law does not specify “cats” or “dogs.” Shelters that read the law as requiring the holding of stray “animals” apparently understand that the required holding period for those animals is the same as for cats and dogs: 72 hours. Again, a shelter may hold such an animal voluntarily for a longer time, but it may not seek reimbursement from the State for doing so.

An important aspect of Hayden’s legislation was its consolidation and unification of requirements shelters previously had but which were scattered throughout many different Codes. For example, whenever an animal receives veterinary care, records must be kept on the animal.<sup>35</sup> Shelters were not keeping records on the treatment or whereabouts of animals, and Hayden’s legislation restated those record-keeping requirements. The Commission on State Mandates agreed that such record-keeping is a requirement that pre-existed the Hayden legislation. However, the Commission decided that euthanasia is not a veterinary medical procedure because veterinary technicians and shelter employees can perform euthanasia under special provisions set out in the Business and Professions Code.<sup>36</sup> According to the Commission, since euthanasia is not a veterinary medical procedure, veterinary medical record-keeping requirements do not apply in the case of an impounded animal who is euthanized

without veterinary medical care. Accordingly, the Commission decided that the Hayden requirements for record keeping, as to those animals, are new and reimbursable state mandates.<sup>37</sup> Those record keeping requirements have been suspended. Record-keeping for other animals who receive any veterinary medical attention is required and has not been suspended.

Similarly, the Commission found that the Hayden legislation requires a higher standard of veterinary care.<sup>38</sup> Whereas previously only “emergency” care was required, “necessary and prompt” veterinary care is now required. The Commission did not accept the arguments that “necessary and prompt” is “emergency” care, that Civil Code section 1815 prior to Hayden’s legislation already required depositaries of living animals to treat them “kindly,” and that Penal Code sec. 597f already required veterinary care prior to Hayden’s legislation. Accordingly, anything other than “emergency care” (as distinguished from “necessary and prompt” care) is not required. No one knows what the difference is between “necessary and prompt” and “emergency.” Since the whole veterinary care issue has been confusing from the start, most shelters appear to be doing what they always did, however they understood their obligations to provide veterinary care.

Hayden legislation required shelters to temperament-test a shy, scared, or aggressive cat to determine if the cat was truly feral before denying that cat the opportunity afforded by the longer holding periods. The Commission decided that temperament-testing is an activity mandated by the State and, therefore, reimbursable.<sup>39</sup> However, since the Commission found that the longer holding period is reimbursable, and the Legislature has suspended the longer holding period, there is no need for temperament-testing any cat. As noted in more detail below, however, shelters

are required to hold feral cats for the same holding period as stray cats. In fact, it might be just as well that there are no temperament-testing requirements. Such tests can be constructed in ways that allow shelters to kill far more than just feral cats, resulting in a shorter holding period for many shy, scared, or injured cats who would not have been branded “feral” were it not for temperament-testing constructed in ways that include them.

Finally, the Commission decided that the requirement to post lost/found animal listings is a reimbursable state mandate.<sup>40</sup> That requirement, too, has been suspended for the current fiscal year.

#### B. Hayden Legislative Provisions that Have Not Been Suspended

The Commission on State Mandates did not accept the test claimants’ arguments that all of the Hayden legislation constitutes reimbursable state mandates. Many of the Hayden provisions remain in effect because the Commission on State Mandates did not find them to be reimbursable state mandates, and, therefore, the Legislature did not suspend them. The following is the list of the enacted provisions of the Hayden legislation that are still in effect; they have not been suspended for the fiscal year:

- a) the statewide policy preference for adoption and owner-redemption (Civil Code sec. 1834.4.; Food and Agricultural Code sec. 17005; Penal Code sec. 599d);
- b) the explicit provision that shelters, including public shelters, are “depositories of living animals” (Civil Code secs. 1815, 1816) responsible for treating those animals “kindly” (Civil Code sec. 1834);
- c) only some of the required records that allow shelters (and their owners or rescue/adoption groups) to track animals in the system have survived suspension (Food and Agricultural Code sec. 32003);
- d) the requirement that shelters give owner-relinquished animals who aren’t suffering irremediably an opportunity for adoption or redemption instead of killing them immediately (Food and Agricultural Code sec. 31754);

e) the requirement that shelters release animals to Internal Revenue Code sec. 501(c)(3) animal rescue and adoption groups that have requested an animal prior to his/her euthanasia (Food and Agricultural Code sec.s 31108, 31752, 31752.5, 31753, 31754);

f) the requirement that shelters use all reasonable means of checking for owner-identification (Penal Code sec. 597.1 (l));

g) statutory permission for involuntary gratuitous depositaries to accept freely offered rewards (Civil Code sec. 1846);

h) statutory authorization for a judge to prohibit a convicted animal abuser from owning animals as a condition of probation (Penal Code sec. 597.1);

i) the requirement of pre or post-seizure (of one's animal) hearings if an owner requests one (Penal Code sec. 597.1);

