

OVERVIEW OF PROPOSAL FOR ENACTING ANIMAL CRUELTY STATUTES IN CHINA

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I. INTRODUCTION

"The legal system began the century viewing animals as items of personal property not much different than a shovel or plow. During the first half of the century, lawmakers began to recognize that an animal's potential for pain and suffering was real and deserving of protection against its unnecessary infliction. The last half of the nineteenth century saw the adoption of anti-cruelty laws which became the solid foundation upon which today's laws still stand." ¹ In the United States, the New York State's anti-cruelty statute, which was first enacted in 1829, became a model for similar laws in other states. This statute represented a major step forward in animal protection because it prohibited beating or torturing horses, cattle, or sheep, regardless of ownership of the animal. ²

At present, the punishment for animal cruelty has not been comprised into the Chinese Criminal Law. As a result, animal abusers are free from criminal liabilities, even though their cruel actions severely influence the social welfare and value as well as gravely violate the property rights. Not until the beginning of the Twenty First Century, law makers in China did start to consider animals' pain and suffering. It shows that the negative social influences of animal cruelty have aroused people's attention. As a result, Chinese's society treatment toward animals has shifted from an economic to a more benign approach. One has to ask, do the current economic and conditions in China allow it to pay more attention to reducing the pain and suffering of animals? Since animal slaughtering techniques have developed steadily along with economic and industry development it is time for the Chinese legislative body to catch up and enact an animal abuse statute by amending its criminal law.

Based on the above concerns, in 2009, a group of experts have submitted this proposal for embracing Animal Cruelty Rules into Criminal Law to the Standing Committee of the National People's Congress. In short, this paper attempts to amend the "Criminal Law of The People's Republic of China" by adding three provisions into the Section 1 "Offense against the Public Order" of Chapter VI "Offences against Social Management of Order". That is, "the offence of cruelty to animals", "the offence of disseminating videos and images of animal cruelty" and "the offense of

animal abandonment". However, it was sad that the proposal was rejected by the Chinese legislative body in 2010 and then shortly the Animal Cruelty committee dissolved.

II. THE SOCIAL SIGNIFICANCE

A. Analysis of Ownership

In human history, animals have been considered as personal property. The absolute ownership of animals makes it common for owners to dispose, beat or force them to work or even kill them in any way they want. Treating animals as private property, supplies the government a fettered ability to protect animals by posing liability on their owners because "Interference with this property interest was only justified when the animal had some economic value to the society as well as the owner."³ This reasoning comes from the following assumption: "owners naturally tend to protect their property in order to maximize the economic benefits derived from it". Such assumption seems logical in the context of beasts of burden, but it becomes irrelevant when the property is a companion animal, from which economic benefits are not generally derived."⁴ Thus, the benefit that animals provide as accompanying soul transcends their economical value which grants the government the right to be involved in relationship between owners and their property. In this regards, the fundamental difference between animals and other property is animals' capability of feeling hurts. As a result, animals deserve to be treated differently from the inanimate property because of their mental and physical sensual characters as living creatures.

B. Positive Impact on Social Welfare

1. Positive Impact on the Social Welfare at Large

The modernized animal abuse law is not only beneficial for the welfare of animals, but also beneficial for the welfare of society. "Companion animals may be hostages, tools of humiliation, or threatening examples of potential human pain and suffering that could be inflicted."⁵ "Intentional cruelty has long been considered by law enforcement experts as an indicator of the potential for increasing violence and dangerousness because studies have shown that many serial killers and

mass murderers have a history of animal abuse....”⁶ Accordingly, “animal abuse can be considered as ‘indicator crimes’. This is undoubtedly a valid position where the tendency of animal abusers to commit later acts of violence against humans strengthens arguments for taking animal cruelty more seriously.”⁷ Therefore, if we focus on human interests and we are reluctant to take animal abuse law seriously, we will encounter the danger that animal abusers might commit later acts of violence against humans. This might be one important reason for Chinese scholars to adopt the felony-level penalties for animal abusers into the Chinese criminal law.

2. The Correlation between Animal Abuse and Family Abuse

In an abusive family which owns pets, it is likely that these pets are victims of abuse as well. Acts of aggression tend to be against susceptible family members.⁸ One prominent study reported that of fifty-seven families studies with pets, where child physical abuse had been substantiated, abused animals were found in eighty- eight percent. Two-thirds of these animals were abused by fathers of the children, and one-third by the children themselves.⁹ Similar to children abuse cases, “a study of abuse victims at a crisis shelter found that nearly seventy-five percent of the women who owned pets reported that their partner had threatened, hurt, or killed the animal.”¹⁰ Thus, the existence of the animal abuse will be a predictor of a family violence for children, spouse, and elderly family members who might be potential victims. Furthermore, “research suggests that, when animal abuse and domestic violence occur in the same household, the abuse of the animal often takes place in the presence of children. Even in those cases in which other forms of violence are not present, the abuse of animals may have a deleterious effect on children.”¹¹ Hence, enacting the animal cruelty punishment will advance the child welfare through possible prevention of child abuse. In addition, in the felony-level penalties may provide a clear guideline for prosecutors to track the abuser’s past activities including history of animal abuse. In the cases of acts of intimidation or terror toward children, felony-level penalties play an important role in investigating domestic violence.

