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PEER REVIEW COMMITTEE 2004-2005

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PEER REVIEW COMMITTEE

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Steven M. Wise is President of the Center for the Expansion of Fundamental Rights, Inc. and author of *Rattling the Cage - Toward Legal Rights for Animals* (2000); *Drawing the Line - Science and The Case for Animal Rights* (2002), *Though the Heavens May Fall - The Landmark Trial That Led to the End of Human Slavery* (2005), as well as numerous law review articles. He has taught Animal Rights Law at the Vermont Law School since 1990, and at the Harvard Law School, John Marshall Law School, and will begin teaching at the St. Thomas Law School. He has practiced animal protection law for twenty-five years.

THE GATHERING MOMENTUM

DAVID FAVRE[1] © 2005

It was back in 1994 that I was asked to write an introduction to the first volume of the *Animal Law Review* being produced by the students at Lewis and Clark Law School, in Portland Oregon.[2] At approximately the same time at the same school, a group of law students formed the first Student Animal Legal Defense Fund (SALDF). Since that time interest in the topic of animal law has exploded in the realm of the law schools all across the nation. One consequence of this increasing interest is this opportunity I now have to write an introduction to the first volume of the second law journal dedicated to the issues surrounding animals, namely, the *Journal of Animal Law*, a peer reviewed law review of Michigan State University College of Law.

This is a propitious moment to consider what has and has not happened between the creation of the first and this second animal law journals within the United States.[3]

I. SOCIAL/LEGAL MOVEMENT

While the roots of the present animal welfare social movement reaches back into the 1950's with the efforts of a number of individuals to pass a national animal protection law,[4] it was not until the publication of Professor Peter Singer's *Animal Liberation* (1977) and Professor Tom Regan's *A Case for Animal Rights* (1983) that the philosophical claim for animal rights ignited and the movement achieved intellectual traction. This focus on obtaining rights for animals has caused considerable problems for those seeking change in the legal system and confusion in the minds of the broader public who are less willing to accept the brash new ideas of animal rights, but are fairly accepting of the promotion of animal welfare.[5]

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[1] David Favre is Professor of Law at Michigan State University College of Law. He is Faculty Advisor to the *Journal of Animal Law* and Chair of the Peer Review Committee of the *Journal*. As Editor-in-Chief of the *Animal Legal and Historical Web Center*, he has published several books on animal issues. He teaches Animal Law, Wildlife Law and International Environmental Law.

[2] David Favre, *Time For a Sharper Legal Focus*, 1 ANIMAL L. 1 (1995). In that article the focus was on the conflicting views the American public had about wildlife. For example, state agencies were killing wolves in Alaska as unwanted predators while a federal agency was spending millions to reintroducing them in the Yellowstone ecosystem and National Park.

[3] In just the past six months it has come to the attention of the author that an animal legal journal was published in England and another is planned for publication in Brazil. It is fair to say that this is now a global issue.

[4] *See* Christine Stevens, *History of the AWA*, *in* ANIMALS AND THEIR LEGAL RIGHTS 66 (Emily Stewart Leavitt ed., 4th ed. 1990).

[5] The difference between the two concepts is important. Animal welfare has as an initial premise that humans have an ethical, moral or religious based obligation to treat animals well, to not inflict unnecessary pain or suffering on

On Thanksgiving weekend in 1981, at Brooklyn Law School, the first national conference was held for lawyers to consider animal legal issues. (While names can and should be associated with all this historical information, that level of detail will have to wait until a book is written.) The next year at a meeting in San Francisco, the first national organization of attorneys was formed to promote animal welfare/rights. The initial name was Attorneys for Animal Rights, but several years later the name was changed to the Animal Legal Defense Fund (ALDF).[6] Also in the 1980's the activist organization People for the Ethical Treatment of Animals (PETA) and many others were formed.[7] Thus began the legal and social movement to create awareness of animal suffering and to obtain change within the legal system. This growing movement had sufficient activity and interests in the general population that in the summer of 1990 there was a "March for the Animals" in Washington D.C. Upwards of 10,000 people showed up to march from the White House to the steps of the Capitol, chanting slogans and giving speeches on behalf of animals.

II. LAW SCHOOLS

All of this broader social activity had only a very modest impact within the legal profession and the law schools until the 1990's. But as the issues obtained increasing public awareness, college students, in the tradition of the environmental movement thirty years earlier, went to law schools to pursue legal change on behalf of animals. The past decade saw the first offering of an animal law course at Harvard Law School. Two aspects of this occurrence are important to note. First, it was taught by Steve Wise, past president of ALDF and activist attorney, as an adjunct professor,[8] not by one of the tenured professors. In 2005 it is still the case that only a few of the law school's animal law courses are taught by tenured faculty. Secondly, the occurrence of the class at Harvard gave legitimacy to the issue that had not previously existed. An article in the *New York Times* about the course and the movement resulted in a large cascade of press coverage about the movement generally and possible legal changes specifically.[9]

Another key ingredient necessary for the emergence of a law school offering is the existence of a corresponding textbook. For deans and faculty to approve the creation and teaching of new courses, it is very helpful to be able to show a national textbook that by its chapter headings defines the scope and nature of the course. As might be expected pioneer teachers, who were and are still adjunct professors at various law schools, wrote such a book in

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animals. It is fairly clear that this premise is not reflected in present laws and that considerable change would be required to fulfill that standard. Animal rights has a different premise: that animals are beings with a moral, ethical status just like human beings, and that as a result they should have not just protection of the law (welfare) but be a part of the legal system with rights of their own.

[6] *See generally* ALDF, http://www.aldf.org.

[7] *See* PETA, http://www.peta.org; *and Animal Rights Organizations*, YAHOO! SEARCH DIRECTORY, http://dir.yahoo.com/Science/Biology/Zoology/Animals__Insects__and_Pets/Animal_Rights/Organizations/ (last viewed Oct. 1, 2005).

[8] An adjunct professor teaches only part time, is usually underpaid, and is not an academic appointment that has any responsibility for the policy of the college.

[9] William Glaberson, *Legal Pioneers Seek to Raise Lowly Status of Animals*, N.Y. TIMES, Aug. 18, 1999, at A1. For months after that article the office of ALDF received phone calls from the press around the country asking questions about "this animal rights stuff."

1999.[10] Increasing student demand, the availability of a textbook and the availability of practicing attorneys to teach the course have created a significant increase in course offerings over the past decade. Omitting the intervening details, consider the scope of the interests today as measured by both the number of law schools who are offering the course and the number of law schools where students have self organized to promote animal issues. The best count is kept by the Animal Legal Defense Fund and is available from their website. In of the summer of 2005 the list comprised of 59 law schools offering courses, and 63 law schools having SALDF organizations. (There are approximately 190 ABA approved law schools in the U.S.) Another measure of growing interests is that there is now a national animal law moot court competition being held annually at Harvard Law School with teams from over a dozen law schools.[11] A second national textbook joined the scene in 2002 and a book of essays for use in classes in 2004.[12] As a further example of expanding interests, in 2004 at California Western Law College the first international conference for attorneys and professors interested in animal issues was held.[13]

All this activity has created a presence for animal legal issues within the teaching world. However, much is to be done before it can be judged as a fully integrated part of legal academics. Presently, there is no section of the American Society of Law Schools that has an animal welfare, or animal rights focus. This is primarily because of the small number of full time professors who write and teach in this area; perhaps not more than six or eight in the U.S., depending on how you count. For a number of people it is a novelty course, not a mainstream area where significant academic effort should be expended. While at least one law professor has received tenure at an ABA law school based upon scholarship in the animal law area, scholarship by professors is still low. Most of the courses presently being taught are by adjunct professors. If animal law is to be fully accepted as a respectable topic within the academic portion of the legal profession, then it will be expected that more full time professors will begin writing and teaching in the area. This is an area of growth for the future.

III. THE BROADER LEGAL COMMUNITY

To raise animal issues at attorney meetings (bar associations) a decade ago, often resulted in cat calls and dog barking; it was not taken seriously by the legal establishment. Initial inroads in this portion of the legal world occurred with the creation of recognized committees within

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[10] SONIA WAISMAN, BRUCE WAGMAN, PAMALA FRASCH AND SCOTT BECKSTEAD, ANIMAL LAW: CASES AND MATERIALS (1999). By conscious decision the book focused on classical legal issues like damages, torts, standing and property law, rather than legal rights for animals, which was perhaps too radical for law faculties to accept. While law faculties are often presumed to be very liberal, when acting as a body or institution they are often conservative about new ideas.

[11] This competition is organized by the National Center for Animal Law (of Lewis and Clark Law School) and the Student Animal Legal Defense Fund (of Harvard Law School).

[12] DAVID FAVRE, ANIMAL LAW, INTERESTS, WELFARE AND RIGHTS (2002); ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha Craven eds., 2004).

[13] Individuals came from nine different countries and had a wide assortment of experiences and ideas. The presentations were published in 2004. *See* A GLOBAL PERSPECTIVE ON ANIMALS IN THE LEGAL SYSTEM (2004). More information is available at ANIMAL LEGAL AND HISTORICAL WEB CENTER, http://www.animallaw.info/policy/pobowelfareconf2004.htm. A course on animal law was also offered in Australia in 2004.

state bar associations (usually denoted as an Animal Law Section or Committee). The first such event happened in Michigan in 1995 when the State Bar Association accepted the application of a group of attorneys to form an Animal Law Section. Also, the Bar Association of the City of New York has a long standing committee and has sponsored a number of important conferences over the years. At the moment there are eleven state bars with formally recognized animal law sections. Additionally there are nine regional or city bar associations with animal law sections.[14] The importance of these sections is that they are a critical educational catalysis for attorneys, as almost all of these sections hold educational conferences at least once a year. These efforts within the formal associations, dealing with officers and executive directors, are building credibility among the large group of attorneys who do not have personal interests in animal issues.

Just within the past year this assimilation process started within the premiere national association of attorneys, the American Bar Association. Through considerable effort an Animal Law Committee within the TIPS Section of the ABA was approved in the fall of 2004.[15] This initial presence will hopefully foster more acceptance of animal issues within the broader bar activities.

IV. WITHIN THE COURTS

There has not been any break through case for animal rights, and not much change in animal welfare in the courts over the past decade. Perhaps the most litigated issue of the past decade (besides dog bite cases) has been the issue of what damages will be available for someone whose pet has been harmed or killed by another. At the beginning there were high hopes that state supreme courts would allow loss of companionship, intrinsic value or human pain and suffering as the measures for the value of the loss of a pet. But as we look at the legal landscape today, it is fairly clear that the courts will not be the catalysis for change in this area,[16] and that legislatures are the only avenue open for real change.

For example, a Texas trial court awarded damages to a plaintiff whose dog had escaped defendant's care and was killed. On appeal the court would not let stand the damages for mental anguish of the plaintiff or the intrinsic value of the animal companion.[17] In the past decade, not withstanding the occasional award at the trial court level, no state supreme court has allowed recovery for harm to pets based upon companionship or intrinsic value. The Wisconsin Supreme Court gave a fairly detailed discussion of the public policy considerations before holding that they were unwilling to extend the law, and left the issue in the hands of the legislature.[18] The cause of action known as intentional infliction of emotional distress, where available, generally

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[14] *See Bar Association Animal Law Sections and Committees*, ALDF, http://aldf.org/associations.asp?sect=resources (last visited Oct. 1, 2005).

[15] Barbara Gislason was the first chair of the committee. In August of 2005 they presented their first program within ABA's annual meeting.

[16] *See generally* Rebecca Huss, *Recent Developments in Animal Law*, 40 TORT & INS. L.J. 233, 237-46 (2005).

[17] Petco Animal Supplies, Inc. v. Schuster, 144 S.W.3d 554 (Tex. App. 2004).

[18] Rabideau v. Racine, 627 N.W.2d 795 (Wis. 2001), *available at* ANIMAL LEGAL & HISTORICAL WEB CENTER, http://animallaw.info/cases/causwi627nw2d795.htm.

is still available for fact patterns that include harm to animals. However, negligent infliction of emotional distress has not received a warn reception.[19]

At the federal level there was one significant case over the past decade. A key issue for the enforcement of the Animal Welfare Act has been that of standing; which plaintiff might qualify to bring an action to challenge the implementation of the law. The D.C. Court of Appeals in 1998 for the first time found an individual had standing under the AWA based upon his personal interest in not seeing animals kept in conditions in violation of the AWA.[20]

V. WITHIN THE LEGISLATURES

At the national level the political mix in Washington D.C. has resulted in loss of protection for animals. On the wildlife side there has been very little new legislation. Amendments to the Migratory Bird Act in 2004 removed protection for nonnative birds.[21] A 2004 amendment to the Wild Horses and Burros Act has made it easier to get older unwanted horses to slaughter. Change to the Endangered Species Act and the Marine Mammal Protection Act occurred in 2004 when provisions were added which reduced the burden on the Defense Department in complying with these laws when required by the national defense needs of the county.[22]

On the domestic animal side, the premier federal legislation is the Animal Welfare Act (AWA).[23] After the significant enhancement of the AWA in the 1987 amendments, there have been only two changes to the AWA. In 1990 there was a modest strengthening of the provisions to keep stolen pets out of the chain of commerce.[24] In 2002 Congress, under the watchful eye of Senator Helms, amended the AWA to make clear that birds, rats and mice were exempted from the protections of the AWA.[25] Amendments to help restrain puppy mills and outlaw the use of downed animals for commercial slaughter were removed from the final version that became law.[26] The housing and care of the millions of commercial food animals in the U.S. have never been under the provisions of the AWA and there has not been any movement to include them.

At the state level, the past decade has seen a number of positive changes. The criminal provision of state cruelty laws have been enhanced in many states, including amending the laws

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[19] Harabes v. Barkery, Inc., 791 A.2d 1142, 1143-46 (N.J. Super. Ct. L. Div. 2001); *see also* Pickford v. Masion, 98 P.3d 1232 (Wash. Ct. App. 2004).

[20] ALDF v. Glickman, 154 F.3d 426 (1998), *available at* ANIMAL LEGAL & HISTORICAL WEB CENTER, http://www.animallaw.info/cases/caus154f3d426.htm.

[21] *See* Rebecca F. Wisch, *Overview of the Migratory Bird Treaty Reform Act*, ANIMAL LEGAL & HISTORICAL WEB CENTER, http://www.animallaw.info/articles/ovusmbtra2004.htm.

[22] *See generally* Defense Authorization Act, Pub. L. No. 108-136, 117 Stat. 1392 (2004); *and Legislative Review*, 11 ANIMAL L. 325, 328-34 (2003).

[23] 7 U.S.C. §§ 2131-2159 (2002), *available at* ANIMAL LEGAL & HISTORICAL WEB CENTER, http://www.animallaw.info/statutes/stusawa.htm.

[24] Food, Agriculture, Conservation, and Trade Act of 1990, 7 U.S.C. 1421 (1990), *available at* ANIMAL LEGAL & HISTORICAL WEB CENTER, http://www.animallaw.info/statutes/stusawapl_101_624.htm.

[25] Animal Welfare Act Amendments of 2002, 116 Stat. 134 (2002), *available at* ANIMAL LEGAL & HISTORICAL WEB CENTER, http://www.animallaw.info/statutes/stusawapl107_171.htm.

[26] *Legislative Review*, 9 ANIMAL L. 331, 334-35 (2003).

to make some of the provisions felonies rather than just misdemeanours.[27] A few legislatures have tentatively begun to allow the recovery for harm to pets based upon non-economic basis.[28] Additionally, based on an addition to the Uniform Trust Act, a number of states have made it possible to have lawful pet trusts.[29]

VI. THE DIRECTION FOR THE FUTURE

Eventually the wave of individuals passing through law schools will have their full effect on legal institutions. As they become legislators, judges and community leaders, the issues of animal welfare will rise on the national agenda. The welfare of animals is most likely to be enhanced at the state level rather than the federal level in the foreseeable future. As states have primary control over animal property and anti-cruelty laws, they are the appropriate place for change to originate. Additionally, getting animals on the national agenda in Washington D.C. is not likely in the present political climate.

It is natural for the laws of a maturing civilization (with its increased social and economic wealth) to reflect concern about the less capable, to acknowledge the needs of others, and to be willing to dedicate some level of resources to the well-being of those not able to speak for themselves. Within this context there is considerable hope for obtaining increasing consideration of the plight of so many animals. I am sure the *Journal of Animal Law* will play a significant role in the consideration of the ideas and concepts that will aid in this progression to a more civilized world.

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[27] *See* Stephan K. Otto, *State Animal Protection Laws – The Next Generation*, 11 ANIMAL L. 131 (2005), *available at* ANIMAL LEGAL & HISTORICAL WEB CENTER, http://www.animallaw.info/journals/jo_pdf/vol11_p131.pdf.

[28] In 2002 Tennessee adopted a statute allowing up to $4,000 in non-economic damages, in limited circumstances. TENN. CODE ANN. § 44-17-403(e) (2004). In 2005 Connecticut added a section allowing such damages in small claims court (maximum of $3,500), CONN. GEN. STATUTE § 22-351 (2005).

UNIFORM TRUST CODE § 408 (2003). *See generally* Suzette Daniels, *An Introduction to Pet in Wills and Pet Euthanasia*, ANIMAL LEGAL & HISTORICAL WEB CENTER, http://www.animallaw.info/articles/arusdanielssuzette2004.htm.

NON-ECONOMIC DAMAGES: WHERE DOES IT GET US AND HOW DO WE GET THERE?

SONIA S. WAISMAN[1]

I. INTRODUCTION

One issue in the forefront of animal law in the courts, state legislatures and the media in recent years is the question of whether and under what circumstances a person may be entitled to monetary damages for non-economic harm--such as emotional distress and loss of companionship--for the wrongful injury to or death of a companion animal. This issue is often referred to in shorthand as "non-economic damages," and will be referenced as such in this article. This article will raise some of the fundamental questions that must be addressed in considering this issue and present the reader with some of the hotly debated responses.

First, is there a potential benefit to nonhuman animals overall to allow a particular human to obtain a greater monetary award when one particular nonhuman animal is harmed by the wrongful act of another? In other words, what's in it for the animals? Is this simply another means of dipping into the deep pockets of insurance companies and putting more money into the pockets of greedy plaintiffs? Correspondingly, if animal advocates are to choose their battles, is this one worth fighting or would their time for the animals be better spent addressing other pressing issues?

Second, if we assume the answer to the first question is yes (*i.e.*, there is a potential benefit to nonhuman animals), would it be more productive to focus on legislative efforts to enact statutes expressly allowing compensation for emotional distress and loss of companionship in these circumstances, or is advocates' time better spent trying to advance the issue through the courts? There is no simple answer to these questions. This paper will attempt to summarize the risks and potential advantages of both. In the end, however, careful evaluation and consideration of the big picture may go the furthest in effectuating progress in this area.

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[1] Sonia S. Waisman is co-editor of ANIMAL LAW: CASES AND MATERIALS (2002) and author of several articles on the subject of animal law, including *Recovery of "Non-Economic" Damages For Wrongful Killing Or Injury Of Companion Animals: A Judicial And Legislative Trend*, 7 ANIMAL L. 45 (2001). She has taught animal law courses at California Western School of Law in San Diego, CA and Vermont Law School. She is currently Partner in the Los Angeles office of the law firm of Morrison & Foerster LLP.

II. WHAT'S IN IT FOR THE ANIMALS?

If you are an attorney who represents plaintiffs in cases of tortious harm to companion animals and you seek recovery of damages for emotional distress and loss of companionship because you believe the human plaintiff should have the right to compensation for this aspect of the loss, then you can skip to the next section. You do not need an answer to the first series of questions. If, on the other hand, your motivation for taking these cases is primarily as a means of advancing the interests of nonhuman animals within the legal system, then the fundamental question that must be considered is whether these cases indeed represent an effective means of achieving, or at least moving toward, that goal.

Some animal advocates will answer with a resounding "yes." One rationale is that these cases prompt the courts to recognize that although animals are "property" under the current legal system, they are sentient "property," far different from inanimate objects. Even where courts have ruled that the plaintiff is not entitled to "non-economic" damages, they often have acknowledged the special relationship between humans and their companion animals. Take, for example, the case of *Rabideau v. Racine*, 627 N.W.2d 795 (Wis. 2001). In that case, plaintiff's dog was fatally shot by a police officer. The primary question posed to the Wisconsin Supreme Court was whether the plaintiff was entitled to emotional distress damages based on claims of negligent and intentional infliction of emotional distress. The court ultimately ruled against her based on its interpretation of Wisconsin precedent (also noting the "slippery slope" concern), but it rejected the trial court's conclusion that the claim was frivolous, and recognized the availability of emotional distress damages in cases where the facts support a claim for intentional infliction of emotional distress. Significantly, the court started the opinion as follows:

> At the outset, we note that we are uncomfortable with the law's cold characterization of a dog, such as Dakota, as mere "property." Labeling a dog "property" fails to describe the value human beings place upon the companionship that they enjoy with a dog. A companion dog is not a fungible item, equivalent to other items of personal property. A companion dog is not a living room sofa or dining room furniture. This term inadequately and inaccurately describes the relationship between a human and a dog.[2]

[2] Rabideau v. Racine, 627 N.W.2d 795, 798 (Wis. 2001); *see also* Paprocki v. Nolet, No. 01AS02905 (Cal. Super. Ct., Sacramento County Jan. 22, 2003) (Reluctantly following California precedent and dismissing a claim for "non-economic damages" arising from alleged negligence, the trial judge urged the state appellate court to reverse the ruling, stating in the minute order:

> Today many animals are more than pets, they are true companions. . . . [T]his court takes judicial notice of the emotional and physical well being pets often bring to their human companions. . . . To hold that a person does not suffer severe emotional distress or other noneconomic damage or harm when a negligent act takes the life of his/her companion pet, the law ignores reality.);

Ammon v. Welty, 113 S.W.3d 185, 187 (Ky. Ct. App. 2002) ("The affection an owner has for, and receives from, a beloved dog is undeniable. It remains, however, that a dog is property, not a family member.").

The *Rabideau* majority expressly clarified saying, "To the extent this opinion uses the term "property" in describing how humans value the dog they live with, it is done only as a means of applying established legal doctrine to the facts of this case."[3]

Beyond the potential benefit of court opinions acknowledging that animals are not simply "property," the publicity that often surrounds these cases (particularly in the more egregious cases of intentional harm to the animal) may evoke heightened sympathy for and compassion towards the specific animal harmed and, in turn, toward animals generally (or certain species of animals, at least). It may also increase public awareness of a problem affecting certain animals in a given community (for example, police shootings of animals, which is much more common across the country than most individuals would think or want to believe).[4] Public outcry or action by a vocal segment of society (which may be initiated by a highly emotional, high profile court case) can be the impetus for change in the legal system; also, court rulings themselves may cause the legislature to clarify or change the law.[5] Further, these cases may prompt the media to increase public awareness of issues relating to animals, which, in turn, could effect some change for the benefit of animals.

Proponents argue that these cases are an important step toward the legal system's recognition of animal interests. The argument is that as more and more courts issue published

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[3] *Rabideau*, 627 N.W. 2d at 798; *see generally In re* Estate of Howard H. Brand, No. 28473 (Vt. Prob. Ct., Chittenden County Mar. 17, 1999) (refusing to enforce a will provision calling for the destruction of testator's horses, the court reasoned:

> Although the discussion regarding the future of Mr. Brand's animals occurs within the realm of property law, the unique type of 'property' involved merits special attention.... The mere fact that this court has received more than fifty letters from citizens across the country concerned about the outcome of this case, and not a single communication addressing Mr. Brand's desired destruction of his perfectly good Cadillac, underscores this point.);

but see DeSanctis v. Pritchard, 803 A.2d 230 (Pa. Super. Ct. 2002) (rejecting divorced husband's attempt to enforce the couple's agreement allowing him visitation rights to see their dog, the court commented that the parties were seeking "an arrangement analogous, in law, to a visitation schedule for a table or a lamp," given that animals are property under Pennsylvania law; it is noteworthy that in voiding the agreement the court commented that during a four year separation period the husband never saw the dog.).

[4] *See, e.g.*, Brown v. Muhlenberg Township, 269 F.3d 205 (3d Cir. 2001) (where plaintiff did not witness police shooting of dog, no recovery for intentional infliction of emotional distress under Pennsylvania law); Copenhaver v. Borough of Bernville, 2003 U.S. Dist. LEXIS 1315 (E.D. Pa. Jan. 9, 2003) (dismissing claim for intentional infliction of emotional distress, with leave to amend to allege facts supporting the claim; allowing punitive damages claim to remain); Amons v. District of Columbia, 231 F. Supp. 2d 109 (D.D.C. 2002) (denying a motion to dismiss claim for intentional infliction of emotional distress where officers entered plaintiff's home without permission or a warrant, searched the home and shot plaintiff's dog); Rabideau v. Racine, 627 N.W.2d 795 (Wis. 2001) (police shooting case discussed above); *and* Fuller v. Vines, 36 F.3d 65 (9th Cir. 1994) (after a series of appeals and remands, in December 1998 the jury rendered a special verdict, finding that in shooting the dog one of the police officers violated the human plaintiffs' constitutional rights--the killing was held to constitute a seizure of "property" under the Fourth Amendment--causing $143,000 in damages, plus $10,000 in punitive damages).

[5] For example, in response to the Wisconsin Supreme Court's denial of a woman's application for admission to practice law the state legislature enacted a statute providing that "no person shall be denied admission or license to practice as an attorney in any court in this state on account of sex." *See* Application of Ms. Goodell, 81 N.W. 551 (Wis. 1879) (on reapplication, the court granted Goodell's motion for admission). Court decisions also can evoke a response that may be detrimental to animals. For example, two years after a Minnesota appellate court voided a provision of a "hunter harassment" statute that prohibited animal activists from interfering with hunting activities in *State v. Miner*, 556 N.W.2d 578 (Minn. Ct. App. 1996), Minnesota enacted a constitutional amendment declaring, "Hunting and fishing and the taking of game and fish are a valued part of our heritage that shall forever be managed by law and regulation for the public good." MINN. CONST. art. XIII, § 2.

opinions acknowledging that companion animals are different than inanimate property, this fact will start to be recognized more broadly within the legal system and society as a whole.[6] As such, the argument goes, common sense would seem to dictate that they cannot be treated in the same manner as inanimate property. Longstanding anti-cruelty laws are a testament to this, but in the minds of many such laws are far from enough. The "non-economic damages" cases, proponents assert, could be a catalyst for the legal system to include animals within a category of quasi-property, *sui generis* and entitled to greater legal recognition.[7] As courts gradually begin to acknowledge that animals are considered by many to be family members, it should necessarily follow (so the argument goes) that their interests are entitled to greater weight within the legal system--regardless of whether or not they remain classified as "property." These cases (opponents of animal advocacy fear) could also represent a stepping stone toward a time where a nonhuman animal, through a guardian or other representative, could be a plaintiff in her own right, to seek redress for the injuries she herself has suffered.[8]

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[6] Given that the basis for plaintiffs' claims in these cases is the bond that exists between the plaintiff and his or her companion animal (such that interference with that bond warrants payment of damages for the ensuing emotional distress and loss of companionship), the animals harmed are generally "companion" animals as opposed to those animals suffering in laboratories or on factory farms. Proponents of these cases generally agree that the same theories should be applied to all sentient beings. Although a minority of proponents may view companion animals as being in a distinct category, there would appear to be no rational basis for recognizing the interests of some sentient beings and not others. *See, e.g.,* Rabideau v. Racine, 627 N.W.2d 795, 799 (Wis. 2001) ("Were we to recognize a claim for damages for the negligent loss of a dog, we can find little basis for rationally distinguishing other categories of animal companion.") Unfortunately, human society necessarily tends to rely on the false sense of security of an outdated *status quo* in an effort to rationalize delaying progress, enlightenment and the recognition of the interests of others. It is only with 20/20 hindsight long after the laws and society as a whole have evolved that the absurdity and offensiveness of the position becomes apparent. *See, e.g.*, Mitchell v. Wells, 37 Miss. 235, 252-53 (1859) (Mississippi's "climate, soil, and productions, and the pursuits of her people . . . require slave labor. It was declared in the convention that framed the Federal Constitution, by some delegates, that Georgia and South Carolina would become barren wastes without slave labor. . ."); People v. Hall, 4 Cal. 399 (1854) (ruling testimony of Chinese witness was inadmissible to convict Caucasian man, court looked to "public policy" and referred to "a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point . . . between whom and ourselves nature has placed an impassable difference"); Bradwell v. State, 83 U.S. 130, 132-33 (1872) (quoting from the Illinois Supreme Court and affirming its denial of a woman's application for admission to the bar:

> That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarding as an almost axiomatic truth. In view of these facts, we are certainly warranted in saying that when the legislature gave to this court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege would be extended to women.).

[7] *See, e.g.*, Bueckner v. Hamel, 886 S.W.2d 368, 376-78 (Tex. Ct. App. 1994) (Andell, J., concurring) (where plaintiff sued a hunter for killing his dogs, the court awarded actual and punitive damages; one justice concurred with the majority but would have expanded the award to encompass the "special value" of the dog to the plaintiff "[b]ecause of the characteristics of animals in general and of domestic pets in particular, I consider them to belong to a unique category of 'property' that neither statutory law nor case law has yet recognized.").

[8] *See, e.g.,* Palila v. Hawaii Dept. of Land and Natural Res., 852 F.2d 1106, 1107 (9th Cir. 1988)

> ("As an endangered species under the Endangered Species Act, . . .the bird (Loxioides bailleui), a member of the Hawaiian honey-creeper family, also has legal status and wings its way into federal court as a plaintiff in its own right . . . represented by attorneys for the Sierra Club, the Audobon Society, and other environmental parties.");

see also Northern Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988); *but see* Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium, 836 F. Supp. 45, 49 (D. Mass. 1993) (dismissing a claim brought by Kama, a dolphin, as a named plaintiff, for lack of standing, concluding that the Marine Mammal

Whether or not opponents' fears ultimately will be realized (an issue beyond the scope of this paper), are "non-economic damages" cases an effective means of getting there? Some animal advocates believe they are not. The focus of these cases is on the human plaintiff--the animals as companions or family members to *humans*; the loss suffered by the *human*, even though it is the nonhuman animal herself who has been injured or killed; and monetary compensation to the *human* plaintiff. As such, they offer no direct benefit to anyone other than the human plaintiff in the case.

One counter-argument is that nonhumans can benefit where the impetus for greater protections for the nonhuman was the *human* interest. The prime example is the environment. One often cited rationale for protecting the environment is to preserve it for future generations of *humans*; or to preserve it as a habitat for endangered species of animals so they will be there for "our [*human*] children."[9] Thus, there is arguably a sound basis for the position that even though a particular human plaintiff may obtain monetary compensation in these cases, this does not foreclose the possibility that nonhuman animals ultimately will benefit in some manner.

Advocates who question the value of these cases for the animals may also question whether there is any potential detriment to nonhuman animals if recovery of damages for emotional distress and loss of companionship becomes the accepted norm in these cases. There are several levels of debate in this regard. In no particular order, the first is the debate between animal advocates and opponents. Some opponents who claim to care about animals argue that awards for emotional distress or loss of companionship in veterinary malpractice cases will cause malpractice insurance premiums to increase, resulting in higher fees for veterinary services. They argue that many persons already refuse costly treatment and that higher prices simply will result in more animals being abandoned or euthanized when their guardians are unwilling or unable to pay for life-saving treatment.

Protection Act "does not authorize suits brought by animals." The court distinguished *Palila* and *Northern Spotted Owl* as cases where defendants had not challenged the propriety of naming an animal as a plaintiff.). Of course, it is already a given that nonhuman entities, such as corporations, are parties to lawsuits; in fact, it would be thought absurd if they could not be. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 742 (1972) (Douglas, J., dissenting)

> ("Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. [Fn. omitted.] The corporation – a creature of ecclesiastical law – is an acceptable adversary and large fortunes ride on its cases. The ordinary corporation is a "person" for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.").

[9] For example, certain state constitutions and/or statutes specifically refer to the obligation to preserve the environment for "future generations" [of humans, presumably]. *See, e.g.*, HAW. CONST. art. XI, 1 ("For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources. . ."); MONT. CONST. art. XI, 1 (1) ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."); N.Y. Envtl. Conserv. Law § 8-0103 (Consol. 2004) ("It is the intent of the legislature that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.").

The primary response to this argument would seem to be a reality check. Even where such awards have long been permitted in cases of negligent harm to animals,[10] to this author's knowledge, there has been no reported impact on the price veterinary services or on the volume of animal euthanasia in the jurisdiction; nor has there been any onslaught of litigation.[11] Moreover, even if such awards become permissible in every state, there is no reason to believe that the frequency or dollar value of the awards would warrant any significant change in veterinary fees.[12] In any event, just as in the legal field, *pro bono* free or low cost veterinary services generally are available for low income guardians who seek treatment for their companion animals. On the other side of the coin, studies indicate that an ever-growing percentage of animal guardians are ready to do whatever it takes for their animals and that veterinary practices have been expanding as a result.[13] Nonetheless, this debate raises at least an issue for consideration by advocates who take these cases with the ultimate goal of benefiting nonhuman animals.

The second debate is among animal advocates. Some raise concerns that these cases evoke the perception of greedy plaintiffs and plaintiff attorneys. If the cases are publicized as frivolous and over-reaching, it could work against the animal advocacy movement as a whole and, in turn, against animals. As anyone who has ever been a plaintiff or litigated on behalf of a plaintiff in these cases can attest, however, such cases often are pursued with a strong belief in the righteousness of the cause; and the monetary award of any settlement or judgment generally is a far cry from what plaintiffs and their counsel may receive in a civil action arising out of nearly any other form of alleged tortious conduct. In any event, if there is any media attention, it is important that the plaintiffs and the issues be presented in a favorable light. It is up to the attorneys handling these cases to be fully prepared for any media attention that may arise.

Generally speaking, animal advocates have relatively limited resources available to them--particularly when compared to the strong political power and seemingly endless financial and personnel resources of government agencies and mega-conglomerates that often oppose advocates' efforts to effectuate change. Given this fact, could time, energy and money be better spent toward a more direct, immediate or broader benefit for nonhuman animals? It is beyond

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[10] *See, e.g.*, Campbell v. Animal Quarantine Station, 632 P.2d 1066 (Haw. 1981); *see also* McAdams v. Faulk, 2002 Ark. App. LEXIS 258, *13 (Unpub. Apr. 22, 2002) ("Damages on a negligence claim are not limited to economic loss damages, and include compensation for mental anguish.").

[11] For a thorough analysis of this and related issues, *see generally* Christopher Green, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 ANIMAL L. 163-250 (2004). For this issue in particular, see Section III of the article, "The Quantitative Question: Is the Sky Currently Falling Due to Increased Veterinary Malpractice Litigation and Greater Damage Awards?" (174-77).

[12] *See, e.g.*, TENN. CODE ANN. § 4-17-403 (2004) (T-Bo Act) (limiting awards for "compensation for the loss of reasonably expected society, companionship, love and affection of the pet" to $4,000).

[13] *See, e.g.*, Sonia S. Waisman and Barbara R. Newell, *Recovery of 'Non-Economic' Damages For Wrongful Killing Or Injury Of Companion Animals: A Judicial And Legislative Trend*, 7 ANIMAL L. 45, 61-62 (2001)

> ("According to an American Veterinary Medical Association study reported in 1998, $11.1 billion was spent on health care for companion dogs, cats, and birds in 1996, an increase of 61% from expenditures in 1991. As of 1998, there were twenty board-certified veterinary specialties, ranging from anesthesiology to toxicology. . . . In a 1996 survey by the American Animal Hospital Association, 38% of respondents stated they would spend any amount of money to save the life of their animal companion.")

(Footnotes and citations omitted.)

the scope of this paper to opine as to specific alternatives, but it is a question that every animal advocate should consider before automatically assuming that these cases are "for the animals."

Whether the conclusion is that these cases ultimately will benefit nonhuman animals, or whether it is that they simply are meritorious in their own right because human plaintiffs should be entitled to compensation for non-economic harm suffered in these instances, the next question is whether it may be more productive to focus on legislative efforts to enact statutes expressly allowing compensation for emotional distress and loss of companionship in these circumstances, or whether advocates' time and resources are better spent trying to effectuate progress through the judicial system.

III. LEGISLATE OR LITIGATE?

When it comes to collaborative or collective efforts to effectuate change on behalf of any segment of society (human or nonhuman), it seems that nothing moves forward without debate and differences of opinion (regarding the means to achieve that goal) among individuals all working toward the same ultimate goal.[14] Given that any effort to change a societal *status quo* faces obstacles in every direction, this is not at all surprising. On the issue at hand, there is staunch debate and strongly held opinions by animal advocates on both sides of the issue of whether to legislate or litigate for change.

In an ideal world, creating a statutory right for recovery of "non-economic damages" when a companion animal is harmed would be a simple and logical solution. Unfortunately for both humans and nonhumans, however, we do not live in an ideal world. The realities of the political process factor heavily into this debate.

The T-Bo Act (attached as Appendix A), enacted in 2001, was the first statute in the United States expressly permitting recovery of "non-economic damages."[15] The Illinois "Humane Care for Animals Act" (attached as Appendix B) became effective January 1, 2002.[16] A model statute prepared by the Animal Legal Defense Fund is attached as Appendix C. The chart on the following page summarizes the wide range in scope among the two statutes and the model proposal.

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[14] *See generally* JONATHAN S. HOLLOWAY, CONFRONTING THE VEIL (2002) (providing a history of the civil rights movement from 1919 through 1941 through the life and work of Abram Harris, E. Franklin Frazier and Ralph Bunch). The author is a professor at Yale University, serving as Fellow, Stanford Humanities Center, for the 2004-05 academic year.

[15] TENN. CODE ANN. § 44-17-403 (2004).

[16] 510 ILL. COMP. STAT. ANN. 70/16.3 (2004).

KEY PROVISIONS	TENNESSEE T-BO ACT	ILLINOIS HUMAN CARE FOR ANIMALS ACT	MODEL STATUTE
Animals Encompassed by the Act	"[D]omesticated dog or cat normally maintained in or near the household of its owner"	Any "owned" animal	"[A] dog; a cat; or any warm-blooded, domesticated nonhuman animal dependent on one or more human persons for food, shelter, veterinary care, or companionship." [Subject to exceptions.]
Type of Damages Permitted for Non-Economic Loss	"[C]ompensation for the loss of reasonably expected society, companionship, love and affection of the pet"	Includes, but is not limited to, damages for "emotional distress suffered by the owner"[17]	Includes "compensation for the loss of the reasonably expected society, companionship, comfort, protection and services" of the animal
Caps on Damages	$4,000	None on damages for emotional distress; $25,000 for punitive damages	None
Types of Claims Encompassed	Harm caused by "unlawful and intentional, or negligent, act of another"	Harm caused by acts of "aggravated cruelty" or acts of "bad faith"	Harm caused by any "willful, wanton, reckless or negligent act or omission"
Other Notable Restrictions	Expressly does NOT authorize a "non-economic damages" award in cases of "professional negligence against a veterinarian" --- *See* Appendix A [§ 44-17-403(a), (e) and (f)] for additional limitations	N/A	N/A
Other Notable Benefits	N/A	Expressly allows court to enter "any injunctive orders reasonably necessary to protect animals. . . ."	Where an animal is injured but not killed, allows compensation for "pain, suffering and loss of faculties sustained by the animal" --- Expressly allows court to issue restraining orders or injunctive relief "as appropriate"

[17] It is noteworthy that the Illinois statute also permits an award of damages for "expenses incurred by the owner in rectifying the effects of cruelty, pain, and suffering of the animal."

If the model statute is the starting point and the T-Bo Act is considered as a possible endpoint in the legislative process, the children's game of "telephone" (where a whispered phrase or story gradually transforms into something very different as it is passed along from person to person) comes to mind. This author was not privy to the legislative process in Tennessee, but has been involved in the process in California--where, on several occasions in recent years, bills have been proposed and then withdrawn as they morphed during the legislative process.

For example, a bill may start out encompassing negligent acts or omissions. Along the way (assuming lobbying by veterinary and insurance industry groups, for example, as is common), revisions could change it to delete negligence altogether or to delete claims of professional negligence against veterinarians. Many animal advocates strongly believe that to enact a statute with these limitations would be more detrimental than to have no statute at all. The reason is that, if and to the extent courts over time would otherwise become more inclined to allow "non-economic damages" claims to reach the jury in negligence cases (veterinary malpractice or otherwise), a statute limited in this manner is likely to dissuade the courts from doing so--effectively slamming the door on recovery for the tangible, but non-monetary component of the loss which may be suffered by the plaintiff regardless of whether the harm was inflicted through an intentional, reckless or negligent act.

In addition, lobbying groups and other opponents to such legislation often urge that monetary caps in line with the T-Bo Act should be imposed. Attorneys who routinely litigate these cases on behalf of plaintiffs differ in their views as to whether settlement values in particular (but judgments as well) are increasing to the point where a five-figure statutory cap would be detrimental to progress in the courts. There appears to be general agreement, though, that while the T-Bo Act will remain noteworthy as the first statute of its kind, a four-figure cap is unacceptable and, indeed, would have a negative impact on litigation (from the plaintiffs' perspective).[18]

One way to face these concerns head on may be to work with the state's veterinary association, if and to the extent possible, to try to draft the statute in such a way that is favorable for the animals (or, more directly, their human companions) yet still take into account the concerns of veterinary associations. Where this is possible, it will alleviate the risk of radical changes to the draft language as it weaves through the legislative process. Where this is not possible, animal advocates seeking to initiate legislation in their jurisdiction should fully research the political climate, including the strength and position of potential opponents. While it cannot be known with certainty what a final bill will look like if or when it is signed into law, knowledge of the issues and the players at the outset allows for a well-reasoned and calculated decision as to whether to go forward in a given jurisdiction at a particular point in time. It goes without saying that the intent to "do something good for the animals" is a worthy goal, but if the means to achieve that goal are not well-researched and planned, the risks of a detrimental effect may far outweigh the potential benefits.

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[18] A limitation as to the animals encompassed by the statute could be another factor of concern (e.g., T-Bo Act's limitation to dogs and cats), given that many people form close bonds with other animals (e.g., horses, ferrets, and pot-bellied pigs). However, since the vast majority of cases raising the "non-economic damages" issue involve dogs or cats, and since future statutes are likely to be broader in scope than the T-Bo Act, this is relatively unlikely to become a major point of contention as to whether a proposed statute would benefit animals and/or their human companions.

This holds true with respect to efforts not only on the legislative front, but in the courts as well. For example, when a claim for emotional distress or loss of companionship is dismissed at the pleadings stage, or at any stage for that matter, an attorney must evaluate whether to appeal. Obviously, an attorney has an ethical obligation to the client. We will assume for present purposes that the plaintiff client wants to do whatever is in the best interest of the animals on a broad scale. In considering whether to appeal, it is a given that any time a theory that may be viewed as "pushing the envelope" is put forth, there is a risk of making "bad law." This risk is an inherent part of the process. However, careful and thorough analysis may at least minimize that risk. Relevant factors include: 1) information about each of the appellate judges and their respective past decisions; 2) the results of thorough research of case precedent in the jurisdiction, including any analogous cases that would be helpful or detrimental to the claim; and 3) whether the facts of the case and the particular parties involved are optimal for a "test case," bearing in mind the well known saying that "bad facts make bad law."

From a big picture perspective, lawyers or advocacy organizations may wish to consider using the toxic tort cases as a model and utilizing some form of national coordinating counsel. The role of national coordinating counsel is to oversee (to the extent possible in this context) much or all of the litigation nationwide, to assure consistent handling and availability of resources, and to assist in strategizing as to which cases may best serve as test cases to make good law on the issue. Moreover, national coordinating counsel can provide expertise to local attorneys who may not handle these cases on a regular basis.

Whether the legislative process or litigation is the path to take in a particular jurisdiction will depend on the various factors noted in this section. Anyone looking to effectuate change for nonhuman animals (or to benefit human plaintiffs for that matter) through the development of "non-economic damages" will be doing a disservice to the humans or nonhumans they seek to benefit if they move forward on either path without thorough research and a calculated decision-making process.[19]

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[19] As a practical matter, though, it is noteworthy that various courts and the few legislatures that have addressed this issue appear to be somewhat consistent in generally allowing emotional distress damages for intentional torts but not in cases of negligence. *See, e.g.*, Pickford v. Mansion, 98 P.3d 1232 (Wa. 2004) (distinguishing cases involving malicious conduct and declining to allow recovery of damages for emotional distress where defendant/neighbor's two large dogs wandered into plaintiffs' yard and attacked their small dog); Kennedy v. Byas, 867 So. 2d 1195, 1198 (Fla. Ct. App. 2004) (declining to allow recovery of emotional distress damages, the court distinguished this from the earlier Florida case *LaPorte v. Associated Independents, Inc.*, 163 So.2d 267 (Fla. 1964) (The court stated, in *LaPorte* "the defendant's behavior was malicious -- the defendant threw a garbage can at the plaintiff's pet; in the instant case we are dealing with an allegation of simple negligent behavior by a veterinarian who was trying to provide treatment.")); Petco v. Schuster, 144 S.W.3d 554 (Tex. Ct. App. 2004) (where plaintiff's dog escaped from a groomer and was killed in traffic, the court distinguished from an earlier Texas case involving the intentional, premeditated, fatal shooting of a dog); TENN. STAT. ANN. § 44-17-403 (2004) (allowing up to only $4,000 in negligence cases, in limited circumstances); 510 ILL. COMP. STAT. ANN. 70/16.3 (2004) (not applicable in negligence cases); *see also* Ammon v. Welty, 113 S.W.3d 185, 187 (Ky. Ct. App. 2002) (where a dog warden fatally shot a dog but the facts did not establish intentional infliction of emotional distress, no recovery for loss of consortium or emotional distress); *and* Burgess v. Taylor, 44 S.W.3d 806 (Ky. Ct. App. 2001) (upholding $75,000 award of "punitive damages for emotional distress" where defendant sold plaintiff's beloved horses for slaughter). *But see* Campbell v. Animal Quarantine Station, 632 P.2d 1066 (Haw. 1981); *and* McAdams v. Faulk, 2002 Ark. App. LEXIS 258, *13 (Unpub. Apr. 22, 2002) (cases allowing "non-economic damages" in negligence cases).

Often, this is in line with the case law in a given jurisdiction, which may limit recovery for negligent infliction of emotional distress to a relatively narrow set of factual circumstances. *See, e.g.*, Rabideau v. Racine, 627 N.W.2d 795, 801 (Wis. 2001) ("We note that this rule of nonrecovery applies with equal force to a plaintiff who witnesses as a bystander the negligent injury of a best friend who is human as it does to a plaintiff whose best friend is a dog.").

IV. CONCLUSION

In sum, this paper raises a number of questions to be considered when evaluating whether to pursue the "non-economic damages" issue and in what manner to do so. There are rarely any easy answers when trying to effectuate the evolution of the legal system to include more fully nonhuman animals. This difficulty, however, should not keep the conscientious advocate from thoughtfully evaluating the tough questions before charging forward.

APPENDIX A

TENNESSEE CODE ANNOTATED
"T-BO ACT"

44-17-403. (a) If a person's pet is killed or sustains injuries which result in death caused by the unlawful and intentional, or negligent, act of another or the animal of another, the trier of fact may find the individual causing the death or the owner of the animal causing the death liable for up to four thousand dollars ($4,000) in non-economic damages: provided that if such death is caused by the negligent act of another, the death or fatal injury must occur on the property of the deceased pet's owner or caretaker, or while under the control and supervision of the deceased pet's owner or caretaker.

(b) As used in this section, "pet" means any domesticated dog or cat normally maintained in or near the household of its owner.

(c) Limits for non-economic damages set out in subsection (a) shall not apply to causes of action for intentional infliction of emotional distress or any other civil action other than the direct and sole loss of a pet.

(d) Non-economic damages awarded pursuant to this section shall be limited to compensation for the loss of the reasonably expected society, companionship, love and affection of the pet.

(e) This section shall not apply to any non-profit entity or governmental agency, or their employees, negligently causing the death of a pet while acting on the behalf of public health or animal welfare; to any killing of a dog that has been or was killing or worrying livestock as in § 44-17-203; nor shall this section be construed to authorize any award of non-economic damages in an action for professional negligence against a licensed veterinarian.

(f) The provisions of this section shall apply only in incorporated areas of any county having a population in excess of seventy-five thousand (75,000) according to the 1990 federal census or any subsequent census.

SECTION 2. This act shall be known and may be cited as the "T-Bo Act."

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APPENDIX B

CHAPTER 510. ANIMALS
HUMANE CARE FOR ANIMALS ACT
510 ILL. COMP. STAT. ANN. 70/16.3 (2004)

Civil Actions

Sec. 16.3. Civil actions. Any person who has a right of ownership in an animal that is subjected to an act of aggravated cruelty under Section 3.02 or torture under Section 3.03 in violation of this Act [510 ILCS 70/3.02 or 510 ILCS 70/3.03] or in an animal that is injured or killed as a result of actions taken by a person who acts in bad faith under subsection (b) of Section 3.06 or under Section 12 of this Act [510 ILCS 70/3.06 or 510 ILCS70/12] may bring a civil action to recover the damages sustained by that owner. Damages may include, but are not limited to, the monetary value of the animal, veterinary expenses incurred on behalf of the animal, any other expenses incurred by the owner in rectifying the effects of the cruelty, pain, and suffering of the animal, and emotional distress suffered by the owner. In addition to damages that may be proven, the owner is also entitled to punitive or exemplary damages of not less than $ 500 but not more than $ 25,000 for each act of abuse or neglect to which the animal was subjected. In addition, the court must award reasonable attorney's fees and costs actually incurred by the owner in the prosecution of any action under this Section or exemplary damages of not less than $ 500 but not more than $ 25,000 for each act of abuse or neglect to which the animal was subjected. In addition, the court must award reasonable attorney's fees and costs actually incurred by the owner in the prosecution of any action under this Section.

The remedies provided in this Section are in addition to any other remedies allowed by law.

In an action under this Section, the court may enter any injunctive orders reasonably necessary to protect animals from any further acts of abuse, neglect, or harassment by a defendant.

The statute of limitations for cruelty to animals is 2 years.

APPENDIX C

PROPOSED LEGISLATION TO ADDRESS THE WRONGFUL INJURY OR KILLING OF ANIMAL-COMPANION

(1) "Animal-Companion" defined

For purposes of this section, "animal-companion" means a dog; a cat; or any warm-blooded, domesticated nonhuman animal dependent on one or more human persons for food, shelter, veterinary care, or companionship. It does not include animals that are the subjects of legal, humane farming practices; of legal, humane biomedical research practices; or of activities regulated by the federal Animal Welfare Act.

(2) Wrongful Killing of Animal-Companion

A person who by willful, wanton, reckless or negligent act or omission kills, or causes or procures the death of, an animal-companion shall be liable in damages for the fair monetary value of the deceased animal to his or her human companion(s), including compensation for the loss of the reasonably expected society, companionship, comfort, protection and services of the deceased animal to his or her human companion(s); for reasonable burial expenses of the deceased animal; for court costs and attorney's fees; and other reasonable damages resulting from the willful, wanton, reckless or negligent act or omission.

(3) Wrongful Injury of Animal-Companion

A person who by willful, wanton, reckless or negligent act or omission injures, or causes or procures to be injured, an animal-companion shall be liable in damages for the expenses of veterinary and other special care required; the loss of reasonably expected society, companionship, comfort, protection and services of the injured animal to his or her human companion(s); pain, suffering, emotional distress and consequential damages sustained by the animal's human companion(s); pain, suffering and loss of faculties sustained by the animal; court costs and attorney's fees; and other reasonable damages resulting from the willful, wanton, reckless or negligent act or omission.

(4) Punitive Damages for Willful, Wanton, or Reckless Act

A person who by willful, wanton, or reckless act or omission injures, kills, causes or procures the injury or death of an animal-companion shall be liable in punitive damages of not less than $2,500.

(5) Action; Limitations of Actions; Disposition of Damages

(a) Damages under this section for injuries sustained by an animal's human companion shall be recovered in an action of tort, commenced within three years from the date of injury or death or from the date when the human companion knew, or in the exercise of reasonable diligence should have known, of the factual basis for a cause of action;

or within such time thereafter as is provided by section four, four B, nine or ten of chapter two hundred and sixty.

(b) Damages under this section for injuries sustained by an animal shall be recovered in an action of tort by a guardian ad litem or next friend, commenced within three years from the date of injury or from the date when the guardian ad litem or next friend knew, or in the exercise of reasonable diligence should have known, of the factual basis for a cause of action; or within such time thereafter as is provided by section four, four B, or nine of chapter two hundred and sixty. Damages so recovered shall be payable into a trust for the care of the animal, which trust shall be enforceable for the life of the animal by a person appointed by the court. Any remainder of trust funds existing at the death of the animal shall be distributed to a non-profit organization dedicated to the protection of animals.

(6) Injunctive Relief

Restraining orders and other injunctive relief from wrongful injury or killing of animals may be issued, as appropriate.

INVENTED CAGES:
THE PLIGHT OF WILD ANIMALS IN CAPTIVITY

ALYCE MILLER AND ANUJ SHAH[1]

"God loved the birds and invented trees. Man loved the birds and invented cages."
--Jacques Deval, *Afin de vivre bel et bien*

Recent high-profile media cases, like Ming the tiger living in a high-rise in Harlem with owner Antoine Yates, or the lion found wandering in suburban Ohio, have focused public attention more on the dangers that wild non-human animals pose to human beings rather than the reverse: the dangers posed by human beings to wild animals that live in captivity.

Discussions about the private ownership of wild animals are likely to raise strong emotions on both sides of the "empty cages" versus "larger cages" debate. Though a good deal has been written on this subject, much of the material focuses on either advocating or condemning outright bans on such ownership, or offering various regulatory schemes for strengthening regulations. A number of animal advocate organizations have proposed model statutes that would govern the breeding, ownership, care and sale of wild animals in captivity. [2]

What has not been addressed explicitly, however, are the ways in which current laws and regulations ultimately fail the animals, offering inadequate protections from neglect, abuse, and outright cruelty. Many current regulations, for example, are designed primarily to protect the public from dangerous animals and do little to protect and preserve the animals themselves.

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[1] This article is dedicated to Little Bear, whose tragic story launched the research that resulted in this article.

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[2] Among these are People for the Ethical Treatment of Animals (http://www.peta.org), Humane Society of the United States (http://www.hsus.org), Animal Protection Institute (http://www.api4animals.org), and Captive Wild Animal Protection Coalition (http://www.cwapc.org).

This paper distinguishes itself from others on related subjects, in part, by exploring not only the issues and concerns raised by the acquisition and private ownership of wild animals, but also the messy tangle of applicable laws, regulations and licensing schemes that often fail wild animals held in captivity.

As of this writing, twenty states do not permit private ownership of wild animals, but in the thirty states that currently do, the types of animals permitted, as well as regulations and licensing schemes and enforcement strategies, vary widely.

For example, in some states allowing private possession, permits are required for certain animals, but not for others. In Nevada, for instance, it might be legal to own a pet tiger without a permit, but possession of a cougar would require a license. In many states, it is perfectly legal to own primates privately, or even larger animals like bears and elephants. The federal licensing regulations of the United States Department of Agriculture (USDA) seem to focus on the activities and uses associated with private ownership, such as exhibition and breeding, but seem not particularly concerned with the animals themselves.

"Private ownership" is often defined as that ownership which is "non-government-controlled," though such a distinction does not accurately reflect the various complex funding arrangements of many regulated and accredited zoos and other animal facilities. Some zoos and facilities rely on private endowments and donations, but can also maintain close relations with public entities like cities and municipalities. In many of these more "public" venues, there is often a fairly high level of scrutiny regarding the care of the animals themselves.[3]

Technically, private ownership refers to the keeping of wild animals in roadside zoos and menageries; circuses and carnivals; and private breeding facilities or in backyards under single-family ownership. It also includes such facilities as rehabilitation centers and rescue sanctuaries. But an important distinction should be made here. Legitimate sanctuaries and rehabilitation centers, which focus strictly on providing wild animals with care and

[3] The American Zoological and Aquarium Association (AZA) divides its membership into four categories: commercial, conservation partners, institutional members (like zoological parks and aquariums), and related facilities (like rescue centers, wildlife sanctuaries, rehabilitation centers, breeding farms, and educational organizations). Depending on the type of facility, the AZA offers either accreditation or certification to those facilities that have met their specific standards through a fairly rigorous process that involves self-evaluation, peer review, and on-site inspections. Many city zoos and facilities like Sea World and the San Diego Wild Animal Park are AZA-accredited and, as part of the process, have had to demonstrate good ownership and management. *See* http://www.aza.org/Accreditation. This is not to say, however, that there are not well-run facilities that are not AZA-certified. Some non-profit sanctuaries, such as the Exotic Feline Rescue Center (EFRC) in Indiana—which neither buys, sells, nor breeds--focus solely on the highest care of rescued animals. The EFRC provides shelter, food, medical care and, in many cases, rehabilitation, to large cats who have either been confiscated by authorities or relinquished by private owners unable to meet their needs. While the public is allowed to visit, the primary goal is strictly to educate and raise donations, not to "entertain." In true sanctuaries, there are no "petting zoos" or "animal rides" or interactive amusements that require the animals to perform or come in personal contact with the visitors. Throughout the country, there are a number of small, privately owned zoos which charge fees to the public, and may include "animal entertainment" and activities like camel rides and petting zoos. According to the AZA, some of these facilities "do pretty well by the animals," but for financial reasons have not applied for accreditation by the AZA. (Telephone interview with AZA spokesperson September 2004.) What makes it difficult to cleanly delineate "private ownership" is that, as alluded to earlier, many large zoos have complicated funding schemes. For example, the National Zoological Park in Washington is, to some extent, supported by the federal government, but at the same time, administered by the Smithsonian Institution, a privately endowed foundation. The San Diego Zoo is technically a private, "nonprofit" zoo owned and managed by the Zoological Society of San Diego. For the purposes of this article, "private ownership" refers primarily to that ownership which involves the keeping of wild animals for personal pleasure, income, and/or private breeding and sale on the open market.

maintenance, do not sell, breed, or use the animals as entertainment.[4] *The policies and practices of private groups operating under the rubric of "rescue" or "conservation" are quite varied. Some, like the so-called "Feline Conservation Center" (FCF), a national organization of big cat aficionados, are actively engaged in breeding programs and sale to licensed private owners who may use the animals as companions or for entertainment and exhibit. By contrast, legitimate sanctuaries like Indiana's EFRC and the Tiger Creek Wildlife Refuge in Texas, neither breed nor sell animals. Their single purpose is to provide sanctuary for large cats rescued from often abusive and deplorable conditions and to offer them a "good life."*[5]

Organizations like the American Humane Society, the U.S. Department of Agriculture, the American Veterinary Association, Animal Protection Institute, the Roar Foundation, American Zoological Association (AZA), and city and county animal shelters across the country condemn private ownership and support outright bans on private breeding, selling, and ownership of wild animals, citing both the welfare of the animals and the safety of the community.