The adoption policy statutes remain in effect because they do not involve specific duties that cost local government to implement. It is still the policy of the State of California that adoption and reuniting animals with their human families is preferable to killing them in our animal shelters.<sup>41</sup> As noted before, this means that the policy is still relevant to interpretations of statutes and shelters' policies.

Shelters must, as a matter of state and federal constitutional law, provide owners of animals an opportunity to argue against the State's taking of their animals. The pre- and post-seizure hearing requirements in the Hayden legislation codify California judicial decisions that these hearing opportunities are required under laws that pre-exist the Hayden legislation.<sup>42</sup>

Hayden's legislation requires that shelters hold owner-relinquished animals for the same period of time as strays. This requirement is still in effect. A shelter that kills an owner-relinquished animal without holding it for at least 72 hours is violating the law, with the exception of an animal who is irremediably suffering. The Commission on State Mandates found that the Hayden legislation does not require shelters to take in

owner-relinquished animals; it requires only that, if a shelter takes in owner-relinquished animals, it must hold those animals rather than killing them immediately.<sup>43</sup> Shelters did not previously and do not now have any obligation to take in an owner's unwanted animal and kill that animal at taxpayer expense. Accordingly, it is not a state "mandate" that a shelter take in an owner's unwanted animal. If a shelter does voluntarily take in an owner's unwanted animal, the shelter must, at the least, give the animal a chance to live before the shelter incurs the taxpayer expense of killing that animal and disposing of his/her body.

Shelters must allow I.R.C. sec. 501(c)(3) animal rescue/adoption organizations to take out animals requested by the organizations during the animals' holding periods. The Commission on State Mandates decided that this is not a reimbursable state mandate because the statute explicitly provides that a shelter may assess the same fee of the rescue/adoption group that it would assess from another member of the public. Because the shelter has "fee authority" to cover its costs, the shelter has been given by the State the ability to comply with the law. When the State provides fee authority, the State is relieved from providing the funds directly.<sup>44</sup>

Please note that the statute states that a shelter may, but is not required to, collect an adoption fee from the animal rescue/adoption organization. Many shelters have agreements with such groups that enable the groups to take out animals for reduced rates. Those agreements are legal. A shelter may not charge such a group more than it charges another member of the public, however.

Some shelters have always immediately killed shy, scared, injured cats they deem "feral." This has been illegal since 1980 when holding periods were mandated for stray cats. The statute does not distinguish between feral and non-feral cats; it requires a

holding period for all stray cats.<sup>45</sup> The Commission on State Mandates confirmed that and decided that, therefore, the mere holding of feral cats is not a reimbursable state mandate attributable to Hayden's legislation. It is still illegal to kill any stray cat before the cat's holding period has ended, even though the holding period for all cats is shorter while the holding period part of the Hayden legislation is suspended.

#### Part IV. Conclusion

The Hayden legislation was enacted within the context of a movement that had already gained considerable momentum, albeit with considerable controversy. The goal of reducing killing of homeless animals to instances of true "euthanasia" (killing to relieve suffering) was embraced by many shelters, and many advocates for animals had begun thinking about ways to bring the vision of "no-kill" closer to reality. There were more plans for animal-friendly shelters, more attention to spay/neuter incentives, more coordination with nonprofit animal rescue/adoption groups, and more volunteerism among the public concerned that homeless animals receive every opportunity to survive the misfortune that made them homeless. The expansion of the Internet at the same time has given considerable impetus to the no-kill movement. Not only do groups and individuals coordinate in their efforts, but animals in need of homes can be pictured and described on the Internet in ways that greatly improve their opportunities for finding homes.

Because of this complex intertwining of movements and social change, it is not possible to identify clearly the particular contribution of any one part of that complex. However, it is possible to identify, on the basis of experience in working on the legislation, some factors that affected the shape it took and the retention of some of its provisions even as some provisions have been temporarily suspended.

