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Wildlife Jurisprudence

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The term *wildlife* refers to the animals of this earth that are not the property of human beings and are not under direct human dominion and control. When animals have come under human dominion and control they were historically considered to be personal property, but today they should be considered living property.[1] This Article will focus upon wildlife as they live in their natural habitat and not upon the rules concerning the conversion of wildlife into property.[2] The focus is upon the animals we coexist with on the planet, and the animals such as alligators that are the product of evolution over millions of years.[3] Wildlife existed before *Homo erectus*, well before human civilizations, and the adoption of legal systems. However, species longevity does not translate to legal rights in the artificial world of human law.

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1 *See* David Favre, *Living Property*, 93 MARQ. L. REV. 1021 (2010) (proposing the creation of a fourth category of property, "living property," and the allocation of legal rights for animals in this group. This Article is the companion piece to *Living Property* with a focus on animals not owned by humans.)

2 *See generally* RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY 13–18 (Walter B. Raushenbush 3rd ed., Callaghan & Company 1975) (1936).

3 The American alligator is estimated to have been around for two hundred million years. U.S. DEP'T. OF THE INTERIOR, U.S. FISH AND WILDLIFE SERV., AMERICAN ALLIGATOR (2008), *available at* http://library.rawlingsforestry.com/fws/American_alligator/alligator.pdf.

Historically, wildlife have not had independent standing in the legal system. Rather, the legal system has presumed that wildlife are available for use and consumption by humans, thus their lower legal status as "things."[4] But as this Article explores, human views toward wildlife have recently been evolving. It is time to take full measure of where wildlife presently stand within the realm of jurisprudence, as well as what is possible for the future.[5] As humanity comes to accept that we share this earth with other species as part of a global community, and that an ethical duty exists toward wildlife, the necessity of change within jurisprudence becomes stronger.

The historical human attitude of unlimited consumption of wildlife, or even the more benign attitude of live and let live—do no harm—is unsupportable in a world of seven billion human beings[6] who possess an ever-increasing appetite for the consumption of material goods. The ecosystems of the Earth are being destroyed at a historically alarming rate.[7] Assuming a level of ethical duty toward wildlife,[8] it is clear that to fulfill our obligations toward wildlife, humans must adopt an agenda that goes beyond a passive attempt to save existing ecosystems. This duty supports an obligation to both protect and actively restore the ecosystems where wildlife live.

The realization of these goals should be accomplished by allowing wildlife an enhanced presence in the legal system and by making their interests more visible when humans make decisions impacting wildlife and their habitat. The enhanced presence of wildlife on the stage of jurisprudence will give greater weight to their interests in the everyday balancing of interests that is the bread and butter of the legal process.

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4 This conceptualization of the place of animals began with the early Greek philosophers. *See* Steven M. Wise, *How Nonhuman Animals Were Trapped in a Nonexistent Universe*, 1 ANIMAL L. 15, 17–18 (1995).

5 This author first examined wildlife jurisprudence more than thirty years ago. David Favre, *Wildlife Rights: The Ever-Widening Circle*, 9 ENVTL. L. 241 (1979). Little has changed for the legal status of wildlife within the United States since that time. On a global basis, wildlife and their habitat are now in a much more precarious position. Additionally, thirty years of teaching and writing have brought this author's thoughts to a different level.

6 *See* U.S. Census Bureau, *World POP Clock Projection*, CENSUS.GOV, (Oct. 25, 2010), http://www.census.gov/ipc/www/popclockworld.html.

7 *See generally* ANDREW GOUDIE, THE HUMAN IMPACT ON THE NATURAL ENVIRONMENT: PAST, PRESENT, AND FUTURE (6th ed. 2006); J. PUHE ET AL., GLOBAL CLIMATE CHANGE AND HUMAN IMPACTS ON FOREST ECOSYSTEMS (2001).

8 *See* discussion *infra* Part IV.B, pp. 479–80.

In order to better understand the presence of wildlife within our jurisprudence, it is necessary to adopt a broader definition of legal rights, one that focuses upon the presence of interests. Legal rights for wildlife should be considered to exist when a court or administrative agency takes into account the interests of wildlife and gives some weight to those interests before making a decision. By using this broader definition of legal rights, it is apparent that wildlife already have a modest presence in the legal system. But, there is room for considerable expansion of wildlife's presence and the weight their interests receive when balanced against conflicting human interests.

Our legal system can and should provide for (1) the presence of individual animals as persons in the legal system, (2) the direct, intentional balancing of the interests of wildlife versus human interests, (3) restraints against the unnecessary killing of wildlife, and (4) enhancements for the creation and protection of habitat. A number of topics will be briefly considered to create a palette of ideas with which the canvas of wildlife jurisprudence will be painted.

I
THE SCOPE OF THE TERM *WILDLIFE*

There are at least three different contexts for understanding the scope of the term *wildlife*. The first is science-based, the next is community culture, and the third is legal. In the world of science—specifically taxonomy—all living things are divided into categories. A major category is animals, as distinguished from plants or fungi.[9] However, science is concerned with the gene sets of individuals rather than cultural characterization or legal categories such as endangered, game, or pest. Whether a rabbit was in a field or a cage makes no difference when being dissected. Wildlife is a classification of animals created by issues of human control, not biology.

In the cultural context it is useful to note that *wildlife* is a compound word. The connotation of wild within the word *wildlife* acts as a limiter on the term *life*: wild, as in to be feared, uncontrollable by humans; wild, as juxtaposed with tame or domestic. The history of the United States, and the march across our continent

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9 Biological life on Earth is organized by scientists into five kingdoms. Besides animals, there are plants, fungi, protista (protocists), and monera (bacteria) (the last two being mostly unicellular). LYNN MARGULIS, KARLENE V. SCHWARTZ, & MICHAEL DOLAN, DIVERSITY OF LIFE: THE ILLUSTRATED GUIDE TO THE FIVE KINGDOMS 10–13 (1999).

by European settlers, is the story of taming the frontier, the elimination of the wild,[10] and the plowing of the natural habitat of millions of wild animals. The consumption and elimination of wildlife has been a longstanding part of western movement heritage.[11]

Within the realm of the law, animals are divided into two primary categories: domestic animals within the direct dominion and control of humans, and wildlife that remain outside of human control.[12] Generally defined, the term *wildlife* refers to specific animals living in their natural habitat that are not within the possession or control of humans.[13] Under this definition, there are many sub-categories, including game animals, endangered animals, and feral animals.

It must be noted that even wildlife living in a natural habitat are often not free from the influence of humans. The actions of humans have profound effects on lives and deaths of animals, even though humans do not control the bodies of the animals. Numerous species of wildlife are managed by humans to be captured or killed, and their habitat is often manipulated to increase or decrease the number of a species. For example, deer are often managed by state game agencies

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10 When sent by President Jefferson to find a water route across America, Lewis and Clark (particularly Clark) kept extensive journals of their travels in the American Wilderness. Interspersed with comments about the geographic features and tales about the crew and their travails are occasional comments about the great numbers of wildlife. Clark comments that while hunting, he walked onto a high "emin[e]nce" where: "I had a view of a greater number of buffalow than I had ever Seen before at one time. I must have Seen near 20,000 of those animals feeding on this plain." MERIWETHER LEWIS & WILLIAM CLARK, THE JOURNALS OF THE LEWIS AND CLARK EXPEDITION, Aug. 29, 1806, *available at* http://libxml1a.unl.edu/lewisandclark/read?_xmlsrc=1806-08-29&_Lestyles.xsl (available in full at http://lewisandclarkjournals.unl.edu). On a different day, Lewis comments, "game is still very abundant we can scarcely cast our eyes in any direction without percieving deer Elk Buffaloe or Antelopes." MERIWETHER LEWIS & WILLIAM CLARK, THE JOURNALS OF THE LEWIS AND CLARK EXPEDITION, Apr. 29, 1805, *available at* http://lewisandclarkjournals.unl.edu/read/?_xmlsrc=1805-04-29.xml&_xslsrc=LCstyles.xsl; *see generally* JAMES A. TOBER, WHO OWNS THE WILDLIFE?: THE POLITICAL ECONOMY OF CONSERVATION IN NINETEENTH-CENTURY AMERICA 3–22 (1981).

11 "Despite a copious history of protective laws, by the end of the nineteenth century deer had virtually disappeared from the eastern seaboard. Other species such as the beaver and wild turkey whose numbers played so vivid a part in colonial history were decimated throughout the east by the early years of the twentieth century." THOMAS A. LUND, AMERICAN WILDLIFE LAW 57–58 (1980) (citations omitted).

12 The use of domestic in this context is not to suggest that just because humans control a particular animal, perhaps a bear at a zoo, then the animal is domesticated in the way species traditionally living with humans are domesticated. The bear in a cage is no longer part of the wildlife category focused on in this Article.

13 *See* DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW: CASES AND MATERIALS 1–21 (2nd ed. 2009) [hereinafter GOBLE & FREYFOGLE] (discussing the legal complexities of the term wildlife).

for hunting season every fall. Even though groups of animals may be manipulated by humans, they fall under the definition of wildlife for the purposes of this Article.[14]

II
SOCIAL, CULTURAL, AND LEGAL PERSPECTIVES ON WILDLIFE

A. A Diversity of Views

Definitions alone cannot describe the cultural presence of wildlife. It is the historical context that gives insight into wildlife's cultural significance. Human views about wildlife and the values they represent vary significantly from person to person and over time. "People worldwide have different reasons for caring about wildlife: Wildlife are a source of attraction and fear, they have utilitarian value and symbolic meaning, they have religious or spiritual significance, and they are a barometer measuring people's concern for environmental sustainability."[15]

During the past 2000 years animals have been part of the entertainment within many cultures. In the days of ancient Rome, hundreds of captured wildlife could be slaughtered in a day for the entertainment of the masses in the arena.[16] At the time of Shakespeare, bearbaiting was accepted entertainment.[17] Traditional bullfights culminating in the death of the bull have been a longstanding part of Spain's culture, and a constant topic of debate.[18] In the United States, animal death for entertainment purposes is less socially acceptable, and many of these practices are not allowed.

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14 If individual animals are living in a natural habitat and not under the direct dominion and control of humans, then they are wildlife. *Id.* at 1.

15 MICHAEL J. MANFREDO, WHO CARES ABOUT WILDLIFE? 2 (2008).

16 *See* J.M.C. TOYNBEE, ANIMALS IN ROMAN LIFE AND ART 17 (1973).

17 LIZA PICARD, ELIZABETH'S LONDON: EVERYDAY LIFE IN ELIZABETHAN LONDON 219–21 (2004). Some of the bears at the Queen's Palace in Whitehall had unique names—George Stone, Harry Hunks, Harry of Tame, and Sackerson. *Id.* at 220. In Shakespeare's *The Merry Wives of Windsor*, Sackerson is referred to specifically. *Id.* Cockfighting, bullbaiting, and a sport involving trained dogs attacking a monkey riding a small horse were also common. *Id.* at 219–21.

18 *See* Graham Keely, *Spain's Bleeding Economy Spurs a Different Bull Run*, TIMES, Jan. 4, 2010, http://business.timesonline.co.uk/tol/business/industry_sectors/leisure/article6974728.ece; Raphael Minder, *Looking for Wedge From Spain, Catalonia Bans Bullfighting*, N.Y. TIMES, July 29, 2010, at A4 (showing an example of changing cultural attitudes where the Spanish region of Catalonia banned the centuries-old tradition of bullfighting in July 2010).

Within our culture, a diversity of images concerning wildlife has historically coexisted. For centuries, the tale of Little Red Riding Hood has provided children a perspective on wolves that induces fear and emotional trauma. In 1942, Disney studios released *Bambi*, which put deer in a different emotional light than just being the target of sport hunters.[19] In 1975, Steven Spielberg released *Jaws* to world acclaim and artistic and financial success.[20] Unfortunately, the movie created such a significant and negative image of sharks in the public's mind that today it is hard to obtain the political support necessary to protect endangered shark species from human killings.[21]

Current television programming brings us Shark Week[22] and Whale Wars, where the Sea Shepherd battles Japanese research ships for the protection of whales.[23] Trophy hunters gather prestige for climbing mountains and shooting bear and goats.[24] Whales are hunted and killed for cultural heritage in several countries.[25] Rare birds are smuggled into wealthy countries as living trophies.[26] Humans kill

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19 BAMBI (Walt Disney Productions 1942). *See also Bambi*, WIKIPEDIA, http://en.wikipedia.org/wiki/Bambi (last visited Nov. 17, 2010).

20 JAWS (Universal Pictures 1975). *Jaws* won Academy Awards for Film Editing, Music (Original Score), and Sound. *See Jaws (film)*, WIKIPEDIA, http://en.wikipedia.org/wiki/Jaws_(film) (last visited Nov. 17, 2010). It was also nominated for Best Picture. *Id.* The film's financial success set records for the time, grossing $470 million worldwide ($1.9 billion in 2010 dollars). *Id.*

21 *See* Matthew Berger, *Biodiversity: Lucrative Shark Trade Under Scrutiny*, INTER PRESS SERVICE, Mar. 12, 2010, http://www.ipsnews.net/print.asp?idnews=50646; Press Release, CITES, *Wildlife Trade Regulation Needed More than Ever*, June 30, 2010, http://www.cites.org/eng/news/press/2010/20100630_CITES35.shtml (last visited Oct. 24, 2010) (All the proposals for protective listings of sharks were rejected at the Conference of the Parties Convention on International Trade in Endangered Species in Wild Fauna and Flora.).