In general, most of the private rescue centers, regardless of their status, do not support outright bans on private ownership. But even those that are engaged in the breeding, sale and transport of these animals—like the Feline Conservation Federation—generally support stricter regulations and discourage "casual ownership."

The objective of this article is to fill some of the gaps that exist in current literature addressing the complexities and problems coincident with the private possession of wild animals, and to demonstrate the need for regulations and statutory schemes that would mesh at local, state, and national levels."[6]

I. INTRODUCTION: DANGEROUS OR ENDANGERED, IMPERILED OR PERILOUS?

> *Large wild and exotic cats such as lions, tigers, cougars, and leopards are dangerous animals . . . . Because of these animals' potential to kill or severely injure both people and other animals, an untrained person should not keep them as pets. Doing so poses serious risks to family, friends, neighbors, and the general public. Even an animal that can be friendly and loving can be very dangerous.*
>
> --The United States Department of Agriculture

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[4] Legitimate rescue and rehabilitation centers typically have not-for-profit status, do not engage in breeding or selling animals, and limit exhibition, if there is any exhibition at all, primarily to donating guests. Unless otherwise noted, "private ownership" in this article does not include such sanctuaries and rehabilitation centers.

[5] As of this writing, the Exotic Feline Rescue Center houses and cares for about 170 large cats rescued from all over the United States.

[6] With respect to state laws, we discuss the laws of Texas and Indiana. As this article aims to forge a general overview and understanding of the issue of the private possession of wild animals, it would exceed the scope, in addition to being logistically impracticable, to delineate the statutory and regulatory schemes of all fifty states. We present Texas and Indiana law as examples, both for their representativeness, as well as for the simple reason that the authors are respective citizens of those states. As we will discuss, while both Texas and Indiana are states that have instituted regulations, not bans, on the possession of exotic animals, they differ slightly in their respective approaches to such regulation.

The dangers that wild animals pose to the human community have long been recognized, and many laws relating to the ownership of animals demonstrate this concern. Stories about idiosyncratic people who keep wild or exotic animals abound in the media, but only usually when the animals escape or otherwise pose a tangible threat. The dangers associated with owning wild animals are recognized and correspondingly reflected in tort law, in particular. The *Restatement of Torts* has long provided that owners of wild animals should be held strictly liable for harms committed by their animals.[7] Section 507 of the *Restatement (Second) of Torts* states:

> (1) A possessor of a wild animal is subject to liability to another for harm done by the animal to [others] . . . although the possessor has exercised the utmost care to prevent the harm.[8]

Further, a tentative draft of the *Restatement (Third) of Torts* reiterates the idea:

> (a) The owner or possessor of a wild animal is subject to strict liability for physical harm caused by the wild animal.
>
> (b) A wild animal is an animal that belongs to a category which has not been generally domesticated and which is likely, unless restrained, to cause personal injury.[9]

It is has really been only in the last several decades that a growing awareness of the harm that captivity inflicts on the animals themselves and the ethics and morality of keeping wild animals in captivity have entered the discussion. This shift has resulted in large part from the increased insight into and growing awareness of the complexity and richness of the cognitive and emotional characteristics of non-human animals.[10]

As this article will point out, many laws and regulations governing private ownership of wild animals have focused almost exclusively on public health and safety with little regard for the well-being or care of the wild animals themselves. Thus far, lawmakers have accorded little consideration to the fact that non-human animals are conscious and sentient beings, *not* inanimate objects or property, thereby maintaining the status of non-human animals owned by humans as legal property.[11]

Recent studies on animal behavior demonstrate strong evidence that non-human animals have far richer and more complex social, emotional, and cognitive lives than previously thought,

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[7] *See* RESTATEMENT (SECOND) TORTS § 507 (1977).

[8] *See id.*

[9] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 22 (T.D. No. 1 2001).

[10] For a detailed discussion of the extraordinary cognitive and emotional lives of nonhuman animals, *see, e.g.*, MARK BEKOFF, MINDING ANIMALS: AWARENESS, EMOTIONS, AND HEART (Foreword by Jane Goodall) (2002); KRISTIN VON KREISLER, THE COMPASSION OF ANIMALS: TRUE STORIES OF ANIMAL COURAGE AND COMPASSION (1999); STEPHEN BUDIANSKY, IF A LION COULD TALK: ANIMAL INTELLIGENCE AND THE EVOLUTION OF CONSCIOUSNESS (1998); VICKI HEARNE, ANIMAL HAPPINESS (1994).

[11] The authors express their shared belief that animals are not "things" and that animals in captivity should not be classified as "property" under the law. Recent cases discussing such issues as the custody of non-human animals in divorce, as well as the potential for non-economic damages in wrongful death suits of companion animals, suggest that the legal status of animals as property is not only being challenged, but also being blurred. *See, e.g.*, Petco Animal Supplies, Inc. v. Schuster, No. 03-03-00354-CV (Tex. App. 2004) (Under the heading "'Intrinsic value' loss of companionship," the court states, "Indeed, within our jurisdiction, there are myriad examples that Texans today view dogs more as companions, friends, or even something akin to family than as an economic tool or benefit. . . . As an intermediate appellate court, we are not free to mold Texas law as we see fit but must instead follow the precedents of the Texas Supreme Court unless and until the high court overrules them or the Texas Legislature supersedes them by statute.")

and that many animals in captivity, even if well-fed, are often bored, lonely, and unhappy.[12] Though zoos continue to face controversy over the ethics of caging wild animals, many zookeepers and animal behaviorists now acknowledge that the needs of wild animals far exceed the barely minimal standards regulations provided in the past.

Many zoos, for example, are now implementing animal enrichment programs that encourage mental stimulation and promote activities and social groupings for the emotional well-being of the animals kept in captivity.[13] Even with all their resources, many of which are out of reach for most private individuals, zoos are still unable to replicate life in the wild, and maintaining the physical and mental welfare and well-being of wild animals in captivity poses numerous ongoing challenges. Regulations prescribed under the Animal Welfare Act (AWA)[14] and the recent reforms to the Lacey Act,[15] which forbid the interstate transportation of many wild animals for use as pets, have helped to offer some protection. Nonetheless, such laws are few and far between and remain woefully insufficient.

"Wild animals" is a legal designation distinguishing them from domestic animals like cats, dogs, and certain farm animals. In addition, wild animals are placed in one of two categories: those who are non-native (exotics) and those who are native.[16] Legally, wild animals are described as "animals in a state of nature" or "animals *fearae naturae*," classifications which convey significant legal implications in tort suits that turn on the question of strict liability versus negligence.[17] Various state statutes and regulations governing the keeping of wild animals often simply characterize wild animals as "non-domestic" animals.[18]

Every year, hundreds of thousands of wild animals, many of whom are known as "exotics,"[19] are sold in the wild pet trade which is, by some estimates, a $10 billion a year business.[20] Some of them are captured in their native habitats and either smuggled in to the

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[12] *See, e.g.*, Adam Bissen, *Large Animals Suffer in Zoo Captivity*, DAILY CARDINAL, Oct 7, 2003, *at* http://www.dailycardinal.com/news/2003/10/07/News/Report.Large.Animals.Suffer.In.Zoo.Captivity--520716.shtml (describing stereotypy, a behavior in which animals engage in pacing activities in zoos).

[13] *See, e.g.*, KERWOOD WOLF EDUCATION CENTER, INC., *at* http://www.kerwoodwolf.com/index.html; *Synopsis of the Environmental Enrichment Program*, 2ND CHANCE SANCTUARY, *at* http://www.2ndchance.info/Enrichment.htm; and *Great Apes and Other Primates*, SMITHSONIAN NATIONAL ZOOLOGICAL PARK, *at* http://www.nationalzoo.si.edu/Animals/Primates/Enrichment/default.cfm.

[14] 7 U.S.C. §§ 2131-2159 (2004). A detailed discussion of the AWA appears below.

[15] 16 U.S.C. §§ 3371-78 (2004).

[16] The United States Department of Agriculture (USDA) defines "exotic animals" as "animals foreign to the United States, whether wild or domesticated." *See United States Department of Agriculture, Licensing and Registration Under the Animal Welfare Act*, APHIS, *available at* http://www.aphis.usda.gov/lpa/pubs/awlicreg.html#Intro.

[17] The doctrine of strict liability for harm caused by animals was historically applied to the trespass of livestock. Case law suggests that strict liability is not reserved only for wild animals, but can be applied to domestic animals with known vicious propensities (dogs are a common example). *See generally* SONIA S. WAISMAN, BRUCE A. WAGMAN, AND PAMELA D. FRASCH, ANIMAL LAW: CASES AND MATERIALS 150-175 (2002).

[18] Tort law has certainly made the distinction between "wild" and "tamed" animals based on an idea of the "inherent nature" of various animals. A Louisiana Appeals court has stated: "In ordinary speech, sanctioned as well by dictionaries, the word 'domestic' means belonging to the home or household, and the word 'domesticated' means made domestic or converted to domestic use. Where descriptive of the word "animals," these terms in general usage carry the meaning of 'tamed,' 'associated with family life,' or 'accustomed to live in or near the habitations of men.'" Smith v. State Farm Fire & Cas. Co., 381 So. 2d 913, 914 (1980) (quoting 4 AM. JUR. 2d 250 § 1).

[19] "Exotic" is a term of art distinguishing those wild animals which are non-native from those native to a particular locale. For practical reasons, we will sometimes use "exotic" and "wild" interchangeably throughout this article.

[20] *Exotic Animals: Born Free, Sold Out*, HELPING ANIMALS, *at* http://www.helpinganimals.com/h-other-exotic.html.

United States or legally imported.[21] Others are bred in captivity by private breeders and sold to private owners, some of whom are backyard hobbyists who enjoy the idea of having wild animals as pets, and others who contend they are engaged in "conservation education" and "wildlife management." Some animals, treated as "surplus" from traveling shows, private menageries, and roadside zoos end up being sold into the exotic pet trade, medical research, "canned hunts," or for body parts used in the "medicinal trade."[22]

Further, only 5,000 tigers are reportedly left in the wild, partly because of the popularity of their organs which have played a large role in traditional Eastern medicine.[23] In India and Russia, tigers are poached at the rate of one per day. A huge black market exists in tiger parts. Teeth, claws, fat, nose leather, bones, eyeballs, tail, bile, and brain are used to cure various ills, including headaches, insomnia, fever, and laziness. Tiger dung is used to treat alcoholism. The tiger penis has traditionally been used in love potions. In addition, tigers are also hunted because of the threat they pose to farmers and their livestock in areas near tiger habitats.[24]

Lions, too, are also considered a "vulnerable population" with numbers currently estimated at about 23,000. Although leopard numbers top out at an estimated 300,000 and they are still abundant in some parts of Africa and Asia, they are critically endangered in places like North and West Africa, and in some Asian countries.[25]

II. DEFINING THE PROBLEM

The keeping of wild and exotic animals brings with it huge responsibilities and drawbacks. Many of these animals are acquired when they are young, either through sale or well-intentioned acts of rescue. Owning a wild animal can be an exciting experience, precisely because wild animals do not behave like domestic animals.

For example, tiger cubs are perfectly rendered grown tigers in miniature. They bear enough similarity to domestic kittens at play that their appeal is understandable. They are designed, as nature intended, high on the adorable-visual scale to compel protection and care from their parents. But they are literally only months away from becoming heavily-muscled, 500-pound predators, red in tooth and claw, who will be capable of devouring 80 pounds of meat in one feeding, at a cost of roughly $600 a month. Simply put, exotic cubs can initially be every

[21] 20,000 prairie dogs, for example, are yanked from their homes in Texas every year and shipped off to "pet" stores. *Inside the Exotic Animal Trade*, PETA, *at* http://www.peta.org/factsheet/files/FactsheetDisplay.asp?ID=44.

[22] *See, e.g.*, ROSALIND REEVES, POLICING INTERNATIONAL TRADE IN ENDANGERED SPECIES: THE CITES TREATY AND COMPLIANCE 200 (2002).

[23] *See, e.g.*, Rosalind Reeves, POLICING INTERNATIONAL TRADE IN ENDANGERED SPECIES: THE CITES TREATY AND COMPLIANCE 200 (2002).

[24] In May 2002, seven men were indicted in Chicago for killing 17 tigers and one leopard to sell their skulls, hides, meat, and other body parts, which can bring $10,000 or more per animal. Six tigers and one leopard were rescued. Michael Satchell, *How some of America's best zoos get rid of their old, infirm, and unwanted animals*, ANIMALS IN PRINT ON-LINE NEWSLETTER, *at* http://www.all-creatures.org/aip/nl-26aug2002-zoos.html.

[25] *See Nowhere to Roam: Wildlife Reserves Alone Cannot Protect Big Cats. A Look at New Ways to Save Them*, TIME, Aug. 23, 2004, at 50.

bit as lovable and seductive as their domesticated feline cousins, and the desire to own one is not always governed by the rational or the practical.[26]

Baby wild animals, whether bought or rescued, suffer great trauma in being separated from their mothers. Just like human babies, baby animals require a lengthy period of bonding for their physical, emotional, and cognitive development. For example, monkeys sold as pets are prematurely yanked from their mothers, and therefore denied the chance to bond properly, leaving both mother and baby traumatized.[27] Even if already living in captivity, the mothers of these desired babies are often force-bred to produce offspring for sale, relegated to small breeding cages where they are treated to limited and miserable lives.[28]

The emotional, as well as the physical, misery of these non-human animals hardly sounds promising for a well-adjusted companion animal. In truth, many caged monkeys kept by private owners begin, as they mature, to exhibit uncontrollable aggression toward their human owners as well as self-destructive impulses, such as compulsive masturbation and head-banging. In an attempt to prevent injury, some primate owners actually have the monkey's teeth shaved or even removed (a very painful procedure leading to subsequent health problems), which still does little to curtail aggression from the monkey. In addition, to prevent the habit of pinching, some owners will have the monkey's fingertips removed.

A full-grown monkey cannot, however, be trained out of aggression, and non-abusive punishment does not work. Adult pet monkeys who end up viciously attacking their owners and engaging in destructive behaviors have been known to be beaten and otherwise harmed. Unable to return to the wild, and unsuitable for domestic life, these monkeys are left with few options. Some end up being euthanized, others are sold for medical research. Still others are relegated to miserable, lonely lives in solitary confinement.[29]

Baby raccoons, like baby non-human primates, are also adorable, with their soft, furred faces, large, expressive eyes and bandit markings. But, according to the American Raccoon Association, more than half of those "cute babies" kept as pets do not survive their first year.[30] There are a number of reasons that raccoons do not make good pets. For starters, their natural curiosity and agility lead them to destructive behaviors around a house. It is not at all uncommon to hear about pet raccoons tearing up mattresses to make nests; ripping out screens, door jambs, and baseboards; and climbing wherever they want, including into closets and cupboards where they can wreak havoc. Raccoons are also playful creatures for whom biting and scratching are a normal part of social interaction. As a result, they can inadvertently inflict severe injuries on their human companions. Given these aggressive behaviors, many pet raccoons are beaten, kicked, and abused by their owners either in self-defense or as punishment. Many raccoons, when given away by frustrated owners, have difficulty bonding with a new person, and may become even more aggressive and unhappy in their new environment. At the

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[26] These facts are based on the numerous visits Alyce Miller has made to such animal sanctuaries such as the Exotic Feline Rescue Center.

[27] It is not uncommon for breeders to have to sedate mother monkeys who are grief-stricken over the disappearance of their babies. The stolen babies are often shipped in airline baggage, and if they live through the experience, engage in aberrant and self-mutilating behaviors. *See Statement of Purpose*, JUNGLE FRIENDS PRIMATE SANCTUARY, *at* http://www.junglefriends.org/booklet/bkpage11.shtml.

[28] *See Nonhuman Primates in Private Sector Possession*, AESOP PROJECT, *at* http://www.aesop-project.org/Private_Sector.

[29] *See id*.

[30] *See Raccoons as Pets*, AMERICAN RACCOON ASSOCIATION, *at http*://www.geocities.com/EnchantedForest/Glade/9378/pets.html.

same time, a tame raccoon, who lacks sufficient fear of people, cannot survive if let loose in the wild, having come to depend on human beings for food and shelter.[31]

It is illegal in many states to own a raccoon, and if authorities discover one living in a household, the raccoon will be confiscated and, most likely, destroyed.[32] The sad stories of many pet raccoons have been chronicled by rehabilitation and wildlife advocates who see the end result of these failed attempts to tame a wild animal. As one raccoon aficionado notes, "If you keep a raccoon caged, all you will have is a caged wild animal, not a pet."[33]

Simply put, unlike dogs and cats, which have been domesticated over thousands of years and have adapted to life with human companions, wild animals, including primates and smaller wildlife, have not. In general, wild animals fare much better on their own without human interference.

According to experienced animal rehabilitator Janice Turner, Certified Wildlife Rehabilitator with Indiana's WildCare, orphaned baby wild animals often "bond" with human animals for the short period of their development that requires nurture and care. But, she notes, there comes a time when these animals reach a level of maturity and begin to "wild up," demonstrating signs of pulling away and establishing a distance in preparation for adulthood as a wild animal. It is at this stage that many possessors of wild animals begin to see behavioral changes that include aggression, destructiveness, and unhappiness.[34]

Tales of exotic animals kept in shoddy conditions and made to suffer as a result could fill volumes, if not libraries. The stories that follow help to illustrate some of the crucial issues.

A. The Tiger Truck Stop Incidents

Notable among stories that abound regarding the squalor in which privately owned exotic animals live is the series of incidents involving an infamous establishment called the Tiger Truck Stop.

Emily Kern of the *Baton Rouge Advocate* has written about tiger abuse, including in the context of the Tiger Truck Stop.[35] In September 2003, Kern reported on M. Sandlin, owner of

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[31] In addition to carrying rabies and raccoon roundworm (*baylisascaris procynois*), captive raccoons are susceptible to obesity and serious dietary deficiencies. Other reasons that raccoons do not make good pets include legal liability and difficulty in finding a veterinarian willing to treat raccoons (one concern is that a rabid raccoon may be asymptomatic at the time of treatment). Raccoons are also messy and unpredictable. Releasing a rescued baby raccoon is likely to result in his death, since he will not possess the necessary survival skills. *See See* John Hughes, *Twenty good reasons not to have a pet raccoon, available at* http://www.pattyswildliferescue.com/20_reasons.htm (last visited Dec. 31, 2004).

[32] One reason for this is that raccoons have been found to carry dangerous diseases. For instance, *Baylisascaris procyonis*, or roundworm, is a parasite commonly found in raccoons. If transferred to dogs or human beings, the parasite can lead to blindness, central nervous system damage and even death. Wormers are available, but must be administered with great regularity. For more information, *see id*.

[33] *See Raccoons: Dealing with Pest Problems*, THE GABLE, *at* http://www.geocities.com/RainForest/Vines/4892/problems.html.

[34] Interview with Janice Turner, certified wildlife rehabilitator (at her home in Monroe County, Indiana) Nov. 13, 2004.

[35] Emily Kern, *Three Truck-Stop Tigers Taken to Haven Over Violations*, BATON-ROUGE ADVOCATE, Sept. 6, 2003; Emily Kern, *Tiger Truck Stop Owner Disputes Claim Man Says Cats Received Proper Care, Nourishment*, BATON-ROUGE ADVOCATE, Sept. 14, 2003.

the Baton Rouge, Louisiana, Tiger Truck Stop, who was required by the USDA to give up three out of four of the Bengal tigers in his possession, as he had violated numerous Animal Welfare Act provisions.[36] Among other flagrant acts, the tigers under Sandlin's care were forced to live in small, dilapidated cages, sleep on concrete floors, and were provided virtually no medical care or supervision. In addition, one tiger cub died when the cubs had been taken to a veterinarian to be declawed. Finally, a USDA inspector reported that a pair of three-week old cubs was being bottle-raised in the truck stop office, where they could potentially have been stepped on or swallowed harmful substances.[37]

Sandlin denied any wrongdoing, saying he bottle-raised two of the cubs in his office and would do it again.[38] Sandlin was ultimately assessed a fine of $2,500, of which $1,500 was suspended.[39]

A similar situation occurred at the Tiger Truck Stop in El Paso, Texas. There, seven tigers—three adults and four cubs—were forced to live in poor conditions in a "cramped roadside zoo." Consequently, the tigers were moved to the Rocky Mountain Wildlife Conservation Center (RMWCC), where they now enjoy a sixty-five acre habitat, which includes a wading pool for the tigers' enjoyment and relief.[40]

Pat Craig, owner of RMWCC, notes that tigers and mountain lions are the two wild animals most often bought and raised as pets in the U.S., that over 7,000 tigers exist outside of the zoo system in this country, and that many owners are unable to afford to provide humane care for these animals. In addition, owners often cross-breed their exotic animals with different subspecies, leaving them "useless as sources of genetic diversity for conservation programs."[41]

B. The Tiger Rescue Fiasco

John Weinhart and his partner, Marla Smith, ran Tiger Rescue, a putative animal rescue sanctuary in Riverside, California. As it turned out, authorities later charged that the establishment was a ground for illegal breeding and inhumane treatment of the animals who had the misfortune of ending up there. As of this writing, both Weinhart and Smith have been charged with 63 felony and misdemeanor counts, including child endangerment, illegal breeding, and animal cruelty. At the time of the charges, the couple had an eight year-old son who, among other things, often bathed with an alligator in a bathtub.

On April 22, 2003, investigators found dozens of tigers and other large felines, many dead, in the couple's "trash-and-feces-strewn home where two small alligators languished in a bathtub and a juvenile tiger was kept chained in the patio area."[42] The search yielded 90 tiger carcasses, including 58 cubs in the couple's freezer. According to eyewitnesses, in order even to

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[36] Kern, Sept. 6, *supra* note 35.
[37] *Id*.
[38] Kern, Sept. 14, *supra* note 35.
[39] *Id*., and Kern, Sept. 6, *supra* note 35.
[40] Theo Stein, *Seven Malnourished Tigers Get Room to Roar and Roam at Colo. Wildlife Sanctuary*, DENVER POST, Jan. 21, 2003, at B-01.
[41] *See id*.
[42] Sandra Stokley, *Judge Orders Trial in Tiger Raid Case*, (Riverside, Calif.) PRESS-ENTERPRISE, July 12, 2003, at B-01.

conduct this inquiry, investigators had to "walk around mounds of trash and animal waste and sidestep the rotting carcasses of big cats."[43]

Soon after the initial investigation, many felines from Weinhart's premises were relocated to sanctuaries in Colorado, Indiana,[44] and Texas, as well as the Performing Animal Welfare Society's (PAWS) Ark 2000 sanctuary in San Andreas, California.[45] As of the latest report, a second group of tigers originally at the Tiger Rescue "sanctuary" have been moved to the PAWS sanctuary.[46] Meanwhile, Weinhart still faces criminal charges related to his handling of the animals at his enterprise.[47]

C. The Story of Judah

Reporter Miles Blumhardt has written of similar stories in an article articulately describing what many consider the abusive treatment exotic animals suffered before being transported to a sanctuary.[48] Blumhardt writes:

> There is Judah, the mountain lion, whose ears are permanently pinned back thanks to its owner beating the animal about the head so badly that the cartilage is mush. Zeus is a male lion who was found being fed Whiskas cat food and kept in a garage when he was found in Thornton. Big Nalla is a lioness that was found cut and furless about the neck thanks to her owners tying tires around her neck to keep her from moving about. Agape is a male lion that was abandoned when [his] circus owner became a preacher. And then there are seven tigers recently rescued from a tiger truck stop near El Paso, Texas, which were fed a chicken every other day and were so emaciated they nearly lost their stripes.[49]

Blumhardt takes pains to differentiate himself from more committed, radical animal protection groups such as the People for the Ethical Treatment of Animals, but notes that one isn't required to have the level of compassion of PETA members inorder to deplore the miserable conditions in which the animals he writes about are made to exist.[50]

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[43] *See id*.

[44] The animals were sent to the aforementioned Exotic Feline Rescue Center.

[45] Sandra Stokley, *Nine More Tigers Reach New Home*, (Riverside, Calif.) PRESS-ENTERPRISE, Aug. 3, 2004, at B-01.

[46] *Id*.

[47] *See id*.

[48] Miles Blumhardt, *Center Gives New Life to Mistreated and Abandoned Animals*, FORT COLLINS COLORADOAN, May 18, 2003, Section Xplore, at 4G. It is interesting to note that Fort Collins, Colorado, is the location of one of two main Animal Care offices in the United States. Animal Care is a subdivision of APHIS, which is the United States Department of Agriculture's Animal Plant and Health Inspection Service. We discuss these entities in detail below.

[49] *See id*.

[50] *See id*.

III. WHO OWNS WILD/EXOTIC ANIMALS?

There is no typical portrait of the person who chooses to own a wild animal, and the spectrum is broad. Excluding for the moment those whose main goal is profiteering, many are self-described animal lovers, perhaps with romanticized visions of what life with a wild animal companion might be like. Certainly Hollywood has encouraged such a romance with personified animal protagonists like Gentle Ben and Charlie, the Lonesome Cougar. Others are those who, like the members of the Feline Conservation Federation, perceive themselves as "stewards of the wild" with a mission to increase wild populations in captivity and to educate the public through the breeding and sale of "big cats" who are used in exhibition and entertainment, or what the authors of this article might call "edutainment."[51]

One example of a wildlife pet owner might be the child who convinces her parents to buy a ferret from a pet store.[52] Another might be the methamphetamine or cocaine dealer who believes that keeping a big cat chained in his urban bedroom or rural trailer home offers protection from rip-offs and assaults.[53] A third might be the well-meaning backyard hobbyist who having always loved foxes, purchases a baby fox from a breeder, and relegates him to a life tied to a long clothesline outside.[54] Another could be the celebrity who loves primates and builds a compound to house and care for his animals, all of whom come with papers and statements of good health.[55] Then, there might be the rural family who starts a small roadside menagerie, open to the public for a charge, and exhibits caged wild animals ranging from raccoons and squirrels to exotics like cougars and lynx;[56] or the animal entertainer who, while

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[51] For more information about FCF, *see* FELINE CONSERVATION FEDERATION, *at* http://www.thefcf.com.

[52] Some estimates demonstrate that ferrets are the third most popular pet in the country, after dogs and cats, despite the fact that they are often classified as "exotics" and are illegal in a number of states, cities, and counties. *See Ferret Popularity on the Rise*, PRESS RELEASE NEWSWIRE, October 28, 2004, *at* http://www.prweb.com/releases/2004/10/prwebxml171305.php. The keeping of ferrets is highly controversial: Ferret owners tout the benefits of their animal companions, while their antagonists assert that ferrets are wild animals, even when domesticated, bringing with them many of the problems of non-native species.

[53] A number of the big cats living at the Exotic Feline Rescue Center were discovered by law officials in drug busts. For example, seventeen of their cats, including three baby tigers, were rescued in 2000 from deplorable conditions in a Pittsburgh basement during a drug raid.

[54] The fox referenced here is an Arctic Fox who was finally given up as a rescue to the rehabilitation organization WildCare in Bloomington, Indiana, and sent to live with a rehabilitation specialist.

[55] Pop icon Michael Jackson, whose "Neverland" ranch sports a private zoo with giraffes and elephants, sent his beloved chimpanzee Bubbles to live with animal trainer, Bob Dunn. "At 19, 'Bubbles is an adult chimp and a wild animal,' says Dunn. 'We don't let him out to play.' Instead Jackson and his children visit the ranch to frolic with some baby chimps." *See Michael Jackson May Face a Cash Crunch*, CNN, July 29, 2002, *available at* http://archives.cnn.com/2002/SHOWBIZ/Music/07/29/cel.jackson/index.html. It should be noted that a number of celebrities have invested large amounts of money and time in the cause of animal protection. A partial list includes Alec Baldwin, Kim Basinger, Ricky Lake, Alice Walker, Alicia Silverstone, Naomi Campbell, Pamela Anderson, Doris Day, Brigitte Bardot, Rue McLanahan, Beatrice Arthur, Bob Barker, Chrissie Hynde of the Pretenders, Moby, Paul McCartney, and his daughter, Stella McCartney.

[56] Roughly 2,500 roadside menageries, safari parks, circuses, breeders, dealers, and other exhibitors hold USDA licenses and receive inspections. But "weak federal regulations and a crazy-quilt pattern of local and state wildlife laws leave only a thin skein of protection for the animals. Virtually anyone can obtain a permit to exhibit, breed, and sell exotics; no qualifications are required. . . . Though these small zoos, along with traveling circuses and other animal shows, are licensed and inspected by the U.S. Department of Agriculture, their inhabitants often exist in cramped compounds and tiny cages with poor protection from the elements, marginal food, and spotty veterinary care. They typically get little psychological enrichment beyond a tire swing, a plastic ball, and a few dead tree

believing her role in the world is helping to save endangered species through "edutainment," nonetheless enjoys training tigers and other wild animals to perform tricks. There might also be the animal lover who begins his misguided private breeding program to increase the population of various endangered species, selling the offspring to some of those previously mentioned. Last in this non-exhaustive list of examples might be the impulse buyer whose goodwill and curiosity exist in inverse proportion to the necessary education and resources for keeping a bear or a lion, but who thinks that cub for sale in someone's barn 'looked cute,' and is now stuck with a full-grown, unhappy, expensive, aggressive, and dangerous animal who lives in a tiny cage in a basement or is chained in the backyard.[57]

Large, unwanted wild animals cannot be taken to the local shelter or simply given away to a friend. Zoos do not take in exotic "castoffs" and will euthanize any left on their doorstep.[58] The fate of the exotics is often even sadder than the hundreds of thousands of unwanted domestic animals who end up euthanized in the local animal shelter.

IV. GOOD INTENTIONS ARE NOT ALWAYS ENOUGH

> "*[T]he American Veterinary Medical Association opposes the keeping of wild carnivore animals [and reptiles and amphibians] as pets and believes that all commercial traffic of these animals for such purpose should be prohibited.*"[59]

As many animal advocates are quick to point out, wild animals simply do not flourish in most domesticated situations, even those designed to provide the wild animal with reasonable care.[60] The exceptions, of course, are legitimate rescue sanctuaries and rehabilitation centers which offer either temporary or permanent homes to orphaned, abandoned, injured, or

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branches. Half crazy from boredom and lack of exercise, the highly social primates and cooped-up predators often mutilate themselves and spend hours pacing to and fro and biting the bars of their cages." Satchell, *supra* note 24.

[57] The following examples of animals now safely living in "sanctuary" are taken from the PAWS website and exemplify "typical" scenarios of what happens to wild and exotic animals kept as pets: Blake, a mountain lion, was confiscated in 1993 from his owners who had had him declawed, and kept him inside the house, feeding him an insufficient diet. When he began to chew on furniture, he was punished by being kept in a small box. Denny, a lion, was bought from a pet store by his owner when he was a baby. A botched declawing job left all four of his paws mutilated. His owner also had him defanged. According to PAWS, "Samantha (a mountain lion) was born in a drive-through Safari Park in Arkansas. She was taken from her mother before she was three weeks of age and placed in the "petting zoo" at the park. She was sold to a visitor who felt sorry for her because she appeared to be starving. Two months later her owners surrendered her to the local humane society because "she was getting out of hand." *Animal Guests*, PAWS, *at* http://www.pawsweb.org/site/animals/felines.htm. The Humane Society contacted PAWS and Samantha arrived weighing ten pounds, unable to stand on her back legs. Dragging herself by her front legs, the tiny feline was suffering from malnutrition and calcium deficiency. Samantha has since improved on a balanced diet and calcium supplements. She bounds around her enclosure and chases her boomer ball, unaware that a few years ago she was unable to walk." *Id.*

[58] Douglas Birch, *Zoos Slam Door on Exotic Pets Looking for Homes*, BALT. SUN, July 17, 1995, at 1B.

[59] *See Wild Animal Policy*, AMERICAN VETERINARIAN MEDICAL ASSOCIATION, *available at* http://www.avma.org/noah/members/policy/polwild.asp.

[60] Estimates vary. According to PETA, up to 75% of all wild animals kept as pets die in their first year of captivity. *See, e.g.*, *Inside the Exotic Animal Trade*, PETA, *at* http://www.peta.org/mc/factsheet_display.asp?ID=44. According to Big Cat Rescue, a nonprofit educational sanctuary in Florida, 98% of pet wild animals will die within their first two years. *See Did you Know?*, BIG CAT RESCUE, *at* http://www.bigcatrescue.org/animal_abuse.htm.

confiscated wild animals who cannot be returned to the wild. Despite even the best intentions of many owners of wild animals, these animals often do not and cannot adjust to life with human beings.

The recent and tragic case of famous Las Vegas illusionists and entertainers Siegfried and Roy, whose performing white tiger brutally attacked and almost killed Roy while on stage, demonstrates that, no matter how "close" human animals feel to their wild animal "possessions," these animals are often unpredictable and resist full domestication. Roy Horn, who remains partially paralyzed, is convinced that the nearly 400-pound tiger Montecore was actually attempting to protect him.[61]

Some of the relationships that begin with good intentions result in injury to the owner or abuse, illness, and even death of the animal. Take, for example, the pet Java monkey Zip, owned by a Lansing, Illinois, woman, who suspected the seven year-old primate had been abused or neglected in his past life. One day, without warning, he leaped onto the woman's head and began a vicious attack after she had let him out of his cage to play. The woman lost a pint and a half of blood, and sustained six-inch deep bites and lacerations on her body. Sadly, Zip's fate was to be put to death.[62] Every year, a number of such incidents occur around the country.[63]

There are those who may come to possess a wild animal through an act of rescue, and may believe integrating the animal into their households as pets to be an act of kindness. [64] Such actions, even if the wild animal is indeed in need, are best left to trained rehabilitation experts.[65] Most cities and counties have non-profit wildlife rehab centers who generally can be contacted through the local humane society or animal shelter. These organizations can offer the appropriate facilities and care and, in some cases, can successfully reintroduce an orphaned or injured wild animal back into his or her native habitat. If not, they are connected to networks of wildlife sanctuaries where an animal may find a place to live out her or his life.

As just suggested, the diets and special physical needs, such as space and habitat, of wild animals are at best difficult, and at worst impossible to replicate. In their native habitats, tigers

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[61] The Oct. 3, 2003, attack was variously reported in newspapers and broadcasts across the country.

[62] Maria T. Galo, Pet Monkey Attack Puts Its Owner in Hospital: 25-Pound Animal No 'Monster,' Woman Says, PET MONKEY INFO, Feb. 20, 2000, available at http://www.petmonkey.info/news.htm.

[63] Some examples from the year 2004 include the following:

In Massena, New York, a four year-old girl was hospitalized for bruises and an eye injury after being mauled by one of her grandmother's pet cougars. In Port Sulphur, Louisiana, a woman barely managed to survive a vicious attack by her pet leopard as she patted the animal inside the cage. The leopard was subsequently shot by her brother-in-law and police officers. In Elizabethtown, Illinois, a man was mauled to death by his pet lion while changing the animal's bedding. In Surrey County, North Carolina, a 14-year old girl who was taking pictures of one of her father's pet tigers inside the cage was seriously mauled. All four tigers owned by the father were then shot. Just the year before, also in North Carolina, a 10-year old boy was mauled to death by his aunt's pet tiger. There is nothing predictable about wild animals except their unpredictability. These stories are reported by the Animal Protection Institute, which maintains a partial list of "captive feline incidents" since 1990. *See Captive Feline Incidents*, ANIMAL PROTECTION INSTITUTE, *available at* http://www.api4animals.org/383.htm.

[64] Sometimes well-meaning tourists in foreign countries have bought wild animals from local black market sellers, believing that they are saving the animal from a worse fate, such as being eaten. In certain Asian countries, a prized dish in certain restaurants involves fresh monkey brains—eaten while the monkey is still alive. So long as the seller can make money, whether from the well-meaning tourist or the restaurant, the trade in wild animals persists.

[65] Many wild animals who appear to be injured or abandoned are not. Mother killdeer, for example, will mimic injury to draw potential predators away from the nest. Fawns, whose spotted coats offer camouflage, will often wait quietly by themselves for their mothers to return from foraging for food. It is important for those who come across a wild animal to be certain he is actually in need of help before removing him from the wilds.

and cheetahs are territorial animals that travel 400-600 square miles in search of prey.[66] The nature of many wild animals kept in cages and enclosures is such that they may experience stress leading to aggression, placing them in danger of being punished, beaten, and surgically mutilated (tooth and claw removal are common procedures). As a result, many end up unwanted and abandoned. Many of the "unwanted" animals are sold to biomedical research facilities, or even sent to roadside zoos and menageries masquerading as sanctuaries. It is no wonder that some animal humane organizations estimate that 60-80% of exotic animals kept in captivity die within the first year.[67]

A. The Case of Little Bear[68]

In addition to the custodians of wild animals already mentioned, there are those who simply do not meet even minimum standards of care and responsibility, yet continue to "own" wild animals. This seemingly contradictory desire is difficult to understand, and can often result in tragedy for the animals. Little Bear was a baby black bear who was sold by a breeder in the spring of 2004 to a woman in Greene County, Indiana, who held a USDA license giving her the legal right to keep wild animals.[69] Assuming the breeder was also licensed, this purchase was perfectly legal in the state of Indiana. Little Bear was three months old when he was sold. In the wild, baby bears stay with their mothers until they are two to three years old, the age at which they can finally fend for themselves.[70]

Little Bear joined several other "exotic" animals in Ms. X's menagerie, including two cougars, a tiger, and a lion, also permitted under her license. Little Bear arrived with a certificate attesting to his good health. Sadly, that good health was short-lived. Within a month, Little Bear was discovered "half-dead" on Ms. X's living room floor by deputies looking for a neighbor. Arriving at Little Bear's house to make inquiries, the sheriff's deputies discovered a baby bear that was severely malnourished, underweight, and suffering from terrible seizures. He was about a third of the weight a healthy bear his age should have been, and barely able to hold up his head. A normal bear cub his age should have already been climbing trees and learning to forage.

The sheriff's deputies phoned the Indiana Department of Natural Resources (DNR), who came to confiscate the dying cub. DNR does not regulate or license "exotics," and technically, has neither the authority nor the facilities to rehabilitate wild animals. Little Bear was taken to a local wildcare rehabilitation organization where volunteers spent a month round the clock with him, but were unsuccessful in restoring him to health. According to one of the volunteers, Little Bear was having violent seizures lasting up to an hour at a time, during which "he would cry like

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[66] *Nowhere to Roam*, *supra* note 25, at 44-53.

[67] Different figures in this range were given by such organizations as American Humane Society and American Veterinary Medical Association.

[68] General information about this case has been documented by the Animal Legal Defense Fund. *See Bear Euthanized After Alleged Neglect*, ALDF, July 11, 2004, *available at* http://www.aldf.org/content.asp?sect=action&sectionid=2.

[69] Though the woman's identity is publicly available, we choose to use here the pseudonym of Ms. X. Apart from serving several practical purposes, the use of such a generic name also conveys the idea that this woman represents, tragically, perhaps hundreds, or even thousands of people who own wild animals.

[70] *Sounds from the Den: A Collection of Bear Facts*, BEAR DEN, *at* http://www.bearden.org/sounds3.html.

a human baby."[71] His condition never improved and, eventually, to everyone's deep dismay, he was mercifully euthanized by a veterinarian in Bloomington, Indiana.

This was not the first time Ms. X had come to the attention of the authorities. A full-grown bear previously in her possession had managed to escape from his cage, and had to be shot by the DNR. For this she paid a $550 fine to the USDA, and was allowed to continue her activities, despite the fact that primates in her care were allegedly were left to starve to death, and were later buried in her backyard.[72] Ms. X is currently being charged with a Class B misdemeanor for "neglect" under Indiana's anti-cruelty statute. Nonetheless, though Little Bear was confiscated, several other exotic animals still remain in her custody.

B. Where Does One Buy Wild or Exotic Animals?

Acquiring an exotic animal, either legally or illegally, is easy to do. Wild animals such as exotic birds, reptiles, and ferrets are readily available in pet stores. Other wild animals, like monkeys, birds, bears, tigers, lions, and cougars, can be purchased at auctions, through magazine and newspaper ads, and even over the Internet.[73] *Animal Finders' Guide* and *Rare Breeds Journal* are just two of dozens of publications that advertise rare and unusual animals for sale.[74]

Smaller exotic cats like caracals and servals are often advertised on the Internet as raised by hand and bottle-fed to insure their good temperaments and suitability as household pets. As one serval-as-pet advocate writes, "These are delightful animals that adapt well to pet life, and win the hearts and minds of almost anyone priviledged (sic) enough to know them. Therefore, this species has acquired a group of people who are passionately interested in their welfare."[75]

Further, those seeking to purchase a capuchin monkey or a bear cub, for instance, or who might think that owning a lion would be akin to having *The Lion, the Witch and the Wardrobe's* "Aslan" in their backyards, can easily find such wild and exotic animals advertised online, in newspapers and in magazines. Depending on the "quality," a baby tiger or lion can sell for as little as the price of a purebred puppy—approximately $400.[76] A baby capuchin monkey sells for around $4,500, while a spider monkey is about half that price.[77]

Estimates on the number of big cats—lions, tigers, cougars, jaguars, and leopards, commonly known as "exotic felines"—held in private hands in the United States vary from

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[71] Much of this information was gleaned from the wildlife rehabilitation center staff at WildCare in Bloomington, Indiana. The words quoted here are those of the volunteer who served as Little Bear's primary caretaker.

[72] The primate information has not been officially verified, though an Indiana Department of Natural Resources representative, who preferred not to be named, responded, "your information is correct."

[73] Monica Engebretson, Debbie Giles, and Nicole Paquette, *The Dirty Side of the Exotic Pet Trade*, 34 ANIMAL 2 (2003).

[74] Jim Mason, *The Booming Trade in Exotic Animals*, 14 ANIMALS AGENDA 4 (1994), *available at* http://articles.animalconcerns.org/ar-voices/archive/exotic.html.

[75] *The Ethics of Owning A Serval*, SERVAL, *at* http://www.geocities.com/servalsite/ethics.html.

[76] Brian Handwerk, *Big Cats Kept As Pets Across U.S., Despite Risk*, NATIONAL GEOGRAPHIC, Oct. 9, 2003, *available at* http://news.nationalgeographic.com/news/2002/08/0816_020816_EXPLcats.html.

[77] The World Health Organization takes a dim view of keeping non-human primates, who are notorious for harboring deadly and contagious illnesses such as tuberculosis, Hepatitis, and Simian Herpes B. According to People for the Ethical Treatment of Animals, about 90 percent of macaque monkeys are infected with the Herpes B virus. *See* WILD LIFE PIMPS (PETA), http://www.wildlifepimps.com/frontpage.htm.

15,000[78] to 33,000.[79] Currently, there are more tigers bred, raised and sold in the United States than exist in the wild, and most of these are "pets." Less than ten percent are kept in accredited zoos or sanctuaries.[80] Many of these tigers have been bred indiscriminately, leading to genetic weaknesses and health problems. Such breeders, and others who keep wild animals, continue to operate without realizing the repercussions of perpetuating genetic weaknesses such as the abusive inbreeding required to produce the white tiger, an animal that does not exist in the wild and is often plagued with deformities (club feet and cleft palettes), defects (misshapen heads), and low intelligence. This may explain, in part, their popularity in entertainment.[81] To be sure, mutant or deformed tigers are hardly in hot demand, and many come to sad ends.

Where do these animals originally come from? Many are bred and raised in captivity, while others are captured from their native habitats. The latter is almost always a brutal enterprise, as evidenced by the plight of baby primates who are often ripped from the arms of their mothers when they are just hours or days old. Wild baby orangutans, for example, typically watch as their mothers are shot. Because these babies will continue to cling to their dead mothers, it is then easy for them to be taken.[82]

Wild "exotic" birds are often packed tightly in containers for international shipment, their beaks and wings clipped for the long journey. Unsurprisingly, only a tiny percentage usually survive the stress and torment of the trip. In a recent customs inspection at the Miami airport, a smuggler was discovered with 44 Cuban melodious finches strapped to his legs. Naturally, many of the birds had died during the grueling trip.[83] In a similar operation, a Swedish man was recently apprehended by Thai officials for attempting to smuggle eight dangerous snakes, four of whom were baby king cobras, all found dead in containers strapped to his legs.[84]

Wild animals that are bred and raised in captivity often fare no better. So-called "pocket pets," including sugar gliders, prairie dogs, hedgehogs and ferrets are a good example of smaller wild animals mostly bred in captivity. Many of these are actually too large to fit into a pocket (hence, making the name a misnomer and creating potential harm to the nonconforming animal), but are prized for their "cuteness," their "wildness" ignored. Though some of these animals are captured in the wild, many of them are mass-produced in breeding conditions similar to that of puppy mills and sold by pet distributors all over the United States. Even those bred in captivity

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[78] *See* THE ROAR FOUNDATION, http://www.shambala.org.

[79] Michael Fisher, *Seized Tigers Find a New Home*, (Riverside, Calif.) PRESS-ENTERPRISE, April 25, 2003, at A-1.

[80] *See* Wayne Pacelle, Chief Executive Officer of the Humane Society of the United States, *Leave Wild Animals Where They Belong, in the Wild*," *available at* http://www.hsus.org/ace/21353.

[81] *See The White Tiger Fraud*, BIG CAT RESCUE, *http*://www.bigcatrescue.org/white_tigers.htm for more information on the plight of the white tiger. White tigers, for example, do not exist in the wilds, and are the result of intensive inbreeding. Responsible breeding programs militate against furthering the population of white tigers, despite their popular and commercial appeal. In fact, many zoos, like the National Zoo in Washington, now post signs in front of tiger cages explaining why they no longer display white tigers as a way of educating the public about the "unnaturalness" of the white tiger.

[82] *See Nonhuman Primates in Private Sector Possession*, *supra* note 28.

[83] These songbirds are popular pets and can be sold for as much as $350 each. The smuggler of the birds was charged with unlawful importation and possession and lying on his customs form. *See 44 Birds in the Pants May Equal 10 Years in Jail*, (CRIME BLOTTER) ABC NEWS, September 4, 2004, *available under archives at* http://www.abcnews.com.

[84] *Man Snared with Snakes Strapped to Legs*, PLANET ARK, Sept. 25, 2003, *available at* http://www.planetark.org/dailynewsstory.cfm/newsid/22355/newsDate/25-Sep-2003/story.htm. The man was charged under Australia's Environmental Protection and Biodiversity Act.

still retain many of their wild habits and instincts, and recently, many of these animals have been known to present serious health risks, carrying such diseases as monkeypox and *E. coli* that affect human animals.[85]

Furthermore, there are licensed breeders and sellers of wild animals and unlicensed ones. There are breeders and sellers who describe themselves as animal lovers, and others for whom wild animals are simply a salable product in the big business of the exotic pet trade, second only, some assert, to the illegal drug black market.

Regardless of the breeder's or seller's intentions, there is often a surplus of animals that end up unwanted. Some are killed or discarded because they have become too expensive or dangerous to keep, or both, or are no longer profitable, like large animals used in a circus, carnival, or a photo booth. Those cute lion and tiger cubs displayed in roadside zoos or used in photo booths lose their appeal as soon as they mature, and must then be replaced by the next generation of "cute babies."[86]

Because many wild animals are either large or dangerous, or both, they cannot simply be taken to a local shelter or adopted out. Some end up being sold to medical research. As alluded to earlier some older, unwanted male lions and tigers are sold for use in canned hunts, in which "sportsmen" get to shoot a trapped lion in a transport cage.[87] In addition, as noted above, tigers often meet early deaths because their body parts are in high demand in international "medicinal black market."[88] And in many unfortunate cases for both human and non-human animals, the unwanted wild animal is set loose or ends up escaping, a fate that can often result in injury to people or the animal, or even death.

V. PRIVATE OWNERSHIP AS "CONSERVATION" OF ENDANGERED WILDLIFE

There are a number of private organizations around the country that actually advocate the ownership of wild animals. These groups argue that the breeding and sale of wild animals are part of larger conservation efforts, and that such ownership is lodged in an inherent right. The FCF, referred to in the preface, is just such an organization. Though it uses the word "conservation" in its title, the group supports and advances the breeding, sale, and private ownership of exotic felines, outlining its missions as follows:

> Whereas governments and other conservation organizations focus on preservation of the species in the wild, the FCF seeks to function as insurance, encouraging

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[85] A particularly notorious case is that of Phil's Pocket Pets, a pet distributor operating out of suburban Chicago, who sold prairie dogs who, unbeknownst to him, had been infected with the monkeypox virus by a Gambian rat he also owned. A number of people, including children, who came in contact with the prairie dogs fell ill in Illinois, Wisconsin, and Indiana. As a result, the Illinois governor signed a ban on the sale, importation, or display of Gambian rats or prairie dogs. Despite such cases, in 2002 alone, more than 10,000 prairie dogs were shipped out of Texas and sold as pets in the United States. *Health Officials in 3 States Battle Outbreak of Monkeypox*, KATU TV, June 9, 2003, *at* http://www.katu.com.

[86] *See generally The Dirty Side of the Exotic Animal Pet Trade*, ANIMAL PROTECTION INSTITUTE, *available at* http://www.api4animals.org/1563.htm; and *Breeding and Selling*, BIG CAT RESCUE, *at* http://www.bigcatrescue.org/breeding.htm.

[87] The only wild lions found outside of Africa now are the 300 in the Gir Forest sanctuary in India. *In* an unnamed column, TIME, Aug. 23, 2004, at 46.

[88] *See The White Tiger Fraud*, *supra* note 81.

> breeding of those felines often neglected in zoological collections due to their special requirements.[89]

How breeding large cats in captivity contributes to increasing numbers in the wild is unclear. For starters, these are not species native to the United States and cannot be released like wolves or eagles. Second, many members of FCF are not animal husbandry or rehabilitation specialists. Members of the FCF include serious hobbyists, entertainers, magicians, circus and carnival owners, and others who use large cats in entertainment acts.[90]

Though many private owners, breeders, and sellers of wild animals, like some of the members of the FCF, are quick to condemn owners they view as "irresponsible," and ask not to be judged by the casual and careless owners (often the ones featured in the media) who engage in abusive and cruel behaviors, they may, nevertheless, be naive in their good intentions. Not only are they contributing to a problem of the surplus of wild animals in captivity, but they are also discounting the highly specialized skills involved in the maintenance of captive habitats for increasing the populations of endangered or threatened species.

FCF members are also adamant about their role providing badly needed non-AZA education and backup gene pools.[91] The obvious problem with this logic, as noted, is that this proliferation of wild animals bred and sold in captivity bears no relationship to the dwindling populations in the wild. In addition, education about wildlife does not require the breeding and selling of wild animals in captivity, regardless of whether an organization maintains studbooks and exercises care in avoiding genetic flaws. The private breeding, sale, and ownership of exotic felines also does nothing to address the factors that lead to the endangerment of species in the

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[89] *See About Us*, FELINE CONSERVATION FEDERATION, *at* http://www.felineconservation.org/R3/AboutUs/Purpose.html.

[90] Many of those who use wild animals in acts claim these activities have educational value. We would argue, however, that there is nothing educational about watching a tiger jump through a fire-laced hoop. Training methods used on wild animals are often cruel and abusive, in part because of the size and danger these animals pose, though circuses like Ringling Brothers and members of the FCF assert that animals are trained only through positive reinforcement and use of food. *See, e.g.*, *The Reality of Zoos*, THE CAPTIVE ANIMALS PROTECTION SOCIETY, *at* http://www.captiveanimals.org/zoos/zse1.htm; *Circuses: Three Rings of Abuse*, PETA, *at* http://www.peta.org/mc/factsheet_display.asp?ID=66; and *Animals are not ours for Entertainment*, CIRCUSES.COM, http://www.circuses.com (detailing abuses in both entertainment and in zoos).

[91] For more information on the Feline Conservation Federation, please *see* http://www.thefcf.com. In an email exchange, Lynn Culver, the FCF Director of Legal Affairs, sent this information regarding FCF's philosophy:

> FCF maintains studbooks for all feline species. FCF members financially support a 25,000 acre wild feline reserve in Ecuador. FCF conducts husbandry courses around the country. FCF advises people to help them obey the law. FCF has developed a Model for State Regulation that addresses both public safety and animal welfare concerns that is available for anyone to use on our web site www.felineconservation.org**.** FCF supports responsible captive husbandry and private ownership rights. FCF discourages novice ownership of big cats. FCF helps people who keep wild cats be better caregivers. FCF offers a placement referral service to help insure that cats in need of relocation are placed in knowledgeable and legal facilities. We place more cats then both the self-promoting sanctuary associations combined. FCF has the largest combined captive habitat of all associations. FCF is full of sanctuaries that are not members of TAOS or ASA, as well as breeders, exhibitors and collectors and many, many excellent private owners that the press loves to refer to as "pet" owners. FCF members house geoffrey's cat, leopard cat, Eurasian lynx, jungle cat, African and Asian leopard, all species that are not part of the AZA collection plan that will not exist in captivity if private ownership is banned everywhere.

Email from Lynn Culver, FCF Director of Legal Affairs (August 19, 2004, revised by Lynn Culver, September 15, 2004) (on file with author Alyce Miller).

wild, such as loss of natural habitat or encroachment and poaching by human beings.[92] Interestingly, the FCF, which holds exotic cat conventions for its members, does support stricter regulation of wild animal sale, breeding, and ownership, though it decries outright bans.

By contrast, the Association of Sanctuaries (TAOS) in Minnesota is a non-profit organization set up to assist sanctuaries "in providing quality rescue and care for displaced animals." The organization condemns all private ownership of wild animals, adhering to their motto, "Keep the wild in your heart, not in your backyard." They offer accreditation to those sanctuaries who can meet their exacting standards, which include a strict no-breeding policy (exceptions made for animals on the verge of extinction under a careful scientific breeding and reintroduction program), no sales or use of animals as entertainment or other commercial activities, a life-time commitment to the animals by the licensee, and limited and unobtrusive viewing access by the public.[93]

Many of the wild animals finding their way into private hands are classified as "endangered" or "vulnerable" species, meaning that their declining numbers in the wild are moving them toward extinction. Perhaps, this is part of the appeal for private owners. Not only are they getting a "piece of the wild," but they own a creature that soon may be extinct.

In addition, underlying the enterprise of individuals like Lynn Culver of the FCF, is the general notion that in the United States, the "land of the free," the exercise of freedom, regardless of its domain, is an inherent right. One such enthusiast states: "This is America, whose bill of rights [sic] grants us the right to life, liberty, and pursuit of happiness. My pursuit of happiness involves exercising the liberty to share my life with a serval. Our current fight for freedom is taking place not on the shores of a foreign country, but here in the political arena. What do Americans do when their cherished freedoms and ways of life are attacked? They fight. And they win. We will win the fight to protect our beloved cats."[94]

Apart from the minor detail that the "right to life, liberty, and pursuit of happiness" was granted in the Declaration of Independence, and not in the Bill of Rights of the Constitution, the logic founding this serval enthusiast's argument is wayward, at best. First, the writer quoted here ends her passionate plea in a different place from where she begins. Her initial appeal is for the protection of her freedom to keep a serval, while her final *cri de coeur* suggests that it is the animals the writer wants to protect, and not the freedom to keep the animals.

These are two distinct objectives; protecting one's "freedom" to possess a wild animal is at loggerheads with protecting the animals themselves.

Further, and more importantly, it has been well established that constitutional freedoms have limits.[95] One cannot simply assert, for instance, that activities such as robbing, injuring, murdering, enslaving, or otherwise harassing others are justifiable because such actions fulfill the

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[92] *See* generally FELINE CONSERVATION FEDERATION, *at* http://www.thefcf.com. The organization describes itself as "an internationally recognized federation of enthusiasts interested in the propagation and preservation of all the wild feline species." Their membership is made up of "a wide range of exotic cat enthusiasts such as professional breeders and educators, sanctuary and zoo owners and individual 'pet' owners."

[93] *See* The Association of Sanctuaries (TAOS), *at* http://www.taosanctuaries.org/index04.htm.

[94] *The Ethics of Owning a Serval*, *supra* note 75.

[95] *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 894 (1990) (superseded on other grounds) ("Under our First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute."); *see also* Alan E. Brownstein, *Constitutional Wish Granting and the Property Rights Genie*, 13 CONSTITUTIONAL COMMENTING 7, 26-27 (1996) (citing Burson v. Freeman, 504 U.S. 191 (1992); and United States v. Lee, 455 U.S. 252, 254 (1982)).

actor's "pursuit of happiness." It is worth noting that in pre-Emancipation America, many Americans (both Caucasians and non-Caucasians) used a similar rationale and rhetoric to justify keeping slaves.[96] Few, if any, reasonable people today, however, would dispute that such an application of the Declaration of Independence's dictates falls far outside the scope of the spirit and the letter of those dictates.

Regardless of a fundamental disagreement between groups such as FCF and those who believe in a more comprehensive animal protection schema, it is worth reiterating that even groups such as Culver's remain strongly in favor of more stringent laws regulating such possession. They, too, in the end, lament the inadequacy of the current regulatory schemes available at both the state and federal levels.