### A. Legislative Design

The Hayden legislation was conceived and drafted by a group of individuals who saw “animal sheltering” as a process that involves animals, owners of animals, would-be adopters of animals, the public that doesn’t own animals, animal rescue/adoption groups, public shelters, and private shelters. The legislation seemed overly complex to some in the animal community, but, in fact, it had to be complex in order to address such wide-ranging influences on shelter practices. For that reason, the legislation had to involve several drafters, not just one, and the legislation had to incorporate a number of different perspectives. Without that inclusion and without that willingness to work with complexity, the legislation would have accomplished very little. Without an ambitious beginning, inevitable political compromises along the way to enactment would have destroyed much that remains. Much remains precisely because there were many provisions on which to compromise. As it is, the legislation successfully banned the immediate killing of owner-relinquished animals and animals other than cats and dogs. It codified access to our animal shelter population by animal rescue/adoption groups which provide more placement opportunities to those animals. Important provisions such as the ability to prohibit ownership of all animals as a condition of probation for having been cruel to an animal and clarification of the right of owners to a hearing to contest government seizures of their animals have survived. Yet, those provisions would undoubtedly have been contested vigorously if they had not been part of a package that provided so many opportunities to contest shelter reform.

While the drafters created legislation that would have sweeping effects (e.g., the expansion of the measure of damages for harming an animal), some of the apparently more modest provisions have had large effects. For example, it is very important for



the rights of people to demand a hearing when government seizes their animals that the Hayden legislation removed the legal language that local governments could choose whether to make such hearings available. The courts had already established the right to a hearing, but the statute setting up those rights in the Penal Code stated that the hearings were a matter of choice by local government.

Another example of the importance of a seemingly small change that has had significant consequences is the public policy preference for adoption. An entire article could be written just about this statutory public policy preference. Such an article could explore in more detail the facts that it came directly from the success of a nonprofit's courageous experimentation with ways of reducing killing of homeless animals and that it is a key argument in the interpretation of other statutes and shelter policies that affect the opportunities of animals to be adopted.

But such an article would also have to face the reality that this policy, too, is susceptible of distortion. Increasingly over the past five years, more and more shelters are publicly proclaiming a preference for adoption. But that does not mean that more animals will be available for adoption. An adoption preference has come to mean different things in different shelters. In many instances it has involved constructing health measures and temperament-testing protocols that will allow shelters to claim that they kill only "unadoptable" animals. It is relatively easy to become a "no-kill" shelter by manipulating the concept of "adoptable" while killing as many or more animals as before. Statewide statistics on impound rates and kill rates would help us determine whether killing is, in fact, continuing at the same level, but shelters have been supplying those statistics less consistently over the past 5 years.

All of this suggests that legislation to benefit animals must start out aiming responsibly at the highest possible level of benefits for animals without assurances that one will be able to predict with certainty how the legislation will play out ultimately. While it is undeniably true that drafters must work hard to identify and to eliminate predictable unintended consequences of the legislation, unexpected consequences--both beneficial and unfortunate--simply cannot always be predicted. Because legislation is always embedded in the context of other legislation and in a social context, humility about the role of legislation in creating particular changes is appropriate.

#### B. Legislative After-Care

The drafters of the Hayden legislation expected an intense year of legislative work to achieve enactment of the legislation. However, none expected the Hayden legislation to create such intense work demands for the next five years--and beyond. Because of financial disputes, the legislative effort has extended much beyond the initial legislative effort to have the legislation enacted. It is frustrating to continue debating the question of whether local governments need money to implement legislation that is necessary because those local government shelters do not use cost-saving methods. It is all the more frustrating to be portrayed as people who do not want to “give money to shelter animals.” When the Commission on State Mandates first began proceedings in 1999, California was awash in money. A representative of the Department of Finance told me that Finance wouldn’t fight too vigorously against the claim for money because, after all, it doesn’t hurt to give money to shelter animals even if this particular legislation doesn’t warrant it. Having engaged relatively dispassionately in the controversy then, Finance is now stepping in vigorously because the State is in dire financial straits. Now, more than ever, cost-effective shelter operations are important. Fitting as it does with the

humane objective of saving lives at the same time, this cost-effective method of helping homeless animals rather than killing them without a chance should have been and should be a win-win situation for the animals and the State. However, the Commission on State Mandates decided, during financially flush times, that a significant amount of money is due to local governments, and so the legislation is at risk. It could well turn out that, yes, it did hurt the animals to give public shelters money when it was not necessary to do so.