III. THE OFFENSE OF CRUELTY TO ANIMALS

A. Chinese Criminal Law Proposal

“Belongs to one of the following circumstances, anyone who violates subsection (a), (b), (c) or (d) shall be restrained or with criminal detention for not more than 6 months, and be fined meanwhile; when the circumstances are particularly serious or causes the very serious consequences, the person shall be sentenced to fixed-term imprisonment for over 6 months but not more than 3 years:

(a) Intentional treat animals in a cruel way disturbing social order that is very serious or causes serious consequences;

(b) Carrying out performance or activities of cruelty to animals disturbing social order that is very serious or causes serious consequences;

(c) Slaughtering animals that have been treated with epidemic prevention without differentiation, or slaughtering the animals in a non-humanitarian way which is very serious or causes serious consequences;

(d) For the commercial purposes, removing the organs and derivatives from the living animals to sell the animal organs that is very serious or results in serious consequences.

The term of cruelty to animals in this chapter refers to intentionally treating the animals with cruel methods or ways that results in unnecessary suffering and injury to the animals, or killing or injuring the animals in a cruel way.”¹²

B. Relevant Regulations of US and Other Countries

1. Definition of Animal Cruelty

In this Proposal, an offender violates the statute when “intentional treat animals that is very serious or causes serious consequences”. Here, the definition is a general depiction. In comparison to the Proposal, two types of definitions are adopted in US animal cruelty statutes. “To determine how the criminal cruelty statutes attempt to cover these diverse situations, two Mississippi statutes will be considered in depth, as they are fairly representative of many state statutes.”¹³ “The first kind of

statute to be examined is of the “override, overdrive” variety. In this statute, intent is not an element.”¹⁴ “If any person shall override, overdrives, overloads, torture, torment, unjustifiably injure, deprive of necessary sustenance, food, or drink; or cruelly beat or needlessly mutilate; or cause or procure to be overridden, overdriven, overloaded, tortured, unjustifiably injured, tormented, or deprived of necessary sustenance, food or drink; or to be cruelly beaten or needlessly mutilated or killed, any living creature, every such offender shall, for every offense, be guilty of a misdemeanor.”¹⁵ In this way, animal abuses are described in deferent classification.

A second form of cruelty statute can be found in the Mississippi Code, which is “representative of the cruelty statutes that require the defendant to have a particular state of mind before the statute is violated.”¹⁶ In this code, intent is the key. “Any person who shall maliciously, either out of a spirit of revenge or wanton cruelty, or who shall mischievously kill, maim or wound, or injure any horse, mare, gelding, mule, sheep, cattle, hog, dog, poultry, or other live stock, or cause any person to do the same, shall be fined not more than one thousand dollars, or be imprisoned not exceeding six months, or both.”¹⁷

2. Standard of Injury

In the Proposal, the term of cruelty to animals refers to “intentionally treating the animals with cruel methods or ways that results in unnecessary suffering and injury to the animals, or killing or injuring the animals in a cruel way”.¹⁸ The state of Minnesota codified the standards of injury that focused on the bodily harm to the animal. “‘Substantial bodily harm’ means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member to a service animal or a pet or companion animal.”¹⁹

3. Negligence Concerns

In the Proposal, negligence and recklessness are not mentioned in the requirement of mens rea. “In order to secure a criminal conviction for animal abuse, the prosecution must prove the offender committed the act with the requisite mental state. Jurisdictions vary as to whether the offender’s actions must be committed maliciously, willfully, intentionally, knowingly recklessly, with criminal negligence, with ordinary negligence or whether or not the action must be voluntary.”²⁰

Comparing to a variety of mens rea levels in different jurisdictions, certain offenses require lower level of mens rea: negligence or criminal negligence. Louisiana's statute provides for "certain acts done 'intentionally or with criminal negligence' constitute either simple cruelty or aggravated cruelty. Under New Mexico's statute, cruelty to animals includes "negligently mistreating, injuring, killing without lawful justification or tormenting an animal."²¹ "New Hampshire requires a mens rea of negligence for all of its cruelty to animal offenses, making the first offense a misdemeanor and second or subsequent offenses Class B felonies."²² While "Michigan statute unjustifiably neglect or refuse to furnish necessary sustenance, food or drink, or in case of impoundment, sufficient quantity of good and wholesome food and water." ²³

4. Exempt Activities

"California (§599c) and Idaho (§18-2113) listed the following exempt activities:

- (1) Game laws
- (2) Destruction of certain birds
- (3) Destruction of venomous reptiles
- (4) Destruction of any animal know as dangerous to life
- (5) The killing of animals used for food
- (6) Scientific experiments or investigations by medical colleges or universities"²⁴