22 Discovery Channel, *Shark Week 2009 Program Schedule*, http://dsc.discovery.com/sharks/programs/2009-program-schedule.html (last visited Nov. 5, 2010) (treating viewers to the true story behind *Jaws* and specials on sharks after dark in August of 2009).

23 Animal Planet, *Whale Wars: About the Show*, ANIMAL.DISCOVERY.COM, http://animal.discovery.com/tv/whale-wars/about/ (last visited Nov. 5, 2010).

24 *See SCI Big Game Records Is World's Most Used Scoring System*, SAFARI CLUB INTERNATIONAL, http://www.scifirstforhunters.org/content/index.cfm?action=view&content_id=105 (last visited Nov. 5, 2010) (The Safari Club International is an organization that keeps the records for global trophy hunting.).

25 *See* Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 167 (2000–2001).

26 *See* Charles Bergman, *Wildlife Trafficking*, 40 SMITHSONIAN, Dec. 2009, at 34; Jim Dwyer, *Trafficking in Contraband That Sings*, N.Y. TIMES, Apr. 15, 2009, at A19.

highly intelligent dolphins so that tuna can be sold in a can,[27] while others pay to swim with dolphins.[28] Other humans will pay thousands of dollars to spend a few hours in a mountain jungle habitat simply observing a gorilla family.[29] Humans continuously put their lives at risk to take movies of wildlife in exotic and dangerous places.[30] For many humans, wildlife continues to be simply a source of necessary food. Today, there exists a wide range of perspectives concerning wildlife in the United States that are represented by subsistence hunters, sport hunters, environmentalists, and animal activists.[31]

The number of nonprofit organizations addressing wildlife issues that have formed over the decades in the United States exemplifies the history and diversity of American views on wildlife. The Boone and Crockett Club, supporting the perspective of the sport hunter, formed in 1887.[32] The National Audubon Society, with its concern for birds and habitat, formed in 1905.[33] In 1892, environmentalist John Muir and others formed the Sierra Club.[34] In 1947, Defenders of

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27 *See* Kim Murphy, *Fish Nets Snaring False Killer Whales in Hawaii*, L.A. TIMES, GREENSPACE, Jan. 19, 2010, http://latimesblogs.latimes.com/greenspace/2010/01/false-killer-whales-endangered-fishing.html.

28 *See Park Experiences—Dolphin Swim*, DISCOVERYCOVE.COM, http://www.discoverycove.com/Explore/ExperienceDetail.aspx?name=Dolphin+Swim+Experience (last visited Nov. 5, 2010) (This experience is available at a number of commercial vacation sites.).

29 *See Dates and Prices—4 Day Rwanda Safari—Volcanoes Safaris*, VOLCANOESSAFARIS.COM, http://www.volcanoessafaris.com/safaris/4-day-rwanda/dates-and-prices/#whats-included (last visited Nov. 5, 2010); *Rwanda—Primate Tours*, RWANDATOURISM.COM, http://www.rwandatourism.com/primate.htm (last visited Nov. 17, 2010) (The license from the government of Rwanda is for a one-hour viewing and costs $500 per person per day.).

30 DAVID NICHOLSON-LORD, PLANET EARTH: THE MAKING OF AN EPIC SERIES (2007).

31 *See* full discussion in GOBLE & FREYFOGLE, *supra* note 13, at 21–97; WILLETT KEMPTON ET AL., ENVIRONMENTAL VALUES IN AMERICAN CULTURE 106–15 (1995).

32 Boone and Crockett Club, *What Would Roosevelt Think?*, BOONE-CROCKETT.ORG (Sept. 19, 2008), http://www.boone-crockett.org/news/featured_story.asp?area=news&ID=27.

33 Nat'l Audubon Soc'y, *History of Audubon and Waterbird Conservation*, AUDUBON.ORG, http://birds.audubon.org/history-audubon-and-waterbird-conservation (last visited Nov. 5, 2010).

34 Sierra Club, *Who Was John Muir?*, SIERRACLUB.ORG, http://www.sierraclub.org/john_muir_exhibit/about/ (last visited Nov. 5, 2010).

Furbearers, the organization that would later become the Defenders of Wildlife, was founded.[35]

There are multiple and complex threads of human action and perspectives that deserve to be noted: wildlife are associated with recreation and tourism, there are human and wildlife conflicts, wildlife diseases exist, wildlife are an integral part of the environment, and wildlife are often viewed as an economic resource.[36] This palette of social and cultural views is reflected in our laws as they have changed over time.

B. Changing Attitudes Reflected in the Changing Law

The social and cultural perspectives toward wildlife are reflected in the laws of a country. The roots of American legal history go back to the beginning of the Common Law system in Britain.[37] Just prior to the time of William the Conqueror, a significant meeting of landowners organized during the Winchester Parliament of 1016, and at that time the Forest Laws were adopted, setting out which persons could go upon which land and take what wildlife.[38] The Forest Laws evolved into a top-down governing view with royal control at the top and peasants often excluded from open land.

In the British Colonies of America, a different view of the relationships between people and government created different attitudes about wildlife, which in turn produced different laws. Rather than the government restricting access to wildlife, the attitude in America was of open access to wildlife and almost no enforcement of trespass laws.[39] The average person, not just the aristocrat, was able to access wildlife.

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35 *See* JAMES TOBER, WILDLIFE AND THE PUBLIC INTEREST: NONPROFIT ORGANIZATIONS AND FEDERAL WILDLIFE POLICY 21–44 (1989) (fully listing and discussing wildlife organizations).

36 MANFREDO, *supra* note 15, at 2; *see generally* SARA OLDFIELD, THE TRADE IN WILDLIFE: REGULATION FOR CONSERVATION (2003).

37 *See generally* LUND, *supra* note 11, at 3–17 (giving a more detailed consideration of the British legal history); *see generally* Favre, *supra* note 5, at 243–45, for some material on early Roman law.

38 WILLIAM NELSON, THE LAWS CONCERNING GAME pp. x–xi (6th ed. 1762). *See* EDWARD COKE, 4 THE REPORTS OF SIR EDWARD COKE 320 (London, Joseph Butterworth & Sons 1826) (1572–1617). Not long after this event William the Conqueror had human settlements emptied to create a Royal Forest. The topic of access to game was so important that it caused a confrontation with King John, which resulted in the Charter of the Forest, a brother document to the Magna Charter (1215). *Id.*

39 For a full summary of American legal history, see LUND, *supra* note 11, at 19–34.

For the first 100 years of American history, wildlife was generally considered a consumptive resource or a hindrance to settlement. The near extermination of the millions of buffalo that once existed on the western plains of America is a fair representation of early American attitudes toward wildlife. That which seemed limitless was controlled, killed, and eliminated.[40]

Beginning in the 1880s, new attitudes about wildlife began to develop. These perspectives said that wildlife should not be left to the settlers, trappers, and the market hunters, but should be protected for a variety of reasons.[41] These new attitudes coalesced around the term *conservation*. The Lacey Act was an early law that sought to create federal protections for wildlife.[42] This law has since evolved into a very important basis for the enforcement of other state, federal, and international wildlife laws.[43]

Also in the 1800s, a series of U.S. Supreme Court cases established the state ownership doctrine. In the seminal case of *Geer v. Connecticut*,[44] the Court held that state governments—rather than the federal government—have full power to control access to wildlife notwithstanding the Commerce Clause.[45] By the mid-twentieth century, the concept of conservation of wildlife, as articulated by Aldo Leopold,[46] one of the first American ecologists, became the

40 For the full story of the buffalo's demise, see ANDREW C. ISENBERG, THE DESTRUCTION OF THE BISON (2000); Judith Hebbring Wood, *The Origin of Public Bison Herds in the United States*, 15 WICAZO SA REV. 157 (Spring 2000) (discussing efforts to save the bison from extinction).

41 This attitude resulted in public groups that were formed supporting new views. *See* TOBER, *supra* note 35; *see generally* JAMES B. TREFETHEN, AN AMERICAN CRUSADE FOR WILDLIFE 69–173 (1975).

42 Lacey Act, 16 U.S.C. §§ 3371–3378 (2006).

43 Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27 (1995), *available at* http://www.animallaw.info/articles/arus16publlr27.htm ("Iowa Congressman John Lacey first introduced the Lacey Act to the House of Representatives in the spring of 1900. He intended the law to 'enlarge the powers of the Department of Agriculture,' and gave it three primary purposes: (1) to authorize the introduction and preservation of game, song, and insectivorous wild birds, (2) to prevent the 'unwise' introduction of foreign birds and animals, and (3) to supplement state laws for the protection of game and birds." (citations omitted). *Id.* at 36–37).

44 Geer v. Connecticut, 161 U.S. 519, 534-35 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 332, 334–36 (1979).

45 *See generally* MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 10–47 (3d ed. 1997) (fully discussing the development of the state ownership doctrine and its subsequent erosion by federal power).

46 *See generally* ALDO LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE (1949).

policy basis for all state fish and game agencies when making decisions about wildlife management.

The concept of wildlife conservation directed game management by state fish and game agencies for more than half a century in the United States. The arrival of the environmental movement and ecological awareness brought different perspectives and new regulations for wildlife protection, culminating in the Endangered Species Act of 1973 (ESA).[47] The introduction of the ESA states:

> Congress finds and declares that . . . species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction [and that] these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people[.][48]

The ESA focuses on species of wildlife and plants rather than individual animals. No longer did listed species exist solely for human use—the role of wildlife within functioning ecosystems became a new and important focus.

A concern for individual animals is a recent perspective added to our ever-evolving social and cultural mix of views about wildlife. This is usually found within the context of the animal rights debate. Whales began receiving focused attention more than two decades ago. At least one law review article has made the case for legal rights for whales in the international setting.[49] Today, the Great Apes Project seeks to give special acknowledgement and protection to our evolutionary cousins.[50] Reflecting our concern for individual animals, the Animal Welfare Act requires holders of primates to provide a physical "environment adequate to promote the psychological well-being of primates."[51] As we move deeper into the new millennium there will be increasing focus upon the plight and status of individual animals within the legal system.

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47 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–44 (2006).

48 *Id.* at § 1531(a)(2)–(3).

49 *See* Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L. L. 21, 49 (1991) (suggesting a moral status for whales based on international law principles). *See also* Sudhir K. Chopra, *Whales: Toward a Developing Right of Survival as Part of an Ecosystem*, 17 DENV. J. INT'L L. & POL'Y 255, 264–70 (1989).

50 *See* Great Ape Protection, *Project Gap*, GREATAPEPROJECT.ORG, http://projetogap.org.br (last visited Nov. 17, 2010) (The website for the project contains considerable information.).

51 Animal Welfare Act, 7 U.S.C. § 2143(a)(2)(B) (2006).

III
WILDLIFE IN TODAY'S JURISPRUDENCE

While the material above explored the changing cultural perspectives in the United States and how the law has evolved with respect to wildlife, this part of the Article considers the current extent of the presence of wildlife in our common areas of jurisprudence, including property, torts, and criminal law.

A. The Realm of Property

Property law arises initially at the state level of the American system of government and is derived from common law. By the previous definition, wildlife are not the property of humans, and contrary to general perceptions wildlife are not the property of state governments either. State governments assert the right to control access to wildlife, rather than asserting a property interest in beings that those governments do not possess or control.[52] Currently, property law does not provide a public policy context for the issues considered in this Article.

Rather than stating that wildlife are not the property of humans, a better view is to say that wildlife are self-owned unless possession, dominion, and control by a human are lawfully obtained, in which case legal title will be held by the human.[53] However, even when a human holds legal title, the individual animal still retains equitable title. This approach allows for wildlife to retain a legally recognized status (holder of equitable title), which in turn allows for them to be recognized as having a legal personality with interests that need to be considered when humans act against the interests of wildlife. The conceptual basis for this perspective has been developed elsewhere.[54]

Looking to the future, a number of interesting property issues can be expected to arise: to what extent will wildlife be considered to have real property interests in the places they live and possess? Will wildlife be granted the legal capacity to hold actual or equitable title to land? Perhaps property law may even allow wildlife to be beneficiaries of funded trusts established for their benefit. The door

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52 Montana v. Fertterer, 841 P.2d 467, 469 (1992).

53 As previously suggested by this author. *See* David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473 (2000).

54 *Id.*

for this possibility has already been opened by the new position of domestic animals in the realm of trusts and estates.[55]

B. Wildlife as a Natural Resource: Federal Laws

While wildlife have the highest visibility in state laws covering hunting and wildlife management, at the federal level wildlife are primarily a part of natural resource management. The Endangered Species Act, the Bald Eagle Protection Act, the Marine Mammal Protection Act, and the Migratory Bird Act are just a few of the federal laws dealing directly with wildlife.[56] Under a wide variety of political motivations, these laws seek to protect certain species of wildlife and individual animals from unacceptable death and habitat destruction.[57] Contextually, these statutes assume that wildlife are a natural resource to be managed for human use, not that wildlife are legal beings, with each animal possessing an individual status in our legal system.

It will be noted later that the practical effect of many of our present wildlife management laws is to provide both diluted individual rights and habitat protection.[58] This Article approaches the topic from the direction of individual legal rights rather than resource management.