The saga continues. The Bureau on State Audits reviewed two highly funded state mandates and admonished the Commission on State Mandates for deciding on levels of funding for both of those mandates without adequate investigation of the factual basis for the financial claims.<sup>46</sup> In fact, the Bureau of State Audits questions generally the adequacy of the Commission, as a general matter, to create an accurate picture of the State's financial obligation when it evaluates test claims.<sup>47</sup>

Two issues on the animal adoption mandate (the Hayden legislation) have been reopened.<sup>48</sup> The Bureau of State Audits has required the Commission to reopen the matter of funding claims that involve the construction of shelter facilities. It also challenged the way in which local government has assessed employee costs, requiring actual time studies of employees engaging in the mandated activity and not employee guesses about the time it would take to fulfill such obligations as temperament-testing feral cats or maintaining lost/found listings. Therefore, although the Commission on State Mandates has already reached a conclusion about the State's obligation to give local government money for implementation of some of the Hayden legislative provisions, the issue of State funding is not over. Indeed, the whole matter of whether

money is owed by the State to local government is undecided because of the Department of Finance's pending litigation.

Depending on the outcome of these disputes about finances, the Hayden legislation may be the subject of repeal efforts. Opponents of Hayden's legislation sought delays and repeals of the legislation for three years following its enactment; it would not be surprising if they took this opportunity to attempt to repeal some if not all of its provisions.

For these reasons, much is uncertain about the future of the Hayden legislation. But, regardless of whether any of its particular provisions survive, the emergence of the Hayden legislation within the context of a movement that honors the lives of companion animals is indicative of the strength of commitment to move all of our shelters in the direction of saving, rather than taking, animals' lives. That commitment will live and grow beyond the boundaries of any particular legislative provision as we, as a society, accept more fully the idea that an individual animal is unique and deserving of protection in his/her own right. There will inevitably come a day when the idea of "no-kill," which started at the experimental edges of society in the nonprofit sector, will go mainstream into our public shelters. It is only a matter of time.

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<sup>1</sup> Taimie Bryant is Professor of Law at UCLA School of Law. Along with several others, she assisted State Senator Tom Hayden in the research and drafting of legislation he introduced in 1998 for the purpose of reforming many shelter practices. Others involved in this research and drafting effort were Paula Kizlak, DVM (board member of The Association of Veterinarians for Animal Rights), Bob Ferber (Deputy City Attorney for the City of Los Angeles), David Casselman (attorney specializing in government liability issues), and Lois Newman, founder of Cat and Dog Rescue Association. Many other people advised this group about the legislation, and there were others still who explained the bill and the need for the bill to legislators and their aides. Notably Richard McLellan, founder of the Animal Legislative Action Network, made this legislation a priority at the time of its passage and has continued to do so. Similarly, Kate Neiswender, former aide to Tom Hayden, and Teri Barnato, National Director of The Association of Veterinarians for Animal Rights, have fielded questions and defended the legislation concretely for several years. In fact, the Hayden legislation has been very much a group effort from the beginning. And, because the legislation has been under attack for so long, the group involved in supporting it has

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continued to grow. All of the people, named and unnamed in this article, provided tremendous assistance and support to Tom Hayden.

<sup>2</sup> I agree with those who prefer the use of “guardian” to that of “owner.” Nevertheless, much of this article concerns legal provisions that pertain to “owners” rather than guardians. Because the substance of the article is particularly complex and describes laws framed in terms of “owners,” I am using that term throughout the article.

<sup>3</sup> Only seven states provided 72 hours or less for reuniting people with their animals: California, Arizona, Hawaii, Maryland, Ohio, Oregon, and Utah. The Humane Society of the United States stated that holding periods of 5 days were the minimum for providing a realistic opportunity for reuniting animals with their owners. Similarly, federal law regulating the sale of shelter animals to research labs deems 5 days the minimum necessary to provide owners a reasonable chance to reclaim their pets (U.S. Code, Title 7, Chapter 54 section 2135). Even California’s own dangerous dog law provided owners with 5 days to request a hearing before their animals could be destroyed by government (Food and Agricultural Code section 31621).

<sup>4</sup> Information provided by the SF/SPCA at the time the legislation was under consideration by the Legislature. In fact, the SF/SPCA played a vital role in demonstrating that “big city animal control” can in fact turn the kill statistics on their heads; it is not just a “luxury” of smaller cities that had chosen to go no-kill or low-kill. It is the language of the SF/SPCA which forms the basis of the policy statutory provisions enacted in Hayden’s shelter reform legislation.