VI. WHAT CURRENT LAWS AND REGULATIONS LOOK LIKE

The United States currently offers a veritable maze of laws and regulations addressing the private possession of exotic animals, primarily in the form of federal, state, and local statutes. These take primarily three forms: outright bans, licensing/permitting schemes, and general regulatory oversight not requiring licenses or permits, but outlining guidelines by which private owners of wild animals must abide.[97] There is little consistency from state to state, and a number of serious gaps exist between federal, state and local laws. In order to negotiate one's way through the labyrinth, it may be helpful to begin at the federal level.

The principal federal organizations in charge of oversight for exotic animal possession are the United States Department of Agriculture (USDA) and the United States Fish and Wildlife Service (FWS), a sub-agency under the United States Department of the Interior. The USDA is the administrative agency assigned to enforce the Animal Welfare Act (AWA) and, as such, governs the possession of animals (both exotic and non-exotic), primarily in commercial circumstances, and issues licenses and registrations to such private owners as zoos, circuses, breeders, researchers, and exhibitors. The body that actually develops and implements regulations to enforce the AWA's provisions is a subsection of the USDA, the Animal Plant and Health Inspection Service (APHIS), which, in turn, has an "Animal Care" (AC) division. AC has the "direct responsibility to administer and enforce the [AWA], including licensing, registration, inspection, and investigation of complaints."[98] The investigative and enforcement arm of APHIS and AC, Investigative and Enforcement Services (IES), "investigates violations of AC regulations and reviews and processes violation cases referred for formal administrative action."[99]

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[96] The authors here are not analogizing the experience of slaves and animals, but instead are acknowledging parallels in the rhetoric and logic employed for rationalizing subjugation. Some of these include the idea of inferiority; God-given mastery over "lesser beings" who are "different" (otherness); tradition, and the like. *See, e.g.*, STEVEN WISE, DRAWING THE LINE (2002); CHARLES PATTERSON, ETERNAL TREBLINKA: OUR TREATMENT OF ANIMALS AND THE HOLOCAUST, (2005); and MARJORIE SPIEGEL, THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY (Foreword by Alice Walker) (1997).

[97] *See, e.g.*, Matthew G. Liebman, *Overview of Exotic Pet Laws* (2004), ANIMAL LEGAL & HISTORICAL CTR., *at* http://www.animallaw.info/articles/ovusexoticpets.htm (last viewed Sept. 13, 2004).

[98] THE ANIMAL DEALERS: EVIDENCE OF ABUSE OF ANIMALS IN THE COMMERCIAL TRADE 1952-1997 (349) (M.E. Drayer ed.,1998).

[99] *Id.* at 349-50.

The second federal agency mentioned, but with which this essay deals little, in fact, is the FWS. Among a host of other functions, the FWS implements and enforces the provisions of the Endangered Species Act (ESA), which is the implementing statute for the Convention on International Trade in Endangered Species of Flora and Fauna, otherwise known as "CITES." The ESA has a list of species considered "endangered," meaning in danger of extinction, and "threatened," referring to animals and plants on their way to being endangered. The Act regulates the importation of many endangered species, such as various species of tigers, in order (in theory) to optimize their chances of survival. At the federal level, however, FWS is far less involved in the private possession of exotic animals once possessed than is APHIS.

Despite the existence of these federal agencies and their purported jurisdiction, the bulk of legal issues arising with respect to wild animals occur at the state and local levels. This predominance of state authority is explained by at least two reasons. First, as early as 1904 in this country, a state's highest court declared that the regulation of wildlife fell squarely within a state's police powers; as such regulation was directly connected to the public welfare.[100] In fact, the *Bootman* court determined the Lacey Act,[101] passed in 1900, granted the authority to states to exercise their police powers over even "foreign game" just as if the game had been produced in that state.[102] Second, all states have taken a stance with respect to the private possession of wild animals, whether it be through implementing outright bans, permit/licensing schemes, or general, light regulation without any permit or license requirements. One of the principal reasons that the majority of legal and regulatory issues arising in the context of privately possessed exotic animals occur at the state and local levels is that the USDA's jurisdiction under the Animal Welfare Act is strictly circumscribed. As a result, a consideration of laws and regulations at the state level will serve to illustrate how these apply to the private possession of exotic animals in the majority of cases in the United States.

By way of example, we will discuss Indiana and Texas law to demonstrate particulars regarding state regulatory schemes governing the private possession of wild animals. The two states are similar in that rather than establishing total or partial bans on wild animal possession, they both regulate the possession by requiring licenses or permits. The states differ, however, in the way in which power to regulate is distributed. In Indiana, the Department of Natural Resources (DNR) plays a central role in issuing permits and regulating possession, while in Texas, as of 2001, regulation and oversight occur primarily at the local level.

In addition, exotics and native wildlife are treated differently through various statutes and licensing. For example, in Indiana it is illegal to own a raccoon or red fox, because these animals are "native" to the state, but it is perfectly legal to own a big cat. In fact, as we discuss below, it is legal to own a large exotic cat like a tiger or lion in thirty states, though a permit is often required depending on the activities involved.

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[100] *See* New York v. Bootman, 72 N.E. 505 (1904).

[101] The spelling at that time, as it appears in *Bootman*, was "Lacy." *See id.* at 506.

[102] *See id.* It is worth noting that, among a whole host of other sources, *Bootman* perhaps helped to set the tone for the underlying attitude towards nonhuman animals in this country's jurisprudence. The court stated that non-human animals, fish and game in the *Bootman* context, were important to human animals insofar as the former provided the latter with an important "food supply," as well as "delightful recreation." *Id.* at 507.

A. Indiana Law

The primary laws that speak to the possession of exotic animals in Indiana are found in the Indiana Code (IC)[103] and the Indiana Administrative Code (IAC).[104] The relevant IC sections are brief. Subsection 1 states that the relevant sections do not apply to licensed commercial dealers, zoological parks, circuses, or carnivals.[105] Subsection 2 defines "zoological park" (rather broadly, in fact), and subsections 3-5 collectively serve as an enabling mechanism for the director of the DNR to administer and enforce provisions of the IAC governing private possession of wild animals. These sections allow the director to issue permits based on specified criteria and to enforce the regulations pertaining to wild animal possession by such means as seizure of the animal if the circumstances so warrant. Finally, subsection 6 of the IC states that the rules adopted must provide for the safety of the public and the "health" of the animals.[106] As is typical, any notion addressing the animal's "welfare" or "well-being" is ignored.

The IAC addresses requirements that must be met before the DNR issues permits. The Code has two sets of requirements, depending on the type of animal involved. If the animal is designated either as "Class I" or "Class II," as defined under section 5 of the Code,[107] then a prospective owner is allowed to possess the animal, but must apply to the DNR for a permit to possess within five days after acquisition.[108]

Requirements for owning a "Class III" animal, however, are more stringent.[109] Applicants for a Class III wild animal permit must present considerable detail about the animal, including the conditions in which the animal will be kept and maintained. For instance, applicants are required to specify the species of the animal, the location where the animal will be housed, and the type of enclosure used to confine the animal.[110] In addition, permit applications must include a written verification from a licensed veterinarian stating that the animal is immunized, in good health, and free of disease;[111] a plan for the rapid and safe recapture of the animal, should the animal escape;[112] and proof that the animal was lawfully acquired.[113]

It is worth reiterating that one of the primary differences between the way Indiana and Texas oversee private ownership of wild animals resides in the centralization of authority. As

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[103] *See* IND. CODE §§ 14-22-26-1 through 6 (2004).

[104] IND. ADMIN. CODE tit. 312, r. 9-11-1 through 15 (2004).

[105] *See* IND. CODE §§ 14-22-26-1 (2004). Some of these would be covered by the USDA. As our discussion elucidates, however, there are tremendous gaps between state and federal laws, enabling animals (and their welfare) to "fall through the cracks," so to speak.

[106] IND. CODE §§ 14-22-26-1 (2004).

[107] "(1) Class I includes any wild animal which, because of its nature, habits, or status, is not a threat to personal or public safety. (2) Class II includes any wild animal which, because of its nature, habits, or status, may pose a threat to human safety." IND. ADMIN. CODE tit. 312, r. 9-11-5 (2004). Specific animals listed categorized as "Class I" are the East. Cottontail Rabbit, Gray Squirrel, Fox Squirrel, and Southern Flying Squirrel. Animals classified as "Class II" are the beaver, coyote, gray fox, red fox, mink, muskrat, opossum, raccoon, skunk, and weasel. *See* "Wild Animal Possession Permits," handout attachment accompanying the IAC as sent by the IN DNR.

[108] *See id.*; *and* IND. ADMIN. CODE tit. 312, r. 9-11-5(b) (2004).

[109] IND. ADMIN. CODE tit. 312, r. 9-11-8 (2004). "Class III" animals include purebred wolves, all species of bears and wild cats (except feral cats), venomous reptiles, and crocodilians that reach at least a length of five feet.

[110] IND. ADMIN. CODE tit. 312, r. 9-11-2(c).

[111] *See id.* at subsection (d).

[112] *See id.* at subsection (e).

[113] *See id.* at subsection (i).

indicated, Indiana's DNR is the chief governing body from which regulations, enforcement, and general oversight issue. In Texas, on the other hand, governance of exotic animal possession occurs at the local level, as we will see shortly. The United States Court of Appeals for the Seventh Circuit has, nonetheless, held that local ordinances governing private ownership of wild animals are not preempted by either the Indiana DNR or by the federal Animal Welfare Act.[114]

In *DeHart*, the Seventh Circuit ruled that the Animal Welfare Act was drafted with the idea of collaboration and interplay with state and local rules in mind, so that a local ordinance governing private ownership of exotic animals could stand.[115] Consequently, while governing authority for private ownership of exotic animals may reside principally in the Indiana DNR, local ordinances retain a significant amount of power.[116]

(1) Further Details on Indiana Laws on Private Possession of Exotic Animals: A Law Enforcement Officer's Perspective[117]

In Indiana, anyone wishing to possess wild or exotic animals that are native to Indiana, such as certain types of deer, raccoons, skunks, and the like, must first obtain state-issued permits. Prospective possessors of non-native species, on the other hand, including most large, exotic felines, would generally obtain a USDA license, if applicable, and may obtain an Indiana state permit, as well, if they so choose, though most do not obtain both. In the case of large felines, for instance, an owner, under many circumstances, would have to obtain a USDA permit, but may opt to acquire an Indiana state Class III permit, as well, though obtaining the state permit is strictly voluntary.[118]

Primates are an exception. Indiana law does not address primates at all. Therefore, in order to acquire a primate for private possession, an individual in Indiana would normally turn to federal sources to comply with any applicable regulation, even if the possession does not entail commercial activity.[119]

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[114] *See* DeHart v. Town of Austin, Indiana, 39 F.3d 718, 722 (7th Cir. 1994).

[115] *See id.* In addition, local governments are often the best judges as to concerns regarding public health and safety for the local population, thereby making it suitable for local authorities to regulate such matters under appropriate circumstances.

[116] *See also* Hendricks County Bd. of Zoning Appeals v. Barlow, 656 N.E.2d 481 (1995) (holding that statute setting forth licensing procedures for persons desiring to possess wild animals was clear and unambiguous and did not preempt local governments from regulating possession or location of wild animals).

[117] Information detailed in the following discussion was derived from a phone interview with an agent at the Indiana Department of Natural Resource's Division of Law Enforcement (DLE), who wished to remain anonymous, September 21, 2004. The section on federal/state interplay presages a more detailed discussion of this interaction below.

[118] Even if one were to obtain a state permit voluntarily (and it is hard to imagine a situation in which an individual would want to subject herself to unnecessary regulation), what force such a permit would wield is unclear, as technically, the animal who didn't require a state permit in the first place would fall outside the state's jurisdictional authority.

[119] There is, of course, a restriction on the importation of primates into the United States. The Center for Disease Control (CDC) regulates such importation, generally allowing it only for scientific research, education, or exhibition purposes. *See Importation of Nonhuman Primates*, CDC, *available at* http://www.cdc.gov/ncidod/dq/nonhuman.htm (last visited August 14, 2005).

In Indiana, possessors of wild animals must renew their possession permits yearly, the renewal being accompanied by an inspection from the Division of Law Enforcement (DLE) to ascertain the suitability of the permit renewal. Generally, this is the only time during the year that an individual's premises are investigated to determine whether they comply with the relevant state laws regarding the keeping of the animals.

It is possible, however, that if a third party witness has reason to believe that a private wild animal owner is violating state laws in possessing the animal, that individual can contact the DLE, at which time the agency may decide to send officers to investigate the claims and take whatever action they deem appropriate. These actions can range from permit revocation and animal removal to filing criminal charges against the violator.

In the case of Little Bear, his custodian has been charged with cruelty to an animal, which, under Indiana law, is categorized as a class B misdemeanor and can result in a maximum of 180 days in jail and a $1,000 fine.[120] It is interesting to note that the charge levied against Mrs. X is a charge ensuing from Indiana's anti-cruelty statute (though not the class D felony version), and not from the Indiana Administrative Code or other provisions regarding the keeping of wild animals referenced above. If an animal owner's actions are sufficiently egregious, as in Little Bear's case, the DLE is free to reach beyond the IAC's provisions to charge a perpetrator with an even more severe violation should the circumstances so merit.

(2) The Interplay (Or Lack Thereof) Between Federal and State Provisions

In addition to state penalties, penalties can ensue at the federal level, as well. If a wild animal owner has transgressed both federal and state provisions, according to the DLE, the federal and state agents will usually carry out their respective investigations separately. Communication between federal and state enforcement is generally uncommon unless there arises a need for conferral between the two bodies. At the extreme, when it comes to enforcement, a violator of federal and state laws can be haled into both federal and state courts for her or his respective transgressions.

According to the DLE, conflicts between the federal and state authorities generally do not arise, as the respective jurisdictions of these bodies do not overlap. At least in Indiana, that activity falling under state and that falling under federal jurisdiction are reasonably apparent and distinct. And as noted, should there be reason for investigation by both federal and state authorities, it can be done with little friction.

A distinction between the federal and state processes is that at the federal level, violations of the Animal Welfare Act would subject violators to an administrative proceeding at the USDA. Should a case require further adjudication, such as if a party appeals, only *then* would the parties be in federal court proper, and not an administrative agency. At the state level in Indiana, however, there is no administrative-level proceeding. Violations of the IC or IAC, if taken to the adjudicative stage, go directly to state court.

[120] Abandonment or Neglect of Vertebrate Animals, IND. CODE § 35-46-3-7 (2004).

B. Texas Law

(1) General State Provisions

The Texas Health and Safety Code (HSC) provides a general exemplar for municipalities in Texas to follow in regulating, among other domains, the private ownership of wild animals.[121] Just as with other provisions we have examined and will consider, the HSC defines key terms, including "wild animal,"[122] requires registration of wild animals,[123] display of the certificate of registration,[124] liability insurance,[125] periodic inspection of the animals,[126] a plan of action in case the animals escape,[127] and the proper care, treatment and transportation of the animals.[128] In addition, the HSC delineates penalties for violation of its provisions (offenses are deemed Class C misdemeanors) and outlines an adjudicative process available to persons governed by these provisions.[129]

In 2001, in conjunction with the Texas Board of Health, the drafters of the Texas Health and Safety Code permitted the registration of "dangerous wild animals," defined to include, among others, big cats, apes, and bears.[130] Furthermore, the legislature determined that regulation of private ownership of wild animals should take place at the local level.[131] As a result, Texas has nearly as many differing provisions regarding private possession of wild animals as it has municipalities. Constraints of space and time prevent considering each such locale, but Harris County provides an apt example.

Harris County is the third largest county in the United States, and is the county in which the city of Houston, the nation's fourth largest city, lies. While the city of Houston itself has established an outright ban on private possession of exotic animals,[132] Harris County, the overarching entity which includes Houston, allows such possession.[133]

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[121] TEX. HEALTH & SAFETY CODE ANN. §§ 822.101--115 (Vernon 2004).
[122] *See id*. at § 822.101.
[123] *See id.* at § 822.103.
[124] *See id.* at § 822.106.
[125] *See id.* at § 822.107.
[126] *See id.* at § 822.108.
[127] *See id.* at § 822.110.
[128] *See id.* at § 822.112.
[129] *See id.* at §§ 822.105, 113-15; *see also* TEX. LOC. GOV'T. CODE ANN. § 240.003(c) (Vernon 2004).
[130] *See* Regulation of Wild Animals, 36 TEX. PRAC. § 35.4A (citing TEX. HEALTH & SAFETY CODE ANN. §§ 822.101-116 (Vernon 2004)).
[131] *See* "Historical and Statutory Notes" to TEX. HEALTH & SAFETY CODE ANN. §§ 822.101-115 (Vernon 2004), section 6(b) to (d) of Acts 2001, 77th Leg., ch. 54 (c).
[132] Keeping of Wild Animals, HOUSTON, TEX. ORDINANCE, ART. III.
[133] *See* Harris County's Regulations Relating to the Keeping of Wild Animals in the Unincorporated Area of Harris County, Texas, *available at* http://www.countypets.com/DWA/DWAregs2002-Final.htm (last accessed Sept. 14, 2004).

(2) The Houston City Code

The Houston City Code (the Code) defines "wild animal" broadly:

> [T]he term wild animal shall mean any mammal, amphibian, reptile or fowl of a species that is wild by nature and that, because of its size, vicious nature or other characteristics, is dangerous to human beings. Such animals shall include, but not be limited to, lions, tigers, leopards, panthers, bears, wolves, wolf-dog hybrids, cougars, coyotes, coyote-dog hybrids, raccoons, skunks . . ., apes, gorillas, monkeys of a species whose average adult weight is 20 pounds or more, foxes, elephants, rhinoceroses, alligators, crocodiles, caymans, fowl larger than a macaw, all forms of venomous reptiles and any snake that will grow to a length greater than eight feet. The term shall also include any animal listed as an "endangered species" under the federal Endangered Species Act of 1973 . . . or any fowl protected by the Migratory Bird Treaty Act. The term . . . shall not include gerbils, hamsters, guinea pigs, mice and domesticated rabbits.[134]

Thus defining "wild animal," the Code immediately follows this provision with a section entitled "Possession Prohibited," which clearly states: "It shall be unlawful for any person to be in possession of a wild animal within the city."[135] Moreover, the ordinance has in place stringent penalties for infractions:

> Violation of any provision of this article is a misdemeanor punishable by a fine of not less than $500.00, nor more than $2,000.00. Each wild animal possessed in violation of this article and each day on which it is possessed shall constitute and be punishable as a separate offense.[136]

Despite the force of the prohibition, the Code provides a plethora of exceptions which permit wild animal possession. Primarily, the broadest exemptions are provided for under section 6-59, "Exceptions to section 6-51":

> [Section 6-51 does] not apply to animals kept for treatment in a facility operated by a veterinarian licensed by the state, animals kept in publicly owned zoos, and animals used for research or teaching purposes by a medical school, licensed hospital or nonprofit university or college providing a degree program.[137]

In addition, exemptions exist for transportation of wild animals used for filmmaking, productions, and the like,[138] and for wild animals used in exhibitions, carnivals, and circuses.[139] In the latter case:

> [So long as a] person holds a current and valid exhibitors license under the federal Animal Welfare Act . . . or a current and valid circus, carnival, or zoo operator's license issued under chapter 824 of the Texas Health and Safety Code, [s/he is not required to obtain a city permit for the wild animal].[140]

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[134] Wild Animal Defined, HOUSTON, TEX. ORDINANCE, art. III, secs. 6-51.
[135] *Id.* at secs. 6-52.
[136] *Id.* at secs. 6-54, "Penalty."
[137] *Id.* at secs. 6-59.
[138] *See id.* at secs. 6-61.
[139] *See id.* at secs. 6-55, both generally and specifically at subsection (g).
[140] *Id.*

This provision, albeit on a small scale, illustrates, as well, the interplay of local, state, and federal laws regulating the private ownership at issue here.

Finally, the Code authorizes the Director of the Texas Department of Health and Human Services to administer the regulations outlined in the Code,[141] again displaying the local/state interplay.

(3) The Harris County Regulations[142]

As discussed, in 2001, the Texas legislature amended wild animal legislation that had existed (and been amended numerous times) in the state since 1981, allowing counties to regulate "dangerous wild animals" at all locations in the unincorporated area of a county, regardless of proximity to schools or other places.[143] This authority does not extend, however, to the territory within a city or municipality;[144] hence, the distinction between the outright ban in the city of Houston and the regulation, but not complete ban, of wild animals in Harris County.

The Harris County Regulations (HCR) are given force by both section 240 of the Texas Local Government Code, specifically, § 240.002, and Subchapter E of Chapter 822 of the Texas Health & Safety Code, §§ 101-116, referenced earlier.[145] Interestingly, the HCR state that their purpose, along with protecting the "health, safety and general welfare of people in Harris County," is to "protect the health, safety and general welfare of animals kept in Harris County."[146] In addition, the regulations state that they do not have broader power than state or federal laws with respect to keeping wild animals. While a Texas court (or the United States Court of Appeals for the Fifth Circuit) has, to the authors' knowledge, not ruled, as did the Seventh Circuit in *DeHart*, that local ordinances have the authority to regulate their locales regardless of conflicts with state provisions on the topic, the HCR unequivocally provide that they do not "serve to legalize any activity otherwise prohibited under the laws of Texas or the United States."[147]

With respect to the structure of enforcement, just as with the federal and Indiana laws considered, Harris County's Public Health & Environmental Services Department, through its Animal Control Division, is authorized to enforce the HCR and to issue citations in Harris County for violations therein.[148]

To begin, the HCR make a distinction between "wild animal" and "dangerous wild animal," but there is overlap between the two categories: "[T]he term 'dangerous wild animal' may include animals designated as 'wild animals' in these regulations and the Commissioners Court may find that a 'wild animal' is also a 'dangerous wild animal.'"[149] In general, the list of

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[141] *See id.* at secs. 6-58.
[142] Harris County's Regulations, *supra* note 133.
[143] *See* 36 Tex. Prac. § 35.4A.
[144] *See* TEX. LOC. GOV'T. CODE ANN. § 240.002(b) (Vernon 2004).
[145] *See* Harris County's Regulations, *supra* note 133, at sec. 1(A).
[146] *Id.* at sec. 1(B).
[147] *Id.* at sec. 1(C).
[148] *Id.* at sec. 1(D).
[149] *Id.* at sec. 3, *Definitions*.

'dangerous wild animals' is meant to be congruent with the list provided for in § 822.101 of the Texas Health & Safety Code,[150] while a list of animals considered 'wild animals' which "are determined to be dangerous . . . pursuant to Texas Local Government Code § 240.001" is provided with the HCR as an appendix, and is a more generalized categorization of animals considered to be wild, but not dangerous.[151] In any event, for the purposes of this article, the distinction is immaterial to our analysis, as the animals referred to in the HCR are those we are addressing in this piece. Accordingly, we employ the term 'wild animal' to encompass both categories outlined in the HCR.

It is worth noting again that the provisions of the city, county, state, and federal codes do not operate in a vacuum, as these provisions periodically cross-reference one another. For instance, the HCR require that, in the application for a certificate of registration, an owner or custodian of the wild animal provide a copy of any USDA license(s) s/he may have,[152] and further, require that, in an application for renewal, a veterinarian find that the "care and treatment of the animal of the owner meets or exceeds the standards prescribed under subchapter 822 [of the Texas Health & Safety Code]."[153] Requirements for primary enclosures for wild animals in Harris County must conform to standards outlined in § 822.111 of the Texas Health & Safety Code.[154] And actions undertaken by Harris County's Animal Control Division must conform to requirements of the Animal Welfare Act.[155] Similarly, the HRC refer to the Texas Local Government Code,[156] the Texas Penal Code,[157] and the Texas Health and Safety Code, as well.[158]

The provisions of the HCR are fairly detailed. To begin, custodians of wild animals must keep the animals at least 1,000 feet from child care facilities, schools and residences, and must provide a primary enclosure in which to house the animals, both for public safety, as well as for the animals' welfare.[159] The primary enclosure must adhere to the requirements outlined in §822.111 of the Texas Health & Safety Code, which generally provide that the enclosure must be of sound construction in order to secure the animal's well-being, to protect her from injury, and to prevent her from escaping.[160] Among other things, the primary enclosure must, specifically, provide adequate temperature regulation for the animal's well-being,[161] be properly lit to permit inspection and cleaning,[162] be equipped with adequate electrical power and potable water,[163]

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[150] *See id.*; *see also* TEX. HEALTH & SAFETY CODE ANN. § 822.101 (Vernon 2004).
[151] *See* Appendix A to the HCR, "Wild Animals That Are Dangerous and in Need of Control in Harris County, Texas." The HCR provides that the list "may be amended from time to time as [the Harris County] Commissioners Court finds necessary to protect human health and safety." Harris County's Regulations, *supra* note 133, at sec. 3.
[152] *See* Harris County's Regulations, *supra* note 133, at sec. 5(E)(3).
[153] *See id.* at sec. 5(E)(4)(b).
[154] *See id.* at sec. 8(A).
[155] *See id.* at sec. 9(J).
[156] *See id.* at sec. 11(A) and Appendix.
[157] *See id.* at sec. 8(N).
[158] *See generally id.*
[159] *See id.* at secs. 4(A) and (B).
[160] *See id.* at sec. 8(A).
[161] *See id.* at sec. 8(B).
[162] *See id.* at sec. 8(D).
[163] *See id.* at sec. 8(E).

and, at a minimum, provide "floor space at least six times the area occupied by the animal when in a normal standing or reclining position."[164]

In addition, briefly, the HCR provide that custodians must obtain a Certificate of Registration (COR),[165] valid for up to one year,[166] in order to keep a wild animal. The regulations require detailed information regarding the owner and animal,[167] as well as a sworn statement that the custodian has liability insurance for the animal, is not violating pertinent deed restrictions, and plans to house the animal in a location in compliance with the HCR,[168] in order to be issued the certificate. In addition, the HCR mandate that the COR be prominently displayed.[169]

The HCR also delineate situations in which one's COR can be denied or revoked,[170] or those in which the animal can be restrained or impounded.[171] In addition, the regulations outline procedures that custodians must follow should their animal escape or attack a person.[172] And finally, the HCR describes the enforcement procedures in place that address violations of these regulations.[173] In general, Section 12 provides that "[a]n offense under this section is a Class C misdemeanor as authorized pursuant to §240.003 of the Local Government Code,"[174] and the HCR grant the county attorney authority to file an action in District Court to enjoin a violation or threatened violation of the regulations.

Most pertinent to the present article, however, is the treatment accorded to the animals under the HCR. The list of protections provided by the regulations began earlier under the description of the primary enclosure requirements. In continuation of those, the HCR require that the primary enclosures be kept clean, sanitary, and well drained to prevent attracting rodents, vermin, or other disease-carrying pests.[175] In addition, the enclosures must periodically be cleared of food, biological (and other) waste, the bedding must routinely be changed, and all other disease hazards should be handled in accordance with any applicable federal, state, and county laws in order to reduce pollution, prevent disease and public health nuisances, and protect the environment.[176] It would appear then, that at least on paper, the drafters of the HCR gave some considered thought to the animals' welfare. As is very often the case, the difficulty arises in the *consistency* of enforcement.

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[164] *See id.* at sec. 8(G).
[165] *See id.* at sec. 4(D).
[166] *See id.* at sec. 5(G).
[167] *See id.* at sec. 4(C).
[168] *See id.* at sec. 4(D).
[169] *See id.* at sec. 7.
[170] *See id.* at sec. 6.
[171] *See id.* at sec. 9.
[172] *See id.* at sec. 10. These involve notifying the proper authorities and assuming responsibility for any resultant damage or injury consequent to the animal's escape.
[173] *See id.* at sec. 11.
[174] *See id.* at subsection (A).
[175] *See id.* at subsection (J).
[176] *See id.* Note that the animals' welfare is not specifically mentioned in this subsection, though it recurs as a theme throughout the HCR.

VII. THE MACHINATIONS OF LICENSING, AND HOW ANIMALS ARE TRAPPED BETWEEN FEDERAL & STATE LAWS[177]

As we have already seen, the licensing and regulatory world is not designed for the convenience and protection of nonhuman animals. Animals in captivity cannot "call 911," so to speak, when being mistreated, neglected, starved, or abused. They must depend on our system of regulations and laws to insure their well-being, yet often those laws fail, as they did with Little Bear. An example of the slippage between federal and state laws would occur in the case of an owner holding a USDA permit for possession of "exotics" who cannot, however, be investigated on allegations of neglect or abuse by the applicable state agency, which, because of local proximity, might actually be better situated to follow up on complaints but lacks the authority to do so. Similarly, local animal shelters are generally not in a position to handle problems and complaints regarding non-domestic animals. And, sadly, as explained in the earlier discussion of the IN DLE, there is no official system for cross-reporting. While informal exchanges between state and local authorities occasionally take place in feed stores and casual encounters, there is no clear conduit or mandatory reporting between, say, a state DNR officer and a USDA inspector.

Typically, state agencies such as DNRs, are charged with overseeing native wildlife, yet they are given no authority over the keeping of exotic animals. Those animals not covered by a state's statutory or regulatory authority would then, presumably, default to federal jurisdiction. However, as we are about to detail, such a net does not always exist at the federal level. And for cases in which federal jurisdiction does ensue, the constraints are so lenient that the putatively regulated animals can still be left to suffer.

A contributing problem is that it is relatively inexpensive and easy to acquire USDA licenses. The USDA offers three kinds of licenses, and then only for certain kinds of animals under certain conditions: Class A, which allows owners to sell animals raised at their facilities; Class B, which allows owners to broker or sell animals raised by another person; and Class C, reserved for exhibitors only. A key problem with this schema occurs in its application: owners of animals who should be regulated rarely fit easily into one category.[178]

Once an owner has a license, it is very difficult to revoke it, unless the person fails to renew on time. Even incidents of non-compliance are often handled through a system of fines, rather than revocation, as evidenced in the earlier escaped bear incident with Little Bear's owner Ms. X. And it goes without saying that unlicensed breeders and owners live completely outside the law, and their animals remain outside the scope of any legally enforceable protections.

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[177] Much of the discussion and information in this section stems from telephone interviews both authors conducted with official APHIS representatives, including Jim Rogers, APHIS Spokesperson and Media Coordinator, and Darby Halladay, APHIS spokesperson, on Oct. 6 and 7, 2004.

[178] To apply for a USDA license, a prospective owner must fill out APHIS Form 7003-A under the AWA. This can be downloaded from the Internet and must be filled out and submitted with a nominal application fee. After receiving the form, the USDA sends out an inspector to view the facility to determine compliance with the Animal Welfare Act. In addition, the prospective owner and the veterinarian must complete and sign APHIS Form 7002, describing strategies for disease prevention and control, nutrition, safety, and veterinary care, which also includes yearly visits to the premises by the vet. This form is kept by the owner and must be available for any on-site inspections by the USDA inspector.

A. Scope

All this adds up to the fact that the USDA, the federal administrative agency that enforces the Animal Welfare Act (AWA),[179] holds no jurisdiction over private ownership alone of exotic animals.[180] The ownership must be coupled with other activity. According to APHIS, the USDA's jurisdiction is limited. The agency "regulates activity of a certain type," namely, the transportation, breeding for sale, exhibition of, and biomedical research on animals covered under the AWA,[181] and issues licenses and registrations to applicants therein. In addition, whether these animals are exotic or non-exotic is of little significance to the AWA. As stated, what matters is the activity itself, which, in the majority of cases, is of a commercial nature.[182]

B. Enforcement and Penalties for Violations

It is the responsibility of the USDA's Animal Care division to perform compliance inspections of licensed and registered facilities.[183] To that end, AC employs Veterinary Medical Officers and other animal care inspectors (collectively, "Inspectors"), who, at least once each year, visit licensees' facilities unannounced.[184] APHIS requires owners and managers of licensed and registered facilities to comply with certain standards regarding, among others, housing, ventilation, lighting, interior surfaces, primary enclosures, sanitation, recordkeeping, adequate

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[179] The Animal Welfare Act, instituted in 1966 (as the Lab Animal Welfare Act) and amended several times since, is concerned primarily with the housing needs and the humane, veterinary, and nutritional care of covered animals. It has been said of the Animal Welfare Act: "[T]he federal Animal Welfare Act, which provides the primary regulation of the use of animals in experiments, does little beyond regulating issues of animal husbandry. It explicitly provides no restriction of what can be done to animals, or how it can be done." Robert Garner, *Animal Rights and Animal Welfare*, ANIMAL RIGHTS LAW PROJECT *at* http://www.animal-law.org/library/araw_iv.htm. Garner, who is clearly sympathetic toward welfarist reforms, correctly observes that the aim of the federal Act "is not primarily to regulate the kind of procedures adopted but only the supply and care of animals destined for research institutions (purchase, transportation, housing, and handling)."

[180] Therefore, businesses or individuals who collect animals for their "private collections," for instance, are exempt from USDA regulations. Further, as noted earlier, it is a subagency of the USDA, APHIS, that assumes responsibility for matters arising under the AWA, primarily through its Animal Care division.

[181] Large groups of animals are not covered under the AWA. Along with exotic animals possessed privately, most notable among exempted animals are farm and a large swath of research animals, as well as "cold-blooded" animals. *See* David Favre, *Overview of U.S. Animal Welfare Act* (May 2002), ANIMAL LEGAL & HISTORICAL CTR., *at* http://www.animallaw.info/articles/ovusawa.htm#BM5_Which_Other_Animals.

[182] According to Mr. Halladay, if, for example, the custodian of a regulated animal took the animal to a shopping mall to allow people to have their photographs taken with the animal, the USDA would retain jurisdiction even if no money changed hands. Other examples of regulatory jurisdiction would include a magician who owns rabbits he uses in his public performances. Though rabbits are not "exotic" under most any definitional scheme, their mere exhibition automatically subjects the magician to USDA jurisdiction. Conversely, a rock star who decides to have a pet lion for "fun," but who doesn't exhibit the animal or use her for any other regulated activity, would fall outside the USDA's purview.

[183] *See Compliance Inspections*, APHIS, *available at* http://www.aphis.usda.gov/oa/pubs/inspect.html.

[184] *See id.* Inspectors are distributed territorially throughout the United States based on the concentration of licensees and registrants. According to APHIS spokesperson Jim Rogers, there are 100 inspectors nationwide who make 10,000 annual inspections at USDA-licensed facilities.

veterinary care, and the handling and transportation of regulated animals.[185] If the inspectors discover violations, a number of steps are taken, depending on the severity of the violation.

First, inspection reports are prepared for every facility visited, regardless of the existence of violations,[186] which are then sent to the appropriate APHIS office for further review.[187] The regional office director, in conjunction with personnel at APHIS headquarters,[188] then determines the existence and severity of any possible violations. If authorities find violations, they then contact Investigative and Enforcement Services (IES), which exists independently of AC. IES further investigates the matter in question and submits a report to APHIS' Office of General Counsel (OGC), which can then issue a legal complaint against the violating licensee based on the findings before it.[189]

In extreme circumstances, where inspectors discover violations so flagrant as to require immediate action, under the authority of AC, they can act in conjunction with local law enforcement authorities to confiscate animals. In fact, the AWA does not provide APHIS with warrant powers. Therefore, it nearly always falls to local authorities, whatever be their office, to confiscate the animals and transport them to the custody of an APHIS-approved licensee. In the case of Little Bear, the DNR had no authority over his welfare and no resources to aid him. Had the DNR officer on duty not made the imaginative leap to transport Little Bear to the local rehabilitation facility, WildCare, the only other option would have been to euthanize him on the spot.

In cases where violations occur outside of the time frame of the inspectors' annual visit, APHIS responds to information supplied by ordinary citizens who report possible AWA violations. Regardless of where people place a call, whether to APHIS, or to their local animal care bureaus, or even their local law enforcement authorities, APHIS maintains that there is a general understanding that the entity with jurisdiction (in the case of AWA violations, APHIS) will be contacted.

Despite these regulations and implementing guidelines, the problems engendered by such a system are evident. Though inspections ought to be carried out annually, in reality, inspections are conducted on a risk level assessment made by USDA inspectors.[190] If, for instance, a licensed facility is assessed as "low risk," inspections would occur less frequently, perhaps once every eighteen months, rather than every year. Conversely, facilities rated as higher risk could be visited more often. The troubling issue that persists, nevertheless, is, in Jim Rogers' words, "the inspection is the picture of what's happening at the time of inspection."[191] The degree to which licensees and registrants comply with USDA regulations during the time between

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[185] *See id.*

[186] In the case of minor, reparable violations, inspectors often require violating licensees to remedy the violation within a short time and return on the prescribed deadline date to verify compliance. In cases of easily remediable violations, inspectors might even require on-site reparations.

[187] There are two regional APHIS Animal Care offices, one for states west of the Mississippi (Fort Collins, CO) and one for states east of the river (Raleigh, NC).

[188] APHIS headquarters are located in Riverdale, MD. Unlike the regional APHIS AC offices just mentioned, which deal only with Animal Care, the MD headquarters govern all APHIS matters.

[189] This process, while occurring in the context of an administrative agency, follows the same trajectory as that in any legal proceeding. That is, the OGC facilitates service upon the violator, who must then answer the complaint, and so forth.

[190] APHIS spokesperson Jim Rogers explained this point.

[191] *Id.*

inspections, which can often be over a year, is something the system is currently unable to monitor or enforce. What is particularly troubling is that if a licensee has a conviction for past violations, there exists no reporting mechanism from which inspectors can learn of this history. They would simply have to hear of it through some other informal source.[192]

In addition, as learned from both APHIS spokespersons interviewed, as well as from APHIS's own on-line guidelines,[193] APHIS highly stresses compliance over any kind of penalty implementation ("the goal is not to punish, but to bring people into compliance").[194] While, on one hand, this emphasis on compliance is immediately useful, the question remains as to what happens between the time of an on-the-spot compliance and the next inspection, which could occur weeks, months, or even a year, later.

Should a case reach the penalty stage, penalties for violating the AWA are issued by the assigned Administrative Law Judge (ALJ) and range, as noted, from imposed fines[195] all the way to, in cases of egregious violations, criminal prosecution.[196] As there are no rigidly defined fact situations mandating specific penalties, ALJs make case-by-case determinations of the severity of violations and can suspend, or even revoke, licenses.[197] On the whole, however, more than having to dole out penalties, the principal concern and desire of APHIS is to have licensees comply with the AWA. Therefore, the majority of violation cases focus on getting licensees to fall into compliance. What this starts to feel like to many animal advocates is a system of "bad foster care." It would seem, instead, that pursuing the spectrum of available legal remedies, would, in the long term, increase education and offer a deterrent effect, thereby providing for better and more humane care for the animals in question, which, in turn, would contribute to greater public safety.

C. Federal and State Interplay

The interplay of the federally based AWA and state regulations could be said to mirror, in a minimal way, that of the United States Constitution and respective state constitutions in that, just as state constitutions can broaden, as well as provide for, different rights granted in the

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[192] *See id.*

[193] *See generally* APHIS, *available at* http://www.aphis.usda.gov.

[194] Telephone interview with Jim Rogers, APHIS Spokesperson and Media Coordinator (Oct. 6, 2004).

[195] The fining structure for USDA violations provides for a penalty of $2,750 per count, per animal, per day, although if a violation affecting 10 animals is at issue, for instance, only one count will be applied. A violator charged with one count for a feeding infraction, as an example, could be fined $2,750 multiplied by 365 days for a year in which she transgressed USDA rules. One can see how this fine structure, in theory, would strongly encourage immediate and regular compliance.

[196] While the OGC prepares its complaint in a given case, the Department of Justice, through locally based United States Attorneys, could simultaneously also elect to institute criminal proceedings against violating licensees, though this rarely occurs. Mr. Halladay indicated that, again, no firm criteria exist for such determinations. All violations are evaluated on a case-by-case basis.

[197] Another APHIS employee (who prefers to remain anonymous) stated that AC officials are often familiar with local animal care and rescue groups in various regions, so that if it becomes necessary to confiscate animals, they have mechanisms set in place to which they can turn for support. Interestingly, this employee also made a point of indicating that animal welfare or interests were "very low on the totem pole" where the AWA and its enforcement are concerned. Telephone interview with anonymous APHIS employee (Oct. 5, 2004). It is worth pointing out that the nature of these phone interviews is largely informal and the information gleaned can often be a function of fortuitousness and timing.

federal Constitution,[198] so local laws regarding the private possession of wild animals can often be far more expansive than federal authority. In this way, state regulations can exercise wider jurisdiction, as well as address broader issues, than those provided in the AWA.

As already mentioned, the USDA regulates the exhibition of animals. An exhibitor may apply for and obtain a USDA license to carry out an animal exhibition enterprise, but if she resides in a city (such as the city of Houston, as discussed earlier) which prohibits the private possession of exotic animals, and her situation does not fit into one of the exemptions provided for in that city's code of ordinances, she would be precluded from running her exhibit.

As APHIS AC spokesperson Darby Halladay states, "In general, there is nothing in the AWA that prohibits states from doing anything to USDA licensees. If a state or local jurisdiction has more stringent requirements than the AWA, then USDA licensees have to meet those requirements."[199] By definition, Mr. Halladay notes, the AWA and state provisions governing the private possession of exotic animals do not usually overlap, much less conflict, because the AWA, as indicated above, is completely silent on the private possession of exotic animals as pets. Contrarily, as we have seen, many jurisdictions maintain stringent provisions regarding the possession of exotic or wild animals, regardless of the function the animals or the keeping of them would perform.

The problems inherent in this interplay are grave. Simply put, while the federal and state provisions addressing exotic animals in a variety of domains, particularly in terms of private possession, generally co-exist without friction and tend to cover most issues that might arise with respect to such animals, the great potential for "slippage" leads to the tragic, but not uncommon, cases like those of Little Bear. Let us explore in greater detail what occurred in that case.

Ms. X, a USDA licensee, allegedly purchased Little Bear from another USDA licensee, and, as pointed out earlier, at the time of the purchase, Little Bear was in good health. Because Little Bear was a non-native animal, Indiana laws regarding the private possession of animals like him simply did not apply. In fact, Little Bear could well have been with his new custodian without the benefit of any regulation whatsoever. Because Ms. X exhibited the animals in her possession, however, she was required to obtain a USDA license. Had she merely kept Little Bear and her other animals as pets, based on the regulatory scheme delineated in this essay, no rules, neither federal nor state, would have provided for even the most minimal standards or inspections for these animals.

As it happens, Ms. X is a USDA licensee, but that fact makes Little Bear's fate all the more troubling. Indiana sheriff's deputies discovered Little Bear and reported their findings to the state DNR. The DNR conservation officer did everything in his power to help Little Bear, including contacting the USDA to ask them to revoke Ms. X's license. Because Indiana had no jurisdiction in the matter, the officer's only recourse was to call the applicable licensing authority, the USDA. The snarl there is that with so little oversight and so many licensed facilities, USDA officials had no evidence of Ms. X's other alleged violations, and consequently did not have reason or authority to pursue confiscating her license. What they did have on record, however, was a citation for a bear she owned which had escaped her custody a few years before and had to be shot. Even so, the USDA required at that time only that Ms. X pay them a fine (less than $1000), which she did, and which directly went into the United States Treasury.

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[198] *See, e.g.*, City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982); and Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1981).

[199] Telephone interview with Darby Halladay, APHIS AC spokesperson (Oct. 7, 2004).

While limited charges have been filed in Little Bear's case, it remains to be seen what will happen.[200] Ms. X's mistreatment of Little Bear and continued possession of other animals under her roof represents a far more frequent occurrence than those who care about animals and value justice, would either like or be willing to believe.

The lapses of clarity in the regulations and the weaknesses inherent in the federal/state interplay can be illustrated by the challenges associated with determining who needs to do what, when, and how. The following communication with Janice Turner, a Certified Wildlife Rehabilitator with Indiana's WildCare organization, drives home this problem:

> Now, I have a licensing story to share with you. When I first was asked to take Bandit, the Arctic Fox who was so sick when I got him, I called the state office of Fish & Wildlife and asked Linnea Petercheff to send me an application for a possession permit for an exotic animal. When I got the application, I completed it and then called the DNR officer at Paynetown post who approved my rehab permit and asked him to come and inspect Bandit and the kennel we had put up for him. He came to my house and checked everything out and then signed off on the possession application. I then mailed it, along with the licensing fee, to Linnea. A few days later it came back to me with a note saying that in order to keep an Arctic Fox I needed a federal permit, not a state permit. So I called F&W and asked them who [sic] I needed to talk to in order to apply for a federal permit. The first number I was given reached an answering machine, so I left a complete message and waited for three months for a return call. Then I called F&W again and was given another number, this one with a 703 area code, for a Dr. Kirsten. By this time I was getting a bit frustrated. But I called Dr. Kirsten and he asked what I planned to do with Bandit. I explained that he hadn't had a very good life until then (he even had a broken leg as a baby and the owners didn't take him to a vet) and all I wanted to do was to give him a permanent home where he could be happy for the rest of his life, however long that turns out to be. That's when he told me that I don't need a permit for that. So I can keep exotic animals as pets and not need a permit for them. I own two Arctic Foxes and one Pearl Fox, and unless I start doing ed[ucation] presentations with them, I can't get a permit for them. If they take part in any of our education programs, then they must be listed on WildCare's federal permit for education animals. Other than that, no one checks to see if they have been spayed or neutered (yes) or if they appear to be healthy (yes) or if they have their shots (yes).[201]

Ms. Turner was one of the principal rehabilitators who worked with Little Bear upon his arrival at WildCare, and, as indicated by the letter, is a conscientious caregiver and rehabilitator. Here we have an example of an owner who wanted to comply with whatever regulations—state, federal, or both—existed in order to ensure the well-being of her animals, but was met with obstacles in her concerted efforts to obtain direction or cooperation from government authorities. If even determined people who seek to comply with laws can 'get away with' not abiding by these laws, it would clearly be exceedingly easy for any number of wild animal possessors to

[200] The latest on Ms. X's case has been documented at the Animal Legal Defense Fund's website. *See* ALDF, http://www.aldf.org.

[201] Email from Janice Turner ,WildCare, (Oct. 6, 2004).

evade laws and regulations otherwise applicable, on paper, to such private possession. Our research has indicated that Ms. Turner's story is not an exceptional circumstance.

IX. A BRIEF OVERVIEW OF RECENT AND PENDING LEGISLATION, AND SAMPLE PROPOSED MODEL LEGISLATION

Unfortunately, the ease with which custodians of exotic animals can sidestep the law with respect to their possession of these animals is not limited only to weaknesses with the USDA and its purported enforcement of the AWA. The Endangered Species Act, for instance, which deals more with importation than possession within the country, is intended to protect tigers of all ancestries. Mixed-breed, or "generic" tigers, however, are subject to less stringent regulations.[202] While purebred tigers cannot legally be sold through interstate commerce, according to Tim Santel, an agent with the United States Fish and Wildlife Service, the agency assigned to enforce the ESA, mixed breeds may be sold under some circumstances.[203] In addition, although owners of purebred tigers are required to obtain federal permits, owners of generic tigers are not so required. As a result of such loopholes, there is created, in the words of Craig Hoover, deputy director at the World Wildlife Fund, a "second-class citizen of endangered species."[204]

Nonetheless, on the positive side, legislation in recent months has made progress toward stricter regulation of the private possession of exotic animals. On December 19, 2003, President Bush signed into law an amended version of the Lacey Act,[205] known as the Captive Wildlife Safety Act.[206] This law prohibits the interstate and foreign commerce of dangerous exotics such as lions, tigers, leopards, cheetahs, jaguars, and cougars to be used as pets, and makes no distinction between pure-bred and hybrid animals.[207] While the law does make inroads on the way to preventing the practice of keeping exotic felines as pets in this country by addressing the interstate and foreign movement of these animals, it does not prevent states from continuing to breed and sell large cats within their borders. The legislation does, nevertheless, provide a positive stride toward the protection of exotic animals.

Even more recently, on November 3, 2004, Governor Pataki of New York signed into law an exotic pets bill that bans the private sale and possession of wild and dangerous exotic animals, including tigers, lions, cougars, bears, wolves, alligators, and non-human primates. As of this writing, similar bills are pending in the legislatures of Arkansas, Minnesota, Washington state, and Oregon.[208]

In the meantime, organizations such as the Animal Legal Defense Fund (ALDF), Animal Protection Institute (API), and the Captive Wildlife Animal Protection Coalition, have as their

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[202] Deborah Sullivan Brennan, *Raid Uncovers Extent of Traffic in Big Cats*, LOS ANGELES TIMES, June 1, 2003, at B6.
[203] *See id.*
[204] *See id.*
[205] 16 U.S.C. §§ 3371-78 (2004).
[206] Public Law No. 108-191 (2003).
[207] *See* 16 U.S.C. § 3371(g) (2004); and 16 U.S.C. § 3372 (a)(2)(C), (e)(1)-(3) (2004).
[208] *See, e.g.*, CAPTIVE WILD ANIMAL PROTECTION COALITION, *at* http://www.cwapc.org/legislation/state.html for the latest news on such legislation.

mission, among other projects, the protection of captive wildlife in this country. ALDF and API, in addition, have drafted model proposed legislation for the reference of federal, state, and local authorities, in order for these to shape their laws to the end of protecting privately possessed exotic animals. These organizations' efforts provide a strong foundation from which the public and lawmakers can work to improve the lives of animals, human and non-human alike.

X. CONCLUSION

Little Bear is only one of thousands of privately owned wild or exotic animals whose fate involves senseless and unnecessary neglect, abuse, cruelty, and death. Because of the special characteristics and needs of wild and exotic animals, regardless of whether they were snatched from the wild or raised in captivity, they simply *do not* make good pets. Unlike cats and dogs, who have a long history of domestication and a symbiotic relationship with human beings, wild and exotic animals remain wild, despite all efforts (including cruelty) to domesticate or tame them. In captivity, many wild animals are left to suffer, while a large portion simply die.

But assuming that it is legal to own nonhuman animals like Little Bear, the laws and licensing schemes governing private ownership of wild and exotic animals continue to focus almost exclusively on human safety and particular activities related to the use of those animals, while remaining indifferent to the safety and well-being, not to mention happiness, of the animals themselves. An underlying philosophy militating against the passage of stricter laws to protect wild animals is that Americans should have the right to do what they want with their own property. This "unbridled freedom" paradigm is deeply flawed. All rights and privileges must be balanced by duties and obligations for no right or privilege ever absolute. While current laws and regulations in the United States do permit individuals to possess wild or exotic animals privately, this legally sanctioned activity is no more a "right" in the absolute sense than the ability of slave owners to possess human beings as chattel was in the 19th century. As long as animals are considered property in the eyes of the law, there will always be limits to their protection and welfare.

Little Bear was a non-domesticated animal "owned" legally under a USDA license whose predicament surfaced only by accident. Despite his owner's history of violations, Little Bear was offered no protections. Little Bear's story concludes unhappily as, after months of trial postponements and continuances, the case charging Ms. X with neglect of Little Bear was thrown out of court. According to the conservation officer who confiscated the bear cub, the court dismissed the case because in Indiana it is illegal to enter a home without a search warrant—even to rescue an animal that is suffering. With respect to non-human animals, the court appears to be saying that not even such "exigent circumstances" as cruelty inflicted on an animal justify a search without a warrant.[209]

One solution to the plight of wild animals kept in captivity is to implement a federally-sanctioned ban, making it illegal to breed, sell, or possess wild or exotic animals. Under such a ban, those animals currently owned privately could be grandfathered in, but further breeding,

[209] At the time of this writing yet another confiscated wild animal, this time a skunk, once "owned" by Ms. X, had to be euthanized by the local rehabilitation center because of failing health. This update, in addition to the most recent information on the Little Bear case, was received in an informal email forwarded to Alyce Miller on June 30, 2005, by one of the volunteers at WildCare who worked closely with Little Bear.

selling, and buying would be made illegal, and oversight of conditions would be increased. Further exceptions to the ban would include those licensed sanctuaries engaged in legitimate rescue and rehabilitation efforts.

More moderate solutions would involve stricter regulations, heightened oversight, more stringent qualifications for buying, selling, breeding, and owning wild animals, and an increase in the number of formal inspections by trained inspectors. Federal, state, and local officials would engage in cross-reporting and other forms of communication regarding the status of the wild animals in private possession. The gaps in regulations would be closed significantly by a reorganization of statutory schemes, and a standardization of federal, state, and local laws. In addition, the bar for minimal conditions now required for keeping a wild or exotic, regardless of the status of the animal or activity associated with it, would be raised and implemented to match the standards of legitimate sanctuaries and/or AZA standards for accredited zoos.

Implementing these sorts of measures requires, to be sure, an entire re-education of a culture, and the adoption of an ideology based not on "possession," but on a notion of compassionate stewardship. Until we as a society recognize the value of all life and incorporate that philosophy into our legal system, we will continue to perpetuate the suffering of nonhuman animals in the name of rugged individualism, egotism, profit, and even misguided affection.

THE RECENT DEVELOPMENT OF PORUGUESE LAW IN THE FIELD OF ANIMAL RIGHTS

FERNANDO ARAÚJO[1]

I. THE PRESENT LEGAL OUTLOOK[2]

To put it mildly, Portugal is not at the forefront of the international struggle for the implementation of animal rights, and only timidly has the Portuguese legislation on animal welfare shown some progress in that direction in the last few years. Portuguese associations for animal welfare are too small, too financially strapped and too dispersed and uncoordinated to perform a sustained role in championing the cause. Their cultural and social visibility is minuscule – and surely disproportionate to the political, legal and judicial victories that, in spite of everything, the generosity and courage of a few activists[3] have obtained on an individual basis. Worst of all, some traditions of violence on animals have a long history in Portugal, e.g. bullfights, and seem especially well suited to resist legal changes and to erect political barriers in the foreseeable future.

Nevertheless, there are reasons for hope that this bleak outlook will improve. The rural-urban migration over the last century has resulted in the predominance of an urban culture that is becoming more and more sensitive to issues of animal welfare (a sensitivity not immune to the "herding effects" of trends and fads, e.g. the ban on furs in the fashion industry). The growing power of the media, with its consistent denunciations of the more shocking episodes of abuse of non-human animals, both domestically and internationally, has conferred visibility to these issues and put the pressure on politicians to terminate at least the more extreme forms of exploitation and violence. The spectacular progress of Portuguese environmental law over the last 20 years has had some spillover effects on animal rights (bringing with it, among other benefits, the perception that the whole legal system can be changed swiftly, in tune with the progress in its underlying values). Judges and academics are progressively willing to admit that this is a serious issue, that it must be dealt with the utmost seriousness and must be given some priority in the reform of the Portuguese legal system (one can sense that the time is ripe for the

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[2] *See generally* ANTÓNIO PEREIRA DA COSTA, DOS ANIMAIS: O DIREITO E OS DIREITOS (1998); ANTÓNIO MENEZES CORDEIRO, TRATADO DE DIREITO PORTUGUÊS: I-PARTE GERAL TOMO II-COISAS (2000); FERNANDO ARAÚJO, A HORA DOS DIREITOS DOS ANIMAIS (2003).

[3] Miguel Moutinho, Artur Mendes, to name just two of the most active and outspoken.

introduction of specialized courses at the undergraduate level in the curricula of Law and Philosophy degrees). There are growing numbers of politicians willing to discuss publicly the issues of animal welfare (responding to the sensitivity of their urban constituencies). The obligations stemming from Portuguese integration in the European Union (EU) involve the more or less automatic reception, into the national legal system, of the latest European regulations in these areas. Finally, the examples coming from more advanced systems, mainly from the United States, Australia, New Zealand and some European Countries, set powerful standards and provide the more backward systems with ready-made and sometimes fully tested solutions.

The focal point of the Portuguese legal system on animal welfare is Protecção aos Animais, Lei nº 92/95 de 12 de Setembro (hereinafter "Law of 1995") – to which we will pay more attention later. Mainly the initiative of the best-known Portuguese defender of animal rights, António Maria Pereira, a lawyer who was at the time a Member of Parliament, the Law of 1995 was the subject of strong political maneuvering, and its final version is heavily truncated, mainly in what concerns the direct prohibition of the more flagrant forms of abuse of animal health and welfare; powerful lobbies whose strength remains intact to this day – of hunters, bullfighters, pigeon shooters, breeders – opposed any form of substantive prohibition at that general level, taking advantage of the fact that such an initiative had no specific backing from the EU.

The Law of 1995 was preceded by: (1) The main Portuguese environmental law of 1987;[4] and (2) laws about the protection of wild species.[5] The Law of 1995 was followed by: (1) laws about hunting;[6] laws about pets;[7] and (2) laws about bullfighting.[8]

II. THE INFLUENCE OF EUROPEAN REGULATION

The aforementioned laws are all directly influenced and inspired by EU regulations, and it is quite clear that the main thrust for Portuguese legislation in these (and other) domains results from the obligations of Portugal as Member Country. Many other Portuguese laws are simple transpositions of European Conventions and EU regulations, such as:[9] (1) laws on the protection of animals in slaughterhouses and breeding grounds;[10] (2) laws on the transportation of animals;[11] (3) laws on the protection of wildlife habitats;[12] (4) laws on the use of animals for

[4] Lei de Bases do Ambiente, Lei nº 11/87 de 7 de Abril.

[5] Estabelece Medidas de Protecção de Animais Selvagens, Necrófagos e Predadores, Decreto-Lei nº 204/90 de 20 de Junho; Protecção das Aves, Decreto-Lei n.º 75/91 de 14 de Fevereiro.

[6] Lei de Bases Gerais da Caça, Lei nº 173/99 de 21 de Setembro; Regime Jurídico Gestão Sust. Recursos Cinegéticos Decreto-Lei n.º 227-B/2000 de 15 de Setembro.

[7] Animais de Companhia e Animais Poten. Perigosos, Decreto-Lei n.º 276/2001 de 17 de Outubro; Decretos-Leis nºs 312/2003, 313/2003, 314/2003, 315/2003 de 17 de Dezembro.

[8] Touros de Morte, Lei n.º 12-B/2000 de 8 de Julho; Lei n.º 19/2002 de 31 de Julho.