"Most state statutes exempt farm animals, research animals, veterinary practices, and wildlife from enforcement of the animal cruelty statute. Other exemptions include slaughtering animals for food, pet control, rodeos, zoos, and circuses. Three states do not provide any exemptions from their animal cruelty laws."²⁵ As for religious exception, the Humane Slaughter Act of 1958 exempts any slaughtering done in accordance with the requirements of any religion due to the two major reasons: political pressure and the first amendment. ²⁶

"Maryland's statute seems to go the furthest in qualifying the exemptions: exempted activities may nevertheless fall within the scope of criminal sanctions if a person fails to 'employ the most humane method reasonably available while engaging in such activity.'²⁷"In several states, exemptions to animal-cruelty prosecutions are qualified not by the term 'lawful' but are restricted to 'commonly accepted practices' or similarly worded qualification."²⁸ Arizona's statute uses "otherwise lawful"

term, "activity involving the possession, training, exhibition or use of an animal in the otherwise lawful pursuits of hunting, ranching, farming, rodeos, shows and security services shall be exempt from the provisions" .²⁹

5. Every Such Offender Shall Be Accused for Every Offense.

The important issues here include the definition of what constitutes an offense and when charges of multiple offenses are appropriate. "The general concept is that each illegal act is but one offense; otherwise a defendant might face double jeopardy. The test for the existence of double jeopardy is whether or not it is necessary to prove the identical facts for each offense."³⁰

6. Felony-Level Penalties

The amended Minnesota law offered a graduated series of felony-level penalties based on "(1) the level of bodily harm; (2) whether the animal is a companion animal or a service animal; (3) whether the act was done to intimidate another person; and (4) whether the accused has a prior cruelty conviction."³¹

C. Analysis and Recommendation

1. Sufficiency Analysis

The Proposal set the felony- level according to "the circumstances are serious or causes the serious consequence". Such general purpose depiction provides flexibility for the court to handle different situations case by case. Generally, defining method embraces almost all situations once the court believes it is "serious". However, due to the lack of standards, different judges may give different answers to the same fact. It is difficult for a judge to determine how serious the circumstance may be deemed as crime. As a result, the ambiguous definition of seriousness or serious circumstance may not be a clear guideline for the court to analyze the case. It might be helpful to add specific definition or depiction into the Proposal. Namely, the action such as kill, main, wound or injure should be added into statute of animal abasement.

How to weigh the serious circumstance? To make it easier for the court to make determination, substantial bodily harm might be adopted as the standard of weighing the serious circumstance and

serious consequence. Under the control of the depiction of “unnecessary suffering and injury to the animals” in Proposal, defendant may argue that the way he treats the animal is necessary to perform his job even though it seems cruel. A specific depiction may be helpful for court to follow. The standard of the substantial bodily harm in the Minnesota Code is a good example. The depiction of injuring to animals is the one that will be “involving a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member to a service animal or a pet or companion animal.”³²

In addition, to give a judge a clear guidance of weighing the period of imprisonment between 6 months and 3 years, the graduated series of felony-level penalties is necessary to weigh the serious circumstance or consequence. In the Proposal, “anyone who violates subsection (a), (b), (c) or (d) shall be restrained or with criminal detention for not more than 6 months, and be fined. Meanwhile, when the circumstances are particularly serious or cause the very serious consequences, the person shall be sentenced to fixed-term imprisonment for over 6 months but not more than 3 years”.³³ Therefore, the penalty level is determined by the circumstances that are particularly serious or cause very serious consequence. In the sake of efficiency and clarity, the number of the injured or killed animals, the level of bodily harm, the identity of the animal as a companion animal or a service animal, the purpose of the act was done to intimidate another person, and the prior cruelty convict of the accused are worthwhile to be added into the Proposal.

2. Negligence Concerns

Is there a risk that harmed animal may be isolated from protection of the current Proposal due to the offender’s negligence? In other words, a risk that the offender causing serious consequence but cannot be prosecuted for lack of intent? Many US states require lower level of mens rea to accuse the animal cruelty crime at different levels of negligence. Without necessary sustenance, shelter, food or drink for a period of time, the animals may suffer from the unbearable hunger, thirst, cold or heat conditions and even die because of their owner’s negligence. For example, if the owner negligently leased his cat under sun for two days in summer, the cat may die of the extreme dehydration. Is this dehydrating suffering less horrible than intentional beating? If such action

belongs to animal cruelty, is there any reason for excluding it from imposing liability? If the owner negligently mistreats, injures or kills animals without possible prosecution, is it fair to let them escape criminal liability, even if the circumstance is serious or having caused serious circumstance. Furthermore, some offenders may argue that their actions of mistreating, injuring, killing or tormenting animals are of their negligent intent rather than intentional or knowingly purpose. Accordingly, negligently mistreating, injuring, killing or tormenting the animal that “the circumstance is serious or causing serious consequence” should be added to the Animal Cruelty Statue.