<sup>5</sup> At the time Senator Hayden was anticipating introducing the shelter reform legislation, Lois Newman, founder of Cat and Dog Rescue Association, and I conducted some survey research of public and private shelters in urban and rural parts of California. We were interested in such information as how budgets were set, how much money was spent on holding, killing, and disposal, whether the shelter assessed fees/fines, the length of holding period, and the extent to which volunteers and volunteer rescue groups were involved in the shelter’s activities. We also received much unsolicited information from volunteers and from volunteer animal rescue/adoption groups about the difficulties and benefits associated with working with shelters.

<sup>6</sup> Hayden’s shelter reform legislation was technically labeled “SB 1785” until then Governor Wilson signed the legislation into law as Chapter 752, Statutes of 1998. In this article I refer to the legislation as “Hayden’s legislation” in order to avoid confusion between it and other shelter reform legislation that was enacted in the same year and because the legislation has become known by its author’s name.

<sup>7</sup> The damages provision was not the only provision to die during the legislative process. The legislation originally amended the anticruelty statutes to provide explicitly that shelters and shelter employees were bound by their provisions. Explicit mention of shelters and shelter employees was proposed because of numerous reports of cruelty in animal shelters and of responses from shelter employees that they were immune from the anticruelty statutes. Similarly, the legislation originally included an explicit listing, in the Food and Agricultural Code, of the humane care standards that are required in the anticruelty statutes. Both of these were removed at the instance of local government shelter directors. The first was considered an insult because “of course” the anticruelty statutes apply. The second was considered a red flag for liability if a list were so easily available in the Food and Agricultural Code and might more easily give rise to lawsuits brought by owners than the anticruelty statutes, which are used by law enforcement. It was also deemed unnecessary since, once again, the shelters were obligated to comply with the anticruelty statutes from which the list was drawn.

<sup>8</sup> See, e.g., Professional Engineers v. Department of Transportation, 936 P. 2d 473 (Cal. 1997).

<sup>9</sup> Food and Agricultural Code secs. 31108, 31752, 31752.5, 31753, 31754.

<sup>10</sup> I have learned about these additional requirements by reviewing shelter memoranda and from descriptions of the policies given by rescue groups seeking access to shelter animals.

<sup>11</sup> Penal Code secs. 597f and 597.1 empower public shelter and private shelters to address cruelty to animals.

<sup>12</sup> For example, Burbank was holding animals for 5 business days, Los Angeles City was holding animals for 5 business days, plus three additional days for adoption, and Sacramento County was holding animals for 4 days. Perhaps as many as 20% of the shelters surveyed were holding animals for only 72 hours. The

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rest were holding animals longer. However, some were holding dogs longer than cats or animals with owner identification longer than strays, for example.

<sup>13</sup> See, for example, Natalie DiGiacomo, Arnold Arluke and Gary Patronek, "Surrendering Pets to Shelters: The Relinquisher's Perspective," 11(1) *Anthrozoos* (1997) and Colorado State University, "News and information press release" dated February 25, 1998, published originally at <http://www.colostate.edu/depts./pr/releases/news/pet-owner-survey.html>. These reported studies indicated that only 15 to 24% of owner-relinquished animals are candidates for euthanasia from the standpoint of the animal's health or temperament.

<sup>14</sup> Some shelters have stopped taking in owner-relinquished animals at all or until they have more space.

<sup>15</sup> Penal Code secs. 597f and 597.1.

<sup>16</sup> Shelters are not regulated by statute as to how much they can or must charge as adoption fees.

<sup>17</sup> "Stray Animals beet [sic] the odds in Las Vegas," *The San Diego Union Tribune*, March 7, 1999, p. D-1.

<sup>18</sup> The County of Los Angeles submitted its test claim to the Commission on State Mandates in late December of 1998. The Commission on State Mandates designated the claim "CSM 98-TC-11, Animal Adoption."

<sup>19</sup> The less obvious explanation for the test claim is that local government is so financially strapped that it must make every case it can for getting funds from the State. Local government quite frequently uses "test claims" when the Legislature determines that no funds are owed from the State to local government as a result of newly enacted statewide legislation. When local governments could use property taxes to fund local programs, the matter of "state mandated" programs was less contentious. However, now that local governments cannot use property taxes directly, local government entities rarely miss an opportunity to request that the State disburse funds. The theory is that the State should fund any program the State requires of local government; local government should fund any program they decide to require of themselves. The costs of pursuing a test claim can also be recovered from the State if the claimant is successful, so local government has been very active in this area.