C. Torts

In the world of torts, wildlife have almost no presence. This is not because wildlife do not cause harm to humans, but rather, as beings without financial assets, it makes no sense to file a lawsuit seeking to make an animal defendant financially responsible for any harm the animal causes. However, animals are often summarily killed for harm caused to humans. Because life rather than money is at risk, it is best to think of these deaths in the criminal law context of the next section.

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55 *See* discussion *infra* Part IV.E.3, pp. 494–95.

56 *See* Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006); *see* Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668a–668d (2006); *see* Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1421 (2006); *see* Migratory Bird Protection Act, 16 U.S.C. §§ 703–712 (2006) (It does not further this Article's focus on developing new legal rights for wildlife to review all of the federal laws.).

57 These laws, adopted to deal with management issues, have been considered by a wide variety of authors. *See, e.g.* GOBLE & FREYFOGLE, *supra* note 13, at 762–1099; *see generally* RICHARD LITTELL, ENDANGERED AND OTHER PROTECTED SPECIES: FEDERAL LAW AND REGULATION, (1992); *see generally* RUTH S. MUSGRAVE & MARY ANNE STEIN, STATE WILDLIFE LAWS HANDBOOK (1993).

58 *See* discussion of weak rights for species *infra* Part IV.E.4, pp. 496–97.

On the other side of the courtroom, wildlife species are not presently able to seek recovery as plaintiffs for the intentional or negligent harm to their bodies and minds, harm to their dwellings and food lands, or perhaps misappropriation of their images. If wildlife can be acknowledged to possess a robust legal personality, then perhaps in the future wildlife will be allowed to file tort lawsuits and be allowed a remedy of at least injunctive relief to stop unjustified harm by humans.

D. Criminal Law

It has been suggested that in the Middle Ages animals were occasionally put on trial as criminal defendants, but that does not happen today.[59] This does not mean that governments are not willing or able to impose consequences for harm caused by wildlife. The consequences do not occur in the criminal courtroom, but in civil proceedings or by simple agency decisions.

The most complex example of holding individual animals responsible for their actions arises from the various dangerous dog statutes adopted around the country.[60] While dog owners have always been financially liable for the harm done by their animals, under these more recent laws the dog will also bear the consequences for wrongful conduct, including confinement or death.[61] Under most of these laws, because of the property interest the human holds in the dog, a hearing will be held to gather evidence and make a decision as to whether the dog is dangerous. The owner is able to defend the dog from being placed in the dangerous dog category, while the agents of the local government can present evidence against the dog, similar to a criminal prosecution. In these cases, the dog is an individual with a personality, and the dog's actions are the focus of the legal proceeding.

Wildlife species are often held personally responsible by government agencies when they have caused human pain, suffering,

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59 E.P. EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS 4 (Faber & Faber 1998) (1906). Presumably, as young children are not held to criminal charges because they do not have the appropriate capacity to understand the restraints of the criminal law, so wildlife also lack the requisite capacity.

60 *See, e.g.*, FLA. STAT. ANN. §§ 767.11–.16 (2010); *see* DAVID FAVRE, ANIMAL LAW: WELFARE, INTERESTS, AND RIGHTS 180–83 (2008).

61 FLA. STAT. ANN. § 767.13(1) (2010) ("[T]he dangerous dog shall be immediately confiscated by an animal control authority, placed in quarantine . . . thereafter destroyed in an expeditious and humane manner.").

or death. However, since nondomesticated wildlife do not have human owners, there are presently no provisions for due process before a decision is made. While there are usually statutory standards applied to dogs before a death sentence is given, with wildlife there are seldom any such due process protections. For example, mountain lions are killed for roaming into the wrong place.[62] Most often, any predator such as a mountain lion or bear that attacks a human is automatically considered problematic and killed.[63] Similarly, when large animals escape zoo enclosures, an immediate death sentence is often the consequence for escaping.[64]

The other major context in which wildlife are intentionally killed by government decision is when there is economic harm, or the threat of a health risk. It has been reported in Seattle, Washington, that federal agents regularly kill seagulls along the waterfront to keep down the risk of disease.[65] In Michigan, cormorants are killed by state and federal agents to reduce the negative effects caused by the birds

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62 Katie Burford, *Mountain Lions' Presence Shouldn't Paralyze Us in Wild*, DURANGO HERALD (Durango, Colo.), Aug. 16, 2009, *available at* http://www.durangoherald.com/sections/Features/Family/2009/08/16/Mountain_lions_presence_shouldnt_paralyze_us_in_wild/ (a mountain lion was killed after appearing in an elementary school courtyard and in town, before attacking anyone); *see also* Rachel Schleif, *'My Hands Were Shaking': Cougar-Shooter Tells His Story*, WENATCHEE WORLD (Wenatchee, Wash.), Aug. 21, 2009, *available at* http://www.wenatcheeworld.com/news/2009/aug/21/my-hands-were-shaking-cougar-shooter-tells-his/ ("He suspects it was the same cougar that chased at least five mountain bikers on the Freund Canyon Trail during the past two weeks. He said the department had decided that the cat had to be killed if [it] turned up.").

63 *Bear Killed by Wildlife Agents After Attack in Aspen*, DENVERPOST.COM, Aug. 31, 2009, http://www.denverpost.com/ci_13242724?source=rss (another example where a bear was tranquilized and then euthanized after being frightened away by the woman the bear attacked; this was the twenty-fifth bear destroyed in Colorado that year); *see also* Tom Remington, *Colorado Woman Eaten by Bear*, BLACK BEAR BLOG (Aug. 8, 2009), http://mainehuntingtoday.com/bbb/2009/08/08/colorado-woman-eaten-by-bear/; *Grizzly, 2 Cubs Caught after Montana Campground Mauling*, ASSOCIATED PRESS, July 29, 2010, *available at* http://www.heraldnet.com/article/20100729/NEWS02/707299821.

64 *Mountain Lion Killed after Escape at Kansas Zoo*, ASSOCIATED PRESS, May 26, 2009, *available at* http://www.foxnews.com/story/0,2933,521817,00.html (a fourteen-year-old female mountain lion was shot and killed by police at the Great Bend Zoo after it escaped, but had not harmed anyone.). In 2007 a tiger escaped its enclosure at the San Francisco Zoo, killed a person, and was shot dead at the zoo. May Wong, *Cops Want to Know if Tiger Had Help Escaping*, ABC NEWS, Dec. 27, 2007, http://abcnews.go.com/US/wireStory?id=4055095.

65 *See* Christine Clarridge, *The War on Seagulls Continues at State Ferry Terminals*, SEATTLE TIMES, Aug. 4, 2009, *available at* http://seattletimes.nwsource.com/html/localnews/2009593739_seagulls04m.html.

eating fish that humans want to catch.[66] Within the United States Department of Agriculture (USDA), the Wildlife Damage Management approach specializes in killing wildlife and issuing permits for citizens to trap and kill wildlife.[67]

While wildlife is not subject to criminal proceedings, humans clearly can be subjected to criminal proceedings for the infliction of unnecessary pain or suffering on wildlife. The vast majority of the states have adopted anticruelty laws for the protection of all animals. The term *animal* is usually defined as a vertebrate without regard to whether the animal is domestic or wild.[68] These laws acknowledge the ethic that it is wrong to inflict unnecessary pain and suffering.[69] However, human activities such as the hunting and trapping of wildlife are exempted from these criminal laws.[70]

E. Treaties

While this Article focuses upon the jurisprudence of the United States, it is clear that the legal status of wildlife is a global issue. Many of the most pressing problems wildlife face exist outside the boundaries of the United States and outside the reaches of the U.S. zone of economic interests, which extends 200 miles from the nation's land borders. Should whales be killed for native use and human consumption? How should elephants be managed? Will the

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66 John Flesher, *Government Killing Once Endangered Cormorants*, LANSING ST. J. (Lansing, Mich.), Aug. 28, 2009, at 4B, *available at* http://www.thefreelibrary.com/governments+killing+once-endangered+cormorants-a01611977764.

67 U.S. Dep't of Agriculture, *Animal and Plant Health Inspection Service—Wildlife Damage Management*, APHIS.USDA.GOV, http://www.aphis.usda.gov/wildlife_damage/ (last visited Nov. 18, 2010); 7 U.S.C. § 426 (2006) ("The Secretary of Agriculture may conduct a program of wildlife services with respect to injurious animal species and take any action the Secretary considers necessary in conducting the program.").

68 *See infra* notes 117 and 123.

69 Grise v. State, 37 Ark. 456, 460, 1881 Ark. LEXIS 124 at *6 (1881). *See* Favre, *supra* note 1, at 1029.

70 *See, e.g.*, MICH. COMP. LAWS. § 750.50b(2) (2010). The State of Michigan has an extensive anticruelty law and the typical exemption for hunting.

> (2) Except as otherwise provided in this section, a person shall not do any of the following without just cause: (a) Knowingly kill, torture, mutilate, maim, or disfigure an animal. . . .
>
> (9) This section does not prohibit the lawful killing of an animal pursuant to any of the following: . . . (b) Hunting, trapping, or wildlife control regulated under the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106, and orders issued under that act.

Id. at § 750b(2), (9).

tigers of the world be driven extinct by the rising middle class of Asia? Can sharks and bluefin tuna be saved from the consequences of human greed and ignorance? Should major portions of Indonesia be transformed from rich, diverse wildlife habitat into palm oil plantations?

When wildlife are mentioned within international treaties, it is almost always in the context of preserving or using them as a natural resource, not as individuals with needs of their own. For example, the International Convention for the Regulation of Whaling was created to manage the commercial exploitation of whales.[71] However, the nations did such a poor job of managing whale stocks that a commercial moratorium had to be adopted.[72] The purpose of the Convention on International Trade in Endangered Species is to regulate commercial trade of wildlife if a particular species is at risk of extinction.[73] Another international treaty that impacts wildlife is the Convention on Biological Diversity, yet the focus is primarily on habitat protection and the term *wildlife* is absent from the treaty.[74] Concern for individual animals seldom exists in the international realm. When there are limitations on methods of killing, capture, or transportation, it is usually out of concern that the natural resource should not be wasted rather than concern for the pain and suffering of individual animals.[75] There is no international anticruelty treaty.

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71 *See* International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72, T.I.A.S. No. 1849, *available at* http://iwcoffice.org/_documents/commission/convention.pdf; *see generally* INTERNATIONAL WHALING COMMISSION, http://iwcoffice.org (the homepage for the International Whaling Commission) (last visited Nov. 5, 2010).

72 *See* International Convention for the Regulation of Whaling, 1946: Schedule, Int'l Whaling Comm'n, ¶ 6, (June 2009) *available at* http://iwcoffice.org/_documents/commission/schedule.pdf (Section six was amended in 1982 to prohibit the commercial taking of whales.).

73 Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243, *available at* http://www.cites.org/eng/disc/text.shtml#texttop.

74 Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 [hereinafter Biological Diversity Treaty], *available at* http://www.cbd.int/doc/legal/cbd-un-en.pdf; *see generally* Convention on Biological Diversity, http://www.cbd.int (the treaty homepage) (last visited Nov. 5, 2010).

75 Convention on International Trade in Endangered Species of Wild Fauna and Flora, *supra* note 73, at art. III (2)(c) (stating that in the granting of an export permit for a Appendix I species under CITES, the Management Authority of the party state must "be satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment"). This provision has been weakly implemented, if at all, within most party states. *See* John B. Heppes & Eric J. McFadden, *Convention on International Trade in Endangered Species of Wild Fauna and Flora:*

At this pivotal point in time, the future of wildlife within our legal system turns upon the issue of legal personality. As individuals, species, and occupiers of ecosystems, wildlife should be recognized as possessing their own legal personalities, rather than being a resource to be managed.

IV
HOW TO THINK ABOUT WILDLIFE RIGHTS

Why should wildlife have individual rights within our world of jurisprudence? This is initially a question of ethics or moral beliefs. Wildlife will only become part of our legal world if they are part of our ethical world. While many philosophers use the capacity for language, tool making, or the concept of consciousness to support ethical concerns, these categories are unsatisfactory because they create unnecessary divides within the animal kingdom. The better approach and core argument of this Article is to acknowledge that all wildlife have an interest in living similar to that of humans. This interest arises out of the biological fact that all living beings exist as an expression of their DNA.[76] Although wildlife live out their lives very differently from humans, humans and wildlife share many of the same basic needs; for example, needing food, water, and the opportunity to sexually reproduce are common to both. Besides biological parallels, humans and wildlife share ecosystems and can be dependent upon each other. Wildlife provide food and clothing for humans, while humans maintain the habitat where wildlife lives. If all humans deserve the opportunity to live out their lives as best they can, the same ethical principle should be applied to give wildlife such an opportunity. While this statement may be easier to accept when dealing with primates that clearly have complex lives, the principle applies to all animals. From the skunks in the field, to the sharks in the oceans and the bats in the caves, all wildlife deserve consideration.

Respect for others, a critical human capacity, is the bridge to implementing this ethical principle. Such respect for wildlife has long existed within communities and individual humans. Now the question

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Improving the Prospects for Preserving Our Biological Heritage, 5 B.U. INT'L L.J. 229, 232–41 (1987).