3. Exempt Activities

In the US, “most state statutes exempt farm animals, research animals, veterinary practices, and wildlife from enforcement of the animal cruelty statute. Other exemptions include slaughtering animals for food, pet control, rodeos, zoos, and circuses.”³⁴ In the Proposal, the person will violate the animal cruelty statute if “(c) slaughtering animals that have been treated with epidemic prevention without differentiation, or slaughtering the animals in a non-humanitarian way which is very serious or causes serious consequences.”³⁵ In Proposal, slaughtering animals for food, pet control, rodeos or zoos are not to be differentiated from other slaughtering actions. The second half of the sentence of (c) “or slaughtering the animals in anon-humanitarian way” means slaughtering is for the purpose of epidemic prevention only, not referring to other slaughtering actions. However, without specific description or emphasis, the meaning of this section may have a broad application. For example, the slaughtering practices vary regarding with the categories of animals or requirement of production. The non-humanitarian way of slaughtering may lead many slaughters in the danger of being accused.

4. Slaughtering Animals for Purpose of Epidemic Prevention

Lawful destruction of animals and commonly accepted destruction practice are the general standards for epidemic prevention. “The public health exemption is available only if the ‘destruction’ of an animal is ‘lawful’. Other exemptions apply only if the ‘activities’ involving cruelty are themselves ‘lawful’.”³⁶ In several states, exemptions to animal-cruelty prosecutions are qualified not by the term “lawful” but are restricted to “commonly accepted practices” or similarly.

In the Thomason case, for example, “the defendant had made a ‘crush video’ in which mice and rats were crushed and mutilated by the heel of a woman’s shoe worn by one of the defendants. And twelve animals were ‘taunted, maimed, tortured, mutilated, disemboweled and ultimately slowly killed’.”³⁷ The defendant invoked the exemption on the ground that “mice and rats are dangerous to life and limb because they carry diseases such as bubonic plague and Hantavirus. The courts’ initial holding was that only wild mice and rats carried diseases rat were dangerous to humans, whereas those to humans, whereas those subjected to cruelty in making the video were domestic mice and rats bred to be food for other animals; such mice and rats were outside the scope of the exemption.”³⁸

In this case, the court made a difference between the wild mice and domestic ones even the group of mice is usually to be deemed as destructing object. Here, the exemption for epidemic prevention should be done only if the slaughtering action is lawful. However, the term “lawful” is ambiguous and hard to follow without clear standards. Although epidemic slaughtering actions are carried out in the light of orders or rules in China, no measurement is adopted to reduce the suffering of the destructed object animals. Consequently, animals undergo the extremely painful death after being beaten, killed in a cruel way, burnt or poisoned. To reduce the suffering of the destructed animals, slaughtering actions for the epidemic purpose should be restricted to following the commonly accepted practice.

5. Animal fighting

The Proposal doesn’t differentiate animal fighting from the performance of cruelty to animals, and “(b) carries out performance or activities of cruelty to animals disturbing social order that is very serious or causes serious consequences”.³⁹ In reality, animal fighting may be presided in a very cruel way, and many animals die of severe injuries after fighting. “Because of the small societal benefit of such activities and the significant risk to the animals, fighting is one of the activities often expressly outlawed by cruelty statutes. Among our eight states, there is great disparity in the statutes. Texas is most simplistic. The only offense is causing “one animal to fight with another.” In Virginia, only persons who “engage in the fighting of animalsfor money, prize or anything of value” are guilty of

the crime.”⁴⁰ Although animals are not harmed or killed directly by the presiding person, they will not have to suffer such harm or death without the person’s non-humane action.

6. Religion Exception

In sacrifice ceremonies, performer intentionally treats animals in a cruel way that is serious or causes serious consequence, such as killing animal slowly to extend the suffering the animal undergoing or bleeding the vein of its throat to observe the animal struggling to die. Do such behaviors are a part of religious observances? If it is not religion, is such action protected by traditional culture or does it belong to activities disturbing the social order? Without exemption, not many people (mostly villagers) may have to face up the danger of being accused. Although animal sacrifice is not encouraged by many countries and governments, the animal slaughtering of such “traditional ceremony” may encounter the conflict with religious freedom statute in their Constitution.

7. Every Such Offender Shall Be Accused for Every Offense.

In China, situations exist where animal slaughtering and trading practices, such as sellers infuse pounds of water or feeding stuff into the live stock’s throats with injecting pipes or electric equipments, for the purpose of increasing of the total weight of the live stock and thus boasting profits. Such cruel and rude injecting process causes live stock’s stomach and intestine congest or even break. This slaughtering method is not commonly accepted in practice, so the offender can be charged with defraud and cruelty to animals.

In order to give a better protection and a convenient way for the government to prosecute the offenses, one issue needs to be taken into concern, namely, custody. A common situation exists when the owner does not have custody, and the individual with custody fails to provide the required care. “Most courts are reluctant to impose liability on the owner for the failure to provide care, based on ownership alone. The Michigan court has held that ownership alone is not sufficient. There must be a showing of actual custody.”⁴¹ In Proposal, the offender will be anyone who violates the statute or who willfully abandons animals without specifying the ownership or custody, and it is not difficult for the court to impose liability on the offenders.