<sup>20</sup> The Commission is comprised of seven members: the state treasurer, the state controller, the director of finance, the director of the Office of Planning and Research, and three gubernatorial appointees (a "public member" and two local government or school district members). The Commission does have a legal staff, however, to conduct research on the law underlying a claim and to advise the Commission on an appropriate legal outcome.

<sup>21</sup> The Commission is "quasi-judicial" in the sense that it can act only when it has been asked to resolve a specific claim that local government is owed money by the State. Its determinations, like those of administrative agencies, is open to judicial review.

<sup>22</sup> Food and Agricultural Code sec. 32001 applies only to public shelters and not to private shelters. Therefore, it is a mandate from the state that uniquely burdens local government. However, it is an obligation of shelters that could be covered by existing fee authority in Food and Agricultural Code secs. 30652 and 25802. Therefore, while it might be an obligation that uniquely burdens local government, government has been given the legal authority to cover those costs. This is among the arguments yet to be resolved the court.

<sup>23</sup> *County of Los Angeles v. State of California*, 43 Cal. 3d, at 56.

<sup>24</sup> Government Code sec. 17556.

<sup>25</sup> All of this data is from the files of Lois Newman, Cat and Dog Rescue Association, and was communicated to me by e-mail, dated 3/1/04.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> The Commission on State Mandates decision issued its decision, effective February 2, 2001.

<sup>29</sup> The State of California Department of Finance filed a petition for writ of administrative mandate [Government Code sec. 17559(b); Code Civ. Proc. Sec. 1094.5] against the Commission on State Mandates, naming as "real parties in interest" the test claimants (County of Los Angeles, City of Lindsay,

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County of Tulare, County of Fresno, and Southeast Area Animal Control Authority). The petition was filed in the Superior Court of California, County of Sacramento, on or about July 18th, 2003.

<sup>30</sup> E.g., Connell v. Superior Court, 59 Cal.App. 4th 382 (1997).

<sup>31</sup> The Legislature delegated the responsibility for reviewing state mandates to a special committee in the Assembly. That ad hoc review committee recommended to the Legislature that no decision be made on the Hayden legislation, pending an audit of some of the shelters by the Bureau of State Audits and pending litigation initiated by the Department of Finance. However, the mandates associated with the Hayden legislation were eliminated during the last stages of extended budget debates before a new budget was approved in the summer of 2003.

<sup>32</sup> Commission on State Mandates, Statement of Decision, p. 37.

<sup>33</sup> California State Auditor, Bureau of State Audits, Report 2003-106 (October 2003).

<sup>34</sup> Commission on State Mandates, Statement of Decision, pp. 15-16.

<sup>35</sup> Business and Professions Code section 4855 requires record keeping associated with veterinary medical care, as determined by the California Veterinary Medical Board. The CVMB regulations that spell out the specific information required are enumerated in section 2031 of the California Code of Regulations.

<sup>36</sup> Commission on State Mandates, Statement of Decision, p. 22.

<sup>37</sup> Commission on State Mandates, Statement of Decision, p.38

<sup>38</sup> Commission on State Mandates, Statement of Decision, p. 38.

<sup>39</sup> Commission on State Mandates, Statement of Decision, p. 38.

<sup>40</sup> Commission on State Mandates, Statement of Decision, p. 38.

<sup>41</sup> Commission on State Mandates, Statement of Decision, p. 24.

<sup>42</sup> Commission on State Mandates, Statement of Decision, pp. 33-35.

<sup>43</sup> Commission on State Mandates, Statement of Decision, p. 19.

<sup>44</sup> Government Code sec. 17556.

<sup>45</sup> Food and Agricultural Code sec. 31752.

<sup>46</sup> California State Auditor, Bureau of State Audits, Report 2003-106.

<sup>47</sup> “. . .state and local entities participated extensively in the administrative process for the Peace Officers Procedural Bill of Rights and animal adoption mandates. However. . .we questioned a high level of costs during our review of claims. These problems highlight the need for structural reforms of the process to ensure that local entities claim reimbursement for activities that are consistent with legislative intent and the parameters and guidelines. Additionally, changes are needed to estimate mandate costs better. Audits of mandate reimbursement claims do not occur in time to identify and correct potential claiming errors that can lead to reporting and payment of nonreimbursable costs for a mandate. California State Auditor Report 2003-106, p. 55.

<sup>48</sup> The Peace Officer’s Procedural Bill of Rights Act was even more inappropriately funded than the animal adoption legislation, which is probably due to the fact that as to the latter there was a Hayden legislation representative, Lois Newman, at the animal adoption legislation hearings to contest the grossly overstated claims made by the test claimants.