76 *See* C.R. CALLADINE & HORACE R. DREW, UNDERSTANDING DNA: THE MOLECULE & HOW IT WORKS (1992); KARL DRLICA, UNDERSTANDING DNA AND GENE CLONING: A GUIDE FOR THE CURIOUS (4th ed. 2004).

is whether this ethical principle can rise within a large community of humans who have enough passion to gain political traction. Eventually, the goal is the adoption of laws acknowledging that wildlife's living interest should be considered and balanced against human economic interests before humans can exploit and kill them.

At some point the ethical acknowledgement of wildlife's living interest supports an enhanced position for wildlife within the legal system. Reinventing wildlife law is the only sure way to protect wildlife from unjustified human interference. The point of the legal realm is to deal with conflicting interests,[77] and laws should be drafted to resolve conflicts between human interests and wildlife's living interest, either individually or in groups. A critical question in drafting and implementing the law is how to determine the weight that should be given to wildlife interests when in conflict with human interests.[78] For example, how should the living interest of a mountain lion be weighed against the interests of a hunter in killing the mountain lion, or the personal safety of a biker on a mountain trail? An additional issue when dealing with habitat conflicts is determining the weight that should be given to future generations of wildlife. When the wildlife's habitat is destroyed by a human interest for economic profit, the wildlife's future generations will have no chance to come into existence.

A. An Interest in Life

In a previous article the specific interests of individual domestic animals have been discussed:

> As a starting point, some of the behaviors that most, but not necessarily all, animals engage in and that demonstrate the scope of their interests include:
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> 1. fighting for continued life,
> 2. finding and consuming food daily,
> 3. socialization with others (usually of the same species),

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77 3 ROSCOE POUND, JURISPRUDENCE 17 (The Lawbook Exchange, Ltd. 2008) (1959) ("Conflicts or competition between interests arise because of the competition of individuals with each other, the competition of groups or associations or societies of men with each other, and the competition of individuals with such groups or associations or societies in the endeavor to satisfy human claims and wants and desires.").

78 When wildlife interests are interfered with by other wildlife, those conflicts are clearly beyond the control of our legal system. Wolves kill elk under the rules of ecology, not the rules of jurisprudence.

4. mating [and reproduction],
5. caring for their young,
6. sleeping,
7. accessing sunlight (or not),
8. exercising their inherent mental capacities, and
9. moving about in their physical environment.[79]

The interests of self-owned wildlife, unlike those of domestic animals, do not exist in the same context of human possession, which focuses the law upon the obligations of the human owners as guardians to meet the needs of animals to the extent those animals are unable to take care of themselves. Wildlife have the capacity to meet their needs without human interference. While living property is defined as animals removed from their natural environment and possessed by humans, wildlife's living interest exists in the context of the natural environment. To satisfy the needs of wildlife, their rights should be legally distinct from the rights of domestic animals.

The scope of wildlife's living interest is broadly discernible. Even if wildlife cannot communicate directly with us, our scientific understanding of many species allows for an informed discussion of their needs. Wildlife have a critical interest in living in a robust environment where they should be provided the maximum opportunity to live their lives as nature provides. The living interest can be measured by good health, length of life, ability to reproduce, and ability to support their offspring. Good health requires food, water, shelter, and space. Sentient wildlife have an interest in avoiding pain and suffering to the same extent as domestic animals. The neurological system of a mammal is the same whether in the wild or in a cage. Human-induced pain and suffering is already limited by the anticruelty laws of most states,[80] however, all states exclude lawful hunting and trapping from the protective provisions of those anticruelty laws.[81] The mental life of wildlife is more difficult to quantify.

Laws that recognize wildlife's living interest will need to acknowledge that conflicts with human interests are inevitable. Consider bald eagles, the majestic national birds of the United

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79 Favre, *supra* note 1, at 1047.

80 The scope of the term *animal* in many anticruelty laws is defined as vertebrate animals and does not exclude wildlife. *See infra* notes 117 and 123.

81 *See infra* note 118 and accompanying text.

States.[82] They have long-term relationships and use one nesting site for many years.[83] Now, consider a hypothetical lake in Michigan where a particular pair of eagles, having chosen an optimum site, build and use their nest for three years. Then the human owner of the land decides that the tree holding the nest should be cut down because the nest is ugly, he needs firewood, a road is going through, or the eagles are eating too many fish out of his lake. Should the interest of the eagles in using that tree for a nest receive consideration before the human decides to cut it down? Should the law force such a consideration?[84] How much human interference would be justified if some weight is given to the eagles' living interest? How much weight should human interests receive? What if the landowner decides to simply shoot the eagles—should that be allowed?[85] Why not? Obviously it is very difficult to give crisp answers to such questions.

B. Basic Ethical Principles for Wildlife

Having established that wildlife have a living interest, which in turn imposes ethical duties upon us, the following principles are articulated as a basis for developing a new legal perspective.

1. Wildlife shall not be unnecessarily harmed, captured, or killed by humans.

2. If humans harm, capture, or kill wildlife then the methods used shall not inflict unnecessary pain and suffering.

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82 *See generally* Bald and Golden Eagle Protection Act, 16 U.S.C. § 668a–d (2006).

83 *See generally Bald Eagle*, NAT'L GEOGRAPHIC, http://animals.nationalgeographic.com/animals/birds/bald-eagle.html (last visited Nov. 16, 2010).

84 When the eagle was listed as endangered under the Endangered Species Act, it was indeed illegal to destroy an active eagle nest, so the eagles had a trump card regardless of the human interest. But, if not listed under the Act then the legal protection is lost, as the value of protecting an endangered species no longer exists to drive the outcome. So the law reflects the human judgment about the value in preserving gene pools, not in the quality of life for individual birds.

85 It is illegal to shoot an eagle under the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668a (2006):

> (a) Prohibited acts; criminal penalties
>
> Whoever, . . . , without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, . . . any bald eagle commonly known as the American eagle, or any golden eagle, . . . shall be fined not more than $5,000 or imprisoned not more than one year or both.

The term "take" includes also pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb." *Id.* § 668c.

3. Wildlife shall have a habitat sufficient to support their lives.

4. Wildlife shall be deemed juristic persons, capable of holding equitable interests in property.

5. Humans have an affirmative duty to maximize biodiversity, defined as living carrying capacity, and the complexities of the ecosystems of the earth.

There are two goals that these principles help realize. First, wildlife are living beings that have intrinsic value. Second, the principles support the creation of a juristic personhood status within the law for some wildlife. There must be respect for others. This section includes a brief discussion of these principles, and the following sections offer more detail as to how implementation of these principles might occur.

1. Unnecessarily Harmed, Captured, or Killed

Humans use wildlife in an assortment of ways. While many affluent humans are not as dependent upon local wildlife for daily food and clothing as humans living a subsistence lifestyle, the conflict over acceptable use of wildlife continues. Proposing a ban on harming, capturing, and killing wildlife is not practical and is a political nonstarter. Rather, society needs to reexamine the asserted reasons for using wildlife and determine if the use of the animal is a necessity. The degree of necessity is judged by the human interest and value multiplied by the weight of that value. Often there is no simple calculation, and instead human judgment must be used to weigh these incomparable values. For example, is it necessary to trap and kill bobcats to provide pelts for clothes? The lives of thousands of bobcats are on one side of the scale.[86] Besides the quantifiable death of the bobcats, the method of death must be considered. Death may be swift, as by a shot to the head, or slow and painful if done by a leg hold trap.[87] On the other side of the scale is the financial profit made by the

86 The number of bobcats taken varies upon "changes in pelt value and fur harvest intensity for other species." Fourteenth Meeting of the Conference of the Parties, CITES, The Hague, Neth., CoP 14 Prop. 2, at § 6.1, June 3–15, 2007, Consideration of Proposals for Amendment of Appendices I and II, *available at* http://www.cites.org/eng/cop/14/prop/E14-P02.pdf [hereinafter CITES]. Levels of legal harvest are steady around 35,000 in the United States. *Id.* Canada regularly harvests between 1500 and 2000 pelts a year. *Id.* There were 887,498 bobcat "items" legally traded in the period of 1980–2004. *Id.* at § 6.2.

87 Most bobcat deaths are either due to legal harvest or vehicle-caused mortalities. *Id.* at § 3.3. Hunters of bobcats often suggest that hunting by shotgun is best. Lawrence Pyne, *Outdoors: Hunting the Ultimate Hunter—the Bobcat*, BIGCATRESCUEBLOGSPOT.COM, Jan. 24, 2010, *available at* http://bigcatrescue.blogspot.com/2010/01/vermont-hunting

trapper, plus the benefit to the consumers of wearing the animal skins for comfort or fashion.[88] One way to derive the weight of the human benefit is to ask if the benefit is a necessity to the humans. The benefit from killing bobcats then weighs lightly given that there are many alternative ways to stay warm, be fashionable, and make a profit. The human benefit weighed against the death of thousands of complex mammals does not justify their deaths; therefore, a law that banned the killing of bobcats for commercial sale would be supported by this balancing approach.

2. Methods Used Shall Not Inflict Unnecessary Pain and Suffering

Others may weigh the interests differently and believe that the death of bobcats or another mammal is justified for various reasons. The second principle now comes into play. What method of death is acceptable? To be shot in the appropriate organ will bring near instant death and little suffering. Being captured by a leg hold trap results in significant pain and suffering, as well as a long, drawn out death.[89] The legislature may rationally declare that one may kill with a rifle, but the weight of the human benefit does not rise to a level that would justify hours or days of suffering from the use of a leg hold trap.

3. A Habitat Sufficient to Support Their Lives

Humans and wildlife both need a place to live, and humans always seem to win. Human tools, weapons, and expansion make it impossible for most animals to defend their habitat. In the United States, many conflicts were settled by European settlers' western

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-ultimate-hunter-bobcat.html. Trapping is also common. Many states, in their regulations, allow for either hunting or trapping of bobcats. *See generally* Minn. Dep't of Natural Res., *Hunting Seasons*, MINN. DNR, http://www.dnr.state.mn.us/hunting/seasons.html (last visited Nov. 18, 2010); Mich. Dep't of Natural Res. & Env't, *2010–2011 Fur Harvester Trapping and Hunting Season Dates*, MICH. DNR, http://www.michigan.gov/dnr/0,1607,7-153-10363_10880_10994-220502 --,00.html (last visited Nov. 18, 2010); Wis. Dep't of Natural Res., *Hunting and Trapping Season Dates*, WIS. DNR, http://dnr.wi.gov/org/land/wildlife/HUNT/seasdate.htm (last visited Nov. 18, 2010).

88 Whole skins are the most common item in trade, with eighty-three percent of the trade coming from whole skins. CITES, *supra* note 86, at § 6.3. Besides whole skins, "bodies, carvings, claws, feet, hair, garments, leather items, plates . . . skin pieces, tails, teeth, and trophies" are traded. *Id.* at § 2. Most of the skin and skin pieces are traded for use in fur garments. *Id.* at § 6.3. In particular, the spotted belly fur of bobcats is a popular fur for trim on garments. *Id.*

89 *See generally* M. LYNNE CORN, CRS REPORT FOR CONG., 95–356 ENR, THE STEEL JAW LEGHOLD TRAP: ISSUES AND CONCERNS (1993), *available at* http://ncseonline.org/nle/crsreports/biodiversity/biodv-37.cfm.

expansion, yet conflicts continue to exist so long as the human population continues to grow. Today in Africa and Asia, as human growth encroaches on elephant habitat, elephants often strike back, causing both economic harm and human death.[90] Ultimately, humans will win and the elephants will be moved or killed. If we are respectful of individual animals, then we must be respectful of their habitat, for that is what makes their lives possible.

While at a different level, this conflict is similar to the conflicts the colonists from Europe faced with the lands that were inhabited by the Native Americans in the early years of America. Historically, Native Americans were dispossessed of their tribal lands and placed onto treaty lands and reservations.[91] At one level, the settlers acknowledged that the Native Americans had a lawful right of possession in their lands, because they often extracted the land by treaty.[92] This same thought process has given humans title to lands without regard to prior habitation by wildlife. The presumption is that wildlife are fairly treated if humans set aside national parks and forests in which the wildlife might live natural lives. The expansion of the habitat populated by wolves in the Great Lakes region during the past twenty years stands out in contrast to the normal pattern of ever-shrinking wildlife populations.[93]

Both at the societal and personal level, we need to weigh these issues. Consideration should be given to expanding the existing use of private lands by wildlife—beyond that which currently exists under the Endangered Species Act.

4. Wildlife as Juristic Persons Capable of Holding Equitable Interests in Property

The next principle seeks to acknowledge the presence of wildlife in our legal system of jurisprudence by granting them rights as juristic persons. This principle has two primary points of application. First, as

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90 Brian Handwerk, *Elephants Attack as Humans Turn Up the Pressure*, NAT'L GEOGRAPHIC NEWS (June 3, 2005), http://news.nationalgeographic.com/news/2005/06/0603_050603_elephants.html.

91 *See* WENDELL H. OSWALT, THIS LAND WAS THEIRS: A STUDY OF NATIVE NORTH AMERICANS 34–36 (9th ed. 2009).

92 *See id.* at 36–39; *see also* Johnson v. M'Intosh, 21 U.S. 543, 598 (1823) (rejecting title to property based upon a deed given by an Indian tribe).