D. Other Relevant Concerns

1. Prosecution Concerns

"Between 2006 and 2007, recognizing the role of animal abuse in domestic violence situations, the states of Maine, New York, Vermont, California, and Illinois revised their laws regarding protective orders to include animals. A number of other states are considering similar amendments."⁴² "The International Institute for Animal Law has proposed model language for legislation authorizing the inclusion of animals in protective orders. Section 2 Protection orders: (a) In any domestic violence case, the court shall order that the petitioner be granted the exclusive care, custody, or control of any animal owned, possessed, leased, kept, or held by either the petitioner or the respondent or a minor child residing in the residence or household of either the petitioner or the respondent. (b) The court shall further order the respondent to stay away from the animal and forbid the respondent from taking, transferring, encumbering, concealing, molesting, attacking, striking, threatening, harming, or otherwise disposing of the animal."⁴³

A respondent may transfer, conceal, harm, kill or use other ways to dispose off of animals, so the above mentioned protection order is an effective way to preventing the animals from further continuous harming in time. As long as more people become aware of animal cruelty penalty and the negative impact of animal cruelty on both animals and humans, prosecutors and courts may pay more attention to such cases. At present, prosecution for animal cruelty is not available in China, the training of certified humane investigator will be in urgent need once the proposal being passed and enacted into regulation.

2. Funds for Abused Animal Arrangement

Considering the costs of investigation, the veterinary medicine costs, the expenses of keeping or disposing off of the animal and other expenses incident to the animal cruelty violation, a fund should be built at national and province levels in China. Therefore, the abused survivals can obtain food, water, shelter, daily care and medical care in this way.

3. Veterinarian Reporting

"Several states, including California, Minnesota and West Virginia, mandate that veterinarians report suspected or known cases of abuse, cruelty, or neglect to humane agents."⁴⁴ "It is also

important that veterinarians look for signs of child and/or spousal abuse in which a member has abused a pet."⁴⁵ Since veterinarians play such an important role in revealing the potential animal cruelty and family abuse crimes, the requirement for reporting the animal abuse is effective in avoiding the further animal abuse and preventing the potential children or women abuse.

4. Forfeiture of Abused Animals

For the purpose of preventing future cruelty to other animals, the offender may be prohibited from owning any animals for a period of time. New Hampshire's statute, for example, states "the court may prohibit any person convicted of animal cruelty from having future ownership or custody of other animals for any period of time the court deems reasonable or impose any other reasonable restrictions on the person's future ownership or custody of animals as necessary for the protection of the animals."⁴⁶ The question here is not about forfeiting the abused animals, but the costs of taking care of the abused animals, including the shelter, water, medicine, food and other related costs. And the costs may be collected from the offenders as a reasonable standard.

5. Community service

"Six state statutes contain provisions that allow abusers to perform community service work, including work for a local animal shelter, as part of their sentence. Many other states provide for community service in their general sentencing guidelines. The apparent rationale for allowing community service to be performed at a shelter is the hope that offenders will come to appreciate animals, and become more sympathetic human beings."⁴⁷ Community service is not only a useful tool to provide the minor offender with the penalty and education, it is also a way for the offender to take care of animals and cultivate sympathy for animals. Furthermore, it is beneficial to prevent the serious offense and give the public the message of treating animals in a non-human way.

I. THE OFFENSE OF DISSEMINATING VIDEOS AND IMAGES OF ANIMAL CRUELTY

A. Chinese Criminal Proposal

For the commercial or entertainment purpose, anyone who maliciously disseminate the video or images of cruelty to animals disturbing social order that is very serious or causes serious

consequences, shall be restrained or with criminal detention for not more than 6 months, and be fined meanwhile; when the circumstances are particularly serious or causes the very serious consequences, the person shall be sentenced to fixed-term imprisonment for over 6 months but not more than 3 years.

B. Relevant Regulations and Supreme Court Opinions of United States

1. Relevant Regulation

“Section 48 establishes a criminal penalty of up to five years in prison for anyone “whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain.”⁴⁸ A depiction of “animal cruelty” is defined as “any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing take place in the State.”⁴⁹ As the “exceptions clause,” it is exempted from prohibition if the depiction “that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.”⁵⁰

2. Supreme Court Opinions

Robert J. Stevens ran a business, “dogs of Velvet and Steel, and an associated Web site, through which he sold videos of pit bulls engaging in dogfights and attacking other animals. Among these videos were Japan Pit Fights and Pick-A- Winna: A Pit Bull Documentary, which included contemporary footage of dogfights in Japan (where such conduct is allegedly legal) as well as footage of American dogfights from the 1960’s and 1970’s. A third video, Catch Dogs and Country Living, depicts the use of pit bulls to hunt wild boar, as well as a “gruesome” scene of a pit bull attacking a domestic farm pig. On the basis of these videos, Stevens was indicted under 18 U.S.C. § 48.⁵¹ The Supreme Court held that S.48 is not so limited by is instead substantially overbroad, and therefore invalid under the First Amendment.⁵²