[9] The enumeration is incomplete, and it intentionally omits lower-level regulation.

[10] Protecção de Animais nos Locais de Criação, Decreto n.º 5/82 de 20 de Janeiro; Decreto-Lei nº 270/93 de 4 de Agosto; Decreto-Lei nº 113/94 de 2 de Maio; Protecção dos Animais no Abate e ou Occisão, Decreto-Lei nº 28/96 de 2 de Abril; Protecção dos Animais nas Explorações Pecuárias, Decreto-Lei nº 64/2000 de 22 de Abril.

[11] Decreto-Lei nº 130/90 de 18 de Abril; Protecção dos Animais Durante o Transporte, Decreto-Lei nº 153/94 de 28 de Maio; Decreto-Lei nº 245/96 de 20 de Dezembro; Normas de Protecção dos Animais em Transporte, Decreto-Lei nº 294/98 de 18 de Setembro; Identificação, Registo e Circulação de Animais, Decreto-Lei nº 338/99 de 24 de Agosto.

experimentation and laboratory uses;[13] (5) laws on the protection of poultry in aviaries;[14] and (6) laws about pets.[15]

However, it should be noted that the proliferation of international conventions and EU regulations, far from being an unequivocal benefit, increases "regulatory noise" which decreases compliance and the efficiency of enforcement and monitoring, and is no real substitute, in cultural and social terms, for a more fundamental and visible consecration of animal rights – be it on a wide-ranging statute that supersedes the Law of 1995, be it by incorporating a reference to animal rights on the main pillars of the Portuguese legal system, the Constitution and the Civil Code.

Moreover, EU regulations have a serious problem concerning compliance on the national level: the content and accuracy of information of the common citizen about current EU Directives and Resolutions is very low, and quite often bureaucrats fare no better. Worse still, structural or hierarchical relations amongst EU and national legal systems are quite equivocal and contingent on political considerations – as is to be expected from an unfinished process, such being the case with the European integration, although that does not account for all the subtleties and complexities that have emerged along the way at the level of EU regulations.

In spite of all this, those regulations have proven to be a powerful ally to the cause of animal rights in Portugal, as we have noted. It is easy to imagine that, without the pressure of EU regulations, too much would remain to be done, to this date, in terms of the minimum legal rights of non-human animals. The need to keep up to date with EU norms has often helped decisively in cutting the Gordian knot of internal interests and the entangled mesh of endless discussions over the cultural and sociopolitical legitimacy of violent and abusive rural traditions.

That does not mean, on the other hand, that EU regulation is immune to capture by special interest groups, mainly in what concerns cost controls in the meat industry, the use of animals in scientific research and the persistence of traditional privileges of hunters' associations – activities that have in common their apparent utilitarian justification and the near-invisibility, for urban dwellers, of the suffering they cause on non-human animals. Moreover, the transnational nature of EU lobbying and jockeying for special interests makes it more difficult to detect and prevent regulatory capture than would otherwise be the case in pure national terms (one of a few factors that have, over the years, visibly impaired the full development of democratic checks and balances at the EU level).

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[12] Conservação da Vida Selvagem, Decreto-Lei nº 316/89, de 22 de Setembro.

[13] Animais para Fins Experimentais e Científicos, Decreto-Lei nº 129/92 de 6 de Julho; Decreto-Lei nº 197/96 de 16 de Outubro.

[14] Galinhas Poedeiras Criadas em Bateria, Decreto-Lei nº 406/89 de 16 de Novembro.

[15] Protecção de Animais de Companhia, Decreto nº 13/93 de 13 de Abril; Animais de Companhia e Animais Poten. Perigosos, Decreto-Lei nº 276/2001 de 17 de Outubro.

III. Progress and Setbacks in the Political and Judicial Arenas

Portugal is, therefore, far from achieving a reasonable level of legal protection of animal welfare, either at the statutory level or, more pragmatically, in what concerns enforcement and compliance with those laws already in place: the prevailing feeling is that, in spite of a growing conscience and sympathy towards the moral need for improvement of animal welfare standards, fines are not severe enough and are ineffective as deterrents, and impunity is still dominant, and will so remain in the near future – mainly due to widespread attitudes of leniency, indulgence or outright indifference to all but the most extreme cases of animal abuse.

The fast improvement of environmental law, while enacting a wide protection to animal species, mainly to endangered wildlife, hasn't brought with it any particular legal protection for individual animals, for example by imposing criminal liability for cruelty crimes against them. Instead, domestic animals and captured stray animals (including wildlife not in the public domain) are still qualified, by the Portuguese Civil Code, as mere things, mere personal property – a proposition with many corollaries, e.g. the impossibility of legally preventing and repressing abuse perpetrated by the owner of animals against his own property, or the added difficulty of imposing to proprietors duties toward what is formally taken to be their own property (if property includes, in typical Roman Law/civil law fashion, the *ius abutendi*, the right to destroy, why shouldn't it include, *a fortiori*, the right to maltreat, neglect, or abandon?).

A revision of the Portuguese Civil Code and the Portuguese Constitution is clearly in order – if not to radically change the legal status of non-human animals or to solemnly recognize their fundamental interest in the safeguard of their welfare and in the minimization of suffering, at least to block the powers of owners of animals in everything that may amount to acts of serious mistreatment, neglect and cruelty.

The Law of 1995[16] was intended as a landmark in the evolution of domestic legal protection of animal rights – recognizing not only the fundamental interests of non-human animals as juridical trumps against further social, economic or political manipulations, banning the more gross and gratuitous forms of exploitation, of scientific experimentation (limiting recourse to vivisection to strict necessity) and consumption (imposing humane standards in industrial slaughter), but also affirming the right of individual animals to have their welfare interests represented in court, granting a legal standing to Animal Advocacy Associations to sue the perpetrators on behalf of the injured animals and recover damages inflicted to them.

Instead, as we indicated earlier, the final text of the Law of 1995 was heavily truncated vis-à-vis the central intentions stated in earlier drafts – to the point that it now appears fragmentary and incoherent in too many places. Lobbies representing bullfighting, the meat industry, hunting, pigeon shooting, some of them representative of powerful regional constituencies, managed to mangle the parliamentary debate of the fundamental issues beyond the limits of recognition and reasonableness. Courageously, Mr. António Maria Pereira withstood multiple attempts at denigration and scorn, but in the end his political support was so dangerously narrow that he had to make wide concessions in successive drafts.

As a result, the Law of 1995 is confined to more or less innocuous proclamations of basic principles, which in general do not add much to what already resulted from the mere application

[16] Protecção aos Animais, Lei n.º 92/95 de 12 de Setembro.

of diverse domestic and international norms, and of EU regulations. The first Article of the Law imposes negative duties (nº 1), especially the duty to abstain from inflicting *unjustified* violence on non-human animals,[17] afterwards specified in an enumeration of prohibitions (nº 3), and then a very weak positive duty,[18] the duty to help wounded, imperiled or sick animals (nº 2).

Apart from Article 10, the remaining Articles of the Law of 1995 restrict themselves to procedural and bureaucratic aspects: licensing of the commerce of companion animals (Article 2), licensing circuses and bullfights (Article 3), handling of stray animals (Article 5), neutering of pets (Article 6) and access of pets to public transport (Article 7). The true extent of the limitations imposed on the final version becomes apparent when we consider Article 9, which states that "*sanctions for the infringement of this law will be object of a special law*," a special law that never materialized (and was never even considered – a revealing symptom of the political hypocrisy surrounding this whole matter).

In spite of everything, the Law of 1995 has become a cornerstone of the judicial leverage of animal welfare and animal rights advocacy – much, it must be said, to the dismay of its opponents, who lament the fact of having overlooked a point in the law that, according to them, amounts to a loophole. In fact, granting not only a legal standing to Animal Advocacy Associations to sue the perpetrators on behalf of the injured animals, but also affirming the legitimacy of those Associations "*to require to all authorities and courts the adoption of preventive and urgent measures that are necessary and adequate to avoid ongoing or imminent violations*" (Article 10), the Law of 1995 opened up a whole new field of possibilities, mainly the path to judicial activism in affirming animal rights.

Portuguese Animal Advocacy Associations immediately explored that possibility, and soon after they began to require, both from the Courts and from administrative authorities and the police, that effective measures be taken to put an end to everything that could be broadly interpreted as a violation of the prohibitions enumerated in Article 1, 3 of the Law of 1995. These include: (1) subjecting animals to overexertion or to fights (Article 1, 3, (a) and (f)); (2) using any kind of painful, perforating or mutilating tool on an animal (Article 1, 3, (b)); (3) trading in weakened, sick, wounded or aged animals, or denying them a humane treatment or euthanasia (Article 1, 3, (c) and Article 4); (4) the intentional abandoning of domestic animals (Article 1, 3, (d) and Article 8); and (5) inflicting pain or suffering in animals outside of the strict necessity of scientific experimentation (i.e. in activities such as training, contests and exhibitions, advertising, education).

Outstanding in those first judicial struggles, and ever since, was Paulo Azeredo Perdigão, a lawyer from Lisbon. Under his initiative, coordinated with the leaders of Portuguese activism, many Portuguese judges have, over the years, issued court injunctions prohibiting the worst violations of animal welfare – sometimes courageously confronting both groups upholding violent traditions still popular, and the passivity and complacency of the Government, the local authorities and the police. Those judges that have tried to enforce the Law of 1995 against prevailing barbarism have suffered heavy political pressure – but judicial independence has prevented most Portuguese courts from backing down in their jurisprudential activism. Unfortunately, this has meant that many of those same court injunctions haven't been properly enforced by the central and local administration, and namely by the police, and that too many

[17] With the subtle anthropocentric implication that there may be an unspecified margin of justified violence, not even subject, eventually, to the usual rules of conflict of rights.

[18] A weak duty, in the sense that, as we shall see, it is patently unenforceable.

prohibited activities have not only been perpetrated but have remained unpunished. Worse still, when it could be expected that the lack of criminal sanctions and the inadequacy of civil damages would be at least replaced *ad hoc* by the sanctions for disobedience or contempt of court, there ensued a political-doctrinal clash that, on the part of the Government and local authorities, tried to justify their hypocritical disregard for the implementation of the (already truncated and minimal) Law of 1995.

On one hand, they gave in to pressure of groups rooting for a local tradition (in Barrancos, a little village near the Spanish border) that consistently violated the old Portuguese prohibition of the slaughter of bulls in the arena, during bullfights[19] – trying in that way to avoid the embarrassment and the media frenzy around its inability in dealing with consistent disrespect for the law and contempt for successive court injunctions – changing the law and allowing, although exceptionally, the slaughter of bulls during bullfight.[20] On the other hand, even eminent scholars who should have known better came to the help of the Government with the bizarre, and certainly untenable, opinion that there's no such thing as contempt of court on the part of authorities (even when it consists on the open refusal to carry out court orders), because such a notion would violate the constitutional separation of powers – an argument that, if taken seriously, would prevent the enforcement of court injunctions by the police, and would collapse the whole legal and judicial system into a kind of toothless platonism, in the midst of a Hobbesian state of nature, a state of general anomy.

Progress has been reached, nevertheless, and there's no reason to despair: the uncompromising attitudes of many judges seem especially helpful, and it is to be hoped that the steady, albeit slow, progress of moral standards of the urban populations, in compass with the evolution of legal standards at the European and international levels, will someday tip the balance definitely and unequivocally in favor of the general promotion of animal welfare – and force politicians to leave their abject attitude of hypocritical complacency, if not of schizophrenic ambiguity, towards such fundamental values, such defining beacons of our cultural progress. And let it be said, finally, that the fact that things are no better in a multitude of other countries is meager consolation for Portuguese activists and sympathizers, and certainly cannot constitute any kind of justification.

[19] Touros de Morte, Decreto nº 15 355 de 14 de April (1928).

[20] The latter (Lei nº 19/2002 de 31 de Julho) also revised the Article 3 of the Law of 1995: with the most unfortunate consequence that nowadays the only general Portuguese law on animal rights includes a provision (Article 3, 4) that expressly allows the slaughter of bulls in the arena!

IV. MAIN POINTS OF CONTENTION

A. Transportation and Slaughter in the Meat Industry

In spite of an abundance of norms – more than enough, in fact, if they were all applied and obeyed – mainly of EU origin, news of abuse and inhuman treatment of animals in the meat industry still reach the mass media with alarming frequency, sometimes causing a big, but temporary, commotion. The usual invisibility and routine character of what goes on in the meat industry, added to its economic relevance, makes it difficult to generate a public awareness of the main issues that may arise, and make it all the more difficult to raise public support to regulations intended to improve the standards of compliance and monitoring in the meat industry. This means that the problem here lies in the restricted efficacy of State action in enforcing the rules that are already in place – be it because of leniency or of regulatory capture by the industry, a kind of impasse that typically can only be overcome by public awareness of the need for stricter supervision and accountability.

B. Bullfights

Portuguese politics is still a hostage of the bullfighting tradition and the bullfighting industry, although things are not so serious as they are in Spain. As we saw, embarrassments with enforcing the law and maintaining public order, even at the restricted level of a minuscule village whose alleged traditions ran counter to the legal prohibition, forced the Government to make concessions to the bullfighting lobby, who for long has pressured for the introduction of the "Spanish bullfighting" with the slaughtering of the bulls in the arena.

It can be said that the aforementioned episode was by far the most disheartening defeat of the whole evolution toward implementation of a Portuguese legal system of protection of animal welfare. But on the other hand, the Portuguese bullfighting circuit is quickly losing social, cultural and political weight. There are still powerful local constituencies in the South of Portugal (who still claim the right to promote all over Portugal the full Spanish *corrida*, with *picadores* and *matadores*), but they are narrowing quite fast, at least in demographic terms; we can even say that, a bit surprisingly, economic support for the bullfighting business comes increasingly nowadays from tourist attendance.

Despite the setback in the *Barrancos* case, in which neither the law nor court injunctions were efficient, precedents have not been set and the example is not bound to spread – in large part because there's sufficient awareness in international public opinion about this particular topic, making it possible to raise an international outcry at short notice, something that Portuguese politicians profoundly dread. As for bullfighting itself, its abolition seems beyond the horizon, mainly because of tourist interest and of spillovers from the international leverage of the Spanish bullfighting industry.

C. Circuses and Zoos

Portuguese Animal Advocacy Associations have been very active in monitoring animal abuse and inhuman conditions in circuses and private zoos. There are no powerful lobbies in these areas, so we can conclude that problems simply stem from a lack of proper regulation and administrative monitoring; additionally, it can be expected that opportunities for abuse of animals in circuses and zoos can be diminished through an appropriate education of children (making them more sensitive to the suffering that may be involved in the treatment of animals as toys or as anthropomorphic cartoon characters).

D. Pigeon shooting[21]

In a famous court ruling in 2000 – and also a major setback in the progress of Animal Advocacy – the Portuguese Supreme Court found that pigeon shooting was no violation of the Law of 1995, even though it had been proved that unnecessary suffering was inflicted on pigeons, not only in the sense that pigeons were shot at "for sport" (i.e. for the thrill of shooters), but also in the sense that, for aiming purposes, pigeons could be replaced by plastic targets.[22] Again, it is to be lamented that eminent legal scholars assisted with their authority toward this patently abrogating judicial interpretation of the law.

If an opportunity arrives for revising the Law of 1995, the specific interdiction of pigeon shooting is high on the agenda of the Portuguese Animal Advocacy Associations; moreover, the incredibly stretched interpretation of the Supreme Court in 2000 had the unexpected consequence of convincing many people, quite a few politicians included, of the need of legal reform in this matter. Still, there remains a small but active and vociferous lobby in Parliament, so there lays ahead a vigorous political struggle.

D. Dog Fights and Dangerous Pets

The raising of dangerous pets and the organizing of dog fights are recent social developments in Portugal, and are closely connected with marginal activities – ghettos of immigrants and organized gangs – although there are worrying developments in the mainstream of urban fads. The implementation of very recent legislation about pets,[23] added to the fact that these phenomena are very much confined socially and have no roots in Portuguese traditions, make them easy targets for prevention and repression, and it can be said that in this area we have a satisfactory level of law enforcement.

Still, the pet industries, and especially the dog breeders who try to take advantage of the current fashion for attack dogs, try to organize politically, in order to oppose what they allege to

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[21] Jorge Bacelar Gouveia, *A Prática de Tiro aos Pombos, a Nova Lei de Protecção dos Animais e a Constituição Portuguesa*, 2000 REVISTA JURÍDICA DO URBANISMO E AMBIENTE 13 (2000).

[22] Acórdão de 13-12-2000 Proc. N.º 3282/00 Supremo Tribunal de Justiça.

[23] Decretos-Leis n^{os} 312/2003, 313/2003, 314/2003, 315/2003 de 17 de Dezembro.

be an infringement on their economic freedom, what they describe as a menace to simple laws of supply and demand.

(1) Some Possibilities of Improvement: Civil Code Reform, Constitutional Revision

One should not overlook the cultural impact of legal reform in these matters. Scattered, casuistic or piecemeal legal improvements may do the job and they certainly have their pragmatic advantages (mainly as steps of social engineering causing the least political resistance), but they do not have the cultural/ideological impact that may be needed to accelerate that moral revolution without which all legal improvements in animal welfare and animal rights may turn out to be merely contingent and reversible. That's the main reason why there has been such an insistence, at least in European countries of civil law tradition, and Portugal among them, in the need to dignify the founding principles of the Protection of Animals by means of their inclusion in the basic laws of the land, the Constitution and the Civil Code. Of the two, the Constitution has proven to be the most changeable: it has been subject to several revisions since its approval in 1976, whereas the Civil Code of 1966 has been subjected to only one major (and even then, partial) revision.

There has been a hope that, following the example set by the recent revision of the German Constitution, the next revision of the Portuguese Constitution will eventually allow for the explicit recognition of animal rights – on generic terms, namely the right to protection on the part of the Portuguese Republic, based on the recognition of the intrinsic worth of animals as sentient individuals, capable both of a significant existence and of suffering. That is, a formal recognition that animals are not things, mere inert and fungible commodities that can be put entirely at the mercy of human interests, and that there are *fundamental* limits beyond which individual non-human animals cannot be taken to be mere *means* to human *ends*.

Fundamental protection obviously does not mean that animal rights are put precisely on a par with human rights, or that they cannot be sacrificed in case of a serious clash with human interests. In my view, animals do not have a fundamental right to life, although they certainly should have, in all occasions, a right to non-suffering. In case of need, e.g. in case of hunger, it seems unequivocally justifiable to slaughter animals, provided suffering is minimized; and the same could be said in situations where the killing of animals is the only available means of avoiding destruction or predation, or of preserving human health or human lives. Instead, fundamental protection simply means that Portuguese citizens explicitly recognize not only the need for effective respect of the interests of non-humans as the fulfillment of an ethical imperative, a standard of the progress toward higher levels of civilization and humanity; but recognize also the need of laying the foundations of such an effective protection on the Constitution itself, on the grounds over which can be erected the whole legal system of protection of animal interests.

As for the Civil Code, a revision is in the works, but it is to be expected that it will take quite a while before it's over. In what concerns the status of animals, the evolution should point to a definition of non-human animals as a *tertium genus* between humans and things[24], following the steps of recent revisions of some civil codes in Europe, paramount among them the German Civil Code, the Bürgerliches Gesetzbuch (BGB), which now states in its § 90a that "Animals are

[24] As in the new version of Article 524 of the FRENCH CODE CIVIL.

not things. Special laws protect them. In the absence of rules to the contrary, the rules applicable to things are also applicable to animals."[25] As corollaries, limitations should be introduced to the exercise of property rights by the owner of animals, subjecting that exercise to the rules of animal protection;[26] the limitation of liability should not apply to nuisance caused to animals,[27] seizure should not extend to domestic animals,[28] bequests to animals should be allowed as duties of care toward their non-human beneficiaries,[29] among others.

What seems crucial is the fact that the incorporation in the Civil Code of rules about animal rights and animal welfare would certainly have wide-ranging consequences, not only directly influencing other areas of private and public law (think of the impact on rules of legal standing, or the impact on penal rules), but also surely allowing those issues a much more prominent place in the University *curricula*, in the education of the coming generations of jurists, judges, lawyers, bureaucrats, politicians – in what would amount to a crucial step in the direction of a true moral revolution, a profound and long-lasting (and less contingent) improvement on the legal status of non-human animals.

V. Conclusion: Is There a Kuznets Curve for Animal Welfare, or Must We Keep on Struggling for a Moral Revolution?

Last year when I published my book on animal rights,[30] I wondered, quite skeptically, if it would make any difference in the progress of that field, either in the context of the University or in the context of Portuguese society at large. Not intending to be neither naïve nor defeatist, I came up with a somewhat ambiguous answer: on the one hand, no, it will *cause* no changes, but on the other hand, the book is in itself a symptom of a cultural context that has already evolved somewhat, it is *caused* by a previous change that allows Portuguese academics to openly debate, with the utmost seriousness, these new issues and challenges to legal theory. In other words, a long road lies ahead, but we already have come a long way – the mere fact that the issue has been subject to a book-length study, whatever may be the merits of that study, can be used as evidence to that.

A. The Relationship Between Cultural/Economic Progress and Animal Welfare

Let me therefore conclude with two positive notes. First, I think it is possible to observe a relationship between cultural and economic progress, on one hand, and animal welfare, on the other. Contrary to the radical litany that sees fundamental evil in some (if not most) aspects of human progress, I try to be an optimist, upholding that not only the worst moments of generalized abuse on non-human animals may be over in the majority of developed countries (let

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[25] "Tiere sind keine Sachen. Sie werden durch besondere Gesetze geschützt. Auf sie sind die für Sachen geltenden Vorschriften entsprechend anzuwenden, soweit nicht etwas anderes bestimmt ist," a rule almost identical to the § 285a of the Austrian Allgemeines Bürgerliches Gesetzbuch (ABGB).

[26] Following the example set by the § 903 of the BGB.

[27] Following, in this case, the lead of the § 251 of the BGB.

[28] As in the §§ 765a and 881c of the German Zivilprozessordnung and the § 250 of the Austrian Executionsordnung.

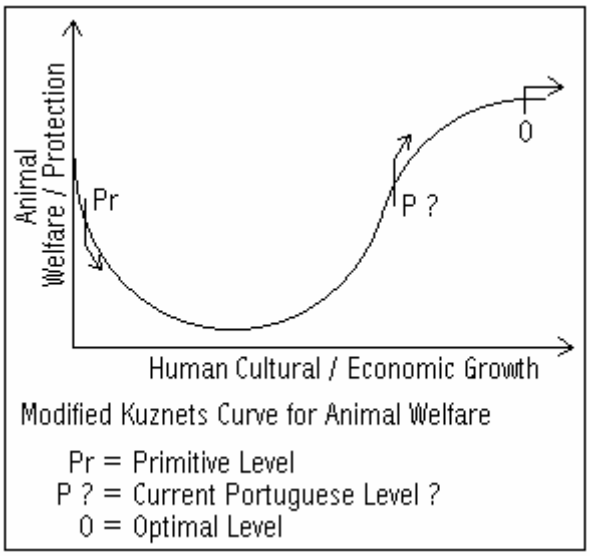
[29] As in the 2002 version of the Article 482, 4 of the Swiss ZBG.

[30] Araújo, *supra* note *2*.

us think of the pervasive exploitation of animal effort in farms, or the massive use of animals in the battlefields, or the "tragedy of the commons" in fisheries and in big game hunting, all not so long ago)[31], but also that non-human animals are sharing, and can continue to share in the future, the benefits of human progress (think of scientific developments applied to the protection of species, and the use of scientific therapies to improve the welfare both of domestic and wild animals).

I'm a firm believer that the "Environmental Kuznets Curve," that has for quite a while demonstrated the relationship between economic growth and successive periods of environmental degradation and improvement – showing that the initial efforts at economic growth tend to sacrifice environmental quality, but in the end growth itself gives us the means to improve environmental standards, sometimes beyond their starting levels at "zero growth" – can be extrapolated to the field of animal welfare, meaning that the sacrifice of animal welfare may have been, historically, an inevitable byproduct of socio-economic progress, that things had to get worse before they began improving again, something I suggested earlier when I mentioned an urban culture that is becoming more and more sensitive to issues of animal welfare, more willing to connect human fulfillment with the realization that non-human welfare is being satisfactorily preserved.

Let me present a modified form of an "Environmental Kuznets Curve," a mere rhetorical-metaphorical device, I must admit, just to show where I think we can locate the uphill struggle that the Portuguese legal system still faces, without disregarding all that has been achieved in the meantime (with and without EU and international help).



Does this mean that I'm willing to adopt a mechanist-determinist view on the legal evolution of animal protection, willing, i.e., to admit a more than merely metaphorical nature to the "Environmental Kuznets Curve"?[32] Certainly not: I insist, I'm no subscriber of a fatalistic

[31] I'm aware that I may be overlooking the invisible suffering in the *eternal Treblink*a of the meat industry, but the improvement of awareness even in those fields leaves us room for hope.

[32] *See* Simon Kuznets, *Economic Growth and Income Inequality*, 49 AM. ECON. REV. 1-28 (1955). *See also* James Andreoni & Arik Levinson, *The Simple Analytics of the Environmental Kuznets Curve*, 80.2 J. PUB. ECON. 269-286 (2001); Alain Bousquet & Pascal Favard, *Hétérogénéité des Agents et la Relation Pollution-Revenu*, 52.6 REVUE ÉCONOMIQUE, 1185-1203 (2001); Susmita Dasgupta et al., *Confronting the Environmental Kuznets Curve*, 16.1 J.

Philosophy of History. Simple common sense says the future is at our mercy, and personally I feel as distant of radical activism as of a contemplative conformism that would wait things to happen for themselves, according to some kind of superhuman logic.

B. Scholars as Guardians of Social Hope

Finally, I also think scholars are the guardians of social hope. Even in the midst of the worst difficulties and the bleakest outlooks, society expects that scholars will be the last members of society to despair of the possibility of improving human experience and coexistence through the progress of ideas and of cultural habits. Let this testimony of an academic from a far country, a country that has a long way to go in the improvement of legal protection of animal welfare, be, in spite of everything, a proclamation of hope – the unashamedly anthropocentric hope that the betterment of human condition is at hand, that a moral revolution is close by, in the ironic meditation and self-redescription of the animals we are, through the solidarity we may feel for fellow non-human creatures.

In my book, I resorted quite often to the bright thoughts of my favorite philosopher, Richard Rorty. And so it seems fitting that I end this paper with two passages from *Contingency, Irony and Solidarity*:

> *Simply by being human we do not have a common bond. For all we share with all other humans is the same thing we share with all other animals – the ability to feel pain.*[33]
>
> *The self-doubt seems to me the characteristic mark of the first epoch in human history in which large numbers of people have become able to separate the question 'Do you believe and desire what we believe and desire?' from the question 'Are you suffering?'*[34]

ECON. PERSP 158ff. (2002); SANDER M. DE BRUYN, ECONOMIC GROWTH AND THE ENVIRONMENT: AN EMPIRICAL ANALYSIS (2000); Gene M. Grossman & Alan B. Krueger, *Economic Growth and the Environment*, 110.2 Q.J. ECON. 353-377(1995); Nico Heerink et al., *Income Inequality and the Environment: Aggregation Bias in Environmental Kuznets Curves*, 38.3 ECOLOGICAL ECON. 359-367(2001); John A. List & Craig A. Gallet, *The Environmental Kuznets Curve: Does One Size Fit All?*, 31 ECOLOGICAL ECON. 409-423 (1999); Thomas M. Selden & Daquing Song, *Environmental Quality and Development: Is There a Kuznets Curve for Air Pollution Emissions?*, 27.2 J. ENVTL. ECON. & MGMT. 147-162 (1994); Mariano Torras & James K. Boyce, *Income, Inequality, and Pollution: A Reassessment of the Environmental Kuznets Curve*, 25 ECOLOGICAL ECON. 147-160 (1998); MICHAEL P. VOGEL, ENVIRONMENTAL KUZNETS CURVES: A STUDY ON THE ECONOMIC THEORY AND POLITICAL ECONOMY OF ENVIRONMENTAL QUALITY IMPROVEMENTS IN THE COURSE OF ECONOMIC GROWTH (1999).

[33] RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 177 (1999).

[34] *Id*. at 198.

A SURVEY OF AGREEMENTS AND FEDERAL LEGISLATION PROTECTING POLAR BEARS IN THE UNITED STATES

JAMIE M. WOOLSEY

I. INTRODUCTION

Polar bears are found in the Artic region and live in close association with polar ice in the countries of Canada, Greenland, Norway, Russia, and the United States.[1] The worldwide population is currently estimated at 22,000 to 25,000.[2] Within the United States, polar bears are found in the wild exclusively in Alaska, which has two stocks. The western Alaska stock is shared with Russia in the Chukchi/Bering Sea, and the northern Alaska stock of the Southern Beaufort Sea is shared with Canada.[3] Because polar bear stocks often cross national boundaries, the five Artic nations that share polar bears recognized decades ago that any efforts to protect and conserve polar bears would have to cross national boundaries as well. Cooperation among these nations remains the only effective means of protecting polar bears from the threats they face from global warming, habitat destruction, excessive sports hunting, and harm caused by increasing oil and gas industry in Alaska.

International concern for polar bears due to a dramatic increase in polar bear hunting in the 1950s and 1960s led the Artic nations to negotiate the Agreement on the Protection of Polar Bears (at times referred to as "Agreement") in 1973.[4] Although this agreement left the implementation of its terms up to each of the respective signatory nations, its objectives and policy goals have led to federal legislation protecting polar bears in the United States, further international agreements between the United States and Russia, and recently, a cooperative management agreement between the native people of Canada and the United States. As such, the Agreement on the Conservation of Polar Bears has served as a guiding force in the continued international interest of polar bear protection.

Polar bears have no natural predators, and they do not appear to be prone to death from disease or parasites.[5] The most significant source of mortality is from humans, which has led

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[1] *Species of Special Concern*, MMC ANN. REP. 91 (2000), *available at* MMC, http://mmc.gov/reports/annual. *See also* Marine Mammals; Incidental Take During Specified Activities, 68 Fed. Reg. 66,744 (Nov. 28, 2003) (to be codified at 50 C.F.R. pt. 18).

[2] *See Marine Mammal Management: Polar Bear*, FWS, *at* http://alaska.fws.gov/fisheries/mmm/polarbear/pbmain.htm.

[3] *Species of Special Concern*, *supra* note 1; *and* 68 Fed. Reg. 66,744, *supra* note 1.

[4] Agreement on the Conservation of Polar Bears, Nov. 15, 1973, 27 UST 3918.

[5] 68 Fed. Reg. 66,744, *supra* note 1.

international agreements and federal legislation to focus on restricting human activities that affect polar bears.[6] For example, since the early 1970s, the Agreement on the Conservation of Polar Bears and the Marine Mammal Protection Act (MMPA) have restricted polar bear hunting to Alaska Natives in the United States. Bears used by Alaska Natives are for subsistence purposes, as well as the traditional making of handcrafts and clothing. Recent amendments to the MMPA, however, have allowed polar bear trophies sports hunted in Canada to be imported, which remains an evolving legal issue unique to polar bears. This article will discuss the evolution of the sports trophy provisions within MMPA, as well as other provisions relevant to polar bears. It will also survey the primary international agreements that focus on polar bear protection and affect law and policy within the United States. These agreements include the Agreement on the Conservation of Polar Bears, the US-Russia Additional Agreement on the Conservation and Management of the Alaska Chukotka Polar Bear Population, as well as the Inupiat and Inuvialuit Polar Bear Management Agreement.[7]

II. AGREEMENT ON CONSERVATION OF POLAR BEARS

During the 1950s and 1960s, international concern began to grow for the welfare of polar bears due to the number of bears being killed by hunters, mainly for their hides.[8] In September 1965, a scientific meeting was arranged at the University of Alaska in Fairbanks to discuss the conservation and protection of polar bears.[9] Three years later, the Polar Bear Specialist Group (PBSG) was established as a division of the International Union for the Protection of Nature (IUCN).[10] The PBSG presently has 12 members, and is made up of research scientists from the five nations in the Artic that have polar bears within their borders. The group meets every 3-4 years to discuss matters pertaining to research and management of polar bears throughout their area and to issue recommendations and resolutions for further polar bear protection. The last meeting was held in Nuuk, Greenland in June 2001.[11]

Shortly after the PBSG was established, the Agreement on the Conservation of Polar Bears was signed in Oslo, Norway in 1973.[12] The Agreement was entered into by the governments of Canada, Denmark, Norway, the former Soviet Union, and the United States. The United States Senate gave its advice and consent to the ratification of the Agreement on September 15, 1976. President Gerald Ford then ratified it on September 30, 1976 and the Agreement on the Conservation of Polar Bears entered into force for the United States on

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[6] *Id.*

[7] Although polar bears are also listed in Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), this article will not discuss its provisions as it is focused on the international agreements specific to Polar Bears.

[8] MARINE MAMMALS MANAGEMENT, U.S. FISH & WILDLIFE SERVICE, CONSERVATION PLAN FOR THE POLAR BEAR IN ALASKA 6, *available at* http://alaska.fws.gov/fisheries/mmm/polarbear/pdf/THEFINALplan.pdf.

[9] *See* POLAR BEAR SPECIALIST GROUP, http://pbsg.npolar.no. The Bear Specialist Group (BSG) was established in 1988, in response to conservation concerns for the terrestrial bear species. In 1992 the BSG initiated an Action Plan for Bears of the World, and invited the PBSG to participate by developing the section for polar bears.

[10] *Id.*

[11] *Id.* [Editorial note: The group met in 2005 after the writing of this article and just before publication.]

[12] Agreement on the Conservation of Polar Bears, Nov. 15, 1973, 27 U.S.T. 3918.

November 1, 1976 when the United States deposited its instrument of ratification with the Government of Norway.[13]

All of the signatory nations of the Agreement on the Conservation of Polar Bears acknowledged their special responsibilities and special interests in the Artic Region in relation to the protection of fauna and flora found there. Specifically, they found that polar bears are a significant resource of this region that require additional protection.[14] These nations agreed that polar bear protection should be achieved through coordinated national measures.[15] For this reason, the Agreement on the Conservation of Polar Bears is politically important because it unites the nations within the Artic towards the singular goal of supporting conservation programs and protecting the interests of polar bears.[16]

The Agreement's primary article prohibits the taking of polar bears. "Taking" is defined to include hunting, killing, and capturing polar bears.[17] The signatory nations also agreed to prohibit the use of aircraft and large motorized vessels used to take polar bears, except where this prohibition is inconsistent with domestic laws.[18] Further, the Agreement requires each nation to prohibit the importation, exportation, and trafficking of polar bears or any polar bear products taken in violation of the Agreement within its territory.[19]

Exceptions to the taking provisions of the Agreement are allowed by each nation if the taking is: (a) for bona fide scientific purposes; (b) for conservation purposes; (c) to prevent serious disturbance of the management of other living resources; (d) by local people using traditional methods in exercise of their traditional rights and in accordance with the laws of that nation; or (e) wherever polar bears have or might have been subject to taking by traditional means by its nationals.[20] If polar bears are taken for conservation purposes or to prevent serious disturbances of other living things under the provisions above, the skins and other items of value cannot be made available for commercial purposes.[21]

In addition to enforcing the taking prohibitions of the Agreement, each signatory nation is required to take appropriate actions to protect polar bears and their ecosystems.[22] The nations agreed to focus special attention on denning and feeding sites, as well as migration patterns, and develop national research programs to facilitate the exchange of information between nations.[23] Although the actions required under the conservation provisions are not specified in the Agreement, it is specified that all conservation measures must be in accord with sound conservation practices based on the best scientific data.[24] It is also important to note that the

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[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] CONSERVATION PLAN FOR THE POLAR BEAR IN ALASKA, *supra* note 8, at 6.
[17] Agreement on Conservation of Polar Bears, *supra* note 12, at art. 1, sec. 2.
[18] *Id*. at art. 4.
[19] *Id*. at art. 6.
[20] *Id*. at art. 3, sec. 1.
[21] *Id*. at art. 3, sec. 2.
[22] *Id*. at art. 2.
[23] *Id*.
[24] *Id*.

Agreement allows for party nations to enact more stringent requirements if they find through research and management of the species that provisions within the Agreement are inadequate.[25]

The Agreement on the Conservation of Polar Bears is not self-enacting. Instead, it mandates that each signatory nation enact and enforce its own legislation for the purpose of giving effect to the Agreement.[26] Because the only term defined is "taking," each nation has been required to define vague terms within the Agreement independently. For example, it is unclear from the text of the Agreement what constitutes "bona fide scientific purposes," what a taking for "conservation purposes" might include, and who might qualify as a "national" allowed to take polar bears by traditional means. Originally, the Agreement was to remain in force for a period of five years, but because no signatory nation requested termination of the Agreement at the end of the five-year period, it remains in effect today.[27]

III. MARINE MAMMAL PROTECTION ACT

A. Legislative History and Introduction to the Marine Mammal Protection Act

The United States chose to implement the terms of the Agreement on the Conservation of Polar Bears with the Marine Mammal Protection Act (MMPA) of 1972.[28] Before the MMPA, legal protection of polar bears in the United States was limited to the state laws of Alaska. In 1961, Alaska adopted regulations restricting the sport-hunting season and requiring hunters to present all polar bear skins and skulls for tagging and examination.[29] Female polar bears and cubs were also protected under the laws of Alaska, and preference was given to subsistence hunters.[30] Passage of the MMPA transferred the management of polar bears to the federal government.

The legislative history of the MMPA expresses Congress' deep concern for the mistreatment of marine mammals and the desire for their increased protection. This concern is expressed best as follows:

> Recent history indicates that man's impact upon marine mammals has ranged from what might be termed malign neglect to virtual genocide. These animals, including whales, porpoises, seals, sea otters, polar bears, manatees and others, have only rarely benefited from our interest; they have been shot, blown up, clubbed to death, run down by boats, poisoned, and exposed to a multitude of other indignities, all in the interests of profit or recreation, with little or no consideration of the potential impact of these activities on the animal populations involved.[31]

As such, Congress sought the middle ground with the MMPA, recognizing that "man's thumb" was already on the balance of nature, and to remove it altogether might be far more cruel and

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[25] *Id*. at art. 6, sec. 2.
[26] *Id*. at art. 6, sec. 1.
[27] *Id*. at art. 5, sec. 5.
[28] Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1421h (1972).
[29] *Species of Special Concern*, *supra* note 1, at 91.
[30] *Id*.
[31] H. R. REP. No. 707 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4144.

damaging than the effects of a responsible management program.[32] By enacting the MMPA, Congress intended to prevent marine mammals from diminishing beyond the point at which they cease to be a significant functioning element in their ecosystem or from becoming "depleted."[33] A species is designated as depleted when it falls below its optimum sustainable populations (OSP).[34] "OSP" is defined as "the number of animals which will result in the maximum productivity of the population of the species, keeping in mind the optimum carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element."[35] Congress found that marine mammals have proven themselves to be resources of great international significance, and that they should be protected and encouraged to develop to the greatest extent possible.[36] Once a species has been designated as depleted, a conservation plan is developed to guide research and management actions to restore the health of the species.[37]

The MMPA of 1972 mandated certain measures be taken immediately to replenish any species or population stock that had already diminished. The most important of these measures is the moratorium on "taking" marine mammals, but it also includes a ban on the importation of marine mammals and marine mammal products into the country.[38] The importation provisions of the MMPA play a particularly important role in the protection of polar bears because hunters often wish to import polar bear trophies, hides, rugs, and full mounts from Canada into the United States. Recent amendments to the MMPA have established specific criteria to allow these types of imports.

B.Taking Provisions under the MMPA

The term "take" under the MMPA "means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal."[39] What constitutes a "taking" and how to interpret this term in light of the statute and agency regulations has evolved through the years. On one hand, courts have limited the taking provisions by allowing sometimes violent measures to be used to deter marine mammals from property. Congress affirmed this finding by specifically authorizing deterrence measures in certain circumstances under the 1994 amendments to the MMPA. On the other hand, the taking provision has been strengthened over time by including feeding as a form of taking by harassment. The harassment provisions of the MMPA distinguish it from the Agreement on the Conservation of Polar Bears, as well other international agreements, that limit "taking" to hunting, killing, or capturing polar bears.

The moratorium on taking has never been absolute. For example, an exemption from the taking provisions of the MMPA was created for Alaska natives.[40] Indians, Aleuts, or Eskimos who live on the North Pacific Ocean or the Artic Ocean may take marine mammals, including polar bears, if the taking is done for subsistence purposes, or for the purposes of creating and

[32] *Id.* at 4152.
[33] 16 U.S.C. § 1362, sec. 3(1).
[34] 16 U.S.C. § 1362, sec. 3(9).
[35] *Id.*
[36] Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027. *See also* 16 U.S.C. § 1361.
[37] 16 U.S.C. § 1383(b), sec. 115(b)(1)(C)
[38] 16 U.S.C. § 1371, sec. 101(a).
[39] 16 U.S.C. § 1362(11)A.
[40] 16 U.S.C. § 1371, sec. 101(b).

selling authentic native articles of handcrafts and clothing. In each case, the MMPA requires that the taking not be done in a wasteful manner.[41]

The MMPA does not grant any federal power to regulate the taking of polar bears under the Alaska Native exception to the moratorium unless it has been determined that the species is depleted.[42] Even if the species becomes depleted, the only thing the MMPA provides is that regulations may be established by the Secretary of the Interior or Commerce consistent with the purposes of the Act.[43] However, a 1994 amendment to the MMPA included provisions for the development of cooperative agreements between United States Fish and Wildlife Service (FWS) and Alaska Native organizations to conserve marine mammals and to provide for the co-management of subsistence use by Alaska Natives.[44] Agreements entered into under this section may include grants to Alaska Native organizations for collecting and analyzing data on marine mammal populations, monitoring the harvest of marine mammals for subsistence use, research, and for developing co-management structures with Federal and State agencies.[45]

Exceptions to the moratorium are also allowed through the issuance of permits, and may be granted for scientific research, public display, or photography for educational or commercial purposes.[46] Permits have also been recently issued to oil and gas industry for exploration, development, and production in Alaska for the nonintentional, "incidental" taking of polar bears and walruses.[47] The power to issue permits is relegated to the Secretary of Commerce and the Secretary of the Interior. The Secretary of Commerce, through the National Oceanic and Atmospheric Administration (NOAA), is responsible for the management and protection of whales, dolphins, porpoises, and seals under the MMPA.[48] The Secretary of the Interior, through the FWS, is responsible for the remaining animals protected by the MMPA, namely walruses, sea otters, polar bears, and manatees.[49] An important role of the both agencies is that they are required under the MMPA to report periodically on the status of marine mammal stocks within their jurisdiction.[50] Each stock assessment includes a description of the stock's geographic range, a minimum population estimate, current population trends, current and maximum net productivity rates, optimum sustainable populations levels, and estimates of annual human-caused mortality and serious injury through interactions with commercial fisheries and subsistence hunters.[51]

The MMPA encourages the public to participate fully in the agency decision-making process for permit applications.[52] Each Secretary is required to publish notice in the Federal Register to invite comment by interested parties before a permit is issued.[53] Under certain

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[41] *Id*.
[42] 16 U.S.C. § 1371, sec. 101(b)(3)
[43] *Id*.
[44] 16 U.S.C. § 1388, sec. 119.
[45] *Id*.
[46] 16 U.S.C. § 1371, sec. 101(a)(1).
[47] 68 Fed. Reg. 66,744, *supra* note 1.
[48] *Id*.
[49] *See* 1972 U.S.C.C.A.N 4144, *supra* note 31, at 4146.
[50] 16 U.S.C. § 1386, sec. 117.
[51] *Id*.
[52] Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027, 1035; *see also* 1972 U.S.C.C.A.N. 4144, *supra* note 31, at 4151.
[53] *Id*.

circumstances, the Secretary may also grant an interested party the opportunity for a hearing.[54] To assist the Secretaries with policy, the MMPA created a three-member panel called the Marine Mammal Commission. The Marine Mammal Commission is charged with monitoring the implementation of the MMPA, recommending policies to the two secretaries, and undertaking research as necessary.[55]

In 1994, the Ninth Circuit Court of Appeals considered the definition of "taking" under the MMPA in *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1994). In this case, the Court found a fisherman who shot at porpoises with a rifle did not constitute a taking under the MMPA. The defendant Hayashi and his son were fishing when a group of porpoises began to eat tuna off their fishing lines.[56] In an attempt to scare the porpoises away, Hayashi fired two rifle shots into the water.[57] The animals were not hit by the rifle shots, but Hayashi was subsequently charged with knowingly taking a marine mammal in violation of the MMPA.[58]

Under the definition of "taking," the Court of Appeals concluded that "to harass" was the only action that could possibly apply to Hayashi's case.[59] At the time of Hayashi's conduct, however, harassment was not defined in the MMPA or any other regulation.[60] The Court of Appeals interpreted harassment under the MMPA to involve a "direct and significant intrusion" upon normal marine mammal behavior.[61] It found that the MMPA did not reach Hayashi's action because it did not disrupt "normal" or "natural" behavior.[62] Namely, it was not natural for the porpoises to feed off fishing lines.[63]

The Court of Appeals also concluded that the MMPA's prohibition against taking by disturbing is not extended to marine mammals acting in ways that endanger human life or property, an important provision included in other international agreements as well.[64] According to the Court:

> Under such a broad interpretation, anyone who acted to prevent or in any way interfered with any marine mammal activity would face potential criminal prosecution. Nothing could legally be done to save a modern-day Jonah from the devouring whale, or to deter a rampaging polar bear from mauling a child. Neither could a porpoise intent on swimming into severely contaminated waters, or into the propellers of a motor boat, be diverted by the selfless actions of a Good Samaritan.[65]

In the 1994 Amendments to the MMPA, Congress created authorization for persons who found themselves in the same position as Mr. Hayashi to deter marine mammals from damaging

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[54] *Id.*
[55] 16 U.S.C. § 1401, sec. 201
[56] United States v. Hayashi, 22 F.3d 859, 861 (9th Cir. 1994)
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* at 864.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*

property. While these amendments include a statutory definition of "harassment," they do not incorporate the Ninth Circuit's strict requirement of "significant intrusion" in all cases. The prohibitions of the MMPA as amended do not apply to the use of measures: (a) by the owner of fishing gear or catch, or an employee or agent of such owner, to deter a marine mammal from damaging the gear or catch; (b) by the owner of other private property, or agent, bailee, or employees of such owner, to deter a marine mammal from damaging private property; (c) by any person, to deter a marine mammal from endangering personal safety; or (d) by a government employee, to deter a marine mammal from damaging public property, so long as such measures do not result in the death or serious injury of a marine mammal.[66]

Under the MMPA, intentional killing continues to be prohibited and acts of deterrence may not cause serious injury or death to marine mammals. Intentional lethal taking is explicitly prohibited, except if such taking is "imminently necessary in self-defense or to save the life of a person in immediate danger."[67] Congress also added an exception to the taking provision which addressed the concern of the Ninth Circuit in *Hayashi* that absurd results could result from such a broad interpretation. The "Good Samaritan" exception allows a taking where it will avoid serious injury, additional injury, or death to a marine mammal entangled in fishing gear or debris as long as reasonable care is exercised and the animal is released safely.[68] The definition of "harassment" was also clarified in the 1994 Amendments and:

> means any act of pursuit, torment, or annoyance which- (i) has the potential to injure a marine mammal or marine mammal stock in the wild [the MMPA calls this Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption off behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].[69]

C. Incidental Takings of Polar Bears by Oil and Gas Industry

The MMPA gives the Secretary of the Interior, through the FWS, the authority to allow the incidental, but not intentional, taking of a small number of marine mammals in response to requests by U.S. citizens engaged in a specified activity, other than commercial fishing, in a specified geographical region.[70] Since 1993, the oil and gas industry has sought and obtained authorization from the FWS for the incidental taking of marine mammals in relation to its year-round exploration, development, and production operations in the Beaufort Sea and northern coast of Alaska.[71]

In order to permit incidental takings by industry, the FWS evaluates each request to determine, based on the best available scientific evidence, whether the total taking will have a "negligible impact" on polar bears.[72] This type of taking may also not have an "unmitigable

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[66] 16 U.S.C. § 1371(a)(4)(A).
[67] 16 U.S.C. § 1371(c).
[68] 16 U.S.C. § 1371(d).
[69] 16 U.S.C. § 1362.
[70] 16 U.S.C. § 1371(a)(5)(A).
[71] 68 Fed. Reg. 66,744, *supra* note 1.
[72] 54 Fed. Reg. 40,338, sec. 18.27(c).

adverse impact" on the availability of such species or stock for subsistence uses.[73] "Negligible impact" has been defined as "an impact resulting from specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates or recruitment of survival."[74] "Unmitigable adverse impact" means:

> an impact resulting from the specified activity (1) that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by (i) causing the marine mammals to abandon or avoid hunting areas; (ii) directly displacing subsistence users; or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.[75]

If the FWS cannot make a finding that the total taking will have a negligible impact on polar bears or will have an unmitigable adverse impact on polar bear availability for subsistence uses, a negative finding will be published in the Federal Register along with the basis for denying the request.[76]

The most recent of these incidental taking authorizations was issued to the Alaska Oil and Gas Association (AOGA) on behalf of its members, which include various pipeline and oil companies. The FWS issued its Letter of Authorization for industry activities on November 23, 2003 and the authorization remains in effect through March 28, 2005.[77] The request by the AOGA was for regulations on the nonlethal incidental taking of a small number of polar bears and walruses. After a detailed assessment of noise disturbances, potential physical obstructions to the movement of polar bears, the potential for polar bear-human interactions, and oils spills, the FWS concluded that any taking likely to occur would have a negligible impact on polar bears.[78] The regulations do not authorize any intentional taking of polar bears and note that the industry activities may be restricted to specific locations to protect pregnant polar bears during denning activities.[79] Each activity covered by the authorization also requires a site-specific polar bear interaction plan.[80]

The authorization also found that oil and gas industry activities would not have an unmitigable adverse impact on the availability of polar bears for subsistence purposes. Not only did the FWS find that the Beaufort polar bear population is distributed throughout this range, but that they typically occur in low numbers in coastal and near shore areas where most industrial activities occur.[81] Additionally, because the native people of Alaska who hunt polar bears generally limit hunting to the ice-covered season, industry activities were expected to have a negligible impact on the distributions, movement, and numbers of polar bears for these local

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[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] 68 Fed. Reg. 66,744, *supra* note 1, at 66,745.
[79] *Id.*
[80] *Id.*
[81] *Id.*

users.[82] Since oil and gas industry activities are likely to increase their presence and activities in the Artic in the future, it is likely that these incidental take permits will continue to be issued and the effects of industry on polar bears and their environment need to be further evaluated.

D. Importation of Polar Bear Sports Trophies

Along with the taking provisions of the MMPA, Congress sought to protect marine mammals by restricting importation of marine mammals and marine mammal products into the United States. The importation restrictions reflect the congressional decision that a denial of import privileges is an effective method of protecting marine mammals in other parts of the world.[83] In 1994, the MMPA was amended to allow the Secretary of the Interior to issue permits to import sport-hunted polar bear trophies from Canada, provided that certain findings were made.[84] The permits limited importation to polar bear parts (other than internal organs) that were taken, but not imported, prior to the date of enactment of the MMPA amendments of 1994.[85]

A primary requirement for an applicant under the 1994 amendments was a showing of proof that the polar bear was legally harvested in Canada. After this showing was made by the applicant, the Secretary could issue the permit if it was found that: (a) Canada had a monitored and enforced sport hunting program consistent with the purposes of the Agreement on the Conservation of Polar Bears; (b) Canada had a sport hunting program based on scientifically sound quotas ensuring the maintenance of the affected population stock at a sustainable level; (c) the export and subsequent import were consistent with the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora and other international agreements and conventions; and (d) the export and subsequent import were not likely to contribute to illegal trade in bear parts.[86] According to a congressional report, the specific criteria in the 1994 amendments for polar bear imports were promulgated to ensure that imports of polar bear trophies would not increase hunting demand in Canada, which ultimately would result in unsustainable harvest levels.[87]

On February 18, 1997 the FWS established application requirements, permit procedures, and a fee for the issuance of permits to import trophies of polar bears sport hunted in Canada, including bears taken before the enactment of the 1994 amendments.[88] The FWS found that five of the twelve Canadian polar bear management programs met the MMPA requirements and the Agreement on the Conservation of Polar Bears and could be imported.[89] An important feature of this final rule was the establishment of a $1000 permit issuance fee, in addition to a $25 processing fee, to be used for polar bear conservation activities.[90]

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[82] *Id.*
[83] Animal Welfare Inst. v. Kreps, 561 F.2d 1002, 1010 (D.C. Cir. 1977).
[84] 16 U.S.C. § 1371(a)(1).
[85] *See* Marine Mammal Protection Act Amendments of 1994, 103 Pub. L. No. 238, sec. 4, 108 Stat. 532.
[86] *Id.*
[87] H.R. REP. NO. 439 (1994).
[88] Importation of Polar Bear Trophies From Canada Under the 1994 Amendments to the Marine Mammal Protection Act, 62 Fed. Reg. 7,302 (February 18, 1997) (to be codified at 50 C.F.R. pt. 18).
[89] *Id.*
[90] *Id.* at 7,303.

Criticism of the FWS regulations by hunters as well as animal welfare groups led Congress to once again amend the MMPA in 1997 to allow imports of all polar bear trophies taken in Canada before the amendments of 1994 without the restrictions on stocks as contained in the 1997 FWS regulations.[91] On November 10, 2003, Congress amended the MMPA once again to allow hunters to import their polar bear trophies legally taken after the enactment of the 1994 amendments, but prior to the finalization of the FWS implementing regulations on 1997.[92] Presently, the FWS is accepting application from hunters for permits to import polar bear trophies legally taken prior to February 18, 1997, from Nunavut or Northwest Territories, Canada. With the 2003 amendments, Congress essentially extended the grandfathered trophies taken prior to the amendments to the MMPA in 1994 to February 18, 1997. Importation of polar bear trophies after February 18, 1997, continues to be allowed, but only from approved populations.[93]

FWS regulations define "sport-hunted trophy" in order to specify what parts of the polar bear may be imported. They also stipulate that the permit holder may only import such items for personal, noncommercial use.[94] The FWS considered congressional findings in order to develop the definition. These findings state that, "Trophies normally constitute the hide, hair, skull, teeth, and claws of the animal that can be used by a taxidermist to create a mount of the animal for display or tanned for use as a rug. This provision does not allow the importation of any internal organ of the animal, including the gall bladder."[95] The definition in the FWS regulations include parts that are traditionally considered trophy items for personal display and excludes items such as clothing and jewelry. Since the definition includes skull, teeth, bones, and baculum (penis bone), the FWS points out that these items must be marked in accordance with marking requirements for loose parts under the laws and regulations of Canada and the United States.[96]

In order to import a polar bear trophy, one must take the following steps. First, the applicant must legally take a polar bear in Canada from the permitted populations of the Southern Beaufort Sea, Northern Beaufort Sea, M'Clintock Channel (only for bears lawfully taken on or before May 31, 2000), Viscount Melville Sound, Western Hudson Bay, Lancaster Sound, and Norwegian Bay. Second, an applicant must apply for a permit from the NWS using the official publication form and pay the $25 processing fee and $1,000 permit issuance fee. Third, an applicant must obtain an export permit from the Canadian Management Authority under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[97] Fourth, polar bears may only be imported through a U.S. port designated for wildlife, although an exception to this requirement may be granted for full mounts. Finally, a wildlife inspector at the port must inspect the sports trophy.[98]

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[91] 1997 emergency Supplemental Appropriations Act for Recovery from Natural Disasters, and for Overseas Peacekeeping Efforts, including those in Bosnia, 105 Pub. L. 18, 111 Stat. 158.

[92] Department of the Interior and Related Agencies Appropriations Act, 2004, 108 Pub. L. 108, 117 Stat. 1241.

[93] *See International Affairs Permit Section*, U.S. FISH AND WILDLIFE SERVICE, *available at* http://www.fws.gov/international/permits/dmapermits.html

[94] 16 U.S.C. § 1362(11)A.

[95] H.R. REP NO. 439 (1994).

[96] 16 U.S.C. § 1362(11)A.

[97] Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, April 30, 1942, 1940 U.S.T. Lexis 85.

[98] *See Importing your Polar Bear Sport-hunted Trophy*, FWS, http://international.fws.gov/pdf/polarbearsporthunted.pdf.