93 *See* William Berg & Todd Fuller, *Wolf Population Expansion in Minnesota*, INT'L WOLF CTR., http://www.wolf.org/wolves/learn/intermed/inter_population/mn.asp (last visited Oct. 26, 2010).

discussed above, wildlife should be self-owned, a title that contains both legal and equitable components. Second, while wildlife do not have the mental capacity to assume the responsibility of legal title to personal and real property, they do have the interest to justify holding equitable title. Bobcats and eagles, much like a four-year-old human, do not have the capacity to judge the investment of money or the development of land. However, for both the human child and wildlife, designated property can be managed for their benefit. Giving equitable title in an asset assures that the legal system will respect that individual and judge the actions of the legal title holder against the needs of the equitable title holder.[94] If a wealthy human desires to create a trust for the benefit of all the wolves in Michigan, it should be allowed. Under such a trust, the wolves would have an equitable interest in the trust assets. The trustee, as holder of the legal title of assets, should be accountable at law to the beneficiaries of the trust.[95]

5. The Affirmative Duty to Maximize Biodiversity and the Complexities of the Earth's Ecosystems

The final principle is the broadest, and perhaps most difficult for implementation through law. The ethical duty asserting preservation of natural areas for their own sake is relatively recent in the evolution of human thinking. It was not until the 1960s and '70s that environmentalism developed as a legal and societal perspective, supporting the idea of a human duty toward the natural world. The year 1992 saw the adoption of the Biodiversity Treaty, seeking a global focus on the preservation of biodiversity.[96] Still, the global human impact on the environment seems to be accelerating as human numbers and human wealth continue to expand. Many countries have not yet fulfilled the minimum obligations of the Biodiversity Treaty—to simply preserve the existing biodiversity—and that duty is no longer sufficient to deal with the ecological disasters facing humankind.[97] Humans do not share resources equally with wildlife. Particularly in the last half century, humans have become so powerful in knowledge and physical capacity to destroy and build that there is no equality of opportunity between humans and nonhumans. With

94 *See generally* Joseph Vining, *The Mystery of the Individual in Modern Law*, 52 VILL. L. REV. 1 (2007) (discussing the consequence of seeing animals as individuals).

95 *See* discussion *infra* Part V.F, pp. 508–09.

96 Biological Diversity Treaty, *supra* note 74.

97 Susan Milius, *Losing Life's Variety*, SCI. NEWS, Mar. 13, 2010, at 20, 20.

extraordinary power comes exceptional responsibility, a responsibility that increases as humans continue their dominance over all life on the planet. We have wildlife at an extreme disadvantage: there are too many of us, we consume, waste, and pollute excessively, and we possess extraordinary tools of destruction. Wildlife have no real defense and no way to fight back in their struggle for life.

Humans need to acknowledge the existence of nonhuman species and acknowledge a duty to not harm other species except for an articulated public purpose. Humans must acknowledge a duty to protect and preserve current wildlife habitat, to maintain the earth's ecosystems, and to create new and diverse habitats where they have been destroyed in order to support wildlife's return and recovery. There is a logical duty to limit human population growth and to reduce the high levels of natural resource consumption by humans. Our ethical path forward is an affirmative duty to give wildlife's living interest increasing weight as we continue to discover their depth and complexities.

C. The Factual Contexts for Considering Wildlife Interests

The principles set out above are not readily translatable to law. Law will evolve toward the fullness of these principles by being adopted in particular fact patterns. Additionally, while the focus of the first two principles deals with the experiences of individual animals, the legal system will find it difficult to deal with individual wildlife unknown or not identifiable to humans. Instead, it is far more likely the principles will come into being when the legal system deals with groups of wildlife.

The assertion of rights in our legal system must allow lawsuits to be filed against those who are interfering with individual or group wildlife rights. This raises issues of both procedure and substance. Setting aside substantive law for the moment, the issues of procedure will set the stage nicely. The protection of individual interests is the primary legal focus, and there are two procedural issues. First, who can assert wildlife interests? Second, how should human-wildlife conflicts be efficiently considered by the courts and administrative agencies? As will be discussed in the next section, there are three possible groups that may file lawsuits representing wildlife: government agents, private citizens and organizations, and court-appointed attorneys. Likewise, there are three ways to organize wildlife into plaintiffs. Issues can be most efficiently presented to the

courts as individual rights, species rights, or ecological location rights. This allows for a matrix that is set out below.[98]

Categories for Consideration of Legal Rights for Wildlife

	Government Agents— Weak Rights	Private Individuals— Strong Rights	Individual Wildlife— Preferred Rights
Individual wildlife	#1 State anti-cruelty laws	#2 Civil citizen suits / ESA citizen suit	#3 Uniform Trust Act
Wildlife species	#4 ESA / Bald and Golden Eagle Protection Act	#5 ESA	#6 Failed *Palia* case, *Cetacean Community* case
Ecological locations	#7 Wetland Protection Acts	#8 Citizen suit provisions in federal environmental law	#9 Justice Douglas dissent in *Sierra Club v. Morton*

The most familiar focus for the legal system is on the individual. Individuals are the traditional holders of legal rights. Individual humans have names, fingerprints, and DNA that make them reliably recognizable to the legal system. When particular wildlife may be recognized as individuals, they too may have reliable access to the legal system. A number of animals in their natural habitat have already been identified and named by humans, including whales, gorillas, and wolves. There is no conceptual limitation on allowing an individual animal or group of animals to file a lawsuit in their own name. Lawsuits and names are filed and chosen on behalf of children by other humans; similarly, the infringed rights of an animal may be brought forward for legal consideration by the appropriate human.

The second grouping of wildlife is at the species level, which our legal system presently utilizes in the ESA. Without identifying or

98 The numbers in the boxes shall be used in the text of this Article as various points are discussed.

naming the individuals, significant issues impacting wildlife can be brought forward in the name of a species under the state or federal ESA, when human activity infringes upon the species' right of existence.[99]

Another example of law focused on species is the Bald and Golden Eagle Protection Act.[100] This law is an example of piecemeal consideration of wildlife issues, and the eagles getting protection because of the political support that existed when the law was adopted. The political motivation for protection may not always be a concern for the individual's well-being, but for more anthropocentric reasons such as the preservation of a national symbol. There is no Turkey Vulture Protection Act even though they play an equally important role in the ecosystem.

Groups of humans may also have separate legal rights that depend upon group membership without named individuals. For example, in certain circumstances, an Indian, Aleut, or Eskimo who resides in Alaska is allowed to take marine mammals under the Marine Mammal Protection Act (MMPA) when it would be criminal for other Americans to do so.[101] Another parallel in the human world is that of the shareholders of a corporation. Shareholders have a mutual interest in the survival and thriving of the company, and while human shareholders might be individually identifiable, many of their rights are not dependent upon that identification when corporate legal actions are brought. Additionally, the physical locations of the shareholders are seldom relevant to the rights of the corporation. Groups may be used when the individual characteristics and experiences are not necessary to resolve the conflict.

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99 While individual animals have their own self-interest in survival, it is not clear they comprehend species survival as humans do.

100 Bald and Golden Eagle Protection Act, 16 U.S.C. § 668a–d (2006).

101 Section 1 of the Marine Mammal Protection Act states:

> (a) Imposition; exceptions
>
> There shall be a moratorium on the taking and importation of marine mammals and marine mammal products. . . .
>
> (b) Exemptions for Alaskan natives
>
> [T]he provisions of this chapter shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking.
>
> . . .

16 U.S.C. § 1371(a), (b) (2006).

The final category in which to organize the interests of wildlife is by their habitat's geographic area. All living organisms need a place to live. An eagle's life will not only be impacted by actions against the individual eagle, but by humans who destroy or modify the eagle's habitat as well. The legal system should resolve conflicts between humans who seek to modify specific ecosystems and the wildlife that live therein, as there is both the human interest in the continued functionality of ecosystems and the wildlife's interest in continued life. The ESA usually requires the administrator to identify and define the critical habitat of listed species.[102] Location matters, as animals within a listed critical habitat receive not only individual protections but habitat protection as well.

The Yellowstone bison represent a sad example of fragmented management of a species. Under federal law, bison within the geographic boundaries of Yellowstone National Park are protected;[103] however, if they cross the park boundary, they may be slaughtered or hunted.[104] After crossing the Yellowstone boundary, the bison are considered a risk, as they may carry brucellosis that might be harmful to cattle.[105] This inconsistency in the legal system exemplifies how human economic interests have wrongly been determined to be of greater weight than the interest of the bison in continued life.[106]

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102 Endangered Species Act of 1973, 16 U.S.C. § 1533(a)(3)(A) (2006) ("The Secretary . . . to the maximum extent prudent and determinable shall, concurrently with making a determination . . . that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat").

103 In 2010 it became lawful to carry a firearm in Yellowstone National Park, but "hunting and discharge of firearms remain prohibited in Yellowstone National Park." Nat'l Park Service, *Laws & Policies*, NPS.GOV, http://www.nps.gov/yell/parkmgmt/lawsandpolicies.htm (last visited Oct. 26, 2010).

104 "[T]he federal government and State of Montana agreed to an Interagency Bison Management Plan (IBMP) that established guidelines for managing the risk of brucellosis transmission from bison to cattle by implementing hazing, test-and-slaughter, hunting, and other actions near the park boundary. . . ." Interagency Bison Mgmt Plan Partner Agencies, Annual Report, Interagency Bison Management Plan: July 1, 2008 to June 30, 2009 2 (2009), *available at* http://www.nps.gov/yell/naturescience/upload/IBMP_2008-2009_AR.pdf.

105 Cory Hatch, *Bison Vaccine No Magic Bullet, Park Service Says*, JHNEWSANDGUIDE.COM (July 7, 2010), http://www.jhnewsandguide.com/article.php?art_id=6181.

106 Jsmacdonald, *Bison Slaughter In Yellowstone National Park Draws Protest Against Park Service*, NATIONAL PARKS TRAVELER (Feb. 17, 2008, 7:18 AM), http://www.nationalparkstraveler.com/2008/02/bison-slaughter-yellowstone-national-park-draws-protest-against-park-service; *see also* Buffalo Field Campaign, *Yellowstone Bison Vaccination Program*, BUFFALOFIELDCAMPAIGN.ORG (2010), http://www.buffalofieldcampaign.org (an organization opposed to the killings); *see also* National Park Service, U.S. Dep't of the Interior, *Yellowstone Bison*, NPS.GOV,

Likewise, humans can have specific rights depending on where they live. In the previously mentioned example of the MMPA, the exemption for taking protected species only applies to the category of natives listed if they dwell on the ocean coast.[107] Also, being a resident of a particular city or village gives rise to residential rights, such as the right to vote.

Because the legal system already allocates legal rights based upon these three categories—individuals, species, and ecosystems—it is reasonable to utilize these categories for the benefit of wildlife. Now it is time to turn to the practical issue of who is going to assert the rights of wildlife.

D. Standing to Assert the Legal Rights of Wildlife

When discussing animals within the legal system, standing is a threshold concern. Standing is the concept by which a court decides whether the plaintiff is the correct person to assert the legal wrong set out in the pleadings of the lawsuit. The concern is that until animals have standing, they will not be able to protect or assert their legal rights. But this is putting the cart before the horse—if an animal has a legal right then someone will have standing to assert the right. What is unique to animal law is that someone other than the animal may have the capacity and standing to assert that animal's interests recognized by law.

Before proceeding further, a modest examination of the legal rights in the context of wildlife jurisprudence is necessary. The general phrase *animal rights* is often used in conflicting contexts and often without any corresponding definition. In the media, the phrase is used for mainstream animal protection issues as well as for illegal activities.[108] In this Article, a legal right will be considered to exist

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http://www.nps.gov/yell/naturescience/bison.htm (National Park Service documents on Yellowstone bison).

107 *See* Marine Mammal Protection Act, 16 U.S.C. § 1371(b) (2006).

108 Lennis Waggoner, *Animal Rights Loony Tunes Conspire to Drive Up Meat Prices*, KNOXVILLE CONSERVATIVE EXAMINER, Sept. 14, 2009, *available at* http://www.examiner.com/x-22228-Knoxville-Conservative-Examiner~y2009m9d14-Animal-rights-loony-tunes-conspire-to-drive-up-meat-prices (suggesting that animal rights groups, particularly the Humane Society, are fraudulently taking public monies to attack decent farming practices and drive up the cost of food); Simon Romero, *Taking Up Arms to Deal With a Drug Lord's Legacy: Wild Hippos*, N.Y. TIMES, Sept. 11, 2009, at A6, *available at* http://www.nytimes.com/2009/09/11/world/americas/11hippo.html (discussing animal rights groups fighting with environmentalists on how to handle the invasive hippo population in South America); Cheryl Corley, *Yale Killing Defied Tight Lab Security*,

when wildlife interests are acknowledged, given weight, or reflected in the decision of a judge, a jury, or an administrator. Finding an animal that possesses the legal characteristic of standing is not a prerequisite to allowing the assertion of a legal right on behalf of wildlife. In a case, the named plaintiff might be a wolf, primate, or whale with a court-appointed legal guardian, or the plaintiff might be the Wolf Legal Defense Fund acting on behalf of the wolf. Additionally, the government itself could be the plaintiff acting in defense of the wolf or her habitat. When this broader definition of legal rights is applied to the existing legal system, it can be shown that wildlife already possess some limited legal rights.[109]

Wildlife, like human children, will not know that they possess legal rights or know when or where to assert them. The assertion of legal rights for wildlife will depend on the legislature and the courts being willing to accept that human plaintiffs will need to file legal actions on behalf of wildlife, or that courts will appoint attorneys as trustees or guardians to represent wildlife. This can occur either when representation is necessary, as when a neighbor finds out an eagle nest is about to be destroyed, or on a long-term basis, as when an organization acts as trustee for a specific forest, river valley, or lake ecosystem and the wildlife therein. The legal system has overcome the obstacle of providing representation for those who are indigent or do not understand their legal rights; it should be no more difficult to overcome the obstacle of providing representation for wildlife.[110]

Three descriptive categories are suggested in the above table for the legal rights of wildlife: weak legal rights that are asserted in government actions, strong legal rights that are asserted by individual humans and organizations, and preferred legal rights that are asserted

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NPR, Sept. 17, 2009, *available at* http://www.npr.org/templates/story/story.php?storyId=112933564 (discussing animal rights groups engaging in criminal activity, causing research institutions to increase security).