The text of s 48 (c) “draws no distinction based on the reason the intentional killing of an animal is made illegal, and includes, for example, the human slaughter of a stolen cow.”⁵³ What is more, “the application of section 48 to depictions of illegal conduct extends to conduct that is illegal in only a single jurisdiction. Under subsection (c) (1), the depicted conduct need only be illegal in “State in which the creation, sale, or possession takes place, regardless of whether the ... wounding... or killing took place in [that] State.: A depiction of entirely lawful conduct runs afoul of the ban if that depiction later finds its way into another State where the same conduct is unlawful. This provision greatly expands the scope of s 48, because although there may be “a broad societal consensus’ against cruelty to animals, there is substantial disagreement on what types of conduct are properly regarded as cruel.”⁵⁴

The government attempts to narrow the statutory ban on the ground of the exception clause Subsection (b), which “ exempts from prohibition any depiction that has serious religious, political, or artistic value.” the Supreme Court declined the government argument, “the government’s attempt to narrow the statutory ban, however, requires an unrealistically broad reading of the exceptions clause. As the Government reads the clause, any material with “redeeming societal value.”⁵⁵ In addition, “the excepted speech must also fall within one of the enumerated categories. Most speeches do not. Many hunting videos, for example, are not obviously instructional in nature, except in the sense that all life is a lesson.”⁵⁶

C. Comparison between US Law and Chinese Proposal

1. Mens Rea Requirement

In Chinese Criminal Proposal, the mens rea requirement is “maliciously” instead of “intentionally”, “knowingly” or “willfully”. Thus, prosecutors need to prove that the offender acts with a malicious purpose when he disseminates videos or images of cruelty to animals. How does the offender’s malicious intent be proven? For example, a defendant intentionally uploads a video at a popular forum, and one part of the video contains the content of cruelty to animal that is viewed by ten thousands of audiences. But the issue here is that the defendant has no malicious intention, and he/she uploads the video just for fun. In addition, he/she has no idea of what consequence this uploading behavior will cause. Does this behavior constitute “serious circumstance”? Apparently,

“the video or images of cruelty to animals disturbing social order that is very serious or causes serious consequences” this general depiction might not send a clear message to the public, since there is no standard or specific definition of what is serious or what causes serious consequences. It is helpful to add the following content prior to the video or images “in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed”, hence, it will provide a specific guideline for both the public and prosecutors.

The general term of “dissemination” covers all kinds of information transmission methods. Since disseminating information is easily available on the Internet by uploading the video somewhere, the initially uploaded video can be disseminated to numerous receivers. Once the receivers find the video, they may send it to more people just by forwarding or transferring to unlimited individuals and groups. Thus, their behavior can be deemed as dissemination because of sharing information with numerous receivers. The issue at stake here is to seek out malicious purpose among numerous individuals.

2. Correlation with Freedom of Speech

Application of section 48 of illegal conduct extends to the conduct that is illegal in only a single jurisdiction, “A depiction of entirely lawful conduct runs afoul of the ban if that depiction later finds its way into another State where the same conduct is unlawful.”⁵⁷ Concluding from the above logic, section 48 is overbroad, and thus, the statute was facially invalid under the First Amendment protection of speech. Since China has one jurisdiction governing all the provinces and districts except Hong Kong and Macao, there is no need to worry about “one lawful conduct is unlawful in another jurisdiction”.

To prevent the overbroad situation, government has made the exception clause Subsection (b) to limit the application of section 48, which “exempts from prohibition any depiction that has serious religious, political, or artistic value.”⁵⁸ The Proposal takes another way to avoid overbroad depiction, “for the commercial or entertainment purpose, anyone who maliciously disseminate the video or images of cruelty to animals disturbing social order that is very serious or causes serious consequence...”,⁵⁹ In Proposal, with the purpose of commercial, entertainment or communication to disseminate the video or image of animal cruelty might encounter the danger of being accused. Meanwhile, the conduct with religious, political, artistic or other purpose is naturedly exempted

from prosecution. Comparing the way of narrowing the breadth of dissemination video or image of animal abuse between US law and Chinese Proposal, commercial or entertainment purpose is a better definition in Proposal than the depiction of “serious religious, political or artistic value” in Section 48, since some speech doesn’t fall within each of above category.

II. THE OFFENSE OF ANIMAL ABANDONMENT

A. Chinese Criminal Proposal

Breaching the duty of taking care for animals, anyone who willfully abandons domestic animals, laboratory animals or other animals causes severe consequences such as abandoning animals in large quantities, the circumstance is very serious, disturbing the social order or endangering public security, shall be restrained or with criminal detention for not more than 6 months, and be fined meanwhile; when the circumstances are particularly serious or causes the very serious consequences, the person shall be sentenced to fixed-term imprisonment for over 6 months but not more than 3 years.