E. Penalties

The MMPA establishes both civil and criminal penalty provisions.[99] A person who violates any provision of the MMPA, including a permit or regulation, may be assessed a civil penalty of $10,000 for each violation.[100] A person who *knowingly* violates any provision of the MMPA may be charged criminally. Upon conviction, a person may be fined up to $20,000 for each violation, imprisoned for up to one year, or both.[101]

Under section 1376, any vessel subject to the jurisdiction of the United States is also subject to seizure and forfeiture of its entire cargo if it is employed in the unlawful taking of any marine mammal.[102] A vessel can also be assessed a civil penalty in the amount of $25,000 for any unlawful taking.[103] To encourage the public's participation in enforcing the MMPA, the Secretary of the Treasury is authorized under the MMPA to pay up to $2,500 to any person who furnishes information which leads to the conviction for a violation of the MMPA.[104]

IV. US/RUSSIA ADDITIONAL AGREEMENT ON THE CONSERVATION AND MANAGEMENT OF THE ALASKA CHUKOTKA POLAR BEAR POPULATION

On October 16, 2000, the United States and Russia entered into the Agreement Between the Government of the United States of America and the Government of the Russian Federal on the Conservation and Management of the Alaska-Chukotka for Polar Bear Population (US-Russia Agreement) for the conservation of polar bears shared between the two countries.[105] The area covered by the US-Russia Agreement is limited to the waters and adjacent coastal areas in the jurisdiction of Chukchi, East Siberian and Bering Seas on the west extending north from the mouth of the Kolyma River and on the east, north of Point Barrow.[106] It also encompasses the southern portion of these areas to the southernmost annual formation of ice drift.[107] Within these areas, the two nations agreed to undertake all efforts necessary to conserve polar bear habitats, with particular attention to denning areas and areas of polar bears during feeding and migration.[108]

The US-Russia bilateral agreement strengthens the goals of the 1973 Agreement on the Conservation of Polar Bears and affirms the mutual interest and responsibility the United States and Russia have for the Alaska-Chukotka polar bear population.[109] On July 11, 2002, after

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[99] 16 U.S.C. § 1375.
[100] 16 U.S.C. § 1375 (a)(1).
[101] 16 U.S.C. § 1375 (b).
[102] 16 U.S.C. § 1376(a).
[103] 16 U.S.C. § 1376(b).
[104] 16 U.S.C. § 1376(c).
[105] Agreement on the Conservation and Management of the Alaska-Chukotka Polar Bear Population [hereinafter "Alaska-Chukotka Polar Bear Agreement"], Oct. 16, 2000, S. TREATY SOC. NO. 107-10 (2002).
[106] *Id.* at art. 3.
[107] *Id.*
[108] *Id.* at art. 4.
[109] *See generally* Alaska-Chukotka Polar Bear Agreement, *supra* note 105.

lengthy negotiations, President George W. Bush submitted the US-Russia Agreement to the Senate for advice and consent to ratification.[110] On July 31, 2003, the Senate gave advice and consent, provided that the Secretary of State promptly notify the Committee on Environment and Public Works and Committee on Foreign Relations if the United States and Russia modify the areas to which the agreement applies.[111]

Like the 1973 Agreement on the Conservation of Polar Bears and the MMPA, the US-Russia Agreement allows the taking of polar bears for subsistence purposes by native people.[112] As such, the US-Russia Agreement attempts to strike a balance between the subsistence needs of the native people and the protection of polar bears.[113] Unlike the 1973 Agreement, the US-Russia Agreement provides specific mechanisms for strengthening the capabilities of the United States and Russia to implement coordinated conservation measures by including specific definitions for "sustainable harvest," and more importantly, by creating the US-Russia Polar Bear Commission.[114] It also calls upon and welcomes the native people of Alaska and Chukotka to continue their involvement in the management of this polar bear population and requests their involvement in the implementation of the Agreement.[115] Furthermore, the agreement recognizes that the illegal taking, habitat loss and degradation, pollution, and other human-caused threats could compromise the continued viability of the Alaska-Chukotka polar bear population as well.

Among other things, the US-Russia Agreement allows polar bears to be taken by native people, for scientific research, for the purpose of rescuing or rehabilitating orphaned, sick, or injured animals, or when human life is threatened.[116] Further, animals held in captivity may only be placed on public display if the animals are not releasable to the wild.[117] "Native people" are defined in the US-Russia Agreement as native residents of Alaska and Chukotka as represented by the Alaska Nanuuq Commission and the corresponding Union of Marine Mammal Hunters. These residents may take polar bears for subsistence purposes, provided that: (a) the take is consistent with the 1973 Agreement on the Conservation of Polar Bears; (b) the taking of females with cubs, cubs less than one year of age, and bears in dens, including bears preparing to enter dens or who have just left dens, is prohibited; (c) the use of aircraft, large motorized vessels and large motorized vehicles for the purposes of taking polar bears is prohibited; and (d) the use of poisons, traps, or snares for the taking polar bears is prohibited.[118]

The US-Russia Agreement advances the goals of the 1973 Agreement on the Conservation of Polar Bears, but it additionally provides for implementation of its provisions through the establishment of the US-Russia Polar Bear Commission (The Commission).[119] The Commission is composed of two national sections, consisting of two members appointed by their respective nations, in order to provide for inclusion of each section a representative of the native

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[110] Letter of Transmittal, Alaska-Chukotka Polar Bear Agreement, *supra* note 105.
[111] S. REP. NO. 108-7, sec. 2 (2003).
[112] Alaska-Chukotka Polar Bear Agreement, *supra* note 105, at art. 5.
[113] *Id.* at arts. 5-6.
[114] *Id.* at art. 8.
[115] *Id.*
[116] *Id.* at art.6, sec. 2.
[117] *Id.*
[118] *Id.* at art. 6, sec. 1.
[119] *Id.* at art. 8, sec. 1.

people and the contracting nation.[120] Each section will have one vote and any decisions or recommendations require approval by both sections.[121]

The Commission will carry out the following tasks under the US-Russia Agreement: (a) promote cooperation between the United States and Russia, between the native people, and between the United States and Russia and the native people; (b) determine, on the basis of reliable scientific data, including traditional knowledge of the native people, the polar bear population's annual sustainable harvest level; (c) determine the annual taking limits not to exceed the sustainable harvest; (d) adopt measures to restrict the taking of polar bears for subsistence purposes within the framework of the established annual taking limits, including restrictions based on sex and age; (e) work to identify polar bear habitats and develop recommendations for habitat conservation measures; (f) consider scientific research programs, including jointly conducted programs, for the study, conservation, and monitoring of polar bears, and prepare recommendations for implementing such programs, in order to determine criteria for reporting polar bears taken; (g) participate in the examination of disagreements between the native people of Alaska and Chukotka on questions regarding subsistence use of polar bears, as well as their conservation, and facilitate their resolutions; (h) issue recommendations concerning the maintenance of captive, orphaned, and rehabilitated polar bears; (i) examine information and scientific data about polar bears, including information on harvested polar bears and those taken in cases where human life is threatened; (j) prepare and distribute conservation materials and reports of each Commission meeting; and finally (k) perform such functions as are necessary and appropriate for the implementation of the US-Russia Agreement.[122]

In his Letter of Submittal to the Senate for its advice and consent, President Bush explains that the United States will implement the habitat components of the US-Russia Agreement through the MMPA and other federal statutes.[123] He also states his belief that the US-Russia Agreement is consistent with current practice, but that some legislative amendments will be necessary to ensure its full implementation. He added that he is working with federal agencies to identify appropriate legislation that will be submitted separately to Congress.[124] Under its terms, the US-Russia Agreement will enter force 30 days after the two parties have exchanged written notification that they have completed their respective domestic legal procedures to bring the agreement into force.[125] For the United States, this will require ratification by the President, with the advice and consent of the Senate. However, President Bush explains that the United States will present the instrument of ratification, only after the necessary legislation is in place.[126]

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[120] *Id.* at art. 8, secs. 1-2.
[121] *Id.* at art. 8, sec. 3.
[122] *Id.* at art. 8, sec. 7.
[123] Letter of Transmittal, Alaska-Chukotka Polar Bear Agreement, *supra* note 105.
[124] *Id.*
[125] *Id.* at art.13.
[126] Letter of Transmittal, Alaska-Chukotka Polar Bear Agreement, *supra* note 105

V. INUVIALUIT AND INUPIAT POLAR BEAR MANAGEMENT AGREEMENT IN THE BEAUFORT SEA

While the MMPA prohibits the taking of polar bears within the United States, unless it is for the subsistence purposes by the native people of Alaska, it sets no limits on the number of polar bears that may be taken for this purpose. Unless a stock becomes depleted, the federal government cannot prevent populations from being over harvested. In recognition of this fact and because of their mutual historic and cultural interest in maintaining healthy polar bear populations, the Inupiat of Alaska and the Inuvialuit of Canada developed a conservation agreement for the polar bear population of the Southern Beaufort Sea.[127] The Inuvialuit-Inupiat Polar Bear Management Agreement in the Southern Beaufort Sea (Inuvialuit-Inupiat Agreement) is unique in that it actually provides more stringent rules than the MMPA. More importantly, the Inuvialuit-Inupiat Agreement is a cooperative management agreement between local native peoples who took it upon themselves to take action to protect polar bears from being over harvested. The Inuvialuit-Inupiat Agreement is enforced among the native groups, but otherwise unenforceable. For example, the Alaskan signatories of the Inuvialuit-Inupiat Agreement acknowledge that they have no authority to bind their group to any agreement that violates the exclusive federal treaty power established by the United States Constitution.[128] Instead, they state that they are simply acting as representatives of their traditional local user group of polar bears in Alaska to assist in the goals of the 1973 Agreement on the Conservation of Polar Bears.[129]

The Inuvialuit-Inupiat Agreement was signed on March 4, 2000 in Inuvik, North West Territories, Canada.[130] It superseded a previous agreement between the two groups signed in January 1988.[131] The objectives of the 2000 agreement include encouraging the "wise use" of the polar bear populations in the Southern Beaufort Sea, as well as specific intentions to protect female polar bears.[132] To maintain a healthy population of polar bears, the two groups agree to collect adequate scientific, traditional, and technical information on them in order to facilitate management decisions.[133]

To meet their conservation goals, the Inuvialuit and Inupiat agreed to: (a) protect polar bears in dens of constructing dens; (b) protect polar bears with cubs; (c) establish annual sustainable harvests, defined as harvests that do not exceed net annual recruitment from all forms of removal from the population, based on the best available scientific data; (d) prohibit the use of aircraft or large motorized vessels for the purpose of taking polar bears; and (e) deter polar bears from villages during closed hunting season (the hunting season is established as being from

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[127] Inuvialuit-Inupiat Polar Bear Management Agreement in the Southern Beaufort Sea, *available at* http://pbsg.npolar.no/ConvAgree/inuvi-inup.htm.
[128] *Id.* at art. 5, sec. c.
[129] *Id.*
[130] *Id.*
[131] *Id.* at art. 3.
[132] *Id.* at art. 2.
[133] *Id.* at art. 2, sec. d.

August 1 to May 31 in Canada and September 1 to May 31 in Alaska).[134] Like the US-Russia Agreement, the Inuvialuit and Inupiat agreed to establish a Joint Commission represented by each side to negotiate and ratify annually what allocation of takings apply to the next hunting season.[135] Each signatory to the Inuvialuit- Inupiat Agreement is to determine for itself the distribution of the harvest within its jurisdiction when these allocations are made for hunting seasons. Both sides also agreed that quotas will not be reduced from one year to the next if the full, allocated quota is not taken.[136] Additionally, polar bears threatening life or safety, including those killed in research activities, may be taken at any time of the year, but will be counted as part of the total quota allocation by the Joint Commission.[137]

In order to monitor the allocations for subsistence taking, the Inuvialuits and Inupiats agreed lastly to a system of data collection and information sharing for polar bears takings.[138] In addition to basic information regarding the sex, date, location of the taking, and the hunter's information, they agreed to collect the lower jaw or an undamaged post-canine tooth for age determination, ear tags, lip tattoos, and radio collars if present, the baculum from each male, and/or other specimens for further studies.[139] In order to conduct these studies, the groups agreed that they will first notify and consult with the other side first.[140]

VI. CONCLUSION

Polar bear protection has evolved from the Agreement on the Conservation of Polar Bears, the first international treaty specifically for the species, to include federal legislation within the United States, as well as local cooperative management agreements between native people in the Artic. To date, legislation within the United States has focused primarily on the threats to polar bears from direct takings, including sport hunting and takings for subsistence purposes, in addition to incidental takings from oil and gas industry. In the 1970s when the Agreement on the Conservation of Polar Bears and the MMPA came into force, mention of habitat protection and the more globally harmful effects of human activities in the Artic were acknowledged, but they have yet to be specifically addressed with protective legislation in the Untied States.

At the most recent meeting of the PBSG, the group noted that future challenges for conserving polar bears and their Arctic habitat will be greater than at any time in the past because of the rapid rate at which environmental change appears to be occurring.[141] The complexity and global nature of the issues will require a great degree of international cooperation and development of diverse and new approaches to address these issues. Perhaps the recent US-Russia Agreement, which includes further provisions to study and develop recommendations for polar bear habitat conservation measures, will provide the necessary changes in the MMPA or other environmental legislation to implement these programs.

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[134] *Id.* at art. 3, secs. a-k.
[135] *Id.* at art. 3, sec. d.
[136] *Id.* at art. 3, secs. d, j.
[137] *Id.* art. 3, sec. h.
[138] *Id.* at art. 5.
[139] *Id.* at art. 5, sec. b.
[140] *Id.*
[141] *See Press Release from 13th Meeting of the PBSG in Nuuk, Greenland, 2001*, PBSG, *available at* http://pbsg.npolar.no.

The PBSG also suggests that native people throughout the Arctic are uniquely positioned to observe changes in the environment. A combination of their traditional knowledge and western science might aid polar bear conservation.[142] For example, ongoing efforts to collect traditional knowledge of polar bear habitat use in Chukotka, Alaska, Canada, and Greenland are being encouraged and the results will be incorporated into future research and management.[143] If politics prevents further federal legislative change in the United States, additional cooperative agreements among native groups, like the Inuvialuit-Inupiat Agreement, might continue to develop habitat conservation and further polar bear protections that governments themselves cannot.

[142] *Id.*
[143] *Id.*

DEFINING ANIMALS AS CRIME VICTIMS

ANDREW N. IRELAND MOORE

Looking down at his complaint form, the humane investigator reviews the notes given to him by the complaining witness. The complaint reads "Defendant (Female) has many cats that appear thin, unhealthy, and have fleas. Can see bald spots on cats. House smells of urine and feces." Knowing this could be an unusual call, he exits his vehicle and approaches the door of the woman's house. Even before reaching the door, he can smell the strong scent of ammonia and see the flies that have gathered to feast on the excess feces that accompany a house full of cats. Upon gaining entry to the house, choking back a reflexive gag as the horrible smell wafts outwards, the investigator begins counting cats- 3, 5, 6, 10, 15, 25, 40. He notices they are lethargic, sneezing, and have mucus all over their faces. Moments later, one of the cats throws up a worm at his feet. He knows these cats need help. He advises the woman that she needs to remedy the situation. She has no idea what he is talking about and states that all the cats are healthy and she takes good care of them here at her rescue facility. The investigator returns to the Humane Society and begins making preparations to cite the woman for animal neglect and to seize the cats. Following the citation, and search and seizure, the investigator sends his report and evidence to the D.A.'s Office. The woman is arraigned and a trial is to occur. Months go by and trials are scheduled and rescheduled. Meanwhile, all 65 of the cats are still sitting in the Humane Society's protective custody complex running up large tabs and they are unable to be adopted. Finally, the D.A.'s Office is able to obtain a plea bargain with the woman. She does not have to serve any jail time and is made to do 15 hours of community service. The plea does not prevent her from owning any cats. Instead it allows her to own a few cats but she does have to give up ownership of the rest at the Humane Society. No one represented the cats' interests from the point of seizure. No one was able to influence how the D.A.'s office dealt with the resolution of the case. No one was able to argue about which cats had to endure living with her again.

I. INTRODUCTION

Acts of animal cruelty cause a great degree of harm to animals. As a result, animals should be afforded protections similar to those granted to other crime victims. In addition the harm that animals incur as a result of animal cruelty, animals also suffer from unfair treatment in the criminal justice process. For example, animals who have been abused do not have their interests represented in court. Instead, the state alone is able to prosecute crimes against animals. Although the crime of animal cruelty is a crime against the state, it is also a crime against the animal who has interests independent of the state's interests. Including animals as "crime victims" will provide animals the additional protections in the criminal justice system that they deserve.

In the process of prosecuting a case of animal cruelty, the State does not fully represent the interests of the animal involved. The District Attorney does not represent animals, or people for that matter, who are victims of crime; instead the D.A. represents the interests of society as a whole. Fortunately for human victims of crime, there are ways to influence the path that the criminal justice system takes in their case through crime victim legislation or crime victim amendments to state constitutions. However, animals do not have those options because they are not included in the definition of "crime victims." Like those already included in the definition,

animals who suffer harm from a crime, deserve special consideration in the criminal justice process and thus should be included in the definition of a crime victim.

This paper seeks to provide a basis for including animals in crime victim legislation. First, the paper will discuss the history of the crime victim movement. Second, it will give a brief history of how animals have been involved with the legal system and how their interests have been represented. Third, the paper will look at the roots of modern anti-cruelty legislation and its purpose. Then using, current crime victim protections, the paper will discuss which crime victim benefits should be extended to animals.

II. HISTORY OF CRIME VICTIMS' TREATMENT IN THE LEGAL SYSTEM[1]

Historically, crime victims played a very active role in criminal prosecutions.[2] During the eighteenth century, the victim of a crime could report a crime against him as well as aid in obtaining warrants and in making arrests.[3] The victim could also investigate the crime and, after an arrest was made, would provide for the prosecution of the accused.[4] Eventually, this system eroded and was replaced with a system in which the victim took a much less active role.

The new system was based on the idea that since the criminal justice system is based on a social contract--it was best to serve the interests of society rather than individual victims.[5] Punishments in the criminal system are meant to deter the actual perpetrator from committing the crime again, to make the criminal repay his debt, and to deter others from committing criminal acts as well.[6] Public prosecutors and professional police took over several of the victim's roles while the victim only remained in the system as a complainant and a witness.[7]

The public prosecutors we see in U.S. courts today are not products of English common law.[8] The English public prosecutor held reviewing power over cases brought by private parties.[9] The reviewing power was only such that he could enter a writ of *nolle prosequi* but the prosecutor's decision was not challengeable.[10] In early U.S. history, most statutes authorized the district attorney to prosecute criminal cases but did not address whether a victim, or anyone else, could prosecute cases on her own.[11] However, U.S. courts inferred from the English system that prosecutorial discretion was not reviewable.[12] Thus, "[t]he American historical error confused the power to intervene and dismiss cases already initiated by private parties with the exclusive

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[1] Attempting to explain in detail exactly what the crime victims' movement has gone through goes beyond the scope of this paper. *See generally* DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE (1999) (for a detailed account of crime victim procedures used in the criminal justice system).

[2] A crime victim is one against whom a crime is committed. *See e.g.* GA. CODE ANN. §17-17-3(11) (2004).

[3] William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649 (1976).

[4] *Id*.

[5] *Id.*

[6] *Id*.

[7] *Id*.

[8] *Id.*

[9] Abraham Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 1 (1982).

[10] *Id*.

[11] *Id*.

[12] *Id*.

power to decide whether they should be initiated at all."[13] As a result, our public prosecutors, the district attorneys, had a monopoly in deciding what actions are worthy of being pursued. Further, victims of crime were alienated and became victims of the criminal justice system as well.[14] For example, victims are no longer able to ultimately decide whether or not they wish to press charges. That decision, and those like it, are left up to the state's prosecutor and may end up leaving crime victims feeling disempowered.

The crime victims' movement has evolved in an effort to remedy the problems that are inherent in a system in which crime victims are not a party. Crime victims are not represented by the state or the defendant. This leaves crime victims in a precarious situation in which their interests are left unaccounted. Crime victims may resort to civil litigation to represent their interests. Despite civil remedies, crime victims still deserve consideration and fair treatment in the criminal justice process.

Crime victims have been successful in obtaining laws providing for consideration and fair treatment in every state. Thirty-one states have crime victim amendments written into their constitutions and the rest at least have crime victim statutes.[15] The protections included in these amendments and statutes include rape shield laws, the ability to make statements about the harm that the victim incurred at sentencing, and the right to consult with prosecutors regarding decisions in their cases.

III. HISTORY OF ANTI-CRUELTY LEGISLATION

The first legislation to protect animals from acts of cruelty by humans was enacted in 1641 by the Massachusetts Bay Colony.[16] In the Colony's Body of Liberties, section 92 states, "No man shall exercise any Tirrany or Crueltie towards any bruite Creature which are usuallie kept for man's use."[17] Although there is documentation of a successful prosecution, it may be more helpful to look at more current historical roots of anti-cruelty legislation to discover their purpose.[18]

In 1821, Maine enacted the first animal anti-cruelty statute in the United States.[19] In 1824, New York also enacted anti-cruelty legislation.[20] The statute followed the lead of a law authored by Richard Martin in England, commonly called "Dick Martin's Act." The act

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[13] *Id*.

[14] *Id*.

[15] Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 328-29 (1999).

[16] THE EVOLUTION OF ANTI-CRUELTY LAWS IN THE UNITED STATES, ANIMALS AND THEIR LEGAL RIGHTS: A SURVEY OF AMERICAN LAW FROM 1641 TO 1990 1-2 (Emily Steward Leavitt & Diane Halverson eds., 1990).

[17] *Id*.

[18] *Id*.

[19] David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, DET. C.L. REV. 1, 6 (1993). The law states: "*Be it further enacted*, That if any person shall cruelly beat any horse or cattle, and be thereof convicted,…he shall be punished by fine not less than two dollars nor more than five dollars, or by imprisonment in the common gaol [sic] for a term not exceeding thirty days, according to the aggravation of the offence." *Id*.

[20] Leavitt, *supra* note 16, at 2. The law states, "Every person who shall maliciously kill, maim, or wound any horse, ox, or other cattle, or sheep, belonging to another, or shall maliciously and cruelly beat or torture any such animal, whether belonging to himself or another, shall, upon conviction, be adjudged guilty of a misdemeanor." *Id*.

prevented cruel treatment of horses, mules, donkeys, oxen, cows, and sheep.[21] It was later extended to protect companion animals and the protections it afforded increased as well.[22] For example, the act now prevents fighting animals and keeping animals used for food to be held in slaughter yards for more than three days.[23] Martin followed the passage of his law with the creation of the Society for the Prevention of Cruelty to Animals (SPCA).[24] The purpose of the SPCA was to pursue more aggressively the prosecution of animal cruelty and it was soon endorsed by the Queen of England.[25] As a result, the SPCA became the Royal Society for the Prevention of Cruelty to Animals.[26]

In addition to Maine's law enacted in 1821, other states in the U.S. also began to enact anti-cruelty legislation.[27] Massachusetts enacted the next law in 1835, followed by Wisconsin and Connecticut in 1838[28] with language similar to the New York law and protections for the same types of animals. States continued to follow suit so that each state had anti-cruelty legislation on its books.[29]

Henry Bergh, founder of the American Society for the Prevention of Cruelty to Animals (ASPCA), played an important role in the history of anti-cruelty legislation[30] The ASPCA's charter also created special humane agents who were used to investigate and enforce the anti-cruelty statutes and it also allowed for their own attorneys to prosecute cases of animal cruelty.[31] Bergh himself was given power by the state's attorney general and the city's district attorney to prosecute cases of animal cruelty.[32] The ASPCA's success rate is remarkable, with convictions in over ninety percent of the cases they pursued in court.[33] To give context to this number, the Massachusetts SPCA (MSPCA) received 80,000 complaints of animal cruelty to be investigated over a twenty-one year period.[34] Out of these 80,000, only 268 were prosecuted by the state and only half of those were successful.[35]

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[21] LAWRENCE FINSEN & SUSAN FINSEN, THE ANIMAL RIGHTS MOVEMENT IN AMERICA: FROM COMPASSION TO RESPECT 31 (1994).
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] Leavitt, *supra* note 16, at 4.
[28] *Id*.
[29] *Id*. New Hampshire (1842), Missouri (1845), Virginia (1848), Iowa (1851), Minnesota (1851), Kentucky (1852), Vermont (1854), Texas (1856), Rhode Island (1857), Tennessee (1858), Kansas (1859), Washington (1859), Pennsylvania (1860), Nevada (1861), Idaho (1864), Oregon (1864), New Jersey (1867), California (1868), West Virginia (1868), Illinois (1869), District of Columbia (1871), Michigan (1871), Montana (1871), Colorado (1872), Delaware (1873), Indiana (1873), Nebraska (1873), Georgia (1875), Arkansas (1879), Louisiana (1879), Mississippi (1880), Ohio (1880), North Carolina (1881), South Carolina (1881), Alabama (1883), Maine (1883), Hawaii (1884), New Mexico (1887), South Dakota (1887), Florida (1889), Maryland (1890), North Dakota (1891), Oklahoma (1893), Wyoming (1895), Utah (1898), Alaska (1913), Arizona (1913), Virgin Islands (1921). *Id*.
[30] The ASPCA was established in 1866. FINSEN, *supra* note 21, at 44.
[31] *Id*.
[32] Gerald Carson, *The Great Meddler*, AMERICAN HERITAGE, Dec. 1967, at 31.
[33] *Id*.
[34] Jennifer H. Rackstraw, *Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Cases*, 9 ANIMAL L. 243, 246 (2003).
[35] *Id*.

Bergh drafted, and the New York legislature enacted, an anti-cruelty law in 1867 because of the previous law's ineffectiveness.[36] The state laws that were enacted before his in 1867 "were narrowly drawn, usually for the purpose of protecting some property interest."[37] Bergh's law, on the other hand, was structured to protect animals for their own sake. As one judge for the Supreme Court of New York interpreted the legislation:

> at common law, cruelty to an animal merely upon the ground that it gave pain to the animal and for the protection or for the sake of the animal was not indictable…under certain circumstances, acts of cruelty when publicly committed to the annoyance of the public, or when committed with a malicious intent to injure the owner of the animal, might have been indictable at common law. I suppose this modern legislation, for the purpose of preventing unjustifiable cruelty to animals, is the result of modern civilization . . . It is impossible for a right minded man, it appears to me, to say that unjustifiable cruelty is not a wrong, a moral wrong at all events, and why should not the law make it a legal wrong? Have not they [animals] a right to appeal to the legislature for protection?[38]

It appears that the sentiment behind this law was created with the purpose of preventing cruelty to animals for their own sake rather than preventing cruelty to animals for their owner's sake or for the state's sake. Forty-one states and the District of Columbia have drafted their anti-cruelty legislation based on the language of Bergh's law.[39]

Oregon's anti-cruelty statute also demonstrates the purpose behind this type of legislation. In its passage, legislators placed the statute in Chapter 167 of the Penal Code, "Offenses Against Public Health, Decency, and Animals" rather than in Chapter 164, "Offenses Against Property." Chapter 167 also includes offenses such as prostitution, gambling, use of controlled substances, and obscenity. These crimes are typical crimes against public health and decency. A separate section for crimes against animals shows that such crimes are not just crimes against the public health. In addition, the state is not listing them as mere property since the code already has a separate property section. If the state thought that animal cruelty was a crime against property, it would be reasonable to assume that the statute would be listed under that section. They are instead crimes against animals, indicating the crime represents a harm upon the interests of the animal for the animal's sake. This is not to say that the state is not making it a crime against the state to harm an animal. However, it is an indication that there is additional harm to the animal above the harm that the state suffers.

It can be argued that animal anti-cruelty legislation has been enacted to protect animals for their own sake rather than merely for the sake of the state or the sake of the animal's owner. Although it is equally important for states to legislate against animal cruelty for the state's sake, it should be recognized that anti-cruelty legislation implies more than that. Just as it is egregious to commit crimes against persons, it is egregious to commit crimes against animals. Similarly, although the state is in part representing interests of both animals and persons when the state prosecutes a crime of animal abuse, just as in offenses against persons, the state is not always able to represent the animal's full spectrum of interests. Because crime victims are the recipients

[36] Leavitt, *supra* note 16, at 5.
[37] Carson, *supra* note 32, at 29.
[38] People v. Brunell, 48 How. Pr. 435 (N.Y. S.Ct. 1874).
[39] Leavitt, *supra* note 16, at 5.

of the harm as a result of a crime, and because they incurred secondary victimization from a lack of representation in the criminal justice process, the crime victims' movement began; it is the same reason that the argument that animals should be included as crime victims should be taken seriously as well.

The following section will look at the current legislation defining crime victims in the United States, which states extend crime victim protections, as well as participatory rights of victims in the criminal justice process. It is important to note that an underlying notion behind crime victim legislation is a result of the state's recognition that it is not able to fully represent a victim's interests--otherwise, the legislation would not be needed. Therefore, those who disagree that a victim's interests are not fully represented by the state can see that the state is implicitly admitting its criminal justice system's fault. This paper is merely seeking to extend this underlying notion to the fact that if the state cannot represent people's interests fully throughout the legal process, it is not able to represent an animal's best interests either.

IV. CURRENT CRIME VICTIM LEGISLATION AND PROTECTIONS

A. Definitions of "Crime Victims"

Current definitions of "crime victim" include the terms persons, individuals, estates, government agencies, corporations, family members, guardians, and legal representatives. However, the definition of a crime victim in a majority of states requires the victim to be a person. Most definitions also exclude the accused perpetrator of the crime. For example, a typical definition is: "a person against whom the criminal offense has been committed, or if the person is killed or incapacitated, the spouse, sibling, parent, child, or guardian of the person, except if the person is in custody for an offense or is the accused."[40]

However, other states include other entities in their definition of a crime victim. For example, an extensive definition of a crime victim can be found in Delaware law:

> the person, organization, partnership, business, corporation, agency or governmental entity identified as the victim of a crime in a police report, a criminal complaint or warrant, an indictment or information, or other charging instrument. "Victim" includes a parent, guardian or custodian of a victim who is unable to meaningfully understand or participate in the legal process due to physical, psychological or mental impairment. "Victim" includes the following relations of a deceased victim if the relation is not the defendant, codefendant or conspirator: a. The spouse; b. An adult child or stepchild; c. A parent; or d. A sibling. e. "Victim" includes qualifying neighborhood or homeowners associations as defined by §9419 of this title.[41]

Delaware has one of the most thorough definitions of a crime victim in the U.S., even including homeowners associations. However, Delaware is not alone in including governmental agencies, corporations, guardians, or family members. Generally, states are in between Alabama's definition and Delaware's definition using various combinations of the types of victims included.

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[40] ALA. CODE §15-23-60 (19) (1975).
[41] DEL. CODE ANN. Tit 11, §9401 (2005).

Looking at the language of Delaware's statute, one can argue that an animal's owner may already be included in the language of Delaware's crime victim definition as a "guardian or custodian of a victim who is unable to meaningfully understand or participate in the legal process due to physical, psychological or mental impairment."[42] If Delaware can include inanimate objects or beings with arguably less intelligence than an animal (for example, a severely mentally handicapped person or an infant[43]), then it is reasonable to also include animals. In the case of animal cruelty, it seems that the animal could plausibly be listed as the victim of the crime in a police report or charging instrument because animals are directly protected by the anti-cruelty statute.

Case law has upheld the use of non-human entities in the definition of crime victims. For example, in Nevada, both the state's Social Services and Welfare Department are considered victims within the meaning of Nevada's crime victim definition.[44] In California, a government agency was held to be a victim even though the agency did not plainly fit in the definition of victim since it could not be considered a natural person nor was the agency "a resident of California."[45]

In sum, the definition of a crime victim varies and is not solely limited to human beings. There is precedent for entities, other than natural persons, to be considered victims. This flexible approach leaves room for animals to be considered crime victims as well. For the purpose of this section, it is enough to know that each state's definition of a crime victim varies as to who and what it includes and is not limited to only persons or even living beings.

B. Legal Protections for Victims

Victims have been able to obtain a number of additional protections in the criminal justice system.[46] The paper will first discuss protections for victims of domestic and family violence as examples of protections which may be beneficial for animals. Next, the paper will look at pretrial, trial, and post-trial crime victim protections that can also be extended to animals.

(1) Police Protections for Victims

Animals and family violence victims have similarities that make it useful to discuss innovations used in family violence as an example of tools that can be used for animals. Also, a familiarity with family violence may be more common than some of the other shields that have been used for crime victims. Similarities between animal and family violence victims include the proximity of living conditions in which the victims reside, power relationships between the

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[42] *Id.*

[43] *See* STEVEN WISE, DRAWING THE LINE (2002).

[44] Roe v. State of Nevada, 917 P.2d 959 (Nev. 1996).

[45] People v. Crow, 864 P.2d 80 (Cal. 1993); *see also* Commonwealth of Pennsylvania v. Mourar, 504 A.2d 197 (Pa. 1986) (holding a drug enforcement agency could be considered a victim within meaning of crime victim restitution statute).

[46] Each protection that crime victims have gained will not be discussed here. Instead, a sampling of ideas will be included in order to illustrate the overall importance of obtaining an education in crime victim procedure and applying it towards animals.

perpetrator and the victim, the privacy in which the offenses are committed, and problems with repeat or cyclical offenses. Victim advocates have been able to achieve significant protections for victims of family violence including "no drop" policies in District Attorney's Offices, mandatory arrest laws, protection from defendants during the proceedings, duty to report laws, and offender registration.[47]

Some states have adopted language into their respective constitutions providing victims the benefit of reasonable protection from the defendant in criminal proceedings. For example, Arizona's constitution provides: "a victim of a crime has a right: . . .to be free from intimidation, harassment, or abuse, throughout the criminal justice process."[48] Furthermore, the state constitution of Illinois states: "Crime victims, shall have the following rights as protected by law: . . . the right to be reasonably protected from the accused throughout the criminal justice process."[49] The practical meaning of these provisions is not entirely clear, but they do indicate that a crime victim should be able to be protected from the accused throughout the criminal trial.

The purpose of such provisions is to provide a safe environment for victims going through the daunting experience of a criminal trial. Especially when family or domestic violence is an issue, the right to be protected from the defendant is important because of the relationship between the victim and the perpetrator of the crime. The defendant may know where the victim will go (where family and friends live) and also often intimately knows what will scare or hurt the victim the most.

Animals who have been victims of abuse should be afforded the same protection for similar reasons. Animals can be faced with a terrible situation if their owner is charged with animal abuse. Although animals will often be seized as evidence and kept in protective custody, if they are not, the offender may kill them or continue to take out their anger on them.[50]

More concrete tools used to help family and domestic abuse crime victims that would be helpful for animals are mandatory arrest schemes, duties to report, and offender registration. Mandatory arrest schemes take a lot of the discretion from police. In the past, when police were called out to domestic violence scenes, they often left without taking any action believing it was private or family matter. Legislatures began adopting mandatory arrest laws to bring this problem to a halt.

Animals also face problems with law enforcements' attitudes towards animal abuse, with them either believing it is a problem for animal control to handle or that it is not important. Animals would be better protected if states passed (and law enforcement used) mandatory arrest laws for animal cruelty.[51] Imposing a duty to report animal abuse would also be beneficial.[52]

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[47] *See* BELOOF, *supra* note 1.

[48] ARIZ. CONST. art. 2, §2.1(A)(1).

[49] ILL. CONST art. 1 §8.1(7).

[50] This is certainly a benefit that animals have as being regarded as property. Otherwise they humane agents and police officers could not easily seize them from abusive owners. It may be that if the law regards them differently in the future, an agency with power like child services will be required to take them out of abusive situations. Interestingly, the ability of child protective services to take children out of homes was derived from Henry Bergh's ASPCA.

[51]For example, Oregon has a mandatory arrest law. OR. REV. STAT. § 133.379(1) (2002) ("It shall be the duty of any peace officer to arrest and prosecute any violator of ORS 167.315 to 167.333 or 167.340 [the animal cruelty laws] for any violation which comes to the knowledge or notice of the officer."). However, the provision is often ignored and rarely, if ever, enforced. Other states should adopt such laws, and animal advocates, especially animal lawyers, should be aware of them and put pressure on appropriate agencies to enforce them.

Mandatory reporting schemes generally require bystanders or neighbors to contact law enforcement if they are a witness to animal abuse. Since animal cruelty often takes place in people's homes away from public scrutiny, and animals are often out of the public view for most of their lives, abuse and neglect can be difficult for law enforcement to detect. Requiring neighbors to report cruelty may give law enforcement a better tool to discover acts of animal abuse. In addition to the previous safeguards for crime victims, the following sections examine protections for victims that would be useful and practical for animals during pretrial, trial, and post-trial stages of an animal cruelty case.

(2) Prosecutorial Decision-Making

A significant area in which it would be extremely helpful for animals to be considered victims is during the period when the decision whether to charge or not is made. Human crime victims have made great progress by influencing a prosecutor's charging decision both through formal and informal methods. The extensive piece of this discussion will center on formal methods of challenging the prosecutor's decision not to charge. However, informal influences on charging decisions should not to be overlooked as an effective tool.

The prosecutor's decision not to charge is subject to judicial review in some jurisdictions. For example, in Pennsylvania citizens are able to file private criminal complaints to the public prosecutor and petition a court for review if the prosecutor denies the complaint.[53] In *Commonwealth v. Benz*, 565 A.2d 764 (Pa. 1989) the district attorney refused to charge on a case involving a homicide with a possible defense of excuse or justification. After the complaint was denied by the District Attorney for lack of evidence and upheld by the court of common pleas, the Superior Court reversed, stating that there was enough evidence to establish a *prima facie* case.[54] The Commonwealth appealed the decision but the Supreme Court found that although public prosecutors have *discretion* not to bring a case even when a *prima facie* case can be established, the public prosecutor cannot just say that a *prima facie* case is not established when there may be a good justification or excuse defense available.[55] Since it was found that there was enough evidence to establish a *prima facie* case, the court overturned the District Attorney's

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[52] *See* Jack Wenik, *Forcing Bystander to Get Involved: Case for Statute Requiring Witnesses to Report Crime*, 94 YALE L.J. 1787 (1985).

[53] PA.R.CRIM.P. 133 (2005). The rule states:

> (a) When the affiant is not a law enforcement officer and the offense(s) charged include(s) a misdemeanor or felony which does not involve a clear and present danger to any person or to the community, the complaint shall be submitted to an attorney for the Commonwealth, who shall approve or disapprove without unreasonable delay. (b) If the attorney for the Commonwealth (1) Approves the complaint, the attorney shall indicate this decision on the complaint form and transmit it to the issuing authority; (2) Disapproves the complaint, the attorney shall state the reasons on the complaint form and return it to the affiant. Thereafter the affiant may file the complaint with a judge of a Court of Common Pleas for approval or disapproval; (3) Does not approve or disapprove within a reasonable period of time, the affiant may file the complaint on a separate form with the issuing authority, noting thereon that a complaint is pending before an attorney for the Commonwealth. The issuing authority shall determine whether a reasonable period has elapsed, and, when appropriate, shall defer action to allow the attorney for the Commonwealth an additional period of time to respond.

[54] *Id*. at 765-66.

[55] *Id*. at 767-68.

decision not to prosecute for that reason. The court was careful not to impose on a prosecutor's decision not prosecute as it would have been a violation of the separation of powers. A complaint that is based on the sufficiency of the evidence, however, is reviewable.

The statute does not appear to be limited to crime victims--the language of the Pennsylvania statute merely requires an affiant. However, the use of the technique may be valuable for animal advocates in jurisdictions which allow the filing of private complaints. If animal abuse cases are being turned down by the public prosecutor, a citizen or animal advocate can file a private complaint with the District Attorney. Not only that, the advocate has access to higher courts reviewing the decision. At the very least, the issue may get media attention. Note, though, that all a prosecutor has to do is base their decision on prosecutorial discretion. Since the public prosecutor is a member of the executive branch, a court cannot violate the separation of powers clause and overrule the decision based on discretionary matters.[56]

Similar to judicial challenges to a prosecutor's decision to charge, an animal advocate should also be aware of the possibility to access the grand jury for review of a prosecutor's decision not to charge.[57] At common law, a citizen has a right to access the grand jury.[58] When public prosecutors were established, such access appears to have been limited. However, this sentiment may be combated by arguing that unless a statute explicitly revokes a citizen's access to the grand jury, the common law right to such access still exists.[59] Another way that a citizen may gain access to the grand jury is if the state constitution provides the right.[60] Finally, it may be that one is unable to gain access to the grand jury unless the prosecutor or a judge approves.[61]

The right of a citizen to access the grand jury by common law unless a statute expressly denies such access is discussed in *Brack v. Wells*, 40 A.2d 319 (1944).[62] The grand jury is free to investigate a case which the public prosecutor has decided through his discretion not to prosecute.[63]

Some states have decided that citizen access to the grand jury is such a fundamental right that it cannot even be taken away by statute.[64] The West Virginia Supreme Court found in *State Ex Rel. Miller v. Smith*, 285 S.E.500 (W.Va. 1981) that the grand jury "is intended to operate both as a sword, investigating cases to bring to trial persons accused on just grounds, and as a shield" to protect citizens from having cases brought against them that are unfounded.[65] The court notes that although the federal grand jury has retreated from allowing such access to

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[56] *See generally* Beth A. Brown, Note, *The Constitutional Validity of Pennsylvania Rule of Criminal Procedure 133(b)(2) and the Traditional Role of the Pennsylvania Courts in the Prosecutorial Function*, 52 U. PITT. L. REV. 269 (1990).

[57] *See* Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Brutality when the Prosecutor Declines to Prosecute*, 53 MD. L. REV. 271 (1994) (giving a detailed account of the history of grand juries, a victim's ability to gain access to the grand jury, and the power that accompanies access to the grand jury).

[58] BELOOF, *supra* note 1, at 312.

[59] *Id*.

[60] *Id*.

[61] *Id*.

[62] Brack v. Wells, 40 A.2d 319, 321 (1944) ("The inquisitorial powers of the grand jury are not limited to cases in which there has been a preliminary proceeding before a magistrate nor to cases laid before them by the Court or State's Attorney.").

[63] *Id*. at 322.

[64] BELOOF, *supra* note 1, at 316.

[65] State Ex Rel. Miller v. Smith, 285 S.E.500, 504 (W.Va. 1981).

citizens, the West Virginia Constitution guarantees that all persons shall have access for injuries upon them.[66] The case centered around a public prosecutor's actions to attempt to deny a citizen access to the grand jury. The court found that this went beyond the prosecutor's official abilities and held that a citizen has a constitutional right under the state constitution to present their case to the grand jury.[67]

Access to the grand jury by an attorney advocating on behalf of an animal may prove to be less successful if access is based on a constitutional right. Since access may be limited to citizens against whom a wrong has been committed, the animal advocate may lack standing to argue on behalf of the animal. However, this idea is included here for the proposition that if a state constitution provides for access to the grand jury by crime victims, and a crime victim includes an animal, then it may be a successful tool. Furthermore, if the argument that animals are considered victims fails (and are then simply considered to be property), this may prove to be a fruitful avenue as well, for if a person's property has been harmed, that person may have a right to access the grand jury.

The final approach towards gaining citizen access to the grand jury is through prosecutorial or judicial discretion. In this jurisdiction type, a citizen may appear before the grand jury if the prosecutor allows it.[68] This approach deals mainly with federal law.[69] Since animal cruelty statutes are a product of state law, it will not be discussed any further here. However, it is worth being aware of in the event that a situation arises in which the animal advocate does wish to appear before the federal grand jury.[70]

On the other hand, some states do provide for judicial approval of victim access to the grand jury. For example in Maine, evidence may be offered to the grand jury by the public prosecutor or "other persons as said presiding justice may permit."[71] However, in In re *Petition of Thomas*, 434 A.2d 503 (Me. 1981) the Supreme Court of Maine significantly reduced the practical ability of a victim to access the grand jury. The court held that not only must the petition to access the grand jury be persuasive, it must also be in the public interest.[72] Furthermore, since the attorney general and the district attorney in the case decided not to present to the grand jury, and there was no prejudice found in the decision, the court decided against the petitioner.[73] The result of this case demonstrates the difficult burden that exists when attempting to obtain judicial approval of presenting to the grand jury. Nonetheless, it is an avenue that may be explored in cases of animal abuse that are in the hands of a persuasive legal advocate.

Finally, an interesting scheme exists in Nebraska where upon petition for a case to be heard from at least ten percent of the registered voters in a county, it is mandatory for the district court in that county to call a grand jury to review the case.[74] This statute puts access to the grand

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[66] The court states that the West Virginia Constitution "guarantees that '[t]he courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law." *Id*.

[67] *Id*. at 507.

[68] BELOOF, *supra* note 1, at 322.

[69] *Id*.

[70] *See In re* New Haven Grand Jury, 604 F.Supp. 453 (D. Conn. 1985) and *In re* Application of Larry A. Wood to Appear Before the Grand Jury Appeal of United States, 833 F.2d 113 (8th Cir. 1987).

[71] *Me. Leg. Doc. No. 1112* (1953).

[72] *In re* Petition of Thomas, 434 A.2d 503, 508 (Me. 1981).

[73] *Id*. at 509.

[74] NEB. REV. STAT. §29-1401 (2004).

jury entirely in the hands of the citizenry. Importantly, the strength of one's ability to persuade the voters of the county to petition most likely rests in one's ability to use the tools of informal methods of influence on the prosecutor, including use of the media.

In Nebraska, it is mandatory that a grand jury be called if the state's citizens petition for one. Even in states without the petition system, as elected officials, prosecutors may be influenced through other means. For example, the public prosecutor may be voted out of office if the citizenry is unhappy with her charging decisions. In that end, use of the media can be extremely helpful. If an animal advocate has a persuading story that appeals to the community, this can be a great avenue to explore.

It is not necessary that an animal be defined as a crime victim to take advantage of the preceding opportunities, although it would be beneficial. Defining an animal as a victim would give more credibility to those who seek access to the grand jury on behalf of the animal victim. Rather than the crime of animal abuse being a crime solely against the state, defining an animal as a victim would indicate the gravity of the harm to the animal as well as the state's recognition of that harm. Furthermore, because of the indication of harm to the animal beyond that of the state, it would also demonstrate the stake that the animal has in obtaining an indictment.

(3) Pre-Trial Protections for Victims

Animals, defined as crime victims, would also benefit from victims' rights to a speedy trial, the ability to participate in plea bargains, and obtaining representation at trial.

a. right to a speedy trial

The right to a speedy trial may be contained in either state constitutions or statutes. For example, in Illinois, the State Constitution states, "crime victims, . . . shall have the following rights as provided by law: . . . The right to timely disposition of the case following the arrest of the accused."[75] This may be extremely important to animals especially if they are still living with the defendant or even if they are being held in protective custody by a law enforcement or humane agency.

It is important if they are living with the defendant in order to protect them from further and extended abuse and it is equally important if they are in an animal shelter so as to reduce the amount of time that they must spend there which will both reduce the stress to the animal and the drain on the shelter's resources. In cases where a large number of animals are seized, shelters are burdened with the cost of providing sustenance and care to the animal, and with the reduced ability to take animals from the general public.

b. plea bargains

If animals are considered crime victims, animal advocates may pursue participation in plea bargains between the state and defendant. Crime victims were generally kept out of the plea

[75] ILL. CONST. §8.1(a)(6).

bargaining process until recent times. In Sarah Welling's article, *Victim Participation in Plea Bargains*,[76] she notes that prosecutors have different interests than victims in the plea bargain situation. For example, the prosecutor, besides having the interests of society in mind, must also balance the shear number of cases and resources that go to cases as well. She goes on to state, "First prosecutors may fear that victim participation would disrupt the plea bargain hearing and render it confrontational. . . . Second, prosecutors might argue that victim participation will impair quick summary disposition."[77] Despite these feelings, by the end of 1996 thirty-six states had provided either statutory or constitutional methods of access for victims to be heard during plea bargaining.[78]

However, the scope of a victim's involvement is limited. The crime victim may not have the ultimate say in whether or not a plea bargain is acceptable. The ability of crime victims to share their feelings about the plea bargain with the public prosecutor is certainly permissible. Furthermore, the public prosecutor may take those views into account when making his decisions regarding the plea bargain. However, the crime victim does not have the authority to veto a plea bargain on his own once it has been offered to a defendant.[79]

The victim's role appears to be to have the opportunity to oppose the plea bargain in front of the judge. The victim's ability to express her satisfaction or dissatisfaction may ultimately sway the judge's decision on whether to accept or reject a plea bargain. This ability can be an extremely powerful tool for the victim as demonstrated in the case of *People v. Stringham*, 206 Cal. App. 3d 184 (Cal. Ct. App. 1988). In *Stringham*, after listening to an impact statement from a murder victim's father, the court rejected a plea arrangement between the defendant and the prosecution.[80] The court found that the circumstances within the victim's statement should be considered by the judge while deciding whether to accept a plea bargain, and to do otherwise would completely divest the victim of her statutory right to speak.[81]

For animal victims, the ability to confer with the public prosecutor when making a plea bargaining decision can be very important. Since animals are not able to speak with the prosecutor or to the court, it is important for an animal's legal advocate to be able to express the special needs of that animal.[82] For example, in a case of abuse by the animal's owner, it is not in the animal's best interest to go back to the defendant after he has spent thirty days doing community service and paying a $200 fine. The animal in reality should not be returned to a person who abused the animal. Therefore, in plea bargaining, it would be beneficial for the animal to have an advocate requesting that the plea bargain also include creative solutions such as requiring the defendant to allow the local humane organization to adopt out his animal. Another example would be to request restitution for the humane shelter that took care of the animal or to an animal advocacy organization. It is not to say that all public prosecutors do not have animal interests in mind. However, creative solutions or even insight into what an animal's

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[76] Sarah Welling, *Victim Participation in Plea Bargains*, 65 WASH. U.L.Q. 301 (1987).
[77] *Id*.
[78] BELOOF, *supra* note 1, at 462.
[79] *Id*. at 466. *See also* McKenzie v. Risley, 842 F.2d 1525 (9th Cir. 1998); *and* State of Oregon v. McDonnell, 794 P.2d 780 (Or. 1990).
[80] People v. Stringham, 206 Cal. App. 3d 184, 190-91 (Cal. Ct. App. 1988).
[81] *Id*. at 196-97 ("To accept defendant's argument that the court is at that point divested of its power to reject the plea bargain would consign the statement to utter ineffectuality: the court would have to listen to the statement and then ignore it, powerless to do anything based upon the statement protesting such a *fait accompli*.").
[82] *Id*. at 196.

needs are can most easily come from those that are experienced with dealing with animal issues on a regular basis.

(4) Victim Representation at Trial

There are two approaches for an animal advocate to keep in mind regarding the prosecution of animal abuse. The most typical method by which animal abuse is prosecuted is through the public prosecutor. The other avenue is through private prosecution in which a private attorney in effect steps into the typical role of the public prosecutor.

a. public prosecution

The public prosecution model is one in which the victim's attorney participates in the trial alongside the public prosecutor.[83] A victim's attorney may participate at trial upon approval of the public prosecutor, and the limit of the victim's attorney's participation in the trial is determined by the public prosecutor. The victim's advocate may conduct all aspects of the prosecution such as direct or cross examination, calling witnesses, and giving opening and closing statements as long as the public prosecutor retains control of crucial decision-making during the course of trial. In the case of *East v. Scott*, 55 F.3d 996 (5th Cir. 1995) the court describes crucial decision-making as retaining control over strategic decisions at trial and the victim's attorney acting under the supervision of the public prosecutor.[84]

In cases of animal abuse, an animal attorney should approach the public prosecutor and seek to participate in the prosecution of the case. The animal attorney should emphasize the benefits that he may provide to the public prosecutor. An animal attorney may have more experience dealing with the intricacies of animal cases and any special circumstances that accompany them than the state's prosecutor. For instance, an animal attorney may be able to speak to any specialized physical or mental trauma that the animal may have suffered as a result of abuse and to any additional care requirements that the animal needs as a result.

Although defining an animal legally as a victim is probably not required to allow an animal attorney to assist the public prosecutor, it would be beneficial. By defining an animal legally as a victim it may legitimize requests by animal attorneys to participate in prosecutions by recognizing the special harms that accompany an animal who has suffered harm as a result of animal abuse. Furthermore, it may help quell any misconceptions that animals do not deserve additional representation. Finally, by defining an animal as a victim, the legal basis on which human victims have been allowed to have their attorneys assist public prosecutors can readily be extended to animal victims.

Since the state will not always represent the animal's interests completely, both because of inherent conflicts with their public position and at times for a lack of specialized knowledge in animal cruelty cases, it is important for the animal's legal advocate to be able to speak for the

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[83] The victim's attorney may also be referred to as a "privately-funded prosecutor." *See* Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43 (1995) (describing the history of privately funded prosecutions).

[84] *See also* Cantrell v. Commonwealth, 329 S.E.2d 22 (Va. 1985) (allowing role of victim's attorney to include opening and closing statements as well as to only limit inasmuch as public prosecutors are limited).

animal's interests. Not only should the advocate attempt to advise the state about routes to take that would be helpful for the animal, but if the animal is defined as a victim, there may also be other rights or issues that the state and the defense will not speak to during the course of a trial. In this capacity, the animal advocate must be well versed in crime victim law to adequately represent the animal's interests before they are overlooked. For example, if a law gives a victim the right to speak regarding the suitability of a plea bargain that the state and the defense have agreed to, the animal advocate must be able to articulate the animal's position as well as the right to speak as provided by law.

b. private prosecution

Common law allows for the prosecution of animal abuse and neglect by private prosecutors if the defendant is charged with a misdemeanor.[85] In those situations, the private animal attorney simply takes the place of the public prosecutor and continues to represent the state.[86] However, the state still retains a significant amount of control in the case. For instance, the state may dismiss the case at any time whether the private prosecutor wants to continue or not.[87] Furthermore, if the state decides to prosecute the case, the state has priority and can then take the case out of the hands of the private attorney.[88]

Nevertheless, since the majority of animal anti-cruelty violations are misdemeanors, private prosecution by animal attorneys is a powerful tool. Even if the public prosecutor steps in to take control of the case and the animal attorney does not ultimately prosecute the case, the animal attorney has still been successful in obtaining prosecution by the state. Thus, it may be that the animal attorney can either prosecute the case himself or cause the state to prosecute the case. In both instances, the crime is receiving the proper attention it deserves.

c. current legislation allowing private participation

Currently, some states explicitly allow for private enforcement of animal-cruelty statutes.[89] The state statutes provide for humane societies or private citizens to request and assist in the enforcement of animal cruelty crimes.[90] For instance, Wisconsin law provides for a

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[85] Cronan v. Cronan, 774 A.2d 866, 871 (R.I. 2001).

[86] *Id*. at 873.

[87] *Id*. at 874-75.

[88] *Id*. at 877.

[89] Rackstraw, *supra* note 34.

[90] *Id.* at 260-62. Minnesota legislation provides:

> Any person who has reason to believe that a violation of this chapter has taken place or is taking place may apply to any court having jurisdiction over actions alleging violation of that section for a warrant and for investigation…If the court is satisfied of the existence of the grounds of the application, or that there is probable cause to believe that a violation exists, it shall issue a signed search warrant and order for investigation to a peace officer in the county.

MINN. STAT. §343.22(1) (2000).

Pennsylvania law states:

> An agent of any society of association for the prevention of cruelty to animals,

humane officer to "request law enforcement officers and district attorneys to enforce and prosecute violations of state law and may cooperate in those prosecutions."[91] As noted above, it is not necessary for a law to affirmatively allow for the prosecution of animal abuse misdemeanors. However, a law such as this does illustrate that legislatures do recognize the importance of allowing those with specialized knowledge of animal abuse cases to have the ability to assist in their prosecution.

However, a law like Wisconsin's does pose potential problems for animal advocates. Providing such legislation may consequently preclude citizens that are not part of a humane society from pursuing private prosecutions. The argument may be made that the law implicitly revokes the common law ability of citizens to prosecute animal abuse misdemeanors and replaces it with statutory law only allowing humane society employees to prosecute animal crimes. This may not only overburden humane societies but also lessens the ability of other qualified individuals to seek prosecutions.[92]

While a legislature need not provide a statutory right for private prosecutions, unless a statute has overruled the common law right of prosecution, it is still beneficial. First, it legitimizes and provides a legal basis for claims by those seeking private prosecution. Second, it allows for private prosecutions of felony animal abuse statutes. Since the common law only allows for prosecution of misdemeanors by private parties, providing a statutory means to prosecute all animal crimes erases that limitation.

d. appropriate representation of animals

An important consideration to the success of animals as victims is the issue of appropriate representation. In order to take advantage of gains made through redefining animals as crime victims, the best representatives would be those from a humane society, a lawyer from an organization that is devoted to animals' interests, or a victims' assistance program's lawyer appointed by an impartial court to represent the animal as a crime victim.

Courts should be required to take notice of who is attempting to represent the animal and consider whether that person is appropriate. If the defendant is the owner of the animal, a lawyer retained by him should not be allowed to represent the animal victim. If not, the owner should be able to decide or hire a lawyer to represent her animal's needs. If the defendant is the animal's owner, the court should be able to take into consideration the relationship of the attorney or attorney's organization to the particular animal and animals in general. If the attorney is from an organization, looking at the group's mission statement would give relevant information as to the suitability of the lawyer. In any event, it is a topic to consider in order to avoid further abuse and victimization of the animal.

> incorporated under the laws of the Commonwealth, shall have the same powers to initiate criminal proceedings provided for police officers by the Pennsylvania Rules of Criminal Procedure. An agent of any society or association for the prevention of cruelty to animals, incorporated under the laws of this Commonwealth, shall have standing to request any court of competent jurisdiction to enjoin any violation of this section.

18 PA. CONS. STAT. ANN. §5511(i) (West 2000).

[91] WIS. STAT. §173.07(4)(m) (2005).

[92] *See* Rackstraw, *supra* note 34, at 262 (discussing implications of such laws overburdening humane societies).

(5) Post Trial Protections for Crime Victims

During the sentencing of a defendant, crime victims may be given the opportunity to present victim impact statements.[93] Such statements provide the crime victim an opportunity to be heard by the court when considering the sentence so that the court may take the statement into account, to be heard by the defendant so as to understand the harm that he has caused to the victim, and to give the victim some sense of empowerment of using the legal system. If the ability to give an impact statement is given to crime victims in one's jurisdiction and animals are considered crime victims, it may be an extremely valuable accommodation for their plight.

Again, the specialized knowledge that accompanies an animal legal advocate who deals with animal cases and issues on a regular basis can provide some valuable insight to the court on the damage that was done to the animal as a result of animal cruelty. This may sway the judge to increase a defendant's sentence after hearing a more detailed and expanded account of the pain that the animal suffered that may not have been allowed to be entered into evidence due to the more strict evidentiary rules that are in place during trial. Furthermore, it may give the defendant more insight into the pain that the animal suffered to give a deterring effect on them in their future dealings with animals.

Animal abusers might also be tracked in a parallel system such as ones in which sexual offenders are registered. It is not one that animals must be defined as crime victims for, but, nonetheless, it is an interesting proposition to include and consider the creation of animal cruelty offender registrations. Sex offender registrations were devised to combat the problems that accompany an atypical criminal offense where the offender may not be able to stop committing the acts.[94] It gives the community where the offender lives an opportunity to educate themselves and their children about the possibility of harm that exists when a serious sex offender is released into their neighborhood. This is especially important when offenders move into a new area.