109 *See* David Favre, *Judicial Recognition of the Interests of Animals—A New Tort*, 2005 MICH. ST. L. REV. 333, 342–52 (2005) (explaining how animal interests presently exist in the legal system).

110 For examples of statutes providing for appointments of guardians for children, see ALASKA STAT. § 13.26.055 (2008) ("The court may appoint as guardian any adult whose appointment would be in the best interests of the minor . . . ."); WIS. STAT. § 48.977 (2009) (Appointment is allowed when a child is judged to be "in need of protection or services . . . ."); MICH. COMP. LAWS § 700.5212 (2009) ("The court may appoint as guardian a person whose appointment serves the minor's welfare . . . ."); *see generally* Peter Mosanyi, Comment, *A Survey of State Guardianship Statutes: One Concept, Many Applications*, 18 J. AM. ACAD. MATRIM. LAW. 253 (2002).

by individual animals through court appointed counsel. The weak category refers to the fact that the government cannot be counted upon to assert or protect wildlife interests for a variety of reasons.[111] The strong category suggests that citizens who care about wildlife will be able to make a case for wildlife when the government fails to act. Citizens may have a stronger will to bring an action when the government may be frozen in inaction. Preferred legal rights refer to circumstances where the individual or group of wildlife will be allowed direct access to the courts with court-appointed attorneys. Allowing wildlife direct access to courts acknowledges their ethical and legal status as juristic persons. Preferred legal rights also reflects that if the plaintiffs are wildlife, then the focus of legal attention will most clearly be upon wildlife interests.[112]

Now it is appropriate to discuss to what degree wildlife interests are presently asserted, or not assertable, within the legal system.

E. The Scope of Wildlife Interests in the Legal System

1. Category 1: Weak Rights for Individual Wildlife

One critical interest of individual wildlife, as with domestic animals, is freedom from pain and suffering. This interest is recognized and protected by our long-existing state anticruelty

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111 Administrative actions are usually allowed within the broad scope of agency discretion. Conflicts of interests, political pressure, and the lack of resources within the government often preclude needed actions. The U.S. Fish and Wildlife Service's failure to list the spotted owl as endangered stands out as such a controversy. *See generally* Northern Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988). The controversy started in 1977 with attempts by the Bureau of Land Management to curtail the cutting down of old-growth forest in the Pacific Northwest. *See* Craig Welsh, *A Brief History of the Spotted-Owl Controversy*, SEATTLE TIMES, August 6, 2000, *available at* http://community.seattletimes.nwsource.com/archive/?date=20000806&slug=4035697. The old-growth forests are the owl's critical habitat. *Northern Spotted Owl*, 716 F. Supp. at 480. In 1987, thirty environmental groups filed petitions for the owl to be listed as an endangered species. Welsh, *supra*. The Reagan administration denied the petitions, but later a U.S. district judge ruled the denial was arbitrary. *Id.* In 1990, Fish and Wildlife Services (FWS) deemed the owl threatened, and three million acres of forest were set aside. *Id. See also* Carlton v. Babbitt, 900 F. Supp. 526, 537 (D.C. Cir. 1995) (holding that the decision of the FWS not to list one population of grizzly bear as endangered was not supported by sufficient evidence in the record). On a second population, the FWS decision not to list was based upon the lack of resources and need to focus on other species, which was found to be without support in the record. *Id.*

112 However, it should be noted on a practical level that both strong and preferred legal rights may be equally successful in court when asserting and protecting wildlife interests.

laws,[113] and was recognized by courts beginning more than 100 years ago. In the 1888 case of *Stephens v. State*, the Supreme Court of Mississippi upheld the state's anticruelty law: "[t]his statute is for the benefit of animals, as creatures capable of feeling and suffering, and it was intended to protect them from cruelty, without reference to their being property, or to the damages which might thereby be occasioned to their owners."[114]

In 1867, one of the earliest anticruelty cases dealt with captured sea turtles that arrived alive at the port of New York, but were strapped on their backs on the ship's open deck.[115] While the early laws defined the protected categories of animals as all living creatures other than humans,[116] more recent definitions of state anticruelty laws apply to nonhuman vertebrate animals.[117]

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113 *See* David Favre & Vivien Tsang, *The Development of Anticruelty Laws During the 1800's*, 1993 DET. C.L. REV. 1 (1993). A few states define animal in the criminal code to exclude wildlife. N.H. REV. STAT. ANN. § 644:8(II) (2010) ("[A]nimal' means a domestic animal, a household pet or a wild animal in captivity."); TEX. PENAL CODE ANN. § 42.092(2) (West 2010) ("'Animal' means a domesticated living creature, including any stray or feral cat or dog, and a wild living creature previously captured. The term does not include an uncaptured wild living creature or a livestock animal."). Livestock animals are covered by another section, but wildlife are not. *See* TEX. PENAL CODE ANN. § 42.09 (West 2010) (listing offenses for cruelty to livestock animals).

114 Stevens v. State, 3 So. 458, 458 (Miss. 1888).

115 *See* AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, 1867 ANNUAL REPORT 48 (1867) [hereinafter ANNUAL REPORT]. In this first case of sea turtles being shipped on their backs, the court and much of the public did not believe the law had been violated because they did not believe that sea turtles could feel pain or suffer from lack of food and water. DAVID FAVRE & VIVIEN TSANG, CRUELTY TO ANIMALS AND INTERPERSONAL VIOLENCE 56 (1998). The Magistrate who dismissed the action allegedly stated, "[n]o greater pain was inflicted than by the bite of a mosquito." ANNUAL REPORT, *supra*. Without proof of suffering the court dismissed the action. *Id.* Forty years later a court sustained a cruelty conviction concerning the shipment of sea turtles. Freel v. Downs, 136 N.Y.S. 440, 451–52 (1911). *Freel v. Downs* involved a trial on charges of cruelty to animals for a master of a steamship and the consignee of a shipment of sixty-five green turtles, commonly used for food. *Id.* at 442. The court found that the manner in which the turtles were transported caused them some pain and suffering. *Id.* at 444.

116 *Id.* at 443.

117 Most older statutes defined animals in the broadest sense, using awkward terms such as all, dumb, or brute creatures. *See* CAL. PENAL CODE § 599b (2010): "[E]very dumb creature" (added to code in 1905). Today, as many states move toward making the statutory violations felonies rather than misdemeanors, they are more specific with definitions: VA. CODE ANN. § 3.1-796.66 (2010): "[A]ny nonhuman vertebrate species except fish" (substantial revisions of cruelty laws in 1990s); MICH. COMP. LAWS § 750.50(1)(b) (2010): "[A]ny vertebrate other than a human being." (1994 Amendment); MISS. CODE ANN. § 97-41-1 (2010): "[A]ny living creature" (1930 code—based on New York's 1867 law); MINN. STAT. § 343.20(2) (2010): "[E]very living creature except members of the human race" (added pre-1900).

At the threshold of legal awareness, wildlife in most states have the right to not be treated contrary to the anticruelty laws, assuming the state or local prosecutors are willing to act. So children who beat a raccoon with a stick or set an opossum on fire can be charged for criminal acts. In all states, the pain, suffering, and death imposed on wildlife in the context of sport and commercial hunting and trapping is exempted from the protective provisions of anticruelty laws.[118] Society, through the legislature, has made a judgment that human interests in hunting and trapping wildlife deserve more weight than the pain and suffering that these acts cause to wildlife. This conflict was brought into focus in a case where the defendant used snares to trap and kill deer. Charges were filed under anticruelty and hunting laws, but the court held the anticruelty provisions were preempted by the hunting laws.[119] These exemptions clearly limit the effectiveness of the law in reducing wildlife suffering. A prosecutor's office does not even have the discretion to act in the case of hunting activities. With no legal action possible, it is the ultimate example of wildlife's weak legal rights.

As a final example of weak wildlife rights, the Bald & Golden Eagle Protection Act provides federal protection for individual bald and golden eagles.[120] The law criminalizes the killing or capturing of individual eagles.[121] However, neither the eagles nor private individuals may file lawsuits to protect eagles—only federal agencies may act. This right of the eagles can only be considered weak.

2. Category 2: Strong Rights for Individual Wildlife

A North Carolina statute is an example of a potential strong right for wildlife. North Carolina's "Civil Remedy for Protection of Animals" specifically seeks to use private civil actions to enforce

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[118] BRUCE A. WAGMAN, SONIA S. WAISMAN, & PAMELA D. FRASCH, ANIMAL LAW: CASES AND MATERIALS 92 (4th ed. 2010) ("Most anti-cruelty laws also include one or more exemptions," which often "exclud[e] from coverage (1) whole classes of animals, such as wildlife or farm animals, or (2) specific activities, such as hunting.").

[119] State v. Cleve, 980 P.2d 23, 29 (N.M. 1999) ("We agree with Cleve that the overall statutory scheme governing hunting and fishing demonstrates a legislative intent to preempt the application of Section 30-18-1 to game and fish with respect to conduct contemplated by game and fish laws."). The court set aside the violations of the cruelty law but let stand the violations of the hunting law. *Id.* at 37.

[120] 16 U.S.C. §§ 688a–688d (2006).

[121] *Id.* § 688a.

anticruelty prohibitions on behalf of animals.[122] Under this statute the definition of animals includes "every living vertebrate in the classes Amphibia, Reptilia, Aves, and Mammalia except human beings."[123] The statute allows for a lawsuit to be filed against anyone who is engaged in a cruel act against an animal, excluding hunting permitted by the state.[124] In one case, the law was used for the benefit of domestic animals found in a hoarding situation,[125] and there is no reason to believe the statute could not also be used to provide strong rights for wildlife. If every state would adopt a statute similar to North Carolina's, it would be a major step forward for all wildlife, as well as domestic animals.

At the federal level, the citizen suit provision of the ESA provides citizens the ability to sue other private parties and agencies for violations of the Act—any person can sue another person to enjoin a violation of the law or a regulation thereunder.[126] While the ESA does not deal with pain and suffering, it prohibits taking ESA-listed species, with some exemptions, defining take to include "to harass, harm, pursue, hunt, shoot, wound, kill, capture or collect, or to attempt to engage in any such conduct."[127]

Also at the federal level, there is an example of whale interests being balanced against national defense in a civil suit brought by private parties. In the 2008 case *Winter v. NRDC*,[128] strong legal rights were asserted on behalf of the interest of whales and other ocean wildlife against the U.S. Navy's interest in national defense.

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122 N.C. GEN. STAT. ANN. § 19A-2 (West 2007) ("It shall be the purpose of this Article to provide a civil remedy for the protection and humane treatment of animals in addition to any criminal remedies that are available . . . ."); *see also* William A. Reppy, Jr., *Citizen Standing To Enforce Anticruelty Laws By Obtaining Injunctions: The North Carolina Experience*, 11 ANIMAL L. 39 (2005).

123 N.C. GEN. STAT. ANN. § 19A-1 (West 2007).

124 *Id.* at § 19A-1, 1.1 ("The terms 'cruelty' and 'cruel treatment' include every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted.").

125 Animal Legal Defense Fund v. Woodley, 640 S.E.2d 777, 777–78 (N.C. Ct. App. 2007) (seeking preliminary and permanent injunctions under North Carolina's Civil Remedy for Protection of Animals N.C. GEN. STAT. ANN. § 19A-1, alleging that "defendants had abused and neglected a large number of dogs (as well as some birds) in [the defendants'] possession." The defendants appealed from an injunction forfeiting all their rights in the animals and an order granting temporary custody of the animals to the plaintiff, the Animal Legal Defense Fund, and lost.).

126 16 U.S.C. § 1540(a) (2006).

127 *Id.* at § 1532(19).

128 Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365 (2008).

The U.S. Navy sought to conduct submarine sonar exercises that may damage the ears of the whales, "causing hemorrhaging and/or disorientation."[129] The Supreme Court used balancing language in the opinion:

> [W]e conclude that the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy. For the plaintiffs, the most serious possible injury would be harm to an unknown number of the marine mammals that they study and observe. In contrast, forcing the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of the fleet. Active sonar is the only reliable technology for detecting and tracking enemy diesel-electric submarines, and the President—the Commander in Chief—has determined that training with active sonar is "essential to national security."[130]

The dissent would have struck a different balance, giving more weight to the interests of the marine mammals.[131] Our legal system has the capacity to provide strong legal rights for wildlife and to balance their interests against human interests.