B. Relevant Regulations of United States

“‘Abandon’ means deserting, forsaking, or intending to absolutely give up an animal without securing another owner or without providing the necessitates...”⁶⁰ Many states use general terms to define the animal abandonment as below: abandons unreasonably (Texas)⁶¹, who abandons such animal or leaves it to die (New York)⁶²; who shall permit the same to be ... without proper care and attention (Idaho and California)⁶³; and no person shall abandon any animal (Virginia).⁶⁴

C. Analysis of Sufficiency

Comparing to other animal cruelty penalties, the penalties for abandoning animals are relatively minor. “Perhaps laws supporting policies that encourage the responsible surrender of unwanted animals will provide the only short-term changes. Eventually, harsher penalties for the intentional abandonment of animals may be possible as a growing segment of the population comes to view

the acquisition of animals as a serious commitment.”⁶⁵ In addition, the abandoned animals straying in the street have caused many social problems, such as disease infection to other animals, negative impact on traffic jams, and reproduction beyond control.. Therefore, the penalty of abandoning animals may send the public a message of treating animals in a humane way, transferring custody legally, and reducing the danger of disease infection.

In Proposal, the action of abandonment cannot be prosecuted unless the abandonment causes serious consequences. And the following situations belong to serious consequences: “abandoning animals in large quantities, the serious circumstance, disturbing social order or endangering public security.”⁶⁶ Here, this statute empowers the court to make decisions and grants the government the power to prosecute under each of above category in virtue of the flexibility. If the illegal abandonment is not one of the groups such as abandoning animals in large quantities or endangering public security, it can be put into the category as disturbing social order depending on case by case. However, any illegal action can be called disturbing social order, no matter whether it is being prosecuted or not. Hence, in Proposal, although abandonment might not be prosecuted without serious consequence, government is of capacity to exercise control over such illegal actions.

D. Other Relevant Concerns

1. Difference between Abandonment and Negligence

“Neglect requires ‘fail unreasonably to provide necessary food, water, care, or shelter’ to an animal; and to be convicted for neglect, the defendant must have unreasonably failed to provide necessary food, water, care, or shelter to an animal.”⁶⁷ While abandonment “includes abandoning an animal . . . without making reasonable arrangements for assumption of custody by another person.”⁶⁸ To be convicted for abandonment, the defendant “must have unreasonably abandoned the animals.”⁶⁹ -Therefore, to prosecute the offense of abandoning animals, prosecutor needs to prove that offender doesn’t make an arrangement to transfer custody to another person. The defect here is that the one may not be accused by this statute even though he does not provide food, water or shelter to the unleashed animals.

2. Religion Concern

In Buddhism, releasing animals from being slaughtered to the natural environment is one traditional Buddhist practice. The fundamental difference between animal release and animal abandonment is because of the intent: releasing animals are from purpose of liberating animals from being killed and for the benefits of animals; while the critical aspect of abandonment is that “the abandoned animal is unable to take care of itself, and there are no arrangements for a human to provide the necessary care.”⁷⁰ Therefore, “the return to the wild does not breach the policy against abandonment because the animal will be able to take care of itself, and assuming it’s properly released in the wild, will pose no risk to society. On the other hand, the release of a pet dog, even assuming it might be able to take care of itself, poses a risk to society.”⁷¹

V. CONCLUSION

At present, people go too far to seek economic interests on the ground of exploitation of animals without any humane concerns. With the development of technology and improvements in economy, China is capable to keep stable economic development and enact the animal abuse law at the same time. By adopting the standard of substantial bodily harm and the graduated series of felony-level penalties, the court is able to analyze the serious circumstance or consequence under a clear guideline. Negligently mistreating, injuring, killing or tormenting animals without lawful justification should be added to the part of cruelty to animal proposal. As for offense of disseminating videos and images of animal cruelty, since China doesn’t have multiple jurisdictions except Hong Kong and Macao, there is no need to worry of arising situation of same conduct resulting in lawful and unlawful status in different jurisdiction; in this manner the Proposal doesn’t conflict with the freedom of speech. Due to frequent occurrences of social problems caused by the abandoned animals, animal abandonment statute is indeed a necessity in China. Furthermore, animal abuse can be considered as “indicator crimes” for the tendency of animal abusers to commit later acts of violence against humans. Thus, the enacting this Proposal will benefit not only animals but also the social welfare at large. All in one, it is time for China to amend Criminal Law by adding the animal cruelty parts.