The offender registration would be useful for both law enforcement and citizens that are neighbors. The registration would provide citizen neighbors a basis to not only watch out for their own animals being abducted or abused by the offender, but it would also warn them to watch out for animals in the offender's possession. The citizens could then notify law enforcement if the offender is not allowed to have animals or if they see or hear something that appears to be a violation of law. Because of the difficulty in recognizing animal cruelty, knowing that a person is a habitual offender may provide the confirmation a citizen needs to contact law enforcement.

V. CONCLUSION

The animal advocacy movement can benefit greatly from the lessons and the progress that the crime victims movement has experienced. Using historical notions of how victims and animals have been treated formulates a basis for their present day inclusion into the criminal justice system. While crime victims lost their ability to meaningfully participate in a system

[93] BELOOF, *supra* note 1, at 621-22.
[94] E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997).

which was supposed to protect their interests, they have regained it, and in the process have shed light on how an individual's interests are not completely met through public prosecution. Using these lessons, animal advocates may gain significantly more protection from anti-cruelty laws that are in place today as a result of increased and proper enforcement.

It is not a novel idea that entities other than humans can be considered crime victims. Businesses, corporations, neighborhood associations, and government entities have been defined as crime victims in state statutes. Including protections for animals as crime victims is a natural progression in the development of the law. As the victims of anticruelty statutes, and as beings who are voiceless without legal advocates, the protections of crime victim laws and the methods used by law enforcement and court systems to protect victims are necessary. The expansion of these systems is critical to the proper enforcement of current laws and the adequate representation and protection of animals.

EVADING EXTINCTION: A 21ST CENTURY SURVEY OF THE LEGAL CHALLENGES TO WILD SIBERIAN TIGER CONSERVATION

JULIE SANTAGELO

I. INTRODUCTION: WHY THE SIBERIAN TIGER?

The Siberian tiger (*Felidae Panthera tigris altaica*),[1] more appropriately known as the Amur tiger,[2] is the largest subspecies of tiger.[3] The tiger is the largest feline species on earth[4]). The largest full-grown wild male Amur tiger weighed in at 660 pounds.[5] Sadly, there are currently more Amur tigers in captivity than in the wild.[6]

While its original range extended throughout the Russian Far East, northeastern China, and the entire Korean peninsula, it is believed that the only remaining genetically viable population lives in the taiga forests of the Primorski and southern Khabarovski Krais--a region in the Far East of the Russian Federation along the Amur River basin in the Sikhote-Alin mountains.[7] The heart of the Amur tiger's habitat lays in the legally protected Sikhote-Alin Preserve, a national park approximately the size of Yosemite.[8] The Amur tiger--like all feline species, a dedicated carnivore--must maintain an average intake of ten pounds of meat per day and preys primarily on elk, sika deer, small roe deer, and wild boar.[9] Because the Sikhote-Alin wilderness is characterized by thin topsoil and long winters, prey species must range widely

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[1] John C. Porter, *Finding Teeth for Russian Federation Tiger Protection Laws: Using United States Gray World Populations as an Inspiration, and United States Endangered Spe*cies *Legislation as a Model for Russian Federation Endangered Species Legal Reform,* 10 PENN ST. ENVTL. L. REV. 365, 369 n.30 (2002).

[2] The home range of this species is actually located south of the region technically considered to be part of Siberia. Kai-Ching Cha, *Can the Convention on Biological Diversity Save the Siberian Tiger?*, 24 ENVIRONS ENVTL. L. & POL'Y J. 3, 5 (2001).

[3] It should be noted that recent studies suggest that the five regional tiger populations currently possessing separate taxonomic classifications as subspecies may not represent true genetic subspecies but simply wide variation within a unified species. K. ULLAS KARANTH AND KE ULLASA KARANTA, THE WAY OF THE TIGER: NATURAL HISTORY AND CONSERVATION OF THE ENDANGERED BIG CAT 45 (2001). The largest wild tigers have, however, been found among the tiger population commonly known as the Amur or Siberian tigers.

[4] Porter, *supra* note 1, at 365.

[5] KARANTH AND KARANTA, *supra* note 3, at 48.

[6] Cha, *supra* note 2, at 13.

[7] Porter, *supra* note 1, at 366 n.3; Cha, *supra* note 2, at 5.

[8] Cha, *supra* note 2, at 6.

[9] *Id.* at 5.

for sustenance, requiring their redators to also range widely.[10] As a result, Amur tigers patrol individual territories averaging 175 square miles.[11]

The Amur tiger, like all tigers, is threatened by its high black market value as an ingredient in traditional Chinese medicine.[12] In fact, the illegal wildlife generates up to ten billion United States dollars per year, trailing only the illegal narcotics and arms trade in annual revenue.[13] The 1989 opening of the Russian-Chinese border exacerbated this illegal trade within the Russian Federation.[14]

The Amur tiger also suffers from a reduction of its prey base due to subsistence poaching of ungulate species and rampant logging. This reduction in wild prey has resulted in increased tiger-human conflicts such as livestock depredation, further reducing the locals' incentive to protect tigers.[15]

There are a number of reasons why the wild Amur tiger is an important candidate for targeted conservation efforts (not to mention an excellent case exemplar of the legal architecture of international wildlife conservation law):

First, the Amur tiger, as a species at the pinnacle of the food chain in its habitat, is what environmentalists refer to as a flagship species or indicator species--the health of which serves as an important indicator of the health of the entire ecosystem in which it lives.[16] Because the Amur tiger lives in one of earth's last remaining critical carbon sinks,[17] the health of its habitat has global ramifications.

Second, the Amur tiger is one of only two wild tiger populations that scientists believe may be sufficiently robust for the purposes of long-term genetic survival.[18] A genetically viable wild tiger population will ideally contain at least 500 individuals.[19] In 2001, the population of wild Amur tigers was estimated at 450.[20] Because of the current paucity of viable wild tiger populations, optimizing the conservation potential of the Amur tiger in its home range is vital for the survival of wild tigers in general.

Third, compared to much of Asia (tigers being an exclusively Asian species), the Russian Sikhote-Alin wilderness is more sparsely populated by both humans and tigers--reducing the relative rate of habitat encroachment and making tigers more difficult for poachers to find.[21]

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[10] *Id.* at 5-6.
[11] *Id.*
[12] Porter, *supra* note 1, at 366.
[13] Amy E. Vulpio, *From the Forests of Asia to the Pharma*cies *of New York City: Searching for a Safe Haven for Rhinos and Tigers*, 11 GEO. INT'L ENVTL. L. REV. 463, 464 (1999).
[14] Cha, *supra* note 2, at 11.
[15] Porter, *supra* note 1, at 365.
[16] Cha, *supra* note 2, at 7.
[17] *Id.* at 8.
[18] *See* Michael 't Sas-Rolfes, *Who Will Save the Wild Tiger?*, PERC POLICY SERIES PS-12 (1998), *at* http://www.perc.org/publications/policyseries/wildtiger_full.php?s=2.
[19] Cha, *supra* note 2, at 4.
[20] *Id.*
[21] Richard Damania, Randy Stringer, K. Ullas Karanth & Brad Stith, *The Economics of Protecting Tiger Populations: Linking Household Behaviour to Poaching and Prey Depletion*, Discussion Paper 0140, UNIV. OF ADELAIDE (Australia) CENTRE FOR INT'L ECON. STUDIES, *available at* http://www.adelaide.edu.au.

Finally, the tiger is an internationally popular, symbolic creature that people want to save, and the Amur tiger is the biggest tiger of them all. Thus, the Amur tiger's own characteristics make it a provocative target of conservation efforts.

II. THE CURRENT LEGAL ARCHITECTURE OF AMUR TIGER CONSERVATION IN THE RUSSIAN FEDERATION

A. Domestic Legislation Protecting Amur Tigers

Russia (beginning under the former Soviet Union) has criminalized the hunting of Amur tigers since 1947.[22] Nevertheless, the Amur tiger remains critically endangered due to the primary threats of poaching (of both tigers and their prey species) and fragmentation of tiger habitat via both legal and illegal logging.[23] While the legal climate in the Russian Federation with regard to logging in tiger habitat will be predominately considered in Section III of this paper, the basic architecture of Russian wildlife protection laws (considered in this section) provides a basic framework relevant to the protection of both the animal and the habitat.

The Constitution of the Russian Federation authorizes the Russian Federal Government to establish federal environmental programs and to regulate commerce as necessary to protect the environment.[24] Furthermore, "Joint jurisdiction over environmental protection between the federal government and subjects of the Russian Federation is granted by the Constitution and is binding on the territories within which the Amur tiger ranges."[25] The ramifications of this joint jurisdiction are further explored in Section III *infra* with respect to logging issues.

The Russian Federation recognizes the importance of balancing natural resource exploitation with ecological health in Russian Federation Forest Code No. 22-FZ (1997), which mandates that "the use of the forest stock must be effected by methods which do not harm the environment, animal life, or human health."[26] Thus, logging in a manner that will harm tiger populations is technically illegal.[27] Additionally, Russia has maintained a forest preserve and national park system since the 1920s,[28] under which, once dedicated, protected lands cannot be later removed (although protected status is not dispositive regarding the disposition of logging rights).[29] As mentioned *supra*, most of the Amur tiger's extant range lies within legally protected forests.

There are criminal, but not civil, penalties for poaching within the Russian Federation. The federation's Criminal Code establishes a variety of possible fines and penalties based not on the nature of the particular poaching crime but, interestingly, on the status of the offender and the

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[22] *Id.* at 365.
[23] *Id.* at 367.
[24] *Id.* at 368.
[25] *Id.* at 368-9.
[26] *Id.* at 367 n. 15.
[27] *Id.* at 367.
[28] Cymbre Van Fossen, *The Evolution of a Comprehensive Environmental Strategy in the Russian Federation*, 13 WIS. INT'L L. J. 531, 533 (1994).
[29] Porter, *supra* note 1, at 372.

minimum wage mandated by the offender's jurisdiction and employment role.[30] Thus, an "ordinary citizen" poaching independently is fined anywhere between the equivalent of $14.42 and $3605.00.[31] Because the "ordinary citizen" poaching in tiger habitat is likely to be unemployed and impoverished,[32] fines would be levied at the low end of the scale. Meanwhile, black market retail value for an adult male tiger carcass can reach upwards of $50,000 in some cities of the world,[33] the local himself earning up to $15,000.[34]

The Criminal Code additionally provides that "[a] functionary who uses the power of position, a conspirator, and a member of organized crime" is fined anywhere between the equivalent of $36.05 and $5047.00 or "may be imprisoned for up to two years."[35] A "functionary" who is imprisoned under the enhanced penalty regime also loses the right to hold certain state positions for a period of three years.[36]

Organized crime does play a substantial role in the trade in tiger carcasses and derivatives, the Russian mafia controlling illegal wildlife trafficking from the far eastern port of Vladivostok.[37] The poachers themselves, however, are often impoverished local subsistence farmers who may not be "a member of organized crime" despite later selling the carcass to such a member.[38] Thus, the stepped-up penalties (including the risk of imprisonment) are not likely to reach the typical Amur tiger poacher, rendering the Criminal Code a poor deterrent.

Making matters worse, the 1989 collapse of the Soviet Union resulted not only in massive unemployment across the nation but also opened the Russian-Chinese border.[39] Since China's own tiger population had been rendered all but extinct, the demand for Russian tigers skyrocketed and a Russian poacher could receive the equivalent of four or five years' salary for a single carcass.[40]

Livestock and pet depredation additionally trigger the incentive for locals to kill Amur tigers by tigers as well as occasional human-tiger interactions.[41] These tiger-related casualties are exacerbated by reductions in the availability of the tigers' preferred prey species due to subsistence poaching of ungulates--sometimes at a rate of three times the legal hunting limit.[42] Finally, the prey species' themselves depend upon the nutrient-rich seeds of the Korean pine, a flora species that is frequently the target of illegal logging.[43]

In addition to authorizing domestic environmental legislation, the Russian Federation Constitution also provides that "the international treaties of the Russian Federation shall be a component part of its legal system," thereby authorizing the enforcement of its treaty

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[30] *Id.* at 375.
[31] *Id.* at 375-6.
[32] *Id.* at 366.
[33] Investigative Network, *Siberian Tiger/Forests Report, available at* http://ces.iisc.ernet.in/hpg/envis/doc6.html.
[34] Porter, *supra* note 1, at 368.
[35] *Id.*.
[36] *Id.* at 376.
[37] Damania, et al., *supra* note 21.
[38] *Id.*
[39] Cha, *supra* note 2, at 11.
[40] *Id.* at 12.
[41] Porter, *supra* note 1, at365.
[42] *Id.* at 377-8.
[43] Cha, *supra* note 2, at 6.

obligations.[44] The Russian Federation, after adopting a republican form of government, reaffirmed its commitment as a signatory member to the Convention on International Trade in Endangered Species (CITES)--having been a member under the former regime since 1976.[45]

As a CITES signatory, the Russian Federation is legally bound to penalize the unauthorized import, export, and possession of endangered species or their parts or derivative products.[46] Despite this obligation under CITES, however, Russian Federation law seems to draw a distinction between the protection of "animal life" and the possession of endangered "animal parts."[47] While the federation did exercise its commerce powers to criminalize the "commercial use" of tiger parts, possession of a tiger carcass, pelt, or part--absent evidence linking the possessor to an act of poaching--is not a criminal violation.[48] The only remedy for possession of tiger parts is forfeiture.[49]

In addition to the numerous weaknesses and loopholes inherent in anti-poaching laws themselves, the Russian Federation suffers from the insubordination of the courts themselves in their reluctance to enforce the wildlife protection laws--despite the legislative edict that decisions made by the Federation State Committee for Environmental Protection (authorized since 1988 to implement federal laws developed to protect the environment[50]) "shall be binding on legal entities."[51]

CITES responded to these numerous deficiencies in the Russian Federation's legal system by delegating members of its Tiger Technical Team to work with Russian officials in developing a special protection program for Amur tigers, which the Russian Federation authorized by law in its 1997 Decree No. 843 entitled "On the Special Federal Program 'Conservation of the Amur Tiger.'" Unfortunately, three years later, Vladimir Putin dissolved the Federation State Committee for Environmental Protection, transferring its functions to the Ministry of Natural Resources, the governmental body responsible for issuing corporate logging permits in the region (see *infra*).[52] Due far more to international efforts than to domestic law enforcement, the special anti-poaching program (also to be discussed *infra*) fortunately remains in force for the time being.

In summary, the Russian Federation's current, fragmented array of domestic wildlife protection laws and enforcement policies remain insufficient to prevent the extinction of the Amur tiger. Therefore, the success of the tiger population remains dependent upon international assistance. Possession of tiger carcasses or parts is not criminalized in Russia, forcing the government to connect the possessor to an actual poaching crime in order to convict; poaching convictions themselves do not carry penalties severe enough to offset the potential gain to an impoverished villager from poaching; and the judiciary is reluctant to enforce even these meager laws.

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[44] Porter, *supra* note 1, at 369.
[45] *Id.*
[46] *Id.* at 370.
[47] *Id.* at 370-71.
[48] *Id.* at 376.
[49] *Id.* at 370.
[50] Van Fossen, *supra* note 28, at 536.
[51] Porter, *supra* note 1, at 376-77.
[52] *Id.* at 371-2.

B. International Interventions to Prevent Amur Tiger Poaching in the Russian Federation

Because of the inadequacy of the Russian Federation's domestic wildlife protection scheme, in situ conservation[53] of the Amur tiger is heavily dependent upon foreign aid--the government's willingness to sanction and participate in these joint efforts stemming at least partially from international pressure to meet treaty obligations under CITES to protect the tiger.

In 1994, the Federation State Committee for Environmental Protection (Committee), responding to international pressure to save the rapidly declining Amur tiger, created a "special tiger project" with the threefold goal of: 1) preventing the destruction of tiger habitat, 2) cessation of tiger poaching and blocking channels of illegal wildlife trade, and 3) restore and maintain the ungulate prey populations.[54] The Committee also acknowledged the need to establish "wildlife corridors" linking current preserves, although it felt stymied by the lack of "legislative precedent" for such a designation.[55] Finally, the Committee recommended road closure programs, ungulate hunting quotas, and methods for livestock maintenance geared towards reducing the likelihood of depredation.[56]

To combat rampant poaching, this program cooperated with international non-governmental organizations (NGOs) to create a well-trained specialized anti-poaching unit, the "Inspection Tiger"[57]--later to be known as Operation Amba.[58] This program involved equipping the unit with vehicles and radio communications equipment funded by the World Wildlife Fund and England's Tiger Trust.[59]

The fact that the Amur tiger did not become extinct as predicted by the year 2000 can be attributed to this highly successful cooperative effort, which managed to reduce poaching in the region by 75% over a seventeen-month period--allowing the beleagured tigers to more than double their numbers over the next six years.[60] The unit received international recognition and a CITES commendation for its successes.[61] Still, however, both the Committee and the CITES Tiger Technical Team remained concerned about the inadequacy of Russian Federation's wildlife laws as a deterrant against poaching. This concern is illustrated in the statement of the Committee itself that "although Inspection Tiger has seized forty tiger skins and carcasses, no prosecutions have followed tiger-related incidents."[62]

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[53] In situ conservation refers to conservation efforts taking place at the site of the wild population. In situ conservation can be contrasted with ex situ conservation, which refers to conservation-minded breeding programs outside of a species' home range--such as programs conducted by zoos or wild animal parks to maintain an extant stock of genetically and physically healthy endangered animals in an environment free of the extinction dangers of the home range.

[54] Porter, *supra* note 1, at 372-3.

[55] *Id.*

[56] *Id.* at 374.

[57] Porter, *supra* note 1, at 375.

[58] Cha, *supra* note 2, at 6.

[59] Porter, *supra* note 1, at 375.

[60] [60] Investigative Network, *Siberian Tiger/Forests Report, available at* http://ces.iisc.ernet.in/hpg/envis/doc6.html.

[61] Porter, *supra* note 1, at 374-75.

[62] *Id.* at 377.

Further NGO assistance arrived in the form of the Siberian Tiger Project, "a joint effort between Russian tiger authorities and American wildlife biologists."[63] This long-term study using radio telemetry allows American co-directors Maurice Hornocker and Howard Quigley to track the movements of radio-collared Amur tigers to better learn how to protect them against poaching and habitat destruction.[64] The Amur tiger's survival in the wild is currently dependent upon these joint efforts between Russian authorities and NGOs--apparently the only way in which the Russian Federation is currently capable of meeting its treaty obligations under CITES.

C. An Economic Model Regarding the Poaching of Tigers and their Prey Species

In November 2001, Adelaide University's Centre for International Economic Studies (Australia) issued Discussion Paper No. 0140, *The Economics of Protecting Tiger Populations: Linking Household Behaviour to Poaching and Prey Depletion*. This innovative economic model utilized contemporary scientific knowledge about threats to tigers worldwide to devise a comprehensive array of variables, the manipulation of which could statistically predict the decline or recovery of wild tiger populations.[65]

While not specific to Amur tigers, the formula was based on the relevant circumstance of impoverished subsistence farmers who subsidized their nutritional intake by hunting wild ungulates as well as selling poached tigers to the illegal wildlife trade.[66]

Factors introduced into the formula included the tiger's nutritional needs, the poacher's remuneration per tiger carcass, additional motives for locals to kill tigers, penalties exacted for poaching, effort required to successfully poach, and the cost per unit of effort.[67] A number of prey poaching variables and tiger biology variables were also introduced into this complex formula.[68]

The researchers found a notable interaction between the condition of the tiger's prey base and tiger poaching pressures. They found that when prey levels are depleted for whatever reason, a relatively small increase in the pay-offs to poaching may trigger rapid extinction.[69] On the other hand, they also found that a relatively small increase in the opportunity costs of poaching would be sufficient to mitigate this risk.[70] As a result, the researchers concluded that anti-poaching policies should be directed at increasing the opportunity costs of poaching activities (i.e. more severe penalties, increased likelihood of being caught).[71] This finding suggests that current anti-poaching activities in the Russian Federation would benefit from a concurrent reformation of anti-poaching laws and enforcement policies.

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[63] Cha, *supra* note 2, at 6.
[64] *Id.*
[65] Damania, et. al., *supra* note 21.
[66] *Id.* The Damania, et al. study recognized the greater potential for tiger conservation in areas such as Russia where both tigers and their prey are more dispersed, requiring a greater expenditure of effort from would-be poachers.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*

III. THE CURRENT LEGAL ARCHITECTURE OF TIGER HABITAT CONSERVATION IN THE RUSSIAN FEDERATION

A. Legal Logging

The Russian Federation contains 58% of the world's conifer forests, most of which are located in the far eastern taiga forest region covering an area the size of the United States.[72] This wilderness not only contains prime Amur tiger habitat but also helps protect the entire planet against global warming as a critical carbon sink.[73]

The ecological stability of this critical forest region is threatened by two conflicting pieces of Russian Federation legislation, which reflect two competing and incompatible policies based on the country's socioeconomic reality: The Enterprises Act promotes economic development and minimal regulation of the use of natural resources, obliging exploiters simply "to make good the damage caused by an irrational utilization of land and other natural resources."[74]

In direct contrast to the Enterprise Act is the Forestry Act, which prioritizes effective conservation of forests and natural resources.[75] Under the Forestry Act, jurisdiction for policymaking and enforcement is distributed to the various regional governmental bodies to ensure that forest harvests are "effected by methods which do not harm the environment, animal life, or human health."[76] The strongest enforcement language under the Forestry Act states that unauthorized concessions of logging rights shall be null and void and can subject the offending party to various criminal and/or administrative liabilities in addition to the forfeiture of illegally harvested forest products.[77]

Unfortunately, the power of the Forestry Act to protect the Russian wilderness is compromised not only by its conflict with the Enterprise Act but also by structural problems with the Russian Federation's bureaucracy. Confusion and conflicts of laws can be traced in part by Russia's civil law tradition, resulting in a body of laws that emphasize comprehensiveness rather than cohesion or the enforceability of individual provisions.[78] The Russian Federation inherited "at least 670 separate environmental enactments" from the old Soviet Code of Laws.[79]

Furthermore, the State Committee for Environmental Protection (Committee) was "rendered ineffective due to an entrenched bureaucracy, wildly confusing national political shifts, curtailed public participation in the legislative process, and an inefficient economic system."[80] Similar to, in its intended function, the United States' Environmental Protection Agency (EPA), the Committee was authorized to issue permits, prepare environmental

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[72] Cha, *supra* note 2, at 8.
[73] *Id.*
[74] Van Fossen, *supra* note 28, at 547.
[75] *Id.* at 548.
[76] *Id.* at 548-50.
[77] *Id.* at 553.
[78] *Id.* at 536.
[79] *Id.*
[80] *Id.*

assessments of proposed projects, draft legislation for environmental protection, regulate the use of natural resources, impose bans on construction, and bring lawsuits for reimbursement of state losses.[81]

In the mounting battle between ecological concerns and the need to attract capital investments, the Committee was further stymied by a 1992 bureaucratic restructuring in which the Committee was combined with two other ministries to form a new "super-ministry" called the Ministry of Ecology and Natural Resources.[82] As mentioned *supra*, the Committee was finally abolished altogether in 2000. Because the Ministry of Ecology and Natural Resources was charged with the duty of attracting economic development under the Enterprise Act, the consolidating of the Committee--charged with protecting the environment under the Forestry Act--created a conflict of interest within the Ministry.[83]

Successful legal intervention on behalf of forest conservation under these bureaucratic circumstances can be attributed to the decentralized jurisdictional provisions of the Forestry Act, which allow local and regional governmental bodies a surprising amount of control over their own resources.[84] Although no regional province is immune from the urgent need to attract hard currency and capital investments, this legal decentralization allows political mobilization on behalf of the forests to occur at a local, grassroots level by those whose livelihoods would be harmed by exploitation of the forest.[85]

The way in local policymaking and enforcement can spawn grassroots conservation efforts in the Russian Federation is well-illustrated by the *Svetlaya* case, which took place in forest that also happened to be Amur tiger habitat.[86]

On November 29, 1992, the Russian Supreme Court, in a landmark decision, determined that the Pozharski District did have a right to cancel the transfer of logging rights to a foreign joint venture company because the company failed to meet their regional legal obligations of obtaining the formal consent of local indigenous peoples or of submitting the required ecological impact reports.[87] As a result, Hyundai Corporation (which formed the Svetlaya venture in the Russian Federation with the goal of operating a large clear-cutting and paper products manufacturing operation) lost millions of dollars on its investment and was forced to resort to regionally approved selective-cutting methods.[88]

While this Russian domestic legal victory on behalf of the environment demonstrates the potential strength of legislative devices permitting regional control over natural resources, there are a number of reasons why the *Svetlaya* success should be viewed with caution. First, there is no doctrine of stare decisis in Russian law, so the *Svetlaya* decision is not mandated legal precedent.[89] Furthermore, Svetlaya's corporate behavior was particularly heinous on a number of counts: (1) by reneging on their original promise not to attempt clear-cutting, (2) by reneging on their original promise to employ mostly local villagers, and (3) by failing to obtain the

[81] *Id.*
[82] *Id.* at 537.
[83] *Id.*
[84] *Id.* at 541.
[85] *Id.*
[86] *Id.* at 553.
[87] *Id.* at 554
[88] *Id.* at 558-9.
[89] *Id.* at 554.

permission of the indigenous Udegei.[90] Thus, the Svetlaya venture utterly failed to provide the regional populace with the sort of socioeconomic incentives that might have dissuaded their mobilization against the logging activity.

It should be noted that the presence of the Amur tiger itself provided some fuel to the revocation of the Svetlaya logging rights. Greenpeace, in an effort to focus international attention on the effects of clear-cutting on the Siberian tiger, successfully barricaded Svetlaya's primary port.[91] This action reminded the world that saving the Amur tiger is inextricably linked to saving the forest habitat in which it lives.

The battle for the taiga forest continues, however, as more foreign corporations--including American companies such as Weyerhauser--seek to secure Russian Federation logging rights in tiger habitat.[92] Furthermore, now that China banned domestic logging to remedy its own environmental injuries, the country is now seeking to import from the neighboring Russian Federation.[93] It remains to be seen if the local populace can be convinced once again to resist the temptation of this capital in-flow.

B. Illegal Logging

Poaching is not limited to animal species but includes illegal timber poaching as well. A full 50% of the Russian Federation's timber poaching activity occurs within the Amur tiger habitat of the Primorski Krai.[94] As with tiger poaching and ungulate poaching, most offenders are unemployed local villagers seeking to sell raw logs to foreign buyers from countries better able to enforce their own environmental protection laws.[95]

IV. THE LIMITATIONS OF THE CITES TREATY AS A VEHICLE OF INTERNATIONAL LAW IN PROTECTING THE AMUR TIGER

A. The Inherent Limitations of CITES as a Treaty

Since Russian Federation domestic laws have proven insufficient to protect the Amur tiger, it is important to look at vehicles of international law attempting to protect this endangered species. The Convention on International Trade in Endangered

Species (CITES) is "the backbone of international prohibitions against trade in endangered species."[96] Signatory nations obligate themselves to enact national laws and enforcement bodies to curtail the extraction or trade in endangered species of flora or fauna, the level of restriction

[90] *Id.* at 556-7.
[91] *Id.* at 556 n.184.
[92] Cha, *supra* note 2, at 9.
[93] *Id.* at 10.
[94] *Id.* at 11.
[95] *Id.*
[96] Vulpio, *supra* note 13, at 465.

dependant on which CITES Appendix the species is listed under. All subspecies of tiger are listed on Appendix I of CITES, affording them the highest level of protection under this treaty.[97]

Legal protection devices under CITES include guidelines for developing a permit system to regulate authorized trade in endangered species, namely the annual report and the biennial Conference of Parties (COPS).[98] Unfavorable reports may lead to the formation of special CITES investigative committees such as the Tiger Technical Mission, which will make specific recommendations (backed by political pressure) to the signatory nation in need of improvement.[99] The Russian Federation, for example, responded positively to intervention of the CITES Tiger Technical Team's recommendations about how to achieve greater conservation successes in the Amur tiger's home range.[100]

CITES, however, does have a number of inherent limitations that reduce its usefulness as a device of international law. First, the burden to implement regulations and penalties falls on the signatory nations themselves; there is no supranational CITES enforcement body.[101] Second, there is no internationally standardized permit system.[102] Instead, signatory nations simply appoint a "Scientific Authority" to issue guidelines to a "Management Authority" in developing species-specific permitting and enforcement standards.[103] Third, the utility of the annual report is compromised by the fact that an estimated 45% of trade in CITES-listed animal products is not reported.[104]

A fourth weakness in CITES relates to the lack of specificity with which prohibited trade "for commercial purposes" is to be usefully distinguished from the exemption for "personal or household effects" and the exemption for "captive-bred, non-commercial loans between scientists or museums, and those forming part of a traveling zoo, circus, menagerie, exhibition, or other traveling exhibition."[105] What remains clear, however, is that commercial trade in wild-caught Appendix I specimens--alive or deceased--is prohibited under a nation's CITES obligations. In furtherance of this mandate, the 2002 CITES Conference of Parties in Santiago, Chile adopted a new resolution urging parties to prioritize legislation and enforcement efforts on behalf of all Asian big cats--which would include the Amur tiger.[106]

Perhaps the biggest weakness inherent to CITES, however, is the lack of its ability to remedy failure of implementation at the national level due to lack of funds or political instability.[107] There is no device inherent to CITES to enforce a remedy when the signatory nation demonstrates a lack of capacity to meet its obligations. This is certainly a problem in the Russian Federation, resulting in the increasingly common scenario in which NGOs provide financial and technical assistance on an ad hoc basis to help signatory nations meet their CITES

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[97] Porter, *supra* note 1, at 369.
[98] Vulpio, *supra* note 13, at 466.
[99] Porter, *supra* note 1, at 370--n. 37; *see also* Vulpio, *supra* note 13, at 467.
[100] Porter, *supra* note 1, at 370--n. 37.
[101] *Id.* at 370.
[102] Vulpio, *supra* note 13, at 466.
[103] *Id.*
[104] *Id.*
[105] *Id.* at 467-8.
[106] *See CITES Conference Decisions on Asian Big Cats and African Leopards*, SAVE THE TIGER FUND, *available at* http://www.5tigers.org/news/CatNews/cn38/CITESdecisions.htm.
[107] Vulpio, *supra* note 13, at 469.

obligations.[108] This weakness can, however, be partially offset when the wealthier destination nations for illegal wildlife products (many of which are themselves CITES signatories) implement strong domestic regulatory legislation and enforcement systems.

B. CITES and the WTO: A Potential Conflict of Laws

Potentially more worrying than the inherent weaknesses of the CITES treaty is the possibility of a conflict of laws between CITES-mandated trade bans and the mandates of another international agreement--the World Trade Organization. As Vulpio observes, "By restricting or prohibiting outright trade in specified items, CITES risks a conflict of laws with the free trade principles embodied by the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO)."[109]

While parties acceding to these agreements do agree "to subsume trade interests to conservation when violations are severe, international consensus is strong, and the protectionism involved is environmental rather than economic,"[110] the trade community also "worries that contrived environmental standards will be used by protectionists to disguise trade barriers."[111]

A much-debated example of the international conflict between conservation and trade is found in the 1994 United States sanctions against Taiwan after CITES recommended penalties up to and including sanctions against China and Taiwan for failing to cease the manufacture and export of shoes made with endangered Finnish elk skin (which were scheduled to be imported into the United States by the Florsheim Shoe Co.).[112] Florsheim was unsuccessful in arguing that CITES would only apply to a country's export of *its own* endangered species.

While GATT/WTO issues were not triggered due to the fact that Taiwan had not yet acceded to these agreements, some scholars have suggested that these CITES recommended sanctions would have violated the free trade provisions of the GATT/WTO had Taiwan been a member at that time.[113] The cited rationale for this analysis lies in the tendency of GATT Panels (which have jurisdiction to settle conflicts between environmental and free trade concerns under the WTO) to interpret the environmental exceptions narrowly due to the above-stated concerns about unfair protectionism.[114]

Because the Russian Federation is currently in the process of acceding to the WTO,[115] the ability of CITES to continue to authorize Amur tiger conservation in the form of outright trade bans may well depend upon a GATT Panel decision that Amur tiger conservation is valid environmental emergency, making the resulting restriction on free trade an acceptable exception to the general rule.

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[108] *Id.*
[109] *Id.* at 468.
[110] *Id.*
[111] *Id.*
[112] *Id.* at 481.
[113] *Id.* at 469.
[114] Christine Crawford, *Conflicts Between the CITES and the GATT in Light of Actions to Halt the Rhinoceros and Tiger Trade*, 7 GEO. INT'L ENVTL. L. REV. 555, 584 (1995).
[115] *See Russia Acceding to the WTO*, WTO, *at* http://www.wto.org/english/thewto_e/acc_e/al_russie_e.htm (last visited Dec. 31, 2004).

V. THE UNITED STATES AS A DESTINATION COUNTRY FOR TIGER PRODUCTS AND THE AMERICAN LEGAL ARCHITECTURE OF TIGER CONSERVATION

While many people associate illegal tiger products with the traditional remedies hawked in Asian street markets, the truth is that the United States is a major destination state for illegal wildlife importation.[116] Independent surveys conducted in 1998 by the World Conservation Society and the World Wildlife Fund found that just under half of over 100 medicinal shops visited by undercover investigators in Asian neighborhoods of several U.S. cities offered imported products claiming to contain rhinoceros, tiger, or leopard ingredients.[117]

Because wealthier destination states such as the United States, Taiwan, Hong Kong, and South Korea[118] both create the market for tiger products and have access to greater economic resources and technology, the steps these nations take to combat the trade in endangered species under their treaty obligations or on their own initiative are vital to the conservation of species like the Amur tiger. The following is a survey of the current legal architecture protecting the Amur tiger--a species located halfway across the world.

A. Implementation of CITES and the Endangered Species Act

As a CITES signatory party, the United States is obligated to pass domestic legislation implementing the treaty and authorizing enforcement. Thus, Section 8 of the Endangered Species Act (ESA) expressly and specifically implements CITES, and Section 9 utilizes the commerce power to prohibit the shipping, selling, or offering of endangered species for sale in interstate or foreign commerce.[119]

The ESA is similar to the Lacey Act (see *infra*) and distinguishable from Russian Federation legislation in that it authorizes a monetary reward to citizens who provide information leading to the arrest, conviction, civil forfeiture, or civil penalty assessment for any violation of the ESA or any regulation promulgated under the ESA.[120] The provision for not just criminal but also civil penalties is, itself, distinguishable from Russian Federation legislation. Finally, the penalties for violating the ESA can be substantial, and the American courts do not uniformly share the Russian courts' reluctance to assess these penalties.[121] Thus, the ESA inserts an arguably far greater disincentive to partake in the illegal wildlife trade at the user end of the market than the Russian Federation's legislation does at the supplier end.

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[116] Vulpio, *supra* note 13, at 485.
[117] *Id.*
[118] *Id.* at 478.
[119] *Id.* at 480.
[120] Porter, *supra* note 1, at 382-83.
[121] *Id.* at 394.

B. The Lacey Act

While pre-dating both the ESA and CITES by decades and overlapping with the ESA considerably in its scope of protections, the Lacey Act of 1900[122] includes the important, specific provision that it is a federal offense to violate another nation's wildlife laws.[123] The Lacey Act makes it unlawful to (1) "import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty or regulation of the US or in violation of any Indian tribal law"; or to (2) "import, transport, sell, receive, acquire, or purchase in interstate foreign commerce any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law."[124]

The Lacey Act also imposes both civil and criminal fines, including civil fines if the offender "should have known" that the conduct they engaged in was in violation of the law.[125] The criminal penalties include the possibility of up to five years imprisonment, and there is a reward provision for any individual who provides information leading to a prosecution.[126]

C. The Rhinoceros and Tiger Conservation and Product Labeling Acts

In 1994, the United States Congress passed the Rhinoceros and Tiger Conservation Act (RTCA), the purpose of the act being "[t]o assist in the conservation of rhinoceros and tigers by supporting the conservation programs of other nations whose activities directly or indirectly affect rhinoceros and tiger populations, and the CITES Secretariat."[127] This important appropriatory act initially designated a Rhinoceros and Tiger Conservation Fund authorizing up to ten million dollars for the fiscal years 1996-2000, which was appropriated to finance such international NGO-mediated interventions such as aerial monitoring of Zairean rhinoceros and Indian tiger poaching investigations.[128] In 2002, the RTCA was, fortunately, reauthorized by the Bush administration to distribute annual funding for several more years[129] and could provide vital funding to NGO interventions in the Russian Federation on behalf of the Amur tiger.

In 1998, the United States Congress overcame a major hurdle in illegal wildlife trade prosecutions by passing the Rhinoceros and Tiger Product Labeling Act (RTPLA).[130] Prior to the RTPLA, the government was stymied in its prosecutorial efforts by the prohibitively expensive laboratory testing necessary to prove that a suspicious product did in fact contain ingredients derived from endangered species.[131] The RTPLA, however, imposes a legal presumption that any product claiming to contain rhinoceros or tiger ingredients does in fact

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[122] Vulpio, *supra* note 13, at 470.
[123] *Id.*
[124] Porter, *supra* note 1, at 381 n.117.
[125] *Id.*
[126] *Id.*
[127] *Id.* at 370 n.34.
[128] Vulpio, *supra* note 13, at 486.
[129] *See Bill Signings*, WHITE HOUSE, *at* http://www.whitehouse.gov/news/releases/2002/01/20020109-1.html.
[130] Vulpio, *supra* note 13, at 470.
[131] *Id.* at 487.

contain such ingredients.[132] As a result, it is effectively illegal to offer a product even *pretending* to contain tiger parts.

Fortunately, this legislation is increasingly being paired with education as traditional medicine practitioners and researchers seek substitutes and inform customers of the endangered status of some of the species used as ingredients.[133] In his February 1998 testimony before the United States Congress, Dr. Lixing Lao of the American College of Traditional Medicine emphasized the importance of conquering the perception in Asian cultures that conservation efforts are merely the product of cultural imperialism and insensitivity.[134]

D. The Pelly Amendment

The Pelly Amendment to the 1967 Fisherman's Protective Act of 1967 is the most controversial of the United States' laws protecting foreign endangered species, as it authorizes the United States to impose unilateral import sanctions against CITES signatories with insufficient enforcement records.[135]

While the 1994 Clinton administration sanctions against Taiwan were the only trade sanctions ever imposed by any signatory for CITES violations, the action is significant in that the violations involved tiger products and because it occurred after Taiwan, unlike China, failed to respond to a specific recommendation by a CITES Standing Committee to step up enforcement.[136]

The sanctions cost Taiwan an estimated ten to twenty-five million dollars before they were lifted by the United States in 1995 following Taiwan's passage of legislation significantly raising the penalties for trading in endangered wildlife.[137] While the international community generally disfavors unilateral trade sanctions, the political impact was mitigated in this case by the international consensus inherent in the CITES recommendation to impose the sanctions and by the relatively modest cost to Taiwan in light of their total annual foreign trade revenue.[138]

The willingness of tiger product destination states such as the United States to impose trades sanctions on countries failing to meet their CITES obligations could successfully offset the weaknesses regarding enforcement inherent in the treaty itself. Sanctions against other economically wealthy destination states could also offset the difficulties economically impoverished supplier states such as the Russian Federation have in protecting endangered species in situ. However, as discussed *supra*, the legality of sanctions under the Pelly Amendment may depend upon the degree of deference a WTO/GATT Panel allots to a CITES recommendation as an environmental concern outweighing the policy to promote free trade.

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[132] *Id.*
[133] *Id.* at 483.
[134] *Id.* at 482.
[135] *Id.* at 470.
[136] *Id.* at 479.
[137] Julie Cheung, *Implementation and Enforcement of CITES: An Assessment of Tiger and Rhinoceros Conservation Policy in Asia*, 5 PAC. RIM L. & POL'Y J. 123, 138 (1995).
[138] Vulpio, *supra* note 13, at 480.

Efforts to save the Amur tiger would benefit enormously from an uncoerced increase in the motivation of other wealthy destination states to put energy and resources into enforcing the trade ban. As Vulpio aptly observes:

> In stark contrast to their less developed neighbors, Asia's economic 'tigers'--particularly Taiwan, Hong Kong, Japan, and South Korea--enjoy twentieth century levels of prosperity generated by manufacturing and trade. Nonetheless, these wealthy countries often contend that insufficient funding hampers their efforts to protect endangered species. Many observers feel that these constraints could actually be more a function of unwillingness, rather than inability, to allocate the necessary resources for effective trade control.[139]

VI. 21ST CENTURY CONSERVATION STRATEGIES FOR THE WILD AMUR TIGER

A. In Situ Strategies

National and international legislation will not alone provide all the ingredients required to save the wild Amur tiger.[140] Tiger conservationists increasingly agree that the survival of wild tigers depends upon allowing them "a sufficient habitat area, sufficient prey, low human disturbance, and genetic viability."[141] Whether efforts at providing these requisites are focused at the impoverished villages sharing the wilderness with the tigers or the urban shopkeepers touting expensive tiger products, the fate of the wild tiger will depend upon it becoming worth more to human beings alive than dead. With this reality in mind, a number of conservation strategies have been suggested for increasing the Amur tiger's chances of survival in its home range.

Operation Amba is an excellent example of a multi-pronged, cooperative, in situ conservation effort with considerable success. A well-publicized international fundraising campaign on behalf of a highly prized, highly symbolic species provided ample funds to equip, train, and pay a local anti-poaching squad. Local authorities consented to give the squad arrest authority; local judges were educated about the severity of the crisis; farmers were compensated for depredated livestock; and the newly trained employees were paid well and on time.[142] The local incentive to poach plummeted, and the Amur tiger more than doubled its wild population in a scant six years.

Efforts like Operation Amba depend heavily on the continuing generosity of the international community--both that of private donors and volunteers and that of governments such as that of the United States with donor legislation such as its Rhinoceros and Tiger Conservation Act. Furthermore, anti-poaching regimes will be rendered moot without simultaneous conservation of the taiga forest and its ungulate prey population. Svetlaya was

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[139] *Id.* at 478.

[140] Vulpio, *supra* note 13, at 471.

[141] Ronald Tilson, Philip Nyhus, Neil Franklin, Sriyanto, Bastoni, Mohammad Yunus, & Sumianto, *Tiger Restoration in Asia: Ecological Theory vs. Sociological Reality*, *in* LARGE MAMMAL RESTORATION: ECOLOGICAL AND SOCIOLOGICAL CHALLENGES IN THE 21ST CENTURY (David S. Maehr, Reed F. Noss, & Jeffery L. Larkin eds., 2001) 277, 279.

[142] Cha, *supra* note 2, at 19-20.

only the beginning of what Cha refers to as "the coming free-for-all in the use of Russia's natural resources."[143] Whether domestic and international concern for the wild Amur tiger and the ozone layer will continue to keep the logging trade at bay remains to be seen.

A second in situ conservation strategy that has met with considerable success in Africa and mixed success in parts of Asia is ecotourism--which, when done well, has the potential to increase the value of live animals by allowing their appreciators to see them in person and by allowing the local villagers to profit from this viewing. The danger of ecotourism, however, lies in the potential for mismanaged tourist access to result in severe habitat encroachment and animal harassment.[144] Problems also arise when tourist operations fail to offer local villagers the opportunity to profit from the venture.[145]

A good example of an ecologically and economically successful ecotourism operation is the safari offered by the Namibian village of Purros.[146] The eight extended families who comprise the village have complete control over the safari venture--including organized game-ranger patrols and supplemental income from craft sales.[147] As a result, the villagers' incentive to poach endangered local wildlife has disappeared.[148]

One must be cautious, however, before attempting to apply the African model of ecotourism to Asia. African wildlife tends to thrive on open grasslands, making it easier to view from a safari vehicle; plus, many of its species are social and live in dense herds or prides--again, making the animals easier to see. Tigers are solitary, elusive cats that depend on cover and silence to meet their nutritional needs.[149] An additional hurdle in the case of the Amur tiger is its location in a remote, often cold and snowbound location with a very low density of wildlife. Nonetheless, at least one Russian company is currently offering the opportunity to attempt to track and photograph (either via remote-control "camera traps" or, if one is lucky, in person) wild Amur tigers in the Primorye province.[150] It remains to be seen if ecotourism can make a more definite inroad than logging in the Russian Far East.

Other strategies to reduce the pressure on the wild Amur tiger population involve finding alternate means of meeting the demand for tiger products. Educating destination state consumers about the plight of the species used in traditional medicine products is one approach. Another is to research and develop alternative remedies for the afflictions allegedly cured by tiger products.

A more controversial strategy proposed to reduce the pressure on wild tiger populations involves "tiger farming" and the harvesting of captive-bred tigers to supply the traditional medicine market.[151] Proponents of this strategy note that CITES relaxes the trade regulations for specimens of Appendix 1 animals that are bred in captivity for commercial purposes.[152] Additionally, for an Appendix 1 species to be considered "bred in captivity" for this purpose, the

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[143] *Id.* at 13.
[144] Vulpio, *supra* note 13, at 476.
[145] *Id.* at 477.
[146] *Id.* at 476.
[147] *Id.*
[148] *Id.*
[149] *Id.* at 476.
[150] *See Ecology Tour*, LUCKY TOUR, *at* http://www.luckytour.com/text/inbound/ecologtour.htm (last visited Dec. 31, 2004).
[151] Joon Moo Lee, *Poachers, Tigers, and Bears. . . . Oh My! Asia's Illegal Wildlife Trade*, 16 NW. J. INT'L L. & BUS. 497, 505 (1996).
[152] *Id.* at 505-6

breeding stock must be established in a way that does not detrimentally affect the wild population and managed in a way "that is capable of reliably producing a second generation and maintaining a continuing breeding stock indefinitely."[153] In other words, the captive-bred stock cannot be developed or replenished using wild specimens.

A number of criticisms can be lodged at the "tiger farming" suggestion: First, there is no exemption in the Rhinoceros and Tiger Product Labeling Act for captive-bred specimens, thereby rendering all "farmed" tiger products illegal within the United States. Second, conservation groups are concerned that legitimizing tiger consumption could actually stimulate further poaching.[154] Perhaps most importantly, it would be impossible to distinguish between legally farmed tiger products and illegally poached tiger products.[155] Finally, none of the utilitarian rationales for tiger farming consider the cruelty involved in raising a solitary, wide-ranging, territorial carnivore as a farm animal. The CITES exemptions for captive-bred specimens would arguably be better employed by ex situ tiger conservation efforts discussed *infra*.

B. Ex Situ Strategies

Ex situ conservation usually suggests carefully selected, carefully managed, captive-bred populations of rare species collected and propagated for the purposes of preventing their extinction and educating the public about their nature and plight in the wild. The term almost always implies a captive--not a wild--population.

Tigers breed very well in captivity, and there are currently around 1200 registered purebred tigers living in captivity worldwide,[156] each one representing one of the five subspecies.[157] Of course, if it turns out that phenotypic variation among regional populations of tigers does NOT rise to the level of subspecies classification, the status of these tigers as "purebred" will not be an issue. It is hoped that maintaining this captive population will eventually allow tigers to re-populate the wild once poaching and habitat factors are resolved.[158]

It appears, however, that the prospect of new populations of wild tigers is no longer necessarily dependent upon improvements in the Asian habitats. Conservation biologists have noted that there is evidence that captive-bred tigers can learn to adapt to wild conditions if they are suitably trained how to hunt and how to avoid humans and livestock before being released.[159] Though considered theoretically possible, this strategy was often discounted as being too difficult, expensive, and time-consuming.[160]

Tiger conservationists John Varty and Dave Salmoni, however, have turned this theory into reality. In the Discovery Channel's television documentary *Living with Tigers*, Varty and Salmoni demonstrated to the world that captive-bred tiger cubs can indeed be trained how to

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[153] *Id.* at 506.
[154] Vulpio, *supra* note 13, at 475.
[155] *Id.*
[156] Many more mixed breed tigers are privately owned or commercially bred in captivity as well.
[157] *See*, Michael 't Sas-Rolfes, *supra* note 18.
[158] *Id.*
[159] *Id.*
[160] *Id.*

select, hunt and sustain themselves on wild prey as well as how to avoid humans, vehicles, and livestock--and not in Asia but in Africa![161]

Introducing an exotic species into a new wilderness is controversial, and not all tiger conservationists support Varty and Salmoni's South African project. Responding to such criticism, however, Salmoni stated:

> In choosing a location for a tiger sanctuary . . . we had to be careful not to be invading an otherwise healthy ecosystem. The sanctuary was developed on farms that had become unviable for grazing domestic stock. Poor farming techniques had led them to a state in which no healthy ecosystem could exist.[162]

By successfully training two Bengal tiger cubs to fend for themselves on damaged South African land, the project minimized its impact on extant African ecosystems while giving tigers a chance to establish a multi-generational wild population in the comparative safety of a well-patrolled game park in a country with a well-developed infrastructure and well-developed wildlife protection laws. Salmoni hopes that tigers from this very first wild ex situ tiger population will prove suitable for re-introduction to their native Asia once conservation reforms there make it safe for new tiger populations.[163]

While the difference in climate between the South African lowlands and the Russian Sikhote-Alin wilderness may well prove too drastic to repopulate Russia with Amur tigers raised in South Africa, there is no reason why similar ex situ projects undertaken in more temperate climates might not supplement the extant in situ Amur tiger population--guaranteeing that it remains genetically viable for long-term survival.

VII. CONCLUSION

The fate of the magnificent wild Amur tiger remains precarious and thoroughly dependent on a tenuous, ever changing network of domestic and international laws, obligations, and enforcement policies. The Russian Federation continues to suffer a slow economic decline, depending more than ever upon foreign capital investment to bolster its economy and upon foreign NGOs to help protect its tigers. Its anticipated accession to the World Trade Organization might present serious limitations on the enforceability of its obligations under CITES.

Meanwhile, the international demand for tiger products and taiga forest lumber continues. The legislative, enforcement, and education policies regarding the illegal trade in tiger products in wealthy destination states remain critical vehicles in reducing the incentive to poach. Without this multi-faceted international and domestic legal architecture attempting to protect wild tigers, not even the most inventive conservation project could succeed. The wild Amur tiger, if it is to evade extinction, will need a lawyer.

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[161] *Living With Tigers* (Discovery Channel broadcast, Mar. 24, 2003); *see also Tiger Conservation: What Others are Saying*, DISCOVERY CHANNEL, *at* http://dsc.discovery.com/convergence/tigers/voices/voices.html.
[162] *Id.*
[163] *Id.*

WHEN RITUAL SLAUGHTER ISN'T KOSHER: AN EXAMINATION OF SHECHITA AND THE HUMANE METHODS OF SLAUGHTER ACT

MICHELLE HODKIN

I. INTRODUCTION

"The righteous person regards the life of his beast."[1] I have always felt honored to be part of a heritage that is known to be the first in recorded history that ascribes such benevolent and compassionate treatment towards animals. Judaism's plethora of laws relating to the treatment of animals delineates the extensive and unique quality of the religion that mandates the utmost compassion of human beings to be extended towards the creatures with which we share this earth. Though the religion permits the slaughter and consumption of animals for food, that permission goes hand and hand with extensive, detailed requirements for the slaughtering process that help ensure that the animal dies as humanely as possible.

It is from this perspective that I viewed and read a *New York Times* article published on December 1, 2004, entitled *Videos Cited in Calling Kosher Slaughterhouse Inhumane*.[2] The article's gripping first sentence read, "An animal rights group released grisly undercover videotapes yesterday showing steers in a major kosher slaughterhouse in Iowa staggering and bellowing long after their throats were cut."[3] With shock and disappointment, I read on and learned that the steak I enjoyed just two nights previous likely came from a cow who suffered from the same treatment as the several cows documented in the videotape released by the People for the Ethical Treatment of Animals (PETA).

Kosher slaughter, or shechita as it is called in biblical Hebrew, is so humane that when performed as intended by Jewish law, the animals don't even feel the cut before dying. Even in modern times and by modern standards, experts have agreed that the shechita method as outlined in Jewish law is humane, and unconsciousness normally follows within seconds of the throat cutting. So how does one reconcile these truths with the video released by PETA of the practices occurring at the AgriProcessors plant in Postville, Iowa? What follows are my own conclusions to that troubling question, and my recommendations to improve the lives and deaths of cows at kosher slaughterhouses.

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[1] *Proverbs* 12:10.

[2] Donald G. McNeil Jr., *Videos Cited in Calling Kosher Slaughterhouse Inhumane*, N.Y. TIMES, Dec. 1, 2004, *available at* LEXIS, Nexis Library, N.Y. TIMES File.

[3] *Id.*

II. BACKGROUND

A. The Basics: History, Religion & Culture

To understand the legal issues that are presented with the treatment of cattle at AgriProcessors, it is first necessary to understand the Jewish dietary laws and where they come from. One of the principles of Judaism is that the Jewish people received both the Written *Torah* (*Torah*), commonly known as the five books of Moses, and the Oral Torah at Mount Sinai, the Oral Torah being an explanation of how the written laws should be executed and followed.[4] The Oral Torah passed from generation to generation without ever being written down; the application of the principles it espoused was meant to be adapted to new circumstances as they arose.[5] Up until the destruction of the Temple in 70 CE,[6] the chain of transmission was virtually uninterrupted, allowing the accurate transmission of the Oral Torah.[7] However, after the destruction, Rabbi Yehudah HaNasi, a great Jewish sage, undertook the massive task of writing down the Oral Torah, which was completed in 219 C.E and is now known as the *Mishna*.[8] Afterwards, other rabbis realized that because the *Mishna* was written in shorthand fashion and was esoteric in parts, there was a need to document the various discussions about the application of the *Torah* and the *Mishna*, as well as stories meant to illustrate certain points in Judaism.[9] That need gave way to the creation of the *Talmud*, which serves as an encyclopedia of Jewish existence.[10] It is in the *Talmud* that specifications and explanations of the basic Jewish dietary laws called kashrut[11] are found, and the body of law that is comprised of the *Torah*, *Mishna*, and *Talmud* is called halacha.

Not all Jewish people subscribe to the same beliefs outlined above, however. There are three principle movements within the Jewish faith: Orthodox, Conservative, and Reform. Reform Judaism does not accept the view that Jewish law is binding, and instead focuses on the moral autonomy of individuals to decide which laws are religiously meaningful for them.[12] The Conservative movement accepts the notion that halacha is binding upon Jews, but it also believes that Jewish law, by its very nature, is capable of evolution as humans learn more about

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[4] Rabbi Ken Spiro, *In a Time of Chaos, the Rabbis Decide That They Must Do the Unprecedented – Write Down the Oral Law*, AISH, *at* http://www.aish.com/literacy/jewishhistory/Crash_Course_in_Jewish_History_Part_39_-_Talmud.asp.

[5] *Id.*

[6] Rabbi Ken Spiro, *On the Saddest Day in the Jewish Calendar, the 9th of Av, the Temple Burns to the Ground*, AISH, *at* http://www.aish.com/literacy/jewishhistory/Crash_Course_in_Jewish_History_Part_35_-_Destruction_of_the_Temple.asp.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] From the Hebrew word "kasher," which means "fit" or "proper."

[12] *The Movements in Judaism*, CONVERSION TO JUDAISM, *at* www.convert.org/movement.htm (last viewed Sept. 25, 2005).

interpreting the *Torah*.[13] The Orthodox movement accepts the idea that halacha is binding on all Jews, and that halacha itself cannot evolve.[14] It is to this last movement that the Hasidim, an ultra-orthodox sect within Judaism, belong, and to this sect that the founders and leadership of AgriProcessors subscribe. Thus, the following analysis will address Orthodox interpretations of Jewish laws and halacha.

As Orthodox Judaism maintains that halacha is binding upon Jews and that it does not evolve, as time passes, the laws of kashrut are thought to be equally applicable today as they were for Jewish people thousands of years ago. The laws of kashrut are highly complex; the main principles are that certain food items listed in the *Torah* are unacceptable for consumption, including but not limited to pigs, rabbits, eagles, owls, catfish, shellfish, insects, and reptiles.[15] In addition, meat and dairy products may not be manufactured or consumed together, and kosher species of meat and fowl must be slaughtered in a prescribed manner.[16]

Shechita is the only method of producing kosher meat and poultry allowed by Jewish law, as interpreted by the Orthodox movement.[17] According to Chabad-Lubavitch, a movement within Orthodox Judaism that seeks to educate less observant Jewish people about halacha, the rules governing kosher slaughter "ensure a swift and painless dispatch of the animal." Furthermore, Chabad states:

> The rules governing shechita are codified and defined and are as binding and valued today as ever and they ensure a swift and painless dispatch of the animal. Infringing the laws of shechita renders the meat unconditionally forbidden as food to Jews. The time hallowed practice of shechita, marked as it is by compassion and consideration for the welfare of the animal, has been a central pillar in the sustaining of Jewish life for millennia.[18]

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[13] *Id*.

[14] *Id*.

[15] The *Torah* in *Lev*. 11:3 and *Deut*. 14:6 states that of the "beasts of the earth," you may eat any animal that has cloven hooves and chews its cud. According to *Lev*. 11:9 and *Deut*. 14:9, you may eat any water creature that has fins and scales. The *Torah* lists forbidden birds in *Lev*. 11:13-19 and in *Deut*. 14:11-18 but does not specify why they are forbidden; the forbidden birds all have the common quality of being birds of prey, however. *Lev*. 11:29-30, 42-43 states that rodents, reptiles, amphibians, and insects (with the exception of a select few that are unidentifiable in modern times) are all forbidden.

[16] These are the laws of shechita, kosher slaughter; *Lev*. 12:21, states "you need only slaughter your cattle and small animals that God will have given you in the manner that I have prescribed." Rabbi Aryeh Kaplan in THE LIVING TORAH stated that this alludes to the many rules of ritual slaughter detailed in the *Mishna* tractate of *Chullin*, 28a.

[17] *What is Shechita?*, CHABAD, *at* http://www.chabad.org/library/article.asp?AID=222240 (last viewed Sept. 25, 2005).

[18] *Id*.