3. Category 3: Preferred Rights for Individual Wildlife

Possible avenues to establish preferred rights for individual wildlife include one example from the dicta of a federal court case, and another in state trust law. In 2004, the Ninth Circuit opened the door for federal preferred rights for wildlife:

> It is obvious that an animal cannot function as a plaintiff in the same manner as a juridically competent human being. But we see no reason why Article III [standing] prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically

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129 *Id.* at 371 ("MFA sonar can cause much more serious injuries to marine mammals than the Navy acknowledges, including permanent hearing loss, decompression sickness, and major behavioral disruptions . . . . [S]everal mass strandings of marine mammals (outside of SOCAL) have been 'associated' with the use of active sonar."); *see also* Kristina Alexander, Congressional Research Service, *Whales and Sonar*, http://www.fas.org/sgp/crs/weapons/RL34403.pdf. ("Scientists have asserted that sonar may harm certain marine mammals under certain conditions, especially beaked whales. Depending on the exposure, they believe that sonar may damage the ears of the mammals, causing hemorrhaging and/or disorientation.").

130 *Winter*, 129 S. Ct. at 378.

131 *Id.* at 387 (Ginsburg, J., dissenting) ("[I]n imposing manageable measures to mitigate harm until completion of the EIS, the District Court conscientiously balanced the equities and did not abuse its discretion.").

> incompetent persons such as infants, juveniles, and mental incompetents.[132]

In the Ninth Circuit view, the concept of standing is not a barrier to providing court access for wildlife if Congress is willing to act. While the decision dealt with species, a fair reading suggests the court would rule similarly for identifiable individuals.

At the state legislative level, an example of a preferred legal right for wildlife exists under section 408 of the Uniform Trust Act, which allows for trusts to be created on behalf of named animals and for courts to appoint someone to enforce the trust.[133] The State of Washington has adopted a variation of the Uniform Trust Act allowing animal trusts in the jurisdiction.[134] The state's definition of animal is "a nonhuman animal with vertebrae," which would include wildlife.[135] If an individual wished to create a trust for a specific bear or other wildlife, it is entirely possible. The point here is not that this would necessarily be practical to do, but that it is possible to do within today's world of jurisprudence. The preferred right category is the most supportive of the jurisprudential position that wildlife can be part of our legal system as juristic persons. There is no jurisprudential barrier to the political process of adopting new laws on behalf of wildlife.

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132 Cetacean Cmty. v. Bush, 386 F.3d 1169, 1176 (9th Cir. 2004) (The substantive issue was the alleged violation of several federal wildlife laws triggered by the use of sonar arrays by the U.S. Navy that might cause harm to various members of the cetacean family in the ocean. But the only listed plaintiff was the "Cetaceans Community" as the attorney sought to establish that this group of animals had standing to challenge the actions of the U.S. Navy.); *see also* FAVRE, *supra* note 60, at 326–29 (discussing generally human standing in the traditional animal law context).

133 UNIF. TRUST CODE § 408(a), (b) (amended 2005):

> (a) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.
>
> (b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

Id.

134 WASH. REV. CODE §§ 11.118.005–.110 (2009).

135 *Id.* at § 11.118.010.

4. Category 4: Weak Rights for Species

The ESA exemplifies this category—it provides for the continued existence of specific species and provides protections to individuals when the species is determined to be at risk of extinction. The protection of the species necessarily requires the protection of individuals. As many books and articles exist that set out the nature and scope of this law, it is touched upon here only to remind the reader of its existence.

The concept of protection of a species has been widely accepted by the U.S. Supreme Court as being within the power of government.[136] The ESA is a clear statement by our system that we must respect the right of other species to live and coexist with humans on this planet. Indeed, so strong is this respect for other species that Congress decided that wildlife species' interests trump human economic interests without any balancing being allowed.[137] On the other hand, national defense needs may trump the otherwise protected interests of listed endangered species.[138] As to these important points, Congress itself did the weighing of the interests when it adopted the language of the present law.

An example of the government giving weight to the potential death of wildlife is shown by the regulations protecting sea turtles from shrimp boats.[139] The traditional method of shrimp fishing involved setting a net around a school of shrimp and then hauling everything up, including sea turtles and other bycatch. The turtles may get caught in the net and drown in the process because they cannot get air, or are harmed when pulled up on deck. The United States, by regulation, required the adoption of nets with built-in escape hatches for sea

136 The ESA of 1973 contained within it an absolute prohibition on any federal activity interfering with the critical habitat of an endangered species. 16 U.S.C § 1536(2). Eventually a project will conflict with an endangered species, and two additional factors make the conflict even sharper: first, if a project is eighty percent complete before the endangered species is found; second, if the species in question had little emotional appeal, such as a small fish that takes an expert to distinguish it from other species. In Tennessee Valley Authority v. Hill, a small fish had none of the equities, but the law on its side. 98 S.Ct. 2279, 2284 (1978). The Court held that the project had to be stopped to protect the species. *Id.* at 2302.

137 16 U.S.C. § 1533(b)(1)(A) (2006) (listing decisions are not supposed to be based on economic impact) ("The Secretary shall make determinations required by subsection (a)(1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species . . . .").

138 *Id.*at § 1536(j); *see also Winter v. NRDC*, *supra* note 133.

139 50 C.F.R. §§ 223.206–.207 (2010).

turtles. This extra cost to the commercial industry was justified because the value of protecting endangered sea turtles was greater than the extra cost of the nets. However, other countries put no such value on the protection of sea turtles and even objected to the efforts of the United States when shrimp imports were limited.[140]

The ESA is a powerful presence in the legal system, as long as we enforce the provisions of the law. In one case, it appeared that political and economic forces would block the listing of an endangered species, the northern spotted owl, because the listing of the bird would interfere with logging in the Pacific Northwest. It took a court order to get the species listed and protected.[141] Congress even sought to short-circuit the power of the law by not providing a budget for the agency to list any new species, as the budget is always the limiting factor on what an agency may accomplish.[142] While the language of the ESA is strong, many exemptions and holes exist in the law, which is why it is a weak right for species protection.

5. Category 5: Strong Rights for Species

A strong legal right can be found in the citizen suit provisions of the ESA, which allows private parties to sue either the government or other private parties for violation of a law. ESA lawsuits are more commonly filed on behalf of groups of unidentified individual wildlife.[143]

6. Category 6: Preferred Rights for Species

In the context of the ESA in the 1980s, it appeared that wildlife species might be able to obtain standing to file civil cases on their own behalf. One landmark opinion, *Paliala v. Hawaii Dep't of Land and Natural Resources*, dealt with a small bird in Hawaii—and the federal district judge viewed the case as having been brought on behalf of the species:

> As an endangered species under the Endangered Species Act . . . the bird (Loxioides bailleui), a member of the Hawaiian honey-creeper

140 This conflict resulted in a major environmental ruling under the World Trade Organization. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/RW (June 15, 2001).

141 *See* Northern Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988).

142 Jeffrey S. Kopf, *Slamming Shut the Ark Doors: Congress's Attack on the Listing Process of the Endangered Species Act*, 3 ANIMAL L. 103, 106–09 (1997).

143 As suggested above, there is no necessity for this Article to consider this point in detail.

> 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 Audubon Society, and other environmental parties.[144]

While additional cases were titled by the species of the wildlife at issue, ultimately the federal courts decided that the species did not have standing.[145] However, as pointed out above, the Ninth Circuit's opinion in *Cetacean Cmty. v. Bush* suggests the willingness of a court to accept species as plaintiffs in a lawsuit only if Congress specifically provides for it.[146] It is only the limitations of political imagination that are keeping species from having preferred legal rights.

7. Categories 7 & 8: Weak and Strong Rights for Ecosystems

The ecosystem categories for weak and strong rights have many laws that could be discussed as being representative of general social concern about protecting the natural environment. The wildlife law chart contains these categories because the protection of habitat is essential for the protection of the wildlife inhabiting that ecosystem. For example, there are federal and state laws protecting wetlands and state laws protecting sand dunes. These laws tend to be weak rights because they are dependent on government action, and private parties usually cannot aid in their enforcement. The Clean Water Act (CWA), having been operational for more than thirty-five years, has played a key role in the protection and restoration of water ecosystems and has provided protection for numerous species of wildlife. However, if only the government implements this law, then the rights of wildlife are weak. Indeed, declining enforcement of the CWA by agencies shows why such laws should be considered weak rights for humans as well as wildlife.[147]

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144 Palila v. Haw. Dep't. of Land & Natural Res., 852 F.2d 1106, 1107 (9th Cir. 1988).

145 Hawaiian Crow ('Alala') v. Lujan, 906 F.Supp. 549, 551-53 (D. Haw. 1991).

146 Cetacean Cmty. v. Bush, 386 F.3d 1169, 1175 (9th Cir. 2004).

147 Charles Duhigg, *Clean Water Laws Are Neglected, at a Cost in Suffering*, N.Y. TIMES, Sept. 12, 2009, *available at* http://www.nytimes.com/2009/09/13/us/13water.html?_r=1 ("However, the vast majority of those polluters have escaped punishment. State officials have repeatedly ignored obvious illegal dumping, and the Environmental Protection Agency, which can prosecute polluters when states fail to act, has often declined to intervene."). *See also* Charles Duhigg & Janet Roberts, *Rulings Restrict Clean Water Act, Foiling E.P.A.*, N.Y. TIMES, Feb. 28, 2010, *available at* http://www.nytimes.com/2010/03/01/us/01water.html?pagewanted=1&em (explaining how recent Supreme Court rules have modified the understanding of the phrase "navigable waters of the United States," which has further hampered enforcement of the CWA).

Within the CWA there is a citizen suit provision like that found in the ESA, allowing private civil actions and in some cases supporting strong rights for wildlife. At the state level, other laws exist that can be used by citizens on behalf of wildlife. For example, the Michigan Environmental Protection Act provides for citizen suits against other private parties if an action is going to impair or destroy the natural resources of the state—and wildlife are considered a natural resource under Michigan law.[148] There presently exist strong legal rights for ecosystems and the wildlife therein, though the number of strong legal rights are more limited than weak rights.

8. Category 9: Preferred Rights for Ecosystems

In the classic case *Sierra Club v. Morton*, Justice Douglas in dissent suggested the idea of considering individual ecosystems as entities within the legal system.

> The critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.[149]

Since that opinion, no real change on behalf of ecosystems has occurred. This quote and the general concern it epitomizes should be updated by changing inanimate objects to groups of living beings. Again, it might be useful to consider an ecosystem as a corporation composed of shareholders whose group interests need to be voiced in the legal system.

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148 MICH. COMP. LAWS § 324.1701 (2009) ("The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.").

149 Sierra Club v. Morton, 92 S.Ct. 1361, 1369 (1972) (Douglas, J., dissenting) (disallowing standing by the Sierra Club as an organization. Nevertheless, the opinion created the test for environmental law standing at the time: aesthetic harm to humans arising out of physical harm to the natural environment.); *see generally* CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING (3d ed. 2010). The original law review article from which Stone's book evolved was referenced by Justice Douglas in his dissent and stands as the seminal discussion of standing for ecosystems.

Now that the framework has been laid for these nine categories of legal rights, it is time to consider the paths available to pursue these legal rights for wildlife.

V
THE FUTURE LEGAL STATUS OF WILDLIFE

This Part proposes possible paths forward for the creation of rights for wildlife within our legal system.

A. Intentional Human Acts

For protection of individual wildlife from intentional acts of harm and death by humans, the first step will be to ensure that the anticruelty laws in each state apply to wildlife. Next, the sweeping exemption for sport hunting and trapping needs to be reexamined. While traditional sport hunting is a very complex activity with many different values and motivations, commercial trapping is a much narrower topic and should be carefully scrutinized.

The commercial trapping of animals should be considered in light of principles one and two[150] for at least a category 1 (government-weak) right in the form of a legal prohibition or limitation. Commercial trapping is an imprecise method of death done in places that are extremely hard to monitor. How many nontarget animals are injured or die as a result of trapping? What is the social benefit of commercial trapping? What is the environmental impact? Do the human benefits outweigh the animal deaths? Since trapping inherently causes suffering, is the practice necessary in modern society?

At the federal level, a closer examination of the programs of the Wildlife Services in the USDA is necessary. This agency, supported by tax dollars, received $58 million in federal funds for its programs in 2008.[151] In fiscal year 2008, the Wildlife Service reported killing 4,210,411 blackbirds and starlings, as well as 89,300 coyotes.[152]

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150 "1. Wildlife shall not be unnecessarily harmed, captured, or killed by humans. 2. If humans harm, capture, or kill wildlife then the methods used shall not inflict unnecessary pain and suffering." *Supra* p. 122.

151 U.S. DEP'T OF AGRIC., WILDLIFE SERVICES FISCAL YEAR 2008 FEDERAL AND COOPERATIVE FUNDING BY RESOURCE (2008), *available at* http://www.aphis.usda.gov/wildlife_damage/prog_data/2008_pdr/PDR_A/PDR_A_FY2008.pdf.

152 U.S. Dep't of Agric., Animal and Plant Health Inspection Service, *Wildlife Damage Management*: Wildlife Services' 2008 Annual Tables, APHIS.USDA.GOV (2008), http://www.aphis.usda.gov/wildlife_damage/prog_data/prog_data_report_FY2008.shtml (last modified June 30, 2009).