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- ¹ Lynn Letourneau, *Toward Animal Liberation*, 40 *Alta, L. Rev.* 1041, 1050 (2003) (Citing D. Favre, & V. Tsang, “The Development of Anti-Cruelty Laws During the 1800’s” (1993) 1 *Detroit College L. Rev.* 1 at 1-2).
- ² Corwin R. Kruse, *Adding a Bit More Bite: Suggestions for Improving Animal Protection Laws in Minnesota*, 34 *Minn. Rev. Laws* 1405, 1407 (2008) (citing Joseph, G. Sauder, *Enacting and Enforcing Felony Animal Cruelty Laws to Prevent Violence Against Humans*, 6 *ANIMAL L.* 1, 3 (2000)).
- ³ David Favre, *Animal Law*, Greenwood Press (1983) at 181.
- ⁴ *Id.*
- ⁵ *See* Kruse, at 1421.
- ⁶ 40 *Alta, L. Rev.* 1041, 1051.
- ⁷ *See* Favre, at 185-186.
- ⁸ Heather D. Winters, *Updating Ohio’s Animal Cruelty Statute: How Human Interests are Advanced*, 29 *CAP. U. L. Rev.* 857, 881(2001).
- ⁹ *Id.* at 882 (Citing Barbara W. Boat, *Abuse of Children and Abuse of Animals: Using the Links to Inform Children Assessment and Protections*, in *CHILD ABUSE*, supra note 1, at 83,84 (citing E. Deviney, J. Dickert and R. Lockwood, *The Care of Pets Within Child Abusing Families*, *International Journal for the Study of Animal Problems* 4:321-29(1983)).
- ¹⁰ *Id.* at 883.
- ¹¹ *See* Kruse, at 1416.
- ¹² Proposal of Amending Criminal Law of the People’s Republic of China, (Sep, 18, 2009), http://www.china.com.cn/news/law/2009-09/18/content_18551501.htm.
- ¹³ *See* Favre, at 123.
- ¹⁴ *Id.*
- ¹⁵ Miss. § 98-41-1
- ¹⁶ *See* Favre, at 127.
- ¹⁷ Miss. § 97-41-15.
- ¹⁸ *See* Proposal.
- ¹⁹ *See* Kruse, at 1411(quoted Minn. Stat. § 343.21, Subdiv. 9 (2006)).
- ²⁰ *See* Winters, at 861-862 (Citing Charlotte A. Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 *ANIMAL L.* 1,19 (1998)).
- ²¹ Amie J. Dryden, *Overcoming the Inadequacies of Animal Cruelty Statutes and the Property-Based View of Animals*, 38 *Idaho L. Rev.* 177, 193-194 (2001-2002).
- ²² *Id.*
- ²³ Miss. § 97-41-7, 97-41-9.
- ²⁴ *See* Favre at 135.
- ²⁵ *See* Winters, at 867.
- ²⁶ 7 U.S.C.A. § 1901
- ²⁷ *See* Dryden, at 193.
- ²⁸ William A. Reppy, *Broad Exemptions in Animal-Cruelty Statutes Unconstitutionally Deny Equal Protection of the Law*, 70 *Law and Contemporary Problems* 255,256 (2007).
- ²⁹ *Id.* at 299.
- ³⁰ *See* Favre, at 127.
- ³¹ *Id.*
- ³² *See* Kruse, at 1411.
- ³³ *See* Proposal.

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- ³⁴ *See* Winters, at 867.
- ³⁵ *See* Proposal.
- ³⁶ *See* Reppy, at 263.
- ³⁷ *Id.* at 270.
- ³⁸ *Id.* at 271.
- ³⁹ *See* Proposal.
- ⁴⁰ *See* Favre at 140.
- ⁴¹ *Id.* at 145.
- ⁴² *See* Kruse, at 1411-1412.
- ⁴³ *See* Kruse, at 1412.
- ⁴⁴ *See* Winters, at 867.
- ⁴⁵ *Id.*
- ⁴⁶ *See* Dryden, at 208.
- ⁴⁷ *See* Winters, at 869.
- ⁴⁸ 18 U.S.C.A. § 48
- ⁴⁹ *Id.*
- ⁵⁰ *Id.*
- ⁵¹ U.S. v. Stevens, 130 S. Ct. 1577, 1583 (Apr. 20, 2010).
- ⁵² *Id.* at 1592.
- ⁵³ *Id.* at 1588.
- ⁵⁴ *Id.* at 1589.
- ⁵⁵ *Id.* at 1590.
- ⁵⁶ *Id.*
- ⁵⁷ *Id.* at 1589.
- ⁵⁸ 18 U.S.C.A. § 48.
- ⁵⁹ *Id.*
- ⁶⁰ Va. §3.1-796.50.
- ⁶¹ Texas § 42.11.
- ⁶² New York § 355.
- ⁶³ Calif. § 18-2109, Calif. § 597 f.
- ⁶⁴ Va. §3.1-796.50.
- ⁶⁵ 74 U. Colo. L. Rev. 181.
- ⁶⁶ *See* Proposal.
- ⁶⁷ V.T.C.A., Penal Code § 42.092(b)(3).
- ⁶⁸ 60 Baylor. L. Rev. 964.
- ⁶⁹ V.T.C.A., Penal Code § 42.092(b) (4).
- ⁷⁰ *See* Favre, at 153.
- ⁷¹ *Id.*