B. The PETA Pleadings

AgriProcessors, Inc., (AgriProcessors) is a meat processing and packing plant based in Postville, Iowa, population 1,478.[19] In 1988, the local Hygrade meat processing plant went out of business and threatened the small town with economic decline.[20] It was at that point that a Hasidic butcher from Brooklyn, Sholom Rubashkin, bought the plant and converted it into a glatt kosher slaughterhouse.[21] The business was officially founded in 1989, and in just sixteen years it became one of the undisputed giants of the kosher meat industry, generating approximately 84.9 million in annual sales.[22] Moreover, it was and is the only kosher slaughtering plant permitted to export its meat to Israel.[23] AgriProcessors processes and packages both poultry and beef under the "Rubashkin's" and "Aaron's Best" brands, which can be found in non-specialty grocery stores nationwide. In fact, my own search for kosher beef in Michigan revealed that those two brands are the only ones available in both Southeast Michigan non-specialty grocery stores and kosher butchers alike.

Prior to filing suit, PETA initiated contact with AgriProcessors to inform them of reports it received regarding the inhumane treatment of cattle and poultry at the Postville plant. These letters between PETA and AgriProcessors' counsel, Nathan Lewin, help provide the appropriate context for understanding the events that led up to the publicity surrounding the inhumane treatment of cattle at the Postville, Iowa plant.

On June 18, 2003, PETA faxed a letter to Donald Hunt, the operations Manager of AgriProcessors,[24] stating that it received vague "reports" from the plant that "Jewish law is being violated."[25] In that letter, Steven Jay Gross, Ph.D., states, "To keep this matter entirely confidential, it would be necessary for you to agree to hire Temple Grandin to help you improve handling and slaughter practices at your plant."[26] Dr. Grandin, a professor at Colorado State University, is best known for her work to improve animal welfare and conditions at slaughtering and processing facilities, and is often hired by meat processing plants and slaughterhouses to help facilities develop transporting, holding, and slaughtering methods that alleviate some of the animals' trauma.[27] She has also done extensive research in the area of ritual slaughter, and is intimately familiar with both kosher requirements as well as halal requirements.[28] The letter

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[19] *Company Profile of Agriprocessors*, GOLIATH, *at* http://goliath.ecnext.com/coms2/product-compint-0000547823-page.html (last visited May 5, 2005).

[20] *Editorial Review: Postville: A Clash of Cultures in Heartland America*, AMAZON, *at* http://www.amazon.com/exec/obidos/tg/detail/-/0156013363/102-2525244-0853750?v=glance (last viewed May 5, 2005)

[21] *Id*.

[22] *Company Profile of Agriprocessors*, *supra* note 19.

[23] McNeil, *supra* note 2.

[24] *See Local News and Announcements*, CHABAD IOWA, *at* http://www.chabadiowa.org/localnews.html (last viewed May 5, 2005).

[25] Letter from Steven Jay Gross, Ph.D., spokesman for PETA, to Donald Hunt, Operations Manager, AgriProcessors, Inc. (June 18, 2003), *at* http://www.goveg.com/feat/agriprocessors/pdfs/Huntpdf.pdf (last viewed May 5, 2005).

[26] *Id.*

[27] Temple Grandin, PhD, *Special Report: Maintenance of Good Animal Welfare Standards in Beef Slaughter Plants By Use of Auditing Programs*, 226 J. AM. VET. MED. ASS'N 370 (2005).

[28] Temple Grandin and Joe M. Regenstein, *Religious Slaughter and Animal Welfare: a Discussion for Meat Scientists*, MEAT FOCUS INT'L, Mar. 1994, at 115-123.

requests that Dr. Grandin be given full access to the plant "so that she could quickly assist AgriProcessors in instituting humane improvements consistent with kashrut," and it also asks that Mr. Hunt contact Dr. Grandin within a week.

Nathan Lewin, counsel for AgriProcessors, responded to PETA's letter on August 26, 2003.[29] He states that "neither Jewish law nor 'common decency' is being violated in the AgriProcessors plant," and denies that the slaughter occurring there violates the "letter and spirit of Jewish law, which prescribes the most humane treatment of animals that has been known throughout human history."[30] He further states that if PETA wants AgriProcessors to take its letter seriously, PETA should provide "detailed descriptions of specific conduct" to support its conclusions."[31] As to PETA's request that AgriProcessors hire Dr. Grandin, Mr. Lewin states, "If this is meant as a constructive suggestion regarding possible employment, AgriProcessors would have to know the details of Dr. Grandin's 'long history of working with plants engaged in kosher slaughter,' and would have to have references from those whom she has, as you indicate, 'guided' in this regard."[32] Furthermore, the letter states:

> If, on the other hand, your letter is to be intended to be a demand that Dr. Grandin be hired, as you specify, "within two months of receipt of this letter" or your organization will take steps to "share" information you allegedly have "with anyone else," it appears to be an extortionate blackmail demand that violates the criminal laws of Iowa, Virginia, and federal criminal law.[33]

In PETA's response to the letter from Nathan Lewin, as addressed to Gary Norris at AgriProcessors, they state yet again that they are "not trying to change the precepts of kosher law or discourage AgriProcessors from performing ritual slaughter."[34] They state instead that they are only recommending that improvements be made at the plant in order to "alleviate some of the suffering [they] are told is occurring there." The following recommendations were outlined in the letter:

> 1. Repair [AgriProcessors] unloading ramps. Some floors are slippery and poorly maintained, causing animals to balk. No more than 1 percent of animals should slip on unloading ramps and floors.
>
> 2. Restrict the use of electric prods to within the guidelines set down by the American Meat Institute (AMI). No more than 5 percent of animals should be subjected to electric prodding.
>
> 3. Ensure that no more than 5 percent of cows vocalize within the restrainer.
>
> 4. Ensure that each chicken is held one at a time, by one person, for slaughter.
>
> 5. Provide fresh, clean water for all animals at unloading.
>
> 6. Ensure that all animals are calm at all stages of processing.
>
> 7. Engage in self-audits on a regular basis.[35]

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[29] Letter from Nathan Lewin, Esq., Lewin & Lewin, to Steven Jay Gross, PhD, spokesman for PETA (Aug. 26, 2003), *at* http://www.goveg.com/feat/agriprocessors/pdfs/Lewin-letter.pdf (last visited May 5, 2005).
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] Letter from Steven Jay Gross, Ph.D., spokesman for PETA, to Gary Norris (Nov. 3, 2003), *available at* http://www.goveg.com/feat/agriprocessors/pdfs/Norrispdf.pdf [hereinafter Gross].
[35] *Id.*

Needless to say, PETA's suggestions went unheeded, and the organization states on its website that "subsequent phone calls from PETA to AgriProcessors were not returned."[36]

As such, in the summer of 2004, PETA sent an investigator to the Postville, Iowa facility, who documented the slaughtering scenes at AgriProcessors with shocking clarity. The video footage that was taken between July 22, 2004, and September 12, 2004, was obtained by the investigator during five days in which he was able to be absent from his assigned location and to instead enter and watch the procedures in the kill room.[37] The video documents each cow as it is retrained in the facioma pen, a device that rotates the cow so that it is completely upside down when the knife is applied to its neck.[38] Then, it shows the shochet, a specially trained slaughterer familiar with the Jewish laws of shechita, as he slits the animal's throat. Immediately afterwards, a second employee immediately uses a knife to enlarge the cut and uses a hook to reach inside and ensnare the esophagus and trachea.[39] The esophagus and trachea are left to dangle from the cow's body, while the animal in the facioma pen is rotated upright once more, only to be dumped on to the cement floor.[40] Finally, one of the cow's rear legs is shackled, and he is then hoisted to the "bleed rail" and conveyed to another room, where he will be decapitated and skinned.[41] Horrifyingly, the video depicts cows that are clearly still conscious after the initial throat cut and during the trachea-tearing procedure, in one case depicting a cow struggling furiously and walking around before he finally bled to death after three minutes.[42]

PETA alleged in its complaint to the United States Department of Agriculture (USDA) that the second throat cut and subsequent tearing out of the trachea and esophagus violated the Humane Methods of Slaughter Act (HMSA), since it is not required by Jewish teachings. Furthermore, it alleged that the "unacceptable number of animals who remain conscious for minutes after shechitah is performed at Agriprocessors indicates that the cut itself is performed improperly in many instances."[43] It cites a study performed by Dr. Grandin and Joe M. Regenstein of the Department of Food Science at Cornell University, in which they determined that calm cattle will collapse within 10 to 15 seconds when shechita is performed properly.[44] In order to determine whether PETA's accusations are accurate, it is necessary to examine both the HMSA and the extensive laws of shechita, and other laws relating to the treatment of animals enumerated in the *Torah* and the *Talmud*.

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[36] *Important Correspondence*, PETA, *at* http://www.goveg.com/feat/agriprocessors/letters.asp (last viewed May 9, 2005).

[37] Letter from Lori E. Keller, Counsel for PETA, Research & Investigations Department, to Dr. Elsa A. Murano, Under Secretary for Food Safety, United States Department of Agriculture, 4 (Nov. 29, 2004).

[38] *Id*.

[39] *Id*.

[40] *Id*.

[41] *Id.*

[42] *Id.* at 5.

[43] *Id*. at 6.

[44] Temple Grandin and Joe M. Regenstein, *Religious Slaughter: A Discussion for Meat Scientists*, 3 MEAT FOCUS 115 (1994).

III. CURRENT LEGAL CONTEXT FOR THE PROBLEM

A. The Humane Methods of Slaughter Act

The Humane Methods of Slaughter Act (HMSA) was enacted in 1958 to promote four main objectives, most of which evince a primary concern for the human being, not farm animals.[45] Congress was concerned about the working conditions for the employees of the slaughterhouses, the improvement of slaughterhouse products, and with setting up a smooth flowing livestock products system because this would maximize the producer's profits and decrease consumer costs.[46] The HMSA was also intended "to bring about the use of humane methods in all livestock and poultry slaughter operations in the United States."[47]

Several drafts of the HMSA were submitted to Congress between 1955 and 1958, all of which were rejected.[48] Finally after a modification in the HMSA that permitted the kosher slaughter of animals, the bill passed the senate by a 72 to 9 vote.[49] The law was enacted on June 30th, 1960, after it was signed by President Eisenhower. The statute permits two acceptable slaughter methods, which are defined as humane:

> (a) in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals are rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or
>
> (b) by slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughtering.[50]

The text of the latter provision is the exemption by which shechita[51] is permitted, but the language of the statute does more than simply permit it. In effect, the HMSA requires one who does not render an animal insensible to pain by the methods described in provision (a) to adhere to "ritual requirements of the Jewish faith," unless one adheres to the guidelines of another religious faith that prescribes a method of slaughter in which the animal suffers loss of consciousness from the simultaneous and instantaneous severance of the carotid arteries. This puts compliance with the HMSA in the hands of those who are knowledgeable regarding the vast and various provisions of Biblical and Talmudic law that enumerate the many laws and opinions regarding shechita. Furthermore, by implication, it means that an animal that is not slaughtered

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[45] Nicole Fox, Note and Comment, *The Inadequate Protection of Animals Against Cruel Animal Husbandry Practices Under United States Law*, 17 WHITTIER L. REV. 145, 162 (1995).
[46] *Id*. at 163.
[47] *Id*.
[48] *Id*.
[49] *Id.*
[50] 7 U.S.C. §1902 (1978).
[51] The only method of slaughter that is permitted by Biblical and Talmudic authorities.

by the method outlined in provision (b) is not kosher, rendering any mistakes in the kosher slaughtering process in violation of the HMSA.

B. Jewish Law

(1) General Principles of Animal Welfare

To understand the laws of shechita, it is helpful to first understand the Jewish legal context that surrounds those specific laws. The *Torah* prescribes many requirements in order to ensure that animals are treated with kindness and compassion. The Talmudic phrase "tza'ar ba'alei chayim" means that it is prohibited to cause pain to animals.[52] There are many examples throughout the *Torah* that illustrate the humanity and compassion the Jewish people are required to exhibit towards animals. To illustrate, there is a requirement that a person must feed his animals before himself,[53] as well as a statement that animals are to rest on the Sabbath since work is forbidden on the Sabbath.[54] It is also prohibited by the *Torah* to sever a limb from a live animal and eat it,[55] and to kill a cow and her calf on the same day.[56] In Moses Maimonides' *Guide to the Perplexed*, he explains this prohibition, writing:

> [T]his being a precautionary measure in order to avoid slaughtering the young animal in front of its mother. For in these cases animals feel very great pain, there being no difference regarding this pain between man and the other animals. . . . This law applies in particular to ox and lamb, because these are the domestic animals that we are allowed to eat and that in most cases it is usual to eat . . . .[57]

Jewish law further obligates[58] one to relieve an animal's suffering,[59] and forbids the harnessing of an ox and donkey together. An animal threshing corn must not be muzzled, either, for that would prevent it from being able to eat freely while it is working in the field.[60] It is clear when reading the numerous Biblical and Talmudic provisions that provide guidelines on man's dealings and interactions with animals that the authors of those texts have the utmost concern for kindness and compassion to animals. In modern times, when animal experimentation is more prevalent and accessible, there have been additional commentaries that addressed the subject. Authorities point out that "the fundamental criterion in animal experimentation, establishing a line of demarcation between the permissible and the forbidden, is the relationship of the act to a legitimate human need."[61] In the 19th century, Jacob Ettlinger expressed the view that the prohibition of cruelty to animals is waived for any medical or useful purpose is limited to medical needs but not for financial gain.[62]

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[52] *Talmud B.M*. 32a.
[53] *Deuteronomy* 11:15.
[54] *Exodus* 20:10, *and Deuteronomy* 5:14.
[55] *Genesis* 9:4.
[56] *Leviticus* 22:2.
[57] MAIMONIDES, GUIDE FOR THE PERPLEXED, 3:48.
[58] *Deuteronomy* 22:10.
[59] *Deuteronomy* 22:4.
[60] *Deuteronomy* 25:4.
[61] FRED ROSNER, MODERN MEDICINE AND JEWISH ETHICS 331 (1986).
[62] *Id*. (referring to Jacob Ettinger, *Responsa Binyan Zion*, no. 108).

Ultimately, Maimonides states that it is paramount to avoid causing suffering to animals, and that "we should intend to be kind and merciful even with a chance animal individual, except in case of need – 'Because thy soul desireth to eat flesh,' for we must not kill out of cruelty or sport." Not only did Maimonides clearly prohibit hunting for sport here, but he also introduced the concept of consuming meat to satisfy one's hunger.[63] Many Jewish sects were strictly vegetarian, and prior to the biblical flood in which Noah gathered species of animals onto his ark to preserve them from the coming storm, meat consumption was prohibited.[64] In *Genesis*, Adam and Eve were told by God, "Be fruitful and multiply, and replenish the earth and subdue it; and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that creepeth on the earth."[65] The phrase "to have dominion over" does not mean to eat, but rather to use for work purposes,[66] since God also told Adam and Eve:

> Behold, I have given you every herb yielding seed, which is upon the face of all the earth, and every tree . . . to you shall it be for food; and to every beast of the earth, and to every fowl of the air and to every thing that creepeth upon the earth, wherein there is a living soul [I have given] every green herb for food.[67]

From this, we derive that both man and animals were originally vegetarians, notwithstanding the sacrificing of animals to God.[68] After the flood, since Noah and his family saved the animals from extinction, God made a concession to man by giving him the right to consume meat, provided the animals are humanely slaughtered.[69] However, the only method by which it was, and is, permitted to kill an animal is shechita, the details of which are enumerated in the *Talmud*.

(2) The Laws of Shechita

Shechita must be performed by a highly trained slaughterer, called a shochet. The shochet is required to study for a number of years and undergoes an examination in theory and practice of the laws of shechita, animal anatomy, and pathology.[70] A shochet is apprenticed to an experienced shochet before he may become fully qualified.[71] In addition, it is clearly enumerated in the *Talmud* that the shochet must be a god-fearing man of integrity.[72]

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[63] *Id.* at 325.
[64] *Id*.
[65] *Genesis* 1:28.
[66] *Psalms* 8:7-9.
[67] *Genesis* 1:29-30.
[68] ROSNER *supra* note 61, at 325 (citing *Sanhedrin* 59b).
[69] *Id*. (citing *Genesis* 9:3).
[70] *Can Anyone Perform Shechita?*, CHABAD, *at* http://www.chabad.org/library/article.asp?AID=222243 (last viewed May 5, 2005).
[71] *Id*.
[72] The *Shulchan Oruch* (meaning "Set Table"), a compendium of Jewish laws that are applicable today, outlines the requirements of a shochet in *Yoreh De'ah*; "It is customary not to allow a person to slaughter unless he is an observant Jew [*see* 2:1-2ff] and a qualified scholar has certified that he knows the relevant laws [*see* 18:17; 23:1; 25:1], and it is customary that women not be slaughterers [*see* 1:1-2]."

According to Shechita UK,[73] the shechita procedure consists of a rapid, expert transverse incision with an instrument of surgical sharpness, called a chalaf, which severs the major structures and vessels at the neck.[74] The chalaf must be perfectly smooth without the minutest notch or irregularity, and the shochet must constantly examine it to ensure that this is the case.[75] Shechita UK states in its *Guide to Shechita* that the stroke must sever the frontal structures of the animal's neck, namely the trachea, esophagus, the carotid arteries and jugular veins.[76] The aforementioned procedure "causes an instant drop in blood pressure in the brain and immediately results in the irreversible cessation of consciousness. Thus, shechita renders an animal insensitive to pain, dispatches and exsanguinates[77] in a swift action, and fulfills all the requirements of humaneness and compassion."[78]

There are five halachic requirements[79] the shochet must ensure in order to correctly perform shechita. They are:

a. There should be no interruption of the incision;[80]
b. There should be no pressing of the chalaf against the neck, this would exclude use of a guillotine;
c. The chalaf should not be covered by the hide of cattle, wool of sheep or feathers of birds, and therefore the chalaf has to be of adequate length;
d. The incision must be at the appropriate site to sever the major structures and vessels at the neck;
e. There must be no tearing of the vessels before or during the shechita process.[81]

After the severance of the structures and vessels at the neck, the shochet must examine the organs and vessels immediately after severance by the shechita incision, to ascertain that the shechita was properly performed.[82] This examination is visual and tactile, and is required by halacha.[83] The shochet also examines the internal organs and lungs of an animal in order to determine whether there are any defects or abnormalities in the animal that otherwise would

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[73] An organization that unites representatives from the Deputies of British Jews, the National Council of Shechita Boards, the Union of Orthodox Hebrew Congregations and the Campaign for the Protection of Shechita. It incorporates representatives from all the Kashrut Authorities of the United Kingdom. It was established to promote awareness and education about the Jewish religious method of dispatching animals for food.

[74] *Guide to Shechita*, SHECHITA UK, *at* http://www.shechitauk.org/downloads/A_Guide_to%20Shechita_July_2004.pdf.

[75] *Shulchan Oruch, Yoreh De'ah*, 6:1: "The instrument must be free of blemishes on or close to its cutting edges that can "catch" even an object as thin as a hair [*see* 18:2, *and* 18:4-6,10]. It should be checked (by touch) for such blemishes both before and after slaughtering with it [18:3, 9, 11-12]; this checking must be done very carefully by a qualified expert [18:17]. If a blemish is found after slaughter the slaughter is invalid even though no blemish was present before slaughter [18:1; *see also* 18:11, 13,15-16]."

[76] *Id*.

[77] Exsanguination is the bleed-out of the carcass.

[78] *Guide to Shechita*, *supra* note 74.

[79] According to the *Shulchan Oruch* (meaning "Set Table"), a compendium of Jewish laws that are applicable today. It was compiled by Rabbi Yosef Karo in the 1560's; they can be found in the section of *Yoreh De'ah* ("It Teaches Knowledge") in 23.

[80] Even a momentary pause will render the shechita invalid; *Shulchan Oruch, Yoreh De'ah*, 3:23:2.

[81] *Guide to Shechita*, *supra* note 72.

[82] *Id*.

[83] *Shulchan Oruch, Yoreh De'ah* 25:1.

disqualify it from being kosher.[84] In shechita, stunning the animal prior to slaughter is not permitted; in fact, it renders the animal non-kosher, since an animal intended for food must be healthy and uninjured at the time of slaughter.[85] Furthermore, if the stunning kills the animal, the animal is also rendered non-kosher, and it is forbidden as food to Jewish people.[86]

(3) Shechita in Modern Times

Over the years, shechita has come under attack from several fronts. On April 20, 1933, one of the first anti-Jewish measures in Nazi Germany was to ban shechita, in the name of kindness to animals. In Switzerland, a law that was enacted in 1893 which banned ritual slaughter (defined as the "bleeding to death of animals which have not been stunned first"), was upheld on December 9, 2002 in a draft sent to Parliament.[87] The Swiss Government considered an earlier draft of the animal right rights bill, which would have lifted the ban on shechita and halal methods of slaughtering, considering it an infringement of religious freedom.[88] The Swiss Government backed down, however, when it came under fire from animal rights groups, consumer groups, farmers and veterinary surgeons, who all contended that the practice inflicted unnecessary suffering on animals.[89] Attempts at rendering shechita illegal have been made in various countries in the 20th and 21st centuries, the most recent of which was in Great Britain. In 2003, the Farm Animal Welfare Council (FAWC) recommended that killing animals without stunning them first caused severe suffering.[90] The organization Shechita UK was organized primarily in response to efforts in the United Kingdom to attempt to ban shechita, the earliest of which occurred in 1985. Ultimately, however, the latest attempt of shechita detractors failed, as the British government rejected a call to ban the practice in March 2004.

Considering the numerous attempts to ban shechita in various countries throughout the world over the course of the last two centuries, the responsive sentiment among observant Jews is to interpret those attempts as acts of hostility against members of the religion and the Jewish religion itself. As Dayan[91] Dr. Isador Grunfeld stated:

> The anti-*Shechitah* campaigns which recur from time to time are not merely attacks on a particular Jewish religious observance. As *Shechitah* has always been described by those who attack it as an act of cruelty, and as believing Jews maintain that it is a Biblical commandment and, as such, of divine origin, any anti-*Shechitah* campaign tends to become, therefore, in its nature an attack either on the morality or on the divine origin of the *Torah*, and at the same time against the moral character of the Jewish people. For to say that the Jewish method of slaughter is a great cruelty means to brand the Jews as a cruel people.[92]

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[84] *Shulchan Oruch, Yoreh De'ah 29-60*, and *Guide to Shechita*, *supra* note 72.
[85] *Guide to Shechita*, *supra* note 72.
[86] *Id*.
[87] *Switzerland: International Religious Freedom Report 2003*, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, *at* http://www.state.gov/g/drl/rls/irf/2003/24436.htm.
[88] *Id*.
[89] *Id*.
[90] Paula Dear, *Animal Welfare Takes on Religion*, BBC NEWS, Apr. 1, 2004, *at* http://news.bbc.co.uk/1/hi/uk/3590731.stm.
[91] Meaning "judge."
[92] DAYAN DR. ISIDORE GRUNFELD, THE JEWISH DIETARY LAWS 56 (1972).

Consequently, PETA's attack on AgriProcessors was viewed in much the same light, despite repeated assertions by the organization that it was not condemning the practice of shechita, merely the practice of the employees at AgriProcessors whose actions resulted in the apparent suffering of animals.

To counter those who would contend that the practice of shechita is cruel, Shechita UK has devoted the last section of its *Guide to Shechita* to quoting several sources who have determined the process to be humane.[93] It states that "there is a significant body of scientific opinion which concludes that shechita causes no suffering, pain or distress for the animal."[94] It cites a series of experiments conducted in 1994 by Dr. Temple Grandin, stating:

> Dr. Grandin set out to determine whether cattle feel the shechita incision. In one case, the device used to restrain an animal's head during shechita was deliberately applied so lightly that during the incision it could pull its head away from the chalaf. None of the ten animals in the experiment reacted or attempted to pull their heads away leading Dr. Grandin to conclude: "*it appears the animal is not aware that its throat has been cut.*"[95]

Shechita UK further states that Dr. Fleming Bager, Head of the Danish Veterinary Laboratory, conducted a similar experiment two years earlier on twenty bulls subjected to the shechita incision.[96] Shechita UK states, "The research indicated that they too did not react to the shechita incision: '*the bulls were held in a comfortable head restraint with all body restraints released. They stood still during the cut and did not resist the head restraint.*'"[97] Moreover, the guide quotes Professor Harold Burrow, a former Professor of Veterinary Medicine at the Royal Veterinary College in London, who stated:

> *Having witnessed the Jewish method carried out on many thousands of animals, I am unable to persuade myself that there is any cruelty attached to it. As a lover of animals, an owner of cattle and a veterinary Surgeon I would raise no objection to any animal bred, reared or owned by me being subjected to this method of slaughter*.[98]

Lastly, Shechita UK cites a paper entitled *Physiological Insights Into Shechita*, published in The Veterinary Record and authored by Dr. Stuart Rosen of the Faculty of Medicine, Imperial College, London.[99] It states that "the paper discusses the behavioural responses of animals to shechita and the neurophysiological studies relevant to the assessment of pain, and concludes that: '*shechita is a painless and humane method of animal slaughter*.'"[100]

However, viewing the video and concluding that there is in fact a problem with AgriProcessors is not the same as viewing the video and concluding there is a problem with shechita. As Rabbi Yisrael Belsky states in an article regarding shechita, in former generations

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[93] *Guide to Shechita*, *supra* note 72.
[94] *Id*.
[95] *Id*. (emphasis in original).
[96] *Guide to Shechita*, *supra* note 72.
[97] *Id*. (emphasis in original)
[98] *Id*.
[99] *Id*.
[100] *Id*.

the procedure was performed on animals and fowl on a local basis.[101] He writes, "Every town had its own shochtim[102] who were under the personal supervision of the local Rav. Chazal[103] took great pains to assure that the authority of the Rav[104] in the slaughterhouse was supreme."[105] Furthermore, he emphasizes the utmost importance of honoring the *Torah* with regard to shechita, and particularly the requirement of the review of the shochet's knife by the Rabbi.[106] He states, "One who was lax in this practice would be removed from his post, excommunicated and publicly denounced. The rules for penitence were quite severe. Even in the times of the holy Tanaim[107] and Amoraim[108] there was often trouble in the slaughterhouse."[109]

This is in direct contrast with the environment shechita is performed in today, with mechanized conveyor belts transporting cattle to mechanical restraining devices, like the rotating facioma pen used at AgriProcessors. Furthermore, economic necessity has displaced local operations and replaced them with huge, centralized slaughterhouses; Rabbi Belsky states that anywhere from 500-1200 herds are slaughtered daily in over twenty-five facilities across America in assembly line fashion.[110] Thus, supervision is divided among the slaughterhouse distributor, processor, and butcher.[111] The result of producing hundreds of thousands of pounds of meat on such a massive scale can lead to carelessness and error in the interest of expediency, which in turn leads to increased animal suffering. This is the context in which the video of the practices at AgriProcessors must be viewed: as the product of a system in which expediency is paramount to ensure cost effectiveness, and the Jewish laws promoting kindness and compassion to animals takes a backseat. The following section highlights the various problems and inconsistencies between the practices at AgriProcessors and both Jewish and American law, and recommends methods to address them to ensure that high standards of animal welfare are achieved.

IV. RECOMMENDATIONS

One of the most glaring problems that can be observed even by the untrained eye in the PETA video is that some of the animals in the video are conscious after both the cutting of the throat, and the tearing out of the trachea and esophagus. Animals struggle wildly after procedures occur, some for periods lasting as long as three minutes. Even a spokesman for Shechita UK who watched the tape with a rabbi and a British shochet was quoted in the *New*

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[101] Rabbi Yisrael Belsky, *Learn About Kosher, Shechita*, ORTHODOX UNION KOSHER, available *at* http://oukosher.org/index.php/articles/single/18/ (last viewed September 25, 2005).

[102] Plural of "shochet"

[103] An acronym where "CH" stands for "Chachameinu," "Our Sages," and the "Z" and "L" correspond to the expression "Zichronam Livrocho," which means "of blessed memory." This is used to refer to the authoritative opinions of the *Talmud*.

[104] The Hebrew translation of the word "Rav" is "Rabbi" in English.

[105] Rabbi Yisrael Belsky, *supra* note 101.

[106] *Id.*

[107] Jewish sages of the period from Hillel to the compilation of the *Mishna*; their opinions are found either in the *Mishna* or as collected in the *Tosefta*, a collection of Jewish teachings supplementing the *Mishna*.

[108] Scholars predominantly at Ceasarea and Tiberias in Palestine (C.E. 220-C.E. 375) and in Bablyonia (C.E. 200-C.E. 500) who interpreted the *Mishna* and other *Tannaitic* collections.

[109] Rabbi Yisrael Belsky, *supra* note 101.

[110] *Id.*

[111] *Id.*

York Times as saying he "felt queasy," and added, "I don't know what that is, but it's not shechita."[112]

Despite the blatancy of the conclusion that the animals are not still conscious after watching them walk around with their tracheas and esophagi dangling from their necks, Rabbi Chaim Kohn of the AgriProcessors plant "says the animals feel nothing, even as they struggle on the floor and slam their heads into walls. 'Unconsciousness and the external behavior of the animal have nothing to do with shechita,'" he argued.[113] Rabbi Menachem Genack also stated in the *New York Times* article, "Scientific studies . . . found that an animal whose brain had lost blood pressure when its throat was slit felt nothing, and that any motions it made were involuntary. 'The perfect model is the headless chicken running around.'"[114]

While we can assume both rabbis are knowledgeable about halacha and Jewish law, none claims to have any specialized knowledge of animal science, veterinary medicine, or even human medicine. The Orthodox Union, the largest kosher certifying organization responsible for maintaining the kosher integrity of various food products, came out swinging with a ringing endorsement of both shechita, which is deserving, and AgriProcessors, which is not. In a statement made shortly after the release of the PETA video and the New York Times article, it stated that:

> After the animal has been rendered insensible, it is entirely possible that it may still display certain reflexive actions, including those shown in images portrayed in the video. These reflexive actions should not be mistaken for signs of consciousness or pain, and they do not affect the kosher status of the slaughtered animal's meat. There may be exceptional circumstances when, due to the closing of jugular veins or a carotid artery after the shechita cut, or due to the non-complete severance of an artery or vein, the animal may rise up on its legs and walk around. Cases when animals show such signs of life after the slaughter process are extremely rare, and even such an event would not invalidate the shechita if the trachea and esophagus were severed in the shechita cut.[115]

While it must be understood that these rabbis are no animal science experts, it is incomprehensible to understand the OU's repeated assertion that the walking animals in the video were dead, in defiance of the physiological reality that dead animals do not walk.[116] A true expert in the animal science field, Dr. Grandin, has analyzed the video extensively, coming to vastly different conclusions regarding the consciousness of the animals in the PETA video. In answering the question of whether the animal walking around with its throat cut was still conscious, Dr. Grandin explained:

> The walking animal was definitely fully conscious and ripping of the trachea would have caused great pain. Any animal that walks, lifts its head, or attempts to get up after slaughter is still aware and conscious. Cattle on the floor that

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[112] McNeil, *supra* note 2.
[113] *Id.*
[114] *Id.*
[115] *Statement of Rabbis and Certifying Agencies on Recent Publicity on Kosher Slaughter*, ORTHODOX UNION, *at* http://ou.org/other/5765/shechita2-65.htm.
[116] *"Statement of Rabbis and Certifying Agencies on Recent Publicity on Kosher Slaughter": PETA's Response* PETA, *at* http://www.goveg.com/feat/agriprocessors/pdfs/ReplyToOUstatement.pdf (last viewed May 9, 2005) [hereinafter *PETA's Response*].

> thrashed and kicked but made no attempt to raise their head were unconscious and insensible. Leg kicking is just reflexes, but raising of the head would be an indication of sensibility.[117]

Dr. Grandin also addresses the question of whether unconsciousness is instantaneous after the shechita cut. She states that while "[m]ost cattle will become insensible within 5 to 10 seconds after a biologically effective cut," many scientific studies have shown that "insensibility after the throat cut is not instantaneous."[118] As to the instances at AgriProcessors in which shechita failed to produce rapid unconsciousness in some of the cows that were slaughtered, Dr. Grandin opined that the efficacy of the shochet in producing a biologically effective cut is the paramount issue.

She states:

> I have observed kosher slaughter of thousands of cattle and calves. Some shochets are much more effective than other shochets. The cuts from all the shochets were proper and acceptable from a religious standpoint but some shochets performed cuts that were biologically more effective. Shochets who performed a fast knife stroke at the moment the carotid arteries were cut induced rapid unconsciousness more reliably than shochets who used a slower stroke. A slower stroke may cause the blood vessels to seal off. I have observed that cattle are more likely to attempt to get up when a slow stroke is used. Other variables include the angle and the exact position of the cut. The best shochets are able to cause over 90% of the cattle to collapse within 10 seconds. It is my opinion that shochets should be evaluated on the ability to perform both ritually correct cuts and biologically effective cuts. This could be done by scoring them on the percentage of cattle that collapse within 10 seconds.[119]

Finally, Dr. Grandin analyzes the procedure in which a second AgriProcessors employee (not the shochet) tears one end of the trachea and esophagus free from the surrounding tissue in the cow's neck. The Orthodox Union has stated that though the practice is not common, "nothing in any such post-shechita 'second cut' or excision in any way undermines the validity of the shechita itself or the kosher status of the slaughtered animal's meat."[120] Oddly, Rabbi Dr. Tzvi Hersh Weinreb, the Executive Vice President of the Orthodox Union, was quoted in the *New York Times* as saying he found the procedure "especially inhumane" and "generally unacceptable."[121] The Orthodox Union further stated that this second cut "is both approved and encouraged by the USDA."[122] While the USDA Food Safety and Inspection Service (FSIS) has stated in its directive that a second cut to facilitate bleeding is permitted, nowhere could any seeming encouragement of this practice be found in any of its directives. Moreover, the procedure at AgriProcessors was not merely a second cut that would enlarge the initial cut and

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[117] Dr. Temple Grandin, *Answers to Questions About Cattle Insensibility and Pain During Kosher Slaughter and Analysis of the AgriProcessors Video, at* http://www.grandin.com/ritual/qa.cattle.insensibility.html (last viewed May 9, 2005).

[118] *Id.*

[119] *Id.*

[120] *Message from Rabbi Dr. Tzvi Hersh Weinreb, OU Executive Vice President, and Rabbi Menachem Genack, OU Kashrut Administrator*, ORTHODOX UNION, *available at* http://ou.org/other/5765/shechita65.htm [hereinafter *Weinreb*].

[121] Donald G. McNeil, Jr. *Kosher Authority Seeks Change in Steer Killings*, N.Y. TIMES, Dec. 3, 2004, *available at* LEXIS, Nexis Library, N.Y. TIMES File.

[122] *Id.*

facilitate bleeding. It consisted of the digging into the neck of the cow with a hook and removing one end of the trachea and esophagus. Of this process, Dr. Grandin states unequivocally that "removal of the trachea and other parts before the animal has become insensible would cause great suffering and pain."[123] Moreover, she states, "Many of the cattle on this tape had the procedure performed when they were still fully sensible. . . . Several cattle were walking around with the trachea and other parts hanging out of them."[124] She also stated that she had never seen this procedure performed in any other kosher slaughter facility in which trachea pulling occurs.[125]

Embarrassingly, the Orthodox Union also seemed to forgive acts of cruelty to small numbers of individual animals, so long as the vast majority are slaughtered appropriately. In its *Message from Rabbi Dr. Tzvi Hersh Weinreb, OU Executive Vice President, and Rabbi Menachem Genack, OU Kashrut Rabbinic Administrator*, the OU states:

> While unnecessary cruelty to even one animal is intolerable, one has to look at the total picture before judging the matter . . . it must be realized that during the six or seven weeks during which the video was taken, approximately 18,000 animals were slaughtered by the plant in question. With such numbers, it is inevitable that aberrations do sometimes occur, and those shown in the video represent only a tiny percentage of the total number processed in that time span.[126]

Even if that assertion is taken to be true regarding the numbers, a contention PETA disputes,[127] it is largely irrelevant. It does not matter whether the USDA considers a slaughterhouse acceptable if less than 5% of animals killed by any method, including shechita, survive the first shot or cut. AgriProcessors is not the average slaughterhouse; instead, it is one of the largest suppliers of kosher meat to the public. Most, if not all, kosher consumers are concerned with the welfare of "even one animal," as that that is precisely what halacha is concerned with. One of the main concerns with this statement is that looking at the "total picture" is not required by halacha. Jewish law is concerned with acts of unnecessary pain and suffering inflicted on any individual animal; as Jacob Ettinger stated, while the prohibition of cruelty to animals is waived for any medical or useful purpose, that purpose is limited to medical needs but not for financial gain.[128] Consequently, it would seem that even a single instance of unnecessary pain or cruelty inflicted on an animal is enough to violate the principle of tza'ar ba'alei chayim, even if the animal is still technically kosher.

In addition, *Deuteronomy* very clearly states that if one observes an animal to be suffering, one is obligated to alleviate that suffering. Instead, AgriProcessors employees sit idly by while the cattle in some instances struggled to stand on the slippery, blood drenched cement floor, and clearly exhibited consciousness for minutes. In two egregious cases that were filmed,

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[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Weinreb*, *supra* note 120.

[127] PETA says in its Response to the Orthodox Union that the organization made its entire video available to the USDA, and that the video should be extrapolated as a representative sample. If this is the case, the video indicates that of the 18,000 animals slaughtered, more than 4,000 were still conscious when they hit the concrete floor, more than thirty seconds after shechita, and thousands struggled to stand. Also, PETA claims that it has documented that it has been going on for a minimum of nine years, representing hundreds of thousands of cattle who remained conscious for extended periods after the initial throat cut. (*PETA Response*, *supra* note 116).

[128] Rosner, *supra* note 61 (referring to Jacob Ettinger, *Responsa Binyan Zion*, no. 108).

an AgriProcessors employee even kicked blood into the faces of the dying cows. The PETA video states that he is a slaughterer. If this is the case, then not only does it evince a profound lack of concern on the part of AgriProcessors about welfare of its animals and integrity of its employees, but it arguably violates the halachic precept that a shochet must be a god-fearing man of integrity. What god-fearing person of integrity would kick blood into the face of a dying animal?

There are other halachic violations that are apparent from observing the PETA video as well. In two instances, the cows are shocked with electric prods to force them into the restraining device that holds them upside down, the facioma pen. Jewish authorities have contended that the prodding is necessary in order to achieve shechita; i.e. the animals will not enter the pen unless they are shocked, and so it is necessary to shock them to perform shechita. However, Rabbi Moshe Feinstein[129] commented on the limitations of the "legitimate human need" exemption by which one may inflict cruelty to animals. He limits human need to something that is a general need for people, such as food, health, and work.[130] The permit applies only where the suffering caused is merely a means for obtaining a product or a benefit, and even then, only where there is no possibility of obtaining these without causing the suffering.[131] However, where the product or the benefit is the actual suffering of the animal, inflicting cruelty is clearly forbidden, even when one benefits financially as a result.[132]

This commentary has far-reaching implications for the practices occurring at AgriProcessors. Essentially, where an avenue exists that will minimize the suffering of an animal that is killed for food consumption purposes, one is obligated to pursue that avenue which will cause less or no suffering. There are objective ways to evaluate the suffering of cattle; Dr. Grandin states that in response to distress, cows will moo and bellow.[133] She states that some of the methods that induce vocalization in cattle are "slipping on the floor, excessive pressure from the restraining equipment, sharp edges, electric prod use, or abuse by people such as hitting or tail twisting."[134] In *Maintaining Acceptable Animal Welfare During Shechita and Halal Slaughter* she maintains that 95% of the cows should be silent.[135] Furthermore, when alternatives exist to shocking cows with electric prods in order to urge them to enter the restraining device, they must be utilized according to Rabbi Feinstein. In the interest of achieving Judaism's highest standards of animal welfare, the several methods Dr. Grandin recommends to minimize animal suffering prior to and during shechita should be implemented.

Regarding the electric prodding issue, if an animal refuses to enter the restraining device, it is not necessary to shock it with an electric prod; rather, barriers can be installed so that neither people nor moving equipment can be visible to the approaching animals.[136] The American Meat Institute (AMI) has several guidelines to decrease use of cattle prods and to decrease vocalization of cattle. The AMI recommends that adequate lighting is provided that does not shine directly

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[129] The lead halachasist for the past generation and recognized leader of Orthodox Judaism.

[130] Rabbi Moshe Feinstein, *Commentary*, 8.4 HALACHA BERURA (the email newsletter of the Congregation Halacha Berura) (on file with author).

[131] *Id.*

[132] *Id.*

[133] Temple Grandin, *Maintaining Acceptable Animal Welfare During Kosher or Halal Slaughter, at* http://www.grandin.com/ritual/maintain.welfare.during.slaughter.html (last viewed on May 9, 2005).

[134] *Id.*

[135] *Id.*

[136] *Id.*

into the animals' eyes, since animals may refuse to enter a dark space. The AMI also recommends that noise be reduced, and that "[r]educing high pitched motor and hydraulic system noise can improve animal noise which can improve animal movement. Clanging and banging metal should be reduced and hissing air should be muffled. Yelling and whistling is stressful to cattle."[137] The AMI also adds, "Cattle and pigs can often be moved along a chute when the handler walks back by them in the opposite direction of desired movement, taking advantage of the point of balance at the animal's shoulder."

In order to assure animal welfare at the AgriProcessors plant, the plant should be redesigned in order to minimize the suffering that is apparent in the PETA video. Rabbis do not routinely receive training in animal science, and therefore they cannot be expected to know that cows will move more seamlessly if a handler walks by them in the opposite direction. However, this does not mean they can maintain ignorance on these and other points, continuing to state that cattle prodding is necessary to perform shechita. Unfortunately, AgriProcessor's continued refusal to acknowledge PETA's concerns and allow Dr. Grandin (or another qualified expert) to enter the facility to objectively observe the conditions and recommend improvements is indicative of its denial to address the animal welfare of the cows it slaughters, and that should be a profound concern of rabbinic authorities, kosher consumers, and the federal government.

This leads to one of the most major issues that the controversy has brought to light; the HMSA gives what amounts to free reign to individuals who have a financial incentive, and therefore a conflict of interest, in finding that the procedures at AgriProcessors and other slaughterhouses are in compliance with halacha and are humane. The HMSA in section 1906 states:

> Nothing in this chapter shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group. Notwithstanding any other provision of this chapter, in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this chapter.[138]

A Food Safety and Inspection Service (FSIS) Directive issued on October 7, 2003, clarified the minimal USDA role in monitoring ritual slaughter. The agency states that before the slaughter occurs the personnel request that the plant manager inform the agency what method of ritual slaughter will be used, in addition to who will be performing the slaughter.[139] The HMSA states that inspection personnel should request that the establishment provide written verification of slaughter methods from the religious official who has authority over the enforcement of religious dietary laws.[140] Lastly, it requires that inspection personnel verify that the animals are handled humanely prior to the "preparation for slaughter," and that they verify that "no dressing procedure . . . is performed until the animal is insensible."[141]

Unfortunately, it is not even evident that AgriProcessors met even these minimal guidelines. In its statement defending AgriProcessors, the Orthodox Union contends that the

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[137] Temple Grandin, Good *Management Practices for Animal Handling and Stunning*, AMERICAN MEAT INSTITUTE FOUNDATION (2d ed. 2003).
[138] 7 U.S.C. §1906 (1978).
[139] USDA FSIS Directive 6900.2, FSIS, *at* http://www.fsis.usda.gov/OPPDE/rdad/FSISDirectives/6900.2Rev1.pdf.
[140] Sharon D. Brooks, *FSIS Issues Humane Handling, Slaughter Directive*, SOUTHWEST INFO MEAT, Oct. 13, 2003, *at* http://www.southwestmeat.org/sma/Oct1303InfoMeat.PDF.
[141] *Id.*

USDA has found nothing amiss in its observation of the plant, but this assertion is misleading. Though the OU states that Dr. Henry Lawson opined that the procedures at AgriProcessors are humane, the USDA dispatched five investigators to address the allegations of cruelty at AgriProcessors, and the investigation is still active.[142]

Many of the mischaracterizations and problems that have arose during this controversy could be more easily addressed if the language of the HMSA were changed to specify exactly which "ritual requirements of the Jewish faith" must be met, and how often they must be met, in order to fall under the exemption of subsection § 1902(b). The current language of the HMSA, which exempts procedures that conform to the Jewish faith from the stunning requirements determined to be violative of the shechita laws is unfortunately inadequate to assure that the minimum standards for animal welfare are met. The issue is not with exemption of § 1902(b) itself; no one contends that it would violate religious freedom for the HMSA to prohibit shechita, and PETA was not advocating for that solution. Rather, the concern is that there are no objective standards enumerated in the HMSA that satisfy the laws of shechita.

Instead, the HMSA requires that one adhere to the "ritual requirements of the Jewish faith," but as evinced by the laws detailed in the previous section, those requirements are many and they are complex. It leaves the interpretation of American law dependent on the interpretation of Jewish law, which is in turn dependent on layers of interpretation of ancient texts by rabbis. It also does not provide for the "aberrations" in the system that Rabbis Weinreb and Genack acknowledge are "inevitable" occurrences in a processing facility of AgriProcessors' magnitude. For the animals in which shechita fails for whatever reason (the cut was made too slowly, the carotid arteries were not severed simultaneously as required by shechita and the HMSA), they are doomed to slowly bleed to death, often after having their trachea ripped out, while still fully conscious. This practice is not permitted under the § 1902(b) exemption of the HMSA, which requires that the slaughter conform to shechita. If the animal is not stunned prior to slaughter, and shechita fails, the HMSA is violated.

This state of affairs begs for an objective evaluation of the goals that shechita seeks to achieve, and the creation of language to be added to the HMSA that achieves all of those goals and permits shechita itself, while allowing for no ambiguity in the standards required for maintaining humane slaughter. The details should not be left to those who have every incentive to promote expediency and cost efficiency at the expense of animal welfare, namely those at slaughtering facilities that are paid more for every animal that is deemed kosher, and the certifying organization that profits from the plant's use of its label. When there is no mandate for either rabbis or shochtim to become familiar with principles of animal science, such as insensibility and signs of distress in animals, the federal government must step up to the plate and issue its own specific guidelines to ensure that animal welfare remains a principal concern and that religious freedom remains unimpeded.

To this same effect, periodic, unannounced, external audits should be implemented to ensure that AgriProcessors and other kosher slaughter plants violate neither the laws of shechita, halachic prohibitions on cruelty to animals, nor the HMSA. An exemplary model provided by the Sarbanes-Oxley Act of 2002 (SOA) would help ensure that the numerous, complex laws of shechita and halacha are met, and that slaughter facilities are also in compliance with the HMSA. The SOA establishes a Public Company Accounting Oversight Board, composed of five

[142] *PETA Response*, *supra* note 116.

financially-literate members appointed for five year terms; it requires that two members must be or have been certified public accountants, and that the remaining three must not be and cannot have been CPAs.[143] No member of the board may share in any profits or receive payments from a public accounting firm, which ensures that there is no conflict of interest.[144] In effect, the SOA sets high standards for public accounting firms, which are subject to inspection and must produce detailed reports.[145] The SOA requires that annual inspections occur of firms that audit more than 100 issues, while others are inspected every three years.[146] Also, the SOA gives control to the Public Accounting Oversight Board to enforce compliance with the SOA, professional standards, and the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants.[147]

The USDA would do well to mimic the creation and structure of a special board that dealt solely with ensuring that inspection personnel are well versed in the requirements of Jewish law to guarantee compliance with the HMSA. Ideally, such a board would also consist of five members; two Orthodox rabbis, two veterinarians, and one animal science expert familiar with the general concepts and guidelines to assure acceptable animal welfare in kosher slaughterhouses. This would ensure that experts on animal science, physiology, and welfare are collaborating with knowledgeable halachic experts to ensure not only that the letter of the shechita laws are being followed, but that the spirit of the Jewish laws mandating kindness and compassion to animals are followed in slaughterhouses as well. The members of the board should neither be employed by any other governmental agency, nor should they be currently employed by any private kosher-certifying organization (such as the Orthodox Union) or slaughterhouse at the time of appointment and for the duration of their three-year tenure. This would help avert any likely possibility of conflict of interest. The board should be responsible for training inspectors in both principles of animal science and Jewish law; unlike the current USDA inspectors, the ideal inspection personnel would be well versed in signs that indicate shechita is not being performed correctly, thus enabling them to alert the board as to the occurrence of improper procedures. If a kosher slaughterhouse is found to be non-compliant with the HMSA, the board would also be responsible for issuing mandatory requirements in order for the slaughterhouse to retain its USDA certification.

V. CONCLUSION

Even if these animals are still considered to be kosher by the letter of the law (those specific laws addressing shechita), there is still the prohibition against Chillul Hashem, "desecrating God's name." As Rabbi Dovid Rosenfeld states, "In the vernacular, the term 'Chillul Hashem' is understood to refer to public or conspicuous misbehavior on the part of Jews. When a Jew, especially a visibly Orthodox one, publicly sins or otherwise creates a scene, the image of the Jew and Judaism is lowered in the eyes of the onlookers -- both Jew and

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[143] *Summary of Sarbanes-Oxley Act*, THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, *at* http://www.aicpa.org/info/sarbanes_oxley_summary.htm (last viewed on May 10, 2005).
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*

Gentile." The Committee on Jewish Law and Standards of the Conservative Movement in its condemnation of the practice of shackling and hoisting animals pre-shechita stated:

> [W]e definitely should not do anything to suggest to non-Jews that the Jewish religion requires a lower standard of morality and humane slaughter than is now commonly accepted by the rest of society and, indeed, enacted as law. Acting in any way that suggests that we abide by lower moral standards than the rest of society is a clear violation of our duty to avoid a desecration of God's name.[148]

Though this addresses the shackling and hoisting method, the principle behind it applies equally to the practices occurring at AgriProcessors. The ramps could be designed with non-slip surfaces to minimize slipping and balking, as PETA urged in its second letter to AgriProcessors.[149] AgriProcessors failed to respond. Noise could be reduced and barriers erected to prevent cattle from seeing people as they enter the restraint system, eliminating the need for electric prods.[150] AgriProcessors failed to respond. Rabbi Kohn of AgriProcessors has claimed that the tapes were "testimony that this is being done right."[151] The implications of that statement is that the procedures depicted in the video, namely kicking blood into the face of dying cattle, using electric cattle prods to force cattle into a restraint system when there are other less painful methods available, and tearing out of the trachea and esophagus while animals are still conscious are all acceptable, when just the opposite is true. Consequently, it would be natural for the very large audience who read the *New York Times* article to assume that the Jewish religion requires a lower standard of morality than is common in the rest of society, and is thus a Chillul Hashem.

It should be noted that after it issued its statements defending AgriProcessors, the OU asked the facility to end the procedure in which its employees tear out the trachea and esophagus from the live animals, and that is a very good start.[152] It also said in one of its statements that any halachically unnecessary procedures would cease, leading PETA to assume that electric prods would be prohibited, that all shochets should be trained in humane handling to create a calmer environment for cattle, and that the OU should explicitly recognize and train shochets in signs of consciousness in cattle.[153] This would require that the animals are held in the restraining pen until they are unconscious. These would all be appropriate remedial measures if they were to be implemented.

Ultimately, the laws of kashrut as they relate to shechita exist in a vacuum. Any unnecessary pain inflicted on animals in the name of shechita does not render the animal non-kosher, unless one of the main requirements of shechita is violated. Nevertheless, it should be noted that Nahmanides, a great Jewish sage, once said that holiness cannot simply consist in the life of the commandments, for one can follow the letter of the Law and still abuse its range of

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[148] Rabbi Elliot N. Dorff and Rabbi Joel Roth, *Shackling and Hoisting*, *at* http://www.grandin.com/ritual/conservative.jewish.law.html.

[149] Gross, *supra* note 34.

[150] *Id*.

[151] McNeil, *supra* note 2.

[152] McNeil, *supra* note 121.

[153] PETA also assumed that according to the OU statement, it would require the use of the ASPCA upright pen and that use of inverted restraint systems would be eliminated. Furthermore, PETA states that all equipment must be inspected to ensure that it is not harming animals, and that the practices of the Rubashkin plant in Uruguay be subject to the same restrictions. Lastly, PETA states that Dr. Grandin be given access (paid by the OU or AgriProcessors) for periodic, unannounced audits, and that all OU-approved plants should be supplied with the regulations and that the rabbis be trained in how to implement them. *See PETA Response*, *supra* note 116.

permissible actions, acting like a "scoundrel within the Law."[154] He said that the function of holiness is to correct the possibility of such abuse of the Law, to seek broader and higher standards exemplified but not explicitly legislated in the Law.[155] For Nahmanides, the holy life is a spiritual life in that it seeks to achieve not just the letter of the Law but its spirit as well, either through additional injunctions or by cultivating people who have holy characters and holy virtues.[156]

Judaism is and must always be concerned with the principles of tza'ar ba'alei chayim, and therefore our rabbinic leaders today must make it evident that they, too, are concerned with that profoundly significant halachic principle. Repeated assertions that AgriProcessors technically followed the letter of the laws regarding shechita unfortunately do nothing to address the clear violations of Jewish animal welfare standards routinely occurring there. Though implementing the aforementioned recommendations will indubitably be costly to kosher slaughter facilities, requiring that significantly more time and effort is dedicated to ensuring that no unnecessary pain during consciousness is inflicted on animals prior to, during, or after the shechita cut, it is no less than is required by the various Jewish laws mandating kindness and compassion to animals. It should always be remembered that if as humans we don't always rise to the level we should, we should nevertheless strive to reach the spirit of benevolence and goodwill that the laws of shechita and the principles involving tz'ar ba'alei chayim necessitate.

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[154] Josef Stern, *Two Concepts of Holiness: Maimonides on Holiness as Law and Nahmanides on Holiness Despite Law*, *at* http://www.law.upenn.edu/alumnijournal/spring2003/department1/page06.html (last viewed on May 9, 2005).
[155] *Id.*
[156] *Id.*

I FOUGHT THE LAW:
A REVIEW OF *TERRORISTS OR FREEDOM FIGHTERS?: REFLECTIONS ON THE LIBERATION OF ANIMALS*, EDITED BY STEVEN BEST & ANTHONY J. NOCELLA II

MATTHEW LIEBMAN[1]

Compassion and emotion are our most
important safety values.
If we lose them,
Then we lose the vitality of life itself.
Emotional? Hooligans? Cranks?
—Conflict, *This is the A.L.F.*[2]

I. INTRODUCTION

On April 23, 2004, police officers raided an animal rights conference at Syracuse University and arrested Sarahjane Blum in front of a crowd of animal rights activists and scholars. Blum was charged with felony burglary, and faced up to seven years in prison. Her crime: trespassing at the Hudson Valley Foie Gras factory farm; the purloined items: several miserable ducks. The arrest came immediately after Blum's screening of *Delicacy of Despair*, an investigative documentary that details her open rescue ("burglary") of ducks from Hudson Valley.[3]

Just over a month later, on May 26, 2004, fifteen FBI agents kicked down the door of a small house in the sleepy California town of Pinole, and, with guns drawn and Federal Air Marshals circling in helicopters, arrested Kevin Jonas, Lauren Gazzola, and Jacob Conroy, three activists associated with the campaign against the animal testing company Huntingdon Life

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 J.D. Candidate, 2006, Stanford Law School. The author wishes to thank Salena for being there; Ashleigh, Oliver, Emma, Spider, and Anais for constant companionship; Ruthie and Richard for inspiration; and Jeremy for understanding. This review is dedicated to the brave activists, legal and otherwise, who commit their lives to defending animals, as well as to the memory of Chaplin (1994-1999), who introduced me to this struggle.

[2] CONFLICT, *This is the A.L.F.*, *on* THIS IS THE ANIMAL LIBERATION FRONT (Mortarhate Records 1998).

[3] On November 30, 2004, the felony burglary charges against Blum and Ryan Shapiro, the campaigns coordinator for GourmetCruelty.com, were dropped. Nevertheless, the pair plead to a lesser count of misdemeanor trespass, and the possibility remains of more repression as open rescues gain in popularity. *See Felony Charges Dropped Against Animal Rescuers After Foie Gras Court Battle*, GOURMET CRUELTY, http://www.gourmetcruelty.com/news20041202.php.

Sciences (HLS).[4] The three were among seven Stop Huntingdon Animal Cruelty (SHAC) activists arrested not for any overt criminal act, but for the publication of a website that reports on the campaign to shut down HLS. The activists were indicted and charged with animal enterprise terrorism and four counts of conspiracy to commit interstate stalking. At the time of this writing they await a trial date, where they could face years in prison, and a fine of up to $250,000.

In *Terrorists or Freedom Fighters?*[5] Steven Best refers to this upsurge in the legal crackdown on animal rights direct action as "the escalating battle between activists and the corporate-state complex."[6] His new anthology, co-edited with Anthony Nocella, is a long overdue foray into the ethical and tactical issues surrounding the "direct action" wing of the animal liberation movement, including the Animal Liberation Front (ALF), SHAC activists, and the open rescues of groups like Compassion Over Killing and Mercy for Animals.[7]

If this clash expands, as it almost certainly will, the role of lawyers, lobbyists, and animal rights professionals will grow in importance. The field of animal law should be ready to grapple with the thorny legal, ethical, and strategic questions that Best and Nocella's anthology raises. This collection of essays from over 25 activists and academics represents the first major inquiry into the theoretical questions surrounding direct action.

Attorneys, judges, legal academics, law students, and other legal professionals are, for obvious reasons, considered a world away from this aspect of animal liberation. Nevertheless, if the philosophical and tactical arguments in favor of the ALF and other groups are sound, we owe it to the animals and to our profession to ensure that legal barriers to effective and moral animal rights activism are vigorously contested. If, on the other hand, we conclude that these actions are not in the best interests of the animals or our movement, we at least owe it to our animal rights colleagues to honestly evaluate and consider their arguments, and to avoid the simplistic stereotypes that splinter the animal rights movement.

This review seeks to introduce the major issues raised by the authors of the essays in *Terrorists or Freedom Fighters?* and to commend Best and Nocella for their valuable contribution to the body of animal rights theory and practice.

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[4] *Take That Al Qaeda: The U.S. Government is Cracking Down on Animal Rights Protestors!*, SHAC USA, *at* http://www.shacamerica.net/indictments/index.htm (last visited December 31, 2004).

[5] TERRORISTS OR FREEDOM FIGHTERS?: REFLECTIONS ON THE LIBERATION OF ANIMALS (Steven Best and Anthony J. Nocella II eds., 2004) [hereinafter Best and Nocella].

[6] Steven Best, *It's War! The Escalating Battle Between Activists and the Corporate-State Complex, in* Best and Nocella, *supra* note 4, at 300 [hereinafter Best, *It's War*]. Interestingly, Best himself became a target of this "escalating battle" when he and two other radical animal rights activists were banned from entering the U.K. for a conference in the summer of 2004. Best was ultimately allowed entrance, but Jerry Vlasak and Pamelyn Ferdin were not. Steven Best, *Banned in the U.K.! The Home Office says 'Stay Home! to U.S. Animal Rights Activists*, UTMINERS, *at* http://utminers.utep.edu/best/papers/vegenvani/Banned.htm (last visited Dec. 31, 2004).

[7] "Direct action" is used to refer to activist tactics that forgo or circumvent the legal, legislative, and policy arenas. While some have persuasively argued that day-to-day actions like being vegan or caring for stray animals are "direct" action, the term colloquially refers to liberations of animals (usually clandestinely, but increasingly openly) and acts of vandalism and property destruction.

II. THE HISTORY OF DIRECT ACTION

And they all came to one conclusion.
They argued there was no way they'd ever be free
If it was up to humans.
Therefore the only course left was revolution
Which was understandable…
—Dead Prez, *Animal in Man*[8]

The first essay in *Terrorists or Freedom Fighters?*, Noel Molland's *Thirty Years of Direct Action*, traces the modern history of direct action tactics to 1964, when John Prestige founded the Hunt Saboteurs Association, a group of British animal rights activists who disrupted hunts by (legally) making loud noises and placing themselves between hunters and their prey.[9] Ronnie Lee and Cliff Goodman, hunt saboteurs unsatisfied with the limited success of these tactics, formed the Band of Mercy in 1972. The Band began conducting illegal actions such as disabling hunting vehicles, and would leave behind kind, explanatory notes and animal rights literature for the hunters.[10] But their tone soon changed. In 1973, the Band set two separate fires to a vivisection lab under construction, causing £46,000 in damage. Despite this new militancy, their press release identified the Band of Mercy as a "nonviolent guerrilla organization."[11] Lee and Goodman followed up with another arson in 1974, which prevented a seal cull. Continuing its clandestine strategies, the Band added the practice of laboratory raids and liberations, and in the summer of 1974, they broke into eight labs and rescued dozens of animals.[12] But in August of 1974, Lee and Goodman were arrested and convicted for another raid, and each served a year in prison. After their release, Goodman abandoned direct action, but Lee, a former law student, started the soon-to-be-notorious Animal Liberation Front.[13]

From the beginning, the ALF has considered itself a nonviolent organization, as Kim Stallwood notes in his informative contribution to the volume.[14] Its founding principles included a commitment to "take all necessary precautions against harming any animal, human and nonhuman."[15] Stallwood notes that early ALF actions garnered positive media coverage, and activists were portrayed as brave altruists and noble liberators. This positive coverage encouraged other cells to form, which performed their own liberations at labs and factory farms.[16]

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[8] DEAD PREZ, *Animal in Man*, *on* LETS GET FREE (Relativity Records 2000).
[9] Noel Molland, *Thirty Years of Direct Action*, *in* Best and Nocella, *supra* note 4, at 67-68 [hereinafter Molland].
[10] *Id.* at 69.
[11] *Id.* at 69-70.
[12] *Id.* at 71.
[13] *Id.* at 73-74.
[14] Kim Stallwood, *A Personal Overview of Direct Action in the United Kingdom and the United States*, *in* Best and Nocella, *supra* note 4, at 83 [hereinafter Stallwood]. The question of whether it has *remained* a non-violent group is strongly contested by Stallwood. *Id*. at 83-87.
[15] *Animal Liberation Front Guidelines*, *reprinted in* Best and Nocella, *supra* note 4, at 8.
[16] Stallwood, *supra* note 13, at 83.

Before long the ethos and strategies of these small British affinity groups crossed the Atlantic[17] and ALF cells began to pop up in the U.S., beginning in 1979 with a raid at the New York University Medical Center where a cat, two dogs, and two guinea pigs were liberated. In 1984, the ALF left its biggest mark on the animal exploitation industries and the American public when it raided the University of Pennsylvania Head Injury Lab. The ALF stole over 60 hours of video footage shot by vivisectionists showing ghastly experiments on baboons, as well as unprofessional and unscientific behavior. People for the Ethical Treatment of Animals edited this footage into a short film and used it to campaign against the Penn lab in particular and against vivisection in general. Despite extensive police repression, PETA stuck by the ALF and defended the action as necessary for animal liberation.[18] The massive amount of media coverage solidified the image of the black balaclava-clad, clandestine, underground animal rights activist. Gary Francione, the noted animal rights lawyer, referred to the University of Pennsylvania ALF action as "probably the most important event in the history of the American animal rights movement."[19]

In 1985, the ALF won another media victory when it broke into labs at the University of California at Riverside. Footage taken at the raid shows a three-week old monkey, named Britches, whose eyes were sewn shut, and who was isolated from his mother and any other contact.[20] The continued partnership with PETA made sure that the rest of the American public saw these videos, and understood the rationale behind ALF actions.

These early raids often lead to significant material changes beyond the liberation of the animals rescued from the labs. The exposés, and subsequent public outcry, were directly responsible for the cessation of funding to the University of Pennsylvania Head Injury Lab, and to the cancellation of eight animal research programs at the University of California at Riverside.[21]

This success had a downside, however. As the biomedical establishment began to understand the stakes at issue, security was significantly heightened, making the liberations of the early and mid-80s an increasingly difficult option. With the decrease in actual liberations came the shift towards sabotage, vandalism, and arson. The rationale behind this new strategy was that the industries would never respond to public outcry or ethical arguments, but only to *economic* pressure. Through economic sabotage, the ALF took it upon itself to make animal research as costly as possible. Stallwood argues that this shift drastically changed the sympathetic aura that surrounded the ALF in its early days, shifting its image from Robin Hoods to simple vandals.[22] In any event, the ALF soon became well known as the militant, "extremist" faction of the animal rights movement.

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[17] In fact, the first U.S. animal liberation probably happened in the Pacific, in Hawaii, where the "Undersea Railroad" released two porpoises from a research lab in 1977. *Id*. at 86.

[18] *See, e.g.*, Vance Lehmkuhl, *Video Killed the Baboon Lab*, PHILADELPHIA CITY PAPER (Sept. 7, 2000), *at* http://citypaper.net/articles/090700/cs.cover.side1.shtml.

[19] *Id.*

[20] Steven Best and Anthony J. Nocella II, *Introduction: Behind the Mask: Uncovering the Animal Liberation Front, in* Best and Nocella, *supra* note 4, at 22 [hereinafter *Introduction*].

[21] *Id.* at 22-23.

[22] Stallwood, *supra* note 13, at 85, 87.

III. THE MODERN PRACTICE OF DIRECT ACTION

[M]eat is still murder.
Dairy is still rape.
And I'm still as stupid as anyone,
But I know my mistakes.
—Propagandhi, *Nailing Descartes To The Wall/ (Liquid) Meat Is Still Murder*[23]

The original activities of the ALF are still ongoing, strong as ever. Several hundred ALF actions have been reported for each of the past two years in publications like Bite Back[24] and No Compromise,[25] with property destruction more common than actual liberations. In addition to these typical ALF actions, two recent developments in the modern practice of direct action deserve special mention: the SHAC campaign and the phenomenon of open rescues.

As mentioned in the introduction, the campaign against Huntingdon Life Sciences (HLS) has been a lighting rod in the debate about direct action, "domestic terrorism," and vivisection. Arising in the U.K. in the mid-90s and more formally in 1999, the Stop Huntingdon Animal Cruelty (SHAC) campaign has taken ALF-style direct action to a new degree of sophistication. Kevin Jonas, the SHAC USA Campaign Coordinator, lays out the theory and practice of SHAC in *Bricks and Bullhorns*, his essay in *Terrorists or Freedom Fighters?*.[26] Jonas argues that as successful as ALF actions were in liberating individual animals, their decentralized efforts were scattershot and unfocused.[27] As a result, animal exploiters could write off an ALF attack as a one-time inconvenience whose recurrence could be prevented by a bit more security. SHAC grew out of the idea that a continuous, targeted, and militant focus on a single entity, concentrating the full force of direct action, would be far more effective. Setting its sights on HLS, a notorious[28] contract animal research organization in the U.K. and U.S., SHAC combined the underground, illegal tactics of the ALF with the aboveground, legal tactics of demonstrations and letter-writing. Rather than hundreds of businesses each suffering a few thousand dollars in property damage, it became HLS suffering tens of thousands of dollars in direct property damage, and millions more in lost contracts and business opportunities. Since the start of the SHAC campaign HLS's value has collapsed, falling by 90%.[29] But this has not let other

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[23] PROPAGANDHI, *Nailing Descartes to the Wall/(Liquid) Meat is Still Murder*, *on* LESS TALK, MORE ROCK (Fat Wreck Chords 1996).
[24] *Diary of Actions*, BITE BACK MAGAZINE, http://www.directaction.info/news.htm (last visited Dec. 31, 2004).
[25] NO COMPROMISE MAGAZINE, http://www.nocompromise.org.
[26] Kevin Jonas, *Bricks and Bullhorns*, *in* Best and Nocella, *supra* note 4, at 263 [hereinafter Jonas].
[27] *Id*. at 264.
[28] Undercover footage taken at HLS shows, among other atrocities, "scientists" punching beagle puppies in the face and dissecting live monkeys. *Cruelty*, SHAC, http://www.shac.net/MISC/cruelty/cruelty.html (last visited Dec. 31, 2004). HLS kills, on average, 500 animals every day. *Frequently Asked Questions About Huntingdon Life Sciences*, INSIDE HLS, http://www.insidehls.com/faq.htm (last visited Dec. 31, 2004).
[29] Jonas, *supra* note 25, at 266.

companies off the hook; it is widely accepted, especially within the animal research community, that as goes HLS, so goes vivisection. This is, as Jonas calls it, a "winner-take-all-scenario."[30]

Not only has SHAC brought this targeted strategy to direct action, but it has also introduced a savvy knowledge of modern business organization. Understanding that businesses are sustained in large part by a slew of secondary and tertiary businesses like market makers and insurance companies, SHAC has not confined its actions to HLS alone. Companies that contract with HLS to have them test their products are targets, as are HLS's insurers, investors, and even its cafeteria suppliers.[31] Jonas says, "SHAC has made it clear that anyone who touches HLS is fair game."[32] All this attention has made HLS something of a "pariah," to borrow the word used by HLS's chairman Andrew Baker, and many companies feel that doing business with HLS is quite simply not worth it.[33] Without these supports, HLS has found it impossible to turn a profit, and, according to Jonas, "teeters on the brink of collapse."[34]

While SHAC has ratcheted up the militancy and ferocity of direct action, "open rescues" have come to occupy the other end of the direct action spectrum, with a focus on strict non-violence. Karen Davis, the founder and president of United Poultry Concerns, details this new and evolving phenomenon in *Open Rescues: Putting a Face on the Rescuers and on the Rescued*, one of the most compelling and interesting essays in *Terrorists or Freedom Fighters?*.[35] Open rescuers, like Sarahjane Blum whose open rescue was mentioned in the introduction to this review, break into factory farms where they document abusive conditions and remove as many animals as feasible, placing them in safe and loving homes and sanctuaries. These open rescues differ from traditional ALF actions in three important ways. First, the focus is exclusively on liberations with no property destruction. In fact, some open rescuers have gone so far as to replace the locks they had to break to gain entrance to the factory farm.[36] Second, unlike the balaclavas worn by ALF members, open rescuers willingly show their faces, almost always on videotapes shot inside the factory farms. These activists feel that they have nothing to hide, and bravely assert that they are ready and willing to cope with the legal consequences of their actions.[37] Third, open rescues function far more self-consciously in the realm of media and public opinion than ALF actions. Open rescuers take extensive documentary footage during the rescues and pass the footage, complete with their unmasked faces, on to the media, and often to the police.[38] Davis argues that these videos are usually seen by the public in a much more positive light than ALF videos, since the narrative depictions of open rescue stories are more

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[30] *Id*. at 267.
[31] *Id*. at 266.
[32] *Id*. at 267.
[33] SHAC's webpage lists 88 companies that have dropped HLS, and features quotes from financial periodicals and HLS executives conceding the enormous impact of the SHAC campaign. *See A List of All Companies who Have Dumped HLS*, SHAC, http://www.shac.net/FINANCIAL/dumpedhls.html.
[34] Jonas, *supra* note 25, at 266.
[35] Karen Davis, *Open Rescues: Putting a Face on the Rescuers and on the Rescued, in* Best and Nocella, *supra* note 4, at 202 [hereinafter Davis].
[36] Stallwood, *supra* note 13, at 89.
[37] Davis, *supra* note 34, at 206. I do not intend to imply, as some open rescue advocates seem to do, that clandestine rescues are somehow shameful or cowardly, nor do I understand Davis to make such a characterization. Each form of activism contains its own version of bravery and honesty.
[38] *Id*. at 208.

dramatic, more animal-centered, and more personal and empathetic, with the activist's human identity readily visible.[39]

Open rescuing was introduced to American activists at Davis's UPC conference on direct action in 1999 by Australian activist Patty Mark of the Animal Action Rescue Team.[40] Conference attendees quickly put the theory into practice, and several groups have conducted open rescues, including Compassionate Action for Animals, Mercy for Animals, and Compassion Over Killing (COK).[41] Davis's essay details the latter group's comprehensive and multi-faceted open rescue strategy. Out of a single open rescue at a major Maryland egg producer, COK created a documentary video (*Hope for the Hopeless*), released an extensive press packet that garnered mostly positive coverage in numerous major national newspapers, held a press conference to expose the factory's atrocities, used the footage in its ongoing vegan outreach programs, and gave eight hens desperately needed veterinary care and new homes.[42]

Until recently, open rescuers were not prosecuted, since pressing charges would draw media attention to the reasons behind the "burglary," giving animal rights activists a platform to bury the factory farms in bad publicity.[43] However, following the prosecution of Blum, all this could change, especially as campaigns like COK's demonstrate the efficacy of open rescues and investigations.

IV. ETHICAL ISSUES IN DIRECT ACTION

Guilty! Free animals from hell;
Guilty! Your reward is a cell;
…To resist is our duty
when injustice is law.
—Oi Polloi, *Guilty*[44]

Many, if not most, legally focused animal rights advocates are uncomfortable with direct action.[45] Best distills their objections to two main arguments: the principled critique and the

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[39] *Id*. at 206-07, 209-210.

[40] *Id*. at 205-06.

[41] *Id*. at 207. Each of these groups has a website with more information on their rescues and investigations: COMPASSIONATE ACTION FOR ANIMALS, http://www.ca4a.org/; MERCY FOR ANIMALS, http://www.mercyforanimals.org/; COMPASSION OVER KILLING, http://www.cok.net/ (last visited Dec. 31, 2004).

[42] Davis, *supra* note 34, at 208-09.

[43] *Introduction*, *supra* note 19, at 40.

[44] OI POLLOI, *Guilty*, *on* GUILTY (Ruptured Ambitions 1993).

[45] The following sections on ethical and tactical considerations will focus more on ALF and SHAC styles of direct action than on open rescues because these are the more complex ones. The proposed justifications in *Terrorists or Freedom Fighters?* for the ALF would apply in even stronger terms to open rescues, since the latter is a milder, less controversial subset of the former. I presume, though cannot empirically prove, that nearly every animal rights advocate supports open rescues that do not involve any property destruction. Even the authors in Best's anthology who come out against ALF direct action readily concede that open rescues pass muster under their conception of legitimate activism. *See, e.g.*, Stallwood, *supra* note 13, at 88; Freeman Wicklund, *Direct Action: Progress, Peril, or Both?*, *in* Best and Nocella, *supra* note 4, at 248 [hereinafter Wicklund].

pragmatic critique of direct action.[46] The book's analysis of the principled critique will be explained in this section, and its analysis of the pragmatic critique will be explained in the next section.

The primary thrust of the ethical justification for direct action consists of an initial definition of violence such that property destruction and vandalism are excluded. Best reasons that violence can only be perpetrated against a sentient being, one who can suffer and feel pain, and therefore speaking of violence against property is nonsensical.[47] Others point out that in over 30 years of ALF actions, not a single person has been killed or injured, while thousands of animals have been rescued and millions of dollars of damage have been inflicted on animal exploitation industries.[48] Under this definition of violence, property destruction and vandalism are nonviolent activism, and can be justified, despite their illegality.[49]

These authors analogize illegal nonviolent direct action to past social movements who have broken the law in pursuit of higher ideals. Best compares the civil rights movement's combination of illegal direct action and aboveground advocacy to that of the animal rights movement.[50] In fact, Best claims, "Few things are more American and patriotic" as direct action, since it has been a central part of every major social movement from the American Revolution and the Boston Tea Party, to the Underground Railroad, to the Women's Suffrage movement.[51]

Following these analogies, Maxwell Schnurer's provocative essay *At the Gates of Hell: The ALF and the Legacy of Holocaust Resistance* draws similarities between Jewish freedom

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[46] *Introduction*, *supra* note 19, at 27, 37.

[47] *Id*. at 30-31.

[48] *See, e.g*., Rod Coronado, *Direct Actions Speak Louder than Words, in* Best and Nocella, *supra* note 4, at 178-79 [hereinafter Coronado].

[49] Other authors in the volume are less concerned with attaining a nonviolent label, and seem willing to justify violent activism beyond property destruction. Robin Webb, for example, says, "The arguments presented in favor of inflicting serious injury, even death, upon animal abusers were quite straightforward. . . . [S]hort-term violence may be justifiable in pursuit of a longer-term peace." Robin Webb, *Animal Liberation—By "Whatever Means Necessary," in* Best and Nocella, *supra* note 4, at 79-80. Ward Churchill, in his foreword to the book, writes, "[T]he drawing of such a figurative line in the tactical sand [between 'legitimate' property damage and 'illegitimate' physical violence] is as arbitrary as that drawn by those who would restrict the range of responses to symbolic gestures." Ward Churchill, *Foreword: Illuminating the Philosophy and Methods of Animal Liberation, in* Best and Nocella, *supra* note 4, at 4. These violence advocates are the minority, however, and most of the volume's authors (at least ostensibly) limit their rationales to direct action that forsakes violence against people. This rationale will, of course, only maintain credibility for as long as direct activists reject physical violence. If Best's contribution to the volume is accurate, the non-violent justifications for the ALF could be replaced by the militant, openly violent philosophies of groups like the Animal Rights Militia, the Justice Department, and the Revolutionary Cells. *See* Best, *It's War*, supra note 5, at 300-01. Interestingly, Rod Coronado, likely the most well-known and effective ALF member, condemns such a move toward violence: "Far from compromising the principles of non-violence, the ALF's actions have and always will be those of a highly moral and disciplined group of compassionate individuals whose efforts would be hypocritical if they ever sanctioned physical violence as our opposition does." Coronado, *supra* note 46, at 183. In other places, however, Coronado rejects nonviolence as ineffective and inappropriate to certain contexts. See, e.g., Rod Coronado, *The High Price of Pacifism*, NO COMPROMISE, Fall 2000, *available at* http://www.nocompromise.org/issues/16pacifism.html (last visited January 2, 2005).

[50] *Introduction*, *supra* note 19, at 46 (quoting Martin Luther King: "I am only effective as long as there is a shadow on white America of the black man standing behind me with a Molotov cocktail.").

[51] *Id.* at 16.

fighters and the ALF.[52] Schnurer argues that groups like the ALF and the ZOB (a Jewish Holocaust resistance organization in Nazi Germany) who were willing to intervene, militantly and unapologetically, to fight systems of oppression, served a vital role in "exposing the methods of destruction."[53] Schnurer argues that the ALF serves this essential function by restoring what Ellen Langer calls "mindfulness" and what Carol Adams calls "the absent referent."[54] It was these very same operative forms of mindlessness and *object*ification that allowed the average German to be complicit with the Holocaust in much the same way that the average meat-eater or fur-wearer is complicit with the standardized torture of animals. The ALF intervenes in the mindless cultural narrative that portrays animals as willing participants in their own oppression. By tearing away the façade of the animal exploitation industries, Schnurer argues, the ALF reasserts the lived experience of animals.[55]

Schnurer points out that genocidal projects like the Holocaust and zooicidal projects like modern industrial meat production require enormous amounts of bureaucracy: "The responsibility for suffering becomes obscured by the complex process of implementing mass slaughter."[56] These bureaucracies function by inducing complicity in the general public, obfuscating the reality of suffering, and blocking compassionate responses. Herein lies the power of direct action, according to Schnurer: "It is at this point that the ALF and the Holocaust resistance movements clash with this system. Their actions expose the mechanisms of oppression and not only make public the hidden secrets, but also strike at the points of weakness. It is this exposure of the clear system of power that enables change to occur."[57] Schnurer sees in the ALF's liberations and property destruction both a pragmatic role and a communicative/symbolic role; by directly interfering with the actions of vivisectors, furriers, and meat producers, the ALF pragmatically contributes to the destruction of those industries; and by demonstrating the rage, compassion, and urgency of animal activists, the ALF symbolically participates in the cultural dialogue on the value and meaning of animals.[58]

While Schnurer analogizes the ALF to the militant Holocaust resistors, Pattrice Jones provides a feminist analysis of and justification for direct action.[59] Jones' is one of the book's most enthralling and multi-perspectival essays. Analyzing such seemingly disparate issues as milk, rape, cockfighting, and domestic violence, Jones points out the continuities in androcentrism and speciesism, and suggests that their destruction will likely involve similar strategies.[60] She examines the ALF through the lenses of several varieties of feminism, including ecofeminism, anarcha-feminism, and radical feminism noting that the ALF shares with these feminisms a commitment to "embeddedness, embodiment, and embrace," to anti-hierarchical and cellular social structures, and to a do-it-yourself attitude which recognizes that

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[52] Maxwell Schnurer, *At the Gates of Hell: The ALF and the Legacy of Holocaust Resistance, in* Best and Nocella, *supra* note 4, at 106 [hereinafter Schnurer].
[53] *Id*. at 117, 111, 122.
[54] *Id*. at 108-09.
[55] *Id*. at 109.
[56] *Id*. at 117.
[57] *Id*.
[58] *Id*. at 113-14.
[59] Pattrice Jones, *Mothers with Monkeywrenches: Feminist Imperatives and the ALF, in* Best and Nocella, *supra* note 4, at 137 [hereinafter Jones].
[60] *Id*. at 140-41.

the personal is political.[61] Similarly, Jones sees feminist ethics as consistent with ALF actions, so long as those actions are motivated by an ethos of care, consistent with a principled resistance to violence against sentient beings.[62] Jones expresses her concern that "disaffected and potentially violent young men [might] use the ALF as an excuse to vent their anger in inappropriate ways," and suggests that activists should "put a feminine face on the ALF."[63] In doing so, the ethical justifications of the ALF would be recalled as a compassionate program of animal liberation, and not simply an aggressive "heroic ethic" that is more preoccupied with masculinist rescue narratives than with effective and moral animal rights activism.[64]

One of the best assets of *Terrorists or Freedom Fighters?* is its diversity of opinion on direct action; it is not simply a mouthpiece for praise of the ALF. Unlike Best, Schnurer, and Jones, several authors criticize the ALF's modern tactics as both immoral and counter-productive. The pieces written by Kim Stallwood, Tom Regan, and Freeman Wicklund, all brilliant and dedicated animal rights advocates, decry modern ALF tactics as violent and unnecessary.[65]

These authors object to the ALF definition of violence by pointing out that property destruction not only exhibits a violent comportment, but also does indeed cause harm to sentient beings by instilling fear and terror in them. Regan, for instance, points out that firebombing a synagogue is undoubtedly a violent act, even if such an action only technically hurts property.[66] Similarly, Stallwood criticizes graffiti, vandalism, and indiscriminate property destruction as forms of violence.[67] While Regan, Stallwood, and Wicklund seem to be against direct action in its most common form, they do not absolutely reject direct action *in toto*. Both Regan and Stallwood set out criteria by which to determine the legitimacy of any given direct action.

Regan is not categorically opposed to violence in every situation. Rather, he seeks to establish certain pre-conditions that should be met before activists resort to violence, including property destruction. Regan concedes that violence may be necessary and justified in certain situations, but differs with some activists regarding in what circumstances such violence is legitimate.[68] Regan proposes three conditions: (1) the violence used must defend the innocent; (2) nonviolent alternatives must be exhausted; and (3) the violence must be proportional and minimal; it must not be more than is needed to achieve the desired objective of defending the innocent.[69] According to Regan, most direct action fails to meet these requirements.

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[61] *Id*. at 142-45.
[62] *Id*. at 147-48.
[63] *Id*. at 149.
[64] *Id*. at 151.
[65] Stallwood, *supra* note 13; Tom Regan, *How to Justify Violence*, *in* Best and Nocella, *supra* note 4, at 231 [hereinafter Regan]; Wicklund, *supra* note 43.
[66] Regan, *supra* note 64, at 232-33.
[67] Stallwood, *supra* note 13, at 89.
[68] Regan, *supra* note 64, at 231.
[69] *Id.* at 231-32. It is interesting to note how similar Regan's test is to the legal tests of strict scrutiny applied in Equal Protection and First Amendment cases. One could say that the ALF (though obviously not a "government") has a *compelling interest* in defending innocent animals, and that violent direct action is justified when it is *narrowly tailored* to achieving that objective; i.e. it must *substantially advance* the interest in defending the innocent; it must not be *overinclusive* by doing violence to people or property that do not implicate the interest; and it must be the *least "restrictive" alternative*, or in other words, non-violent alternatives must have been exhausted. However, the direct action probably need not worry about being *underinclusive*, as there is no expectation that a small cellular

Specifically, violence is not used only when necessary to rescue innocent lives since. According to Regan's estimate, 98 percent of ALF violence is property destruction unrelated to actual liberations.[70] Also, Regan expresses serious doubts that these activists have exhausted nonviolent alternatives.[71]

Unlike Regan, Stallwood seems to have an absolute principled objection to violence in all cases.[72] He outlines four core values required for legitimate animal liberation: compassion, truth, *ahimsa* (nonviolence), and "interbeing" (an understanding of interconnectedness).[73] According to Stallwood, the majority of ALF and ALF-style direct action fails to meet these criteria, especially the compassion and *ahimsa* prongs.[74] Stallwood sees ALF actions as motivated by rage and anger rather than compassion, and thinks the militancy of bomb threats, graffiti, home demonstrations, and indiscriminate property destruction violate the core value of *ahimsa*.[75] As such, these forms of direct action cannot be reconciled with the four core values and are therefore unjustifiable.

Like Stallwood, Wicklund draws heavily on the nonviolent traditions of Gandhi and King, and criticizes ALF actions as overly aggressive since they fail to "refrain from violence of fist, tongue, or heart."[76] Under Wicklund's view, violence is not simply the act of doing harm to the physical senses of another, but is the comportment of the individual herself towards those others.[77] While Best's view focuses on the object of violence (property), Wicklund's focuses on the subject of violence (the direct activist herself). In addition to this principled critique of the ALF, Wicklund also criticizes the ALF from a pragmatic angle, as will be discussed in the next section.

Nevertheless, Regan, Stallwood, and Wicklund all hedge their criticisms of modern direct action. Stallwood, for instance, sees open rescues as ideal forms of direct action since they are motivated by *compassion*, shed light on the *truth* of farmed animal conditions, are strictly *non-violent* and involve no property destruction, and are cognizant of *interbeing* and the larger role of peaceful direct action in shifting societal attitudes about animal liberation.[78] It is also worth

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organization could target the entirety of animal exploitation. For the basic outline of strict scrutiny in the First Amendment context, see, e.g., EUGENE VOLOKH, THE FIRST AMENDMENT 273 (2001).

[70] Regan, *supra* note 64, at 234.

[71] *Id.*

[72] Stallwood, *supra* note 13, at 88.

[73] *Id.*

[74] *Id.* at 89.

[75] *Id.* Although Anthony Nocella, the anthology's co-editor, evidently does not oppose ALF actions as Stallwood does, he uses similar discourse rooted in the nonviolent tradition. Nocella says:

> The essence of performing an act in the name of the ALF is that love must be present in one's heart. . . . [I]t is better to emulate individuals like Jesus, Gandhi, and Cesar Chavez . . . and redirect anger and hatred into a state of love. . . . [I]t is only when all people understand that love will create love, and hate will only create hate, that all will be liberated. . . . [L]ove will light the path to liberation.

Anthony J. Nocella II, *Understanding the ALF: From Critical Analysis to Critical Pedagogy, in* Best and Nocella, *supra* note 4, at 199, 200.

[76] Wicklund, *supra* note 44, at 242 (quoting King).

[77] *Id*. at 245.

[78] Stallwood, *supra* note 13, at 88-89.

noting that Stallwood does not condemn "carefully selected property damage that renders inoperable equipment that is directly used to cause suffering and pain to animals."[79]

Regan is quick to point out that he does not doubt the "sincerity," "commitment," and "courage" of direct activists, and he also reminds us that, though he still disagrees with their actions, "the violence done to things by some [animal rights advocates] . . . is nothing compared to the violence done to feeling creatures by the major animal user industries. A raindrop compared to an ocean."[80]

Despite Wicklund's condemnation of non-Gandhian direct action, he ends his essay with a plea for solidarity and dialogue within the animal rights movement.[81] He argues that Gandhian animal rights advocates can take a lesson from militant direct activists by comprehending the ALF's sense of urgency and using it in their own forms of nonviolent protest.[82] In exchange, militant direct activists need to borrow the compassionate motivation and media-savvy strengths of some Gandhian activists.[83] And according to Wicklund, even absent this cooperation, activists should tolerate diversity within the animal rights movement, lest these internecine disagreements over tactics delay the achievement of animal liberation.[84]

V. TACTICAL ISSUES IN DIRECT ACTION

I don't give a damn
'Bout my bad reputation.
—Joan Jett, *Bad Reputation*[85]

The principle objection to the tactical wisdom of direct action argues that, despite whatever ethical defenses justify direct action, such strategies give the animal rights movement a bad image, and hinder the pursuit of animal liberation. Best calls this the pragmatic critique, since it sets aside the ethical questions in favor of a strategic analysis of direct action.[86]

Stallwood and Wicklund, who critique the ALF on ethical grounds, also question the effectiveness of some forms of direct action. Stallwood points out a significant drop in public support for the ALF once it shifted away from liberations and investigations toward property destruction and other threats.[87] These tactics have allowed the media to frame the issue as a "caring scientific researcher dedicated to saving humanity versus a misanthropic animal activist who cares more about a rat than a baby."[88]

Wicklund similarly focuses on public perception of direct activists and, citing Courtney Dillard, a professor of rhetoric who has extensively researched the discourse of animal rights

[79] *Id.* at 89.
[80] Regan, *supra* note 64, at 235.
[81] Wicklund, *supra* note 44, at 248.
[82] *Id*.
[83] *Id*. at 249.
[84] *Id*. at 250.
[85] JOAN JETT, *Bad Reputation*, *on* BAD REPUTATION (Boardwalk Records 1981).
[86] *Introduction*, *supra* note 19, at 37.
[87] Stallwood, *supra* note 13, at 83.
[88] *Id*. at 89.

activists, asserts that the underlying animal rights message is lost as the public's focus is drawn to the simple acts of vandalism, destruction, and extremist rhetoric.[89] Wicklund also uses the Hegins pigeon hunt protests as illustrative of the pragmatic advantage that Gandhian protests have over militant activism. He notes that when the 1992 hunt was confrontationally protested, the media coverage and the public response focused on the activists rather than the birds, and caused the town of Hegins to dig in its heels and resist pressure to stop the hunt. However, the following year, when protesters adopted a low-key, veterinary rescue approach to the hunt, media coverage focused primarily on the birds (and to the extent the protesters were covered, they were portrayed as compassionate animal lovers seeking to render aid to injured birds). Wicklund argues that this new approach significantly contributed to the shift in public opinion against the hunt, which ended in 1999 following a legal challenge by the Fund for Animals.[90]

In *Defending Agitation and the ALF*, Bruce Friedrich agrees with Wicklund that Gandhian activism works in some contexts, but finds the absolute faith in the universal effectiveness of strategic nonviolence to be "naïve and misguided."[91] He distinguishes the social contexts of Gandhi and King from the current fight for animal liberation by pointing out that those leaders had a higher degree of popular support, with strong numbers of individuals who had a personal stake in fighting against oppression.[92] Gandhi and King also theorized that a humanistic connection would break the chain of oppression by forcing the oppressors to see themselves in the eyes of the oppressed, and yet no such connection has materialized for animals despite the extreme suffering these animals have endured.[93] As such, Friedrich sees the analogies to King and Gandhi as inadequate and imprecise in the animal rights context, and refuses to see strategic nonviolence as the only pragmatic solution.

Friedrich also proposes two pragmatic justifications for the ALF. First, he refutes the assertion that the ALF alienates the public by arguing that such activists in fact "speak to people," since their sense of urgency and heroism is readily understood even by those who do not support animal rights; the ALF resonates with everyday people by drawing on the historical legacy of other liberation tactics such as the Underground Railroad and anti-Nazi activities.[94] Second, the ALF also serves a moderating role. To the extent that radical direct action pushes the envelope of animal rights further and further, more moderate groups (like People for the Ethical Treatment of Animals, where Friedrich serves as Director of Vegan Outreach) begin to look less extreme. Friedrich argues, "[T]hose who work on the radical fringe push that fringe outward and make others, formerly radical from society's vantage, seem far more mainstream."[95]

"Society's vantage" is undoubtedly filtered through the media, and Karen Dawn's essay *From the Front Lines to the Front Page* provides a much needed analysis of how direct action is covered in the media, adding an indispensable nuance to arguments on both sides regarding the role of direct action in the cultural debate on animal liberation.[96] Dawn, who has spent years

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[89] Wicklund, *supra* note 44, at 240-41.
[90] *Id*. at 243-245.
[91] Bruce G. Friedrich, *Defending Agitation and the ALF, in* Best and Nocella, *supra* note 4, at 253, 256.
[92] *Id*. at 255.
[93] *Id*.
[94] *Id*. at 257.
[95] *Id*.
[96] Karen Dawn, *From the Front Line to the Front Page—An Analysis of ALF Media Coverage, in* Best and Nocella, *supra* note 4, at 213.

monitoring and reporting on media coverage of animal rights issues for her DawnWatch website and email alerts, analyzes the role of media in altering public opinion of animal rights and animal rights activists. She argues that too often direct activists disdain media coverage and dismiss it as irrelevant, thereby missing out on an enormous opportunity to bring animal abuse into the spotlight.[97] She sees the true power of direct action not in terms of the number of animals who are actually liberated from labs or fur farms, since it pales in comparison to the total number of animals killed every second of every day. Rather, Dawn argues, direct action's real power stems from its ability to critically intervene in the daily cultural ignorance of animal suffering by injecting itself into the omnipresent mediascape of modern American social life.[98]

Citing three ALF and SHAC actions (vandalism at a foie gras restaurant, a release at a fur farm, and the bombings at HLS client Chiron), Dawn complicates the simplistic version of the pragmatic critique of direct action by showing how ostensibly bad press may still advance the goal of animal liberation.[99] For instance, Dawn cites a front-page story in the *San Francisco Chronicle* reporting on the vandalism and personal threats against a foie gras restaurateur. Although the article by no means portrayed the activists in a positive light, it did dedicate significant space to the animal rights concerns that motivated the ALF action. It detailed the cruel production methods by which ducks' livers are fattened to produce foie gras. The direct action not only spurred this significant front-page story but also subsequent letters to the editor decrying the cruelty of foie gras, international media coverage, a subsequent television news story on animal suffering in foie gras production, major national coverage of open rescues at foie gras farms, an anti-foie gras op-ed in the New York Times, and ultimately, in Dawn's view, the passage of a law banning the production and sale of foie gras in California.[100] Of course, the ALF by itself cannot claim complete responsibility for these animal rights victories, but if Dawn's analysis is correct, it is fair to say that the ALF vandalism in Sonoma and the subsequent ("bad") press put the issue on the national radar.

Dawn is even able to cast a partially positive spin on one of the most controversial events in the modern history of direct action: the use of explosives in the fall of 2003, at the headquarters of Chiron Corporation, a biotechnology company that uses Huntingdon Life Sciences to test its products on animals. The event was extensively covered in over 100 national newspapers, bringing the debate about vivisection back into public discourse.[101]

The central thrust of Dawn's article is twofold: on the one hand, opponents of direct action cannot simply categorically dismiss direct action as harmful to the movement without a more detailed and empirical exploration of the effect of such media. On the other hand, proponents of direct action can no longer ignore the role of image and media in shaping public perceptions of the animal rights movement, since it is that very public who must be convinced not to participate in animal cruelty.[102]

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[97] *Id*. at 215.
[98] *Id.* at 215-16, 227-28.
[99] *Id*. at 217.
[100] *Id*. at 217-220.
[101] *Id*. at 223.
[102] *Id*. at 227-28. Apparently taking Dawn's advice, on December 3, 2004, several aboveground activists opened the Animal Liberation Press Office to articulate and communicate the philosophies and explanations underlying animal rights direct action. Steven Best serves as one of its press officers. *See* ANIMAL LIBERATION PRESS OFFICE, http://www.animalliberationpressoffice.org/ (last visited Dec. 31, 2004).

VI. LAWYERS AND DIRECT ACTION

> [T]here is nothing unlawful in wearing black hats,
> although such apparel may cause apprehension in others.
> *—NAACP v. Claiborne Hardware*[103]

The legal animal rights community has not generally paid much attention to direct action, preferring to focus on equally important projects like litigation, legislation, and enforcement of existing laws aimed at eliminating the suffering of animals. There is certainly no fault in such a focus, as these projects are far more suited to a lawyer's training than clandestine lab raids and window smashing. Nevertheless, lawyers who support direct action, as well as those who do not, should be cognizant of the ethical, strategic, and legal issues surrounding the ALF and other animal liberation groups.

Lawyers that do support direct action, including clandestine liberations and open rescues, could use their legal skills to assist activists who have run-ins with the law. These direct activists are outlaws, but everything they do is intricately entangled in the web of law. Every illegal action carries within it the potential for an equal and opposite legal reaction, be it criminal prosecution by the state or civil suits by the animal exploiters. These activists are increasingly likely to need good lawyers who understand militant animal rights struggle, especially if the current trends continue and the state and federal governments escalate their repression of animal rights activists. In their analysis of the Patriot Act, Jason and Jennifer Black warn of the "dire consequences" animal liberationists face in the wake of the post 9/11 expansion of the "domestic terrorist" label.[104] They argue that the linkage of compassionate, pro-animal acts with the heinous events of those like Osama bin Laden "represents the true capricious, unscrupulous, and evil nature of the USA Patriot Act."[105] Similarly, Best details the prevalence of bills and laws at the state and federal levels, such as Texas HB 433, that target activists, noting that the purpose of such laws is "to cripple the animal rights and environmental movements by kneecapping their right to dissent."[106] Some of these bills would define as "domestic terrorism" such nonviolent acts as taking video footage at a factory farm.[107]

If the predictions of Black and Black, and Best indeed pan out, the ALF and other activists will need more than overworked public defenders that are unfamiliar with animal rights. If the future of direct action brings such an unprecedented crackdown by the state, urged by the moneyed lobbies of the animal exploitation industries, the animal rights movement could be crippled unless lawyers are there to block the most egregious of these prosecutions. In fact, such scenarios may not be too far away: Best's essay reads like a distopian novel (he cites George

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[103] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 925 (1982). For images of "black hats" (balaclavas) causing apprehension in others, see *Images*, INDEPENDENT MEDIA, http://sandiego.indymedia.org/images/2003/05/206163.jpg, and *5 Beagles*, ARK ANGEL WEB http://www.arkangelweb.org/barry/alf/5beagles.jpg (last visited Dec. 31, 2004).

[104] Jason Black and Jennifer Black, *The Rhetorical "Terrorist": Implications of the USA Patriot Act on Animal Liberation, in* Best and Nocella, *supra* note 4, at 289.

[105] *Id.* at 296.

[106] Best, *It's War*, supra note 5, at 314.

[107] *Id*. at 315-16.

Orwell and Philip K. Dick[108]), and yet it is well-documented with examples of state and corporate repression of animal rights activism already occurring across the country. The prosecutions of the seven SHAC activists for operating a website is only the latest evidence of this. Thankfully, Best himself, despite his frequent anarchist rhetoric, recognizes the role of law in the fight. He says, "If it is not already obvious, the struggle for animal rights is intimately connected to the struggle for human rights—for free speech, freedom of association, freedom from search and seizure, a fair trial, and so on. . . . *[N]ow in order to fight for animal rights we have to fight for democracy*."[109] Progressive lawyers in groups like the National Lawyers Guild and the American Civil Liberties Union have spent the last several decades fighting for these very same causes; there is no reason progressive animal rights lawyers cannot also use their legal training to secure these constitutional rights to dissent for militant animal rights activists.

Despite the unfortunate "sell-out" accusations that occasionally are hurled by direct activists against mainstream legally oriented "reformists," many of the authors in this volume recognize the need to work with professionals to secure animal liberation. Pattrice Jones argues that a feminist valuing of cooperation and coordination requires a diversity of approaches, saying:

> Mainstream animal advocates need not jump to distance themselves from the ALF and certainly should not find reasons to criticize the ALF in public. Similarly, ALF activists ought not harshly condemn liberationists who include within their work efforts to improve the lives of animals until such time as freedom is achieved.[110]

Not only might pro-direct action lawyers contribute their legal skills, but it is also conceivable that more than a few lawyers are themselves ALF activists. The cellular structure of the ALF makes membership informal and act-determined. In a "letter from the underground," an anonymous ALF activist advises people to "[c]ome up with your own plan."[111] Any vegetarian or vegan lawyer who has ever swiped a dog from an abusive neighbor, trashed a stack of free circus passes, slipped anti-fur cards into fur coats, or slapped an animal rights sticker on a KFC window could be considered a direct activist. Recall that Ronnie Lee, the founder of the ALF, was reportedly a law student himself.[112] And it is probably only a matter of time before a lawyer, a humane officer, or even a judge participates in an open rescue, willing to make a tremendous statement by openly accepting whatever consequences follow from her direct action.

Lawyers that do not support direct action understandably attempt to distance themselves from activists whom they perceive as jeopardizing their credibility. These lawyers should continue their work in attempting to make the legal system responsive to the needs of animals,

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[108] *Id*. at 308.

[109] *Id*. at 335.

[110] Jones, *supra* note 58, at 151. *See also*, *Introduction*, *supra* note 19, at 44

> (There will never be a homogenous unity or consensus over complex philosophical and tactical issues within the animal advocacy movement, nor will people intent on pursuing one strategy yield to the arguments of others. And so the best one can expect is mutual respect ranging from … legislative measures … to … smashing vivisection labs.)

Of course, this mutual respect cuts both ways: while ALF advocates should avoid deriding legal advocates as "sell-outs," we legal advocates must also avoid deriding ALF advocates as "terrorists," "thugs," or "violent zealots." *Introduction*, *supra* note 19, at 43-46.

[111] Anonymous, *Letters from the Underground, Parts I and II*, *in* Best and Nocella, *supra* note 4, at 355.

[112] Molland, *supra* note 8, at 68.

since it is often the failure of the rule of law that inspires direct activists to turn to criminal strategies.[113] As Nicolas Atwood notes, "Crimes of enormous proportion against animals are commonly ignored by the legal system. . . . [A]nd it is here that the existence of the ALF can be explained."[114] If anti-direct action animal rights lawyers are successful in creating and enforcing animal protective laws, the ALF will become less "necessary." As John F. Kennedy said, "Those who make peaceful revolution impossible will make violent revolution inevitable."[115] Conversely, those who make peaceful revolution effective will make violent revolution unnecessary. It is therefore the task of lawyers who oppose direct action to make such a peaceful, legal revolution not only possible, but also swift and effective.

These lawyers may even find the state repressing the more traditional forms of protest with which they are more comfortable. Black and Black point out that under one construction of the Patriot Act, PETA could be charged with being an accomplice to animal rights domestic terrorism since it has provided material financial support to the legal defense of arrested ALF activists, or with conspiring to commit such terrorism since it frequently supports undercover investigations at animal enterprises.[116] Best also points out that industry front groups like the Center for Consumer Freedom are using the current climate of fear to throw "terrorist" accusations at mainstream groups like the Physicians Committee for Responsible Medicine.[117]

Even anti-ALF lawyers should be concerned enough to take interest in the issue as the current climate threatens to engulf even legal forms of animal rights activism. Thanks to Best and Nocella, the legal community now has a single resource that lays out the basic arguments for and against direct action, as well as many of the subsidiary concerns.

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[113] *See, e.g.*, *Introduction*, *supra* note 19, at 17-18.

[114] Nicolas Atwood, *Revolutionary Process and the ALF*, *in* Best and Nocella, *supra* note 4, at 272.

[115] *Quoted in* Ingrid Newkirk, *Afterword: The ALF: Who, Why, and What?*, *in* Best and Nocella, *supra* note 4, at 341.

[116] Black and Black, *supra* note 103, at 293-94. In November of 2004, the author of this review was told by a police officer at a peaceful anti-fur demonstration outside of a Macy's department store that PETA (whose logo was on signs and literature) was "a terrorist organization" and that the protesters "had better watch out." Additionally, two separate events co-sponsored by the Stanford Law School Student Animal Legal Defense Fund were staked out by local police officers. The first event, in May of 2004, was a panel discussion on animal research that featured, among others, an animal rights lawyer who has done some defense work for SHAC, though her presence on the panel was not related to direct action. The second event, in November of 2004, was a panel discussion on using the law for animal rights, featuring lawyers and academics who were entirely uninvolved in direct action. In a separate event in December of 2004 at the University of Iowa Law School, Leana Stormont, President of the law school's Student Animal Legal Defense Fund, was publicly chastised by the University President, Vice President of Research, and Provost for an op-ed she wrote criticizing animal research following an ALF liberation of 400 mice and rats at the University. The administration took out a full page ad in the Daily Iowan paper condemning her and emailed their sentiments to over 50,000 people affiliated with the university, despite the fact that her article did not even attempt to defend the action, only to add a voice against vivisection to the campus outrage against the action. E-mail from Leana Stormont, President Iowa Law School Student Animal Legal Defense Fund to ALDF Law Students List (Dec. 30, 2004, 09:28:08 PST) (on file with the author).

[117] Best, *It's War*, supra note 5, at 320-21.

VII. CONCLUSION

Breakin' rocks in the hot sun,
I fought the law, and the law won.
—The Crickets, *I Fought the Law*[118]

What would it truly mean for the law to "win" in the context of direct action for animal liberation? There are two possibilities. On the one hand, "the law" (conceptualized as the repressive arm of the state) will win if the efforts of the police and FBI succeed in destroying the lives and reputations of those associated with militant animal rights struggle. The law wins if activists end up "breakin' rocks in the hot sun," or otherwise confined or demoralized.

On the other hand, "the law" (conceptualized as the rule of law with a yearning for species equality) might win by *changing*, such that radical direct action is rendered unnecessary. "The law" might win, *because* activists fought it. The underlying assumption of the song *I Fought the Law* is that if the law wins, then fighting it has failed. However, the law can be simultaneously fought *and* used, cautiously and strategically, to improve the situation of animals and to secure animal liberation. The law wins if it is steered toward more ethical and compassionate ends. Often (though not always) that steering is done by activists willing to risk their freedom to defend, by any means necessary, the lives of innocent animals. Many of these activists will readily concede that if the law worked, the animal exploitation industries would be out of business, and the ALF wouldn't need to vandalize sabotage, or rescue. But Best and Nocella's volume points out that the ALF will exist for as long as animal abuse exists. As legal animal rights advocates, our task is to make the ALF obsolete, not by decrying them as terrorists or hoodlums, but by securing our shared goal of animal liberation. Only then will we have fought (with) the law, and won.

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[118] THE CRICKETS, *I Fought the Law, on* IN STYLE WITH THE CRICKETS (Coral Records 1960). The most well known version is THE BOBBY FULLER FOUR, *I Fought the Law, on* I FOUGHT THE LAW (Mustang Records 1966). Punk versions of the song were done by THE CLASH, *I Fought the Law, on* THE CLASH [U.S.] (Epic Records 1979), and DEAD KENNEDYS, *I Fought the Law (and I Won), on* GIVE ME CONVENIENCE OR GIVE ME DEATH (Alternative Tentacles 1987).

		Summary of Facts	Summary of Holding
Anderson v. Evans	371 F.3d 475 (9th Cir. 2004).	Animal advocacy groups challenged federal government's approval of quota for whale hunting by Makah Indian Tribe.	The court found that the government violated NEPA by failing to prepare environmental impact statement prior to approving whaling quota and the Marine Mammal Protection Act applied to tribe's proposed whale hunting.
Animal Rights Found. Of Fla. V. Siegel	867 So.2d 451 (Fla. Dist. Ct. App. 2004).	Developer of timeshare development brought action against nonprofit animal rights foundation for tortuous interference with business relationships, invasion of privacy, slander, and libel, and sought injunctive relief, relating to picketing and leafleting opposing animal shows to attract potential timeshare buyers.	Content-neutral provisions of temporary injunction did not satisfy First Amendment requirement of burdening no more speech than necessary to serve significant governmental interest, and Content-based restrictions did not satisfy First Amendment requirement of serving a compelling state interest.
Australians for Animals v. Evans	301 F.Supp.2d 1114 (N.D. Calif. 2004).	Environmental groups brought suit, challenging decision of National Marine Fisheries Service to issue permit, allowing scientist to conduct oceanographic research involving the use of under-water whale-finding sonar on gray whales off the California coast.	NMFS's environmental assessment of project adequately discussed, under NEPA, auditory effects of sonar on gray whales and other marine mammals, potential harm that sonar caused on gray whale migration, and the gray whale population NMFS did not act arbitrarily and capriciously, under NEPA, by not extensively considering possible harm to harbor porpoises in EA mitigation measures considered in EA were adequate NMFS was not required to predict or even precisely identify every possible unknown environmental impact of project in EA NMFS's conclusion that project

			did not warrant preparation of environmental impact statement was not arbitrary and capricious issuance of permit did not violate MMPA.
Cetacean Cmty. V. Bush	386 F.3d 1169 (9th Cir. 2004).	Suit was brought against government in name of cetacean community of whales, dolphins, and porpoises alleging that proposed deployment of Navy of law frequency active sonar in time of heightened threat violated various environmental statutes.	Animals lacked standing to sue under ESA, and Animals lacked standing to sue under APA, for alleged violations of MMPA and NEPA.
Cold Mountain v. Garber	375 F.3d 884 (9th Cir. 2004).	Environmental groups brought action against Montana Department of Livestock, USFS, NPS, and various federal officers alleging violation of NEPA, Migratory Bird Treaty Act, APA, and National Forest Management Act.	Environmental groups did not show that prohibited take of bald eagles had occurred, Reinitiation claim was not reviewable by Court of Appeals, USFS took "hard look" required by NEPA before issuing finding of no significant impact and special use permit, Supplemental analysis of special use permit was not required.
Edmondson v. Pearce	91 P.3d 605 (Okla. 2004).	Attorney General sought declaratory relief upholding the constitutionality of statute outlawing cockfighting, after companies and individuals involved in cockfighting obtained a temporary injunction against enforcement.	Supreme Court was entitled to invoke original jurisdiction, Statute did not amount to an uncompensated regulatory takings, Statute did not violate the state or federal constitutional Contract Clause, Statute did not violate state constitutional provision regarding right to life, liberty, and the pursuit of happiness, Statute dud not infringe upon right

			to travel between states, and Statute was not unconstitutionally overbroad.
Kennedy v. Byas	867 So.2d 1195 (Fla. Dist. Ct. App. 2004).	Dog owner filed petition for writ of certiorari, seeking review of the transfer of his action for veterinary malpractice from circuit court to county court for failure to satisfy the jurisdictional limits.	Impact rule precluded dog owner from recovering damages for emotional distress.
Kohola v. Nat'l Marine Fisheries Serv.	314 F.Supp.2d 1029 (D. Haw. 2004).	Environmental groups brought action alleging that decision of NMFS to classify Hawaii longline fishery as "category III" fishery violated MMPA.	NMFS had discretion to consider reliability of only available scientific data in classifying fishery.
Like v. Glaze	126 S.W.3d 783 (Mo. Ct. App. 2004).	Pedestrian attacked by dog brought personal injury action against possessor of dog, who was caring for dog at owner's request.	Possessor of dog was not liable for injuries to plaintiff caused by dog.
People v. Arroyo	777 N.Y.S.2d 836 (N.Y. Crim. Ct. 2004).	Defendant, charged under anticruelty statute for failure to provide medical treatment for his dog.	Statutory provision prohibiting depriving animal of "necessary sustenance" was vague as applied to defendant, and Statutory provision prohibiting "unjustifiably" causing pain to animal was vague as applied to defendant.
People v. Fennell	677 N.W.2d 66 (Mich. Ct. App. 2004).	Defendant was convicted in the Circuit Court of nineteen counts of willfully and maliciously torturing or killing animals.	Trial court's refusal to instruct the jury that prosecution was required to show that defendant specifically intended to kill or torture the horses, was proper, As an issue of first impression, portion of animal torture statute relating to killing or torturing an animal is a general intent crime, Trial court's instructions

			sufficiently conveyed required element of malice, and Evidence was sufficient to support conviction.
People v. Garcia	777 N.Y.S.2d 846 (N.Y. Sup. Ct. 2004).	Defendant was convicted, in a bench trial, of numerous assault-related offenses, as well as aggravated cruelty to animals.	Statute was not unconstitutionally vague as applied to defendant accused of killing a boy's pet goldfish by deliberately crushing it under his heel.
Petco Animal Supplies, Inc. v. Schuster	144 S.W.3d 554 (Tex. App. 2004).	Dog-owner brought action against pet store to recover damages allegedly incurred when dog was killed in traffic after escaping from pet groomer.	Dog-owner was not entitled to damages for mental anguish, absent pet store's ill-will, animus or desire to harm her personally, Dog-owner was not entitled to recover counseling expenses, Dog-owner was not entitled to intrinsic value damages, Dog-owner was not entitled to damages for lost wages, and Dog-owner was not entitled to exemplary damages.
Rocky Mountain Animal Def. v. Colo. Div. of Wildlife	100 P.3d 508 (Colo. Ct. App. 2004) (cert. denied Nov. 15, 2004).	Wildlife welfare group sought declaratory judgment, injunction, and mandamus relief relating to constitutional amendment prohibiting inhumane and indiscriminate methods of killing wildlife, insofar as rodent exception, as applied to poisoning prairie dogs, allegedly resulted in incidental poisoning of other wildlife.	Voters did not intend that amendment prohibit poisoning of nontargeted wildlife which was incidental to permissible rodent poisoning, Group was not entitled to mandamus or injunctive relief, Failure to reopen case to admit contested exhibits was not abuse of discretion, and Group was not entitled to costs.
Smaxwell v. Bayard	682 N.W.2d 923 (Wisc.	Child and her parents brought common-law negligence claims against defendant, who owned parcel on which apartment unit	On public policy grounds, common-law liability of landowners and landlords for negligence associated with injuries

	2004).	rented by parents and child was located and who also owned adjacent parcel, alleging child was seriously injured, while on parcel containing apartments, from attack by dogs owned by another tenant and housed, with defendant's permission, on adjacent parcel.	caused by dogs is limited to situations where the landowner or landlord is also the owner or keeper of the dog causing injury, abrogating *Patterman v. Patterman*, 173 Wis.2d 143, 496 N.W.2d 613.
State v. Anthony	861 A.2d 773 (N.H. 2004).	Following a jury trial, defendant was convicted in the Superior Court of accomplice to negligent cruelty to animals.	Statute governing accomplice liability requires proof that accomplice intended to promote or facilitate another's unlawful or dangerous conduct and that accomplice acted with culpable mental state specified in underlying statute with respect to result, and Crime of accomplice to negligent cruelty to animals exists in New Hampshire.
State v. Coble	593 S.E.2d 109 (N.C. Ct. App. 2004).	Defendant was convicted in the Superior Court of cruelty to animals.	Evidence supported defendant's conviction, Defendant waived for appeal claim that trial court unlawfully precluded defendant from challenging credibility of former deputy with the animal control department, and Jury instructions on admissions was warranted.
State v. Kingsbury	129 S.W.3d 202 (Tex. App. 2004).	State brought criminal action against defendants, alleging animal torture.	As a matter of first impression, the felony offense of "torture" did not include failing to provide necessary food, care, or shelter, and Interpreting felony offense of "torture" to include failing to provide necessary food, care, or shelter defeated statute's categorization of "torture" as a

			more serious crime.
State v. Zawistowski	119 Wash. App. 730, 82 P.3d 698 (Wash. Ct. App. 2004).	Jury returned guilty verdict against two defendants on two charges of second degree animal cruelty with regard to allegedly underweight and malnourished horses. The Superior Court reversed the convictions, finding the evidence insufficient to support jury's verdicts, and the State appealed.	Evidence was sufficient to show that underweight and malnourished horses suffered pain from defendant's failure to provide necessary food.
UFO Chuting of Hawaii, Inc. v. Young	327 F.Supp.2d 1220 (D. Haw. 2004)	Parasail operators brought actions challenging validity of state law banning parasailing in navigable waters.	Statute was preempted by MMPA and ESA did not repeal MMPA's preemption provision.