These actions are often done for the benefit of private commercial activities. There is no statutory guidance requiring agencies or courts to balance the harm to animals against the benefits to humans. There is no requirement to even be economically efficient about killing wildlife. The private group permitted to kill the wildlife usually does not pay for the cost of the service, and the weight of the death and suffering of the wildlife cannot be justified by an economic cost/benefit analysis.

At the international level, a highly visible topic is the necessity for humans to kill whales for food purposes.[153] While prohibitions on killing have been adopted under the International Whaling Convention on a geographical basis, and there is a theoretical moratorium on commercial whaling, the reality is that several countries are still killing whales for human consumption. As discussed previously, the living interest of the whale has to be weighed against the need for humans to have protein and profit. Fundamentally, more weight should be given to the interests of those beings that are more complex, more capable of experiencing life, capable of understanding that they are alive, and capable of having complex modes of consciousness. The life and death of a whale is heavier on our scale than that of a sardine, and it is rational that the death of a sardine for human consumption is more acceptable than the death of a whale.[154] One path toward rights for whales is to grant them rights as individuals per category 3 (preferred individual rights) and simply prohibit their killing except under the usual human defenses, such as self defense.[155]

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153 A more complex topic is the killing of whales for cultural purposes. *See* Brian Trevor Hodges, *The Cracking Facade of the International Whaling Commission as an Institution of International Law: Norwegian Small-Type Whaling and the Aboriginal Subsistence Exemption*, 15 J. ENVTL. L. & LITIG. 295 (2000), *available at* http://www.animallaw.info/articles/arus15jenvtllandlitig295.htm. *See also* MARK NUTTALL, PROTECTING THE ARCTIC: INDIGENOUS PEOPLES AND CULTURAL SURVIVAL (1998).

154 Some individuals may well decide that the killing of neither is justified for human protein, but the discussion should start with whales, as they are highly intelligent beings.

155 *See generally* HERMAN MELVILLE, MOBY-DICK (1851). Clearly a whale can act with intentionality, but if their acts of destruction are caused by human pursuit, would not the actions of the whale be justified? If humans have the right to self defense, should not whales? Should it not be the case that Moby-Dick should have been able to get an injunction against Captain Ahab?

B. Unintentional Human Acts

The death and suffering of wildlife often occurs as an unintended or undesired consequence of human activity. One example of unintended wildlife death arises in the context of electrical power generation and transmission. The mining of coal can destroy local habitat, and the transmission of electricity can kill birds that perch on electrical wires. Wind turbines kill thousands of migratory songbirds every year because of their large rotating blades. While the issue of energy needs and sustainable production methods is a complex issue, when considering all the tradeoff of the alternative approaches, protection of individual wildlife and their habitat need a higher, weightier presence in the decision-making process. Once basic decisions about energy policy are made, mitigation on behalf of wildlife is a critical next step. There should be monetary contributions from governments and corporations to protect wildlife and their habitat when methods of energy production are harmful to certain species.

Commercial fishing methods also need to be examined; particularly those that will predictably kill and injure nontarget species or bycatch. Fishing nets may be lost or abandoned and become ghost nets, killing wildlife for months on end. Pots and lines of hooks also kill on a random basis.[156] As with many of the wildlife issues, one of the reasons that indiscriminate and destructive methods are still used is because those who cause death and ecosystem destruction pay no price for the death or the harm caused to the ecosystem.[157] There is a lack of accountability for the individuals killed, whether they are sharks, dolphins, squid, or fish species.

Another human activity resulting in significant death for wildlife is the use of the automobile in rural areas. In the countryside, humans driving automobiles may be the greatest predator that many wildlife

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156 Graeme Macfadyen, Tim Huntington & Rod Cappell, *Abandoned, Lost or Otherwise Discarded Fishing Gear*, FAO Fisheries and Aquaculture Technical Paper 523 (2009) *available at* http://www.fao.org/docrep/011/i0620e/i0620e00.htm. *See also* Richard Black, *Turtles Killed 'In Millions' by Fishing Gear*, BBC NEWS, *available at* http://news.bbc.co.uk/2/hi/science/nature/8604723.stm (last updated Apr. 6, 2010). ("Millions of marine turtles have been killed over the past two decades through entrapment in fishing gear, according to a global survey.").

157 Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (discussing classic examples of the concept of the Tragedy of the Commons, where the common goods of wildlife or wildlife habitat are consumed or destroyed because the individual actor receives the marginal benefit without paying the marginal cost).

face.[158] "In fact, collision with vehicles is one of the leading causes of death for Florida panthers."[159] There have been occasional efforts to reduce deaths caused by vehicles by providing underpasses through which wildlife can cross under roads.[160] State Farm Insurance "estimates 2.4 million collisions between deer and vehicles occurred in the U.S. during the two-year period between July 1, 2007 and June 30, 2009 (100,000 per month)."[161] Despite the economic and human harm, society just accepts wildlife death by collision without giving much thought to the factors involved or finding ways to reduce the deaths. Admittedly, there are no easy answers.[162]

C. Duty to Protect Where Wildlife Live

Addressing the third principle—how to help wildlife keep their habitat when located on private land—is one of the most difficult issues that humans face on behalf of wildlife. While private property ownership has always been subject to limitations such as nuisance law and exercises of the state police power, concern for wildlife has had little weight when landowners decide how to use their land. For most individual landowners, economic value has always been the dominant factor in deciding the appropriate use of land. To counter this, organizations such as The Nature Conservancy (TNC) have pursued goals of either obtaining nondevelopment easements or buying up critical habitat from private parties.[163] This land and title is either kept

158 One study of four routes in Indiana counted 10,515 vertebrate roadkill mortalities in a 17-month period, but estimated that actual mortality was far higher. David J. Glista et al., *Vertebrate Road Mortality Predominantly Impacts Amphibians*, 3 Herpet. Conserv. & Biol. 77 (2007), *available at* http://www.herpconbio.org/Volume_3/Issue_1/Glista_etal_2008.pdf.

159 Heidi Ridgley, *Heartbreak Highway: Roads and Development Spell Trouble for Florida's Panthers*, DEFENDERS, Fall 2009, http://www.defenders.org/newsroom/defenders_magazine/fall_2009/heartbreak_highway.php.

160 *Id.*

161 Press Release, State Farm Ins., *Deer-Vehicle Collision Frequency Jumps 18 Percent in Five Years*, (Sept. 28, 2009), *available at* http://www.statefarm.com/about/media/media_releases/20090928.asp.

162 "There were nearly 62,000 such crashes [in Michigan] last year, but the number may be much greater since many car-deer accidents are not reported. These collisions account for $130 million in property damage annually, but also result in numerous deaths and injuries. In 2007, 11 motorists died and 1,614 were injured in car-deer collisions." Michael Morse, *October is 'Michigan Car-Deer Crash Safety Awareness Month,'* (Oct. 1, 2008), http://www.michigan-accident-injury-lawyer-blog.com/?paged=2; OFFICE OF HIGHWAY SAFETY PLANNING, MONTHLY AND SEASONAL RATES FOR MOTOR VEHICLE-DEER CRASHES (2009), http://www.michigantrafficcrashfacts.org/doc/2009/deer_3.pdf.

163 "Our mission of preserving biological diversity guides everything we do." The Nature Conservancy, *The Nature Conservancy's Values*, NATURE.ORG,

by the organization or transferred to government ownership in some natural preservation capacity. This approach does not need to change property rights or give wildlife any new rights. While TNC might be thought of as guardians of animals and habitat, they owe no legal duty to the wildlife living on the lands they own. Wildlife do not have a say in how these lands are used, but the practical effect is to preserve critical habitat on behalf of wildlife.

Instead of buying full title to land, the government can seek to restrict land use. The ESA represents the other side in our legal system, making it very difficult to economically develop any privately owned tract of land that is designated as critical habitat for a listed endangered species.[164] Our legal system has the capacity to limit the use of private land for social, environmental, or wildlife values, and has done so in the case of endangered species. For non-endangered species, there should be a middle ground where habitat protection receives more weight in the decisions impacting private land, but less severe restrictions than are imposed by the ESA.

One place to enhance category 7 (weak ecosystem rights)[165] is through state enabling acts for local zoning. The state statutes should direct local governments to take into account the benefits of preserving land and habitat in its natural state whenever possible when developing and adopting local zoning plans and codes. A trade-off system should be utilized, where private parties agree to set aside a portion of their land as natural habitat and other land could be more densely developed. Also, if a state has not yet done so, statutes need to be adopted that allow for conservation easements and require property tax assessments to reflect the decreased economic value of land when it has been put into a conservation easement.

Wildlife do not have the capacity to understand the consequences of human decision-making, and they need an advocate within all levels of government. A Wildlife Advocacy Agency needs to be created within the government.[166] The strongest possibility for

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http://www.nature.org/aboutus/features/ (last visited Oct. 26, 2010). "We've protected more than 119 million acres of land and 5,000 miles of rivers worldwide—and we operate more than 100 marine conservation projects globally." The Nature Conservancy, *About Us*, NATURE.ORG, http://www.nature.org/aboutus/ (last visited Oct. 26, 2010).

164 Unless the private landowner gets a Habitat Conservation Plan and Environmental Impact Statement approved by FWS and/or NMFS.

165 *Supra* p. 498.

166 A 2010 nationwide Swiss proposal to create a government-funded attorney to help with animal issues was rejected by the voters. Robert Mackey, *No Free Lawyers for Most*

category 7 rights would reside in the Wildlife Advocacy Agency's legal duty to promote the interests of wildlife wherever possible. This is one way society can ensure that wildlife receive their allotted due process as laws are adopted over time.

While a government agency could be a wildlife advocate, it would be an inherently weak position, as any agency could only assert weak legal rights for wildlife. A better alternative, supporting strong legal rights, would be to appoint a private party to carry out these responsibilities with private support. Large well-established organizations may be willing to take on this responsibility, or perhaps individuals could do it with public and private funding.

Beyond weak rights, if we wanted to create a truly meaningful breakthrough for legal rights for wildlife, we should return to the position that the original American Society for the Prevention of Cruelty to Animals (ASPCA) in New York exercised in 1867 on behalf of domestic animals. Under the New York cruelty law at the time, the legislature granted this private organization the power to investigate as well as the power to arrest and prosecute individuals who violated that cruelty law.[167] The ASPCA prosecuted cases without the state prosecutor being involved in the process.[168] While in today's world it may not he possible to give full criminal enforcement power to individuals and private organizations, it certainly would be possible to give them the right to bring civil suits and obtain injunctive relief on behalf of wildlife. Thus, the Defenders of Wildlife might take on the challenge of Utah's wildlife, while the Sierra Club focuses on California. The citizen suit provision of the ESA exists as

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Swiss Animals, N.Y. TIMES NEWS BLOG, Mar. 8, 2010, http://thelede.blogs.nytimes.com /2010/03/08/no-free-lawyers-for-most-swiss-animals/. However, in Zurich such a position does exist. *Id.*

167 Section 8 of the 1867 New York anticruelty law states:

> Any agent of the American Society for the Prevention of Cruelty to Animals, upon being designated thereto by the sheriff of any county in this state, may, within such county, make arrests and bring before any court or magistrate thereof, having jurisdiction, offenders found violating the provisions of this act, and all fines imposed and collected in any such county, under the provisions of this act, shall inure to said society, in aid of the benevolent objects for which it was incorporated.

An Act for the More Effectual Prevention of Cruelty to Animals, N.Y. REV. STAT. ch. 375, § 8, 87 (1867) (current version at N.Y. AGRIC. & MKTS. § 371 (Consol. 2004). Thus, the ASPCA had the power to arrest, prosecute, and receive any fines imposed—an amazing exercise of legal power by one private group.).

168 ASPCA, TWENTY-FOURTH ANNUAL REPORT FOR 1889 17 (1890), *available at* http://www.animallaw.info/historical/articles/arusaspcareport1889.htm (In 1889, the ASPCA prosecuted 949 cases in the courts.).

a model for the adoption of a law that would reach out to wider wildlife issues. This approach will enhance strong rights within categories 5 and 8.

To create stronger legal rights in categories 6 and 9, trustees should be established for ecosystems or species. This would allow the pursuit of preferred rights for wildlife, and such trustees would have standing in any proceeding that impacted the interests of wildlife within their geographic area. Standing in court would be for the purpose of representing the wildlife, not for the trustee's personal or organizational interests. Thus, a wildlife trustee for the Porcupine Mountains or the Shenandoah Valley could seek to intervene at local, state, and federal levels of government when significant wildlife interests of their area are threatened, be it by a new road, or a power plant, or zoning for a new subdivision, or in any other way. The trustee would be accountable to the courts, and though they would not have legislative or administrative veto power over private or public actions, trustees would ensure that laws adopted for the benefit of wildlife are implemented.[169]

D. Duty to Create Habitat

Implementing principle 5—the duty to establish or recreate ecosystems—requires a reorientation of how we think about land. We must understand that wildlife habitat is not just something to drive past in national parks, but that habitat is all around us, wherever we live. While the expansion of humans in urban and rural areas makes wildlife habitat sparse, there is plenty of land throughout the United States that is under-utilized as wildlife habitat—specifically the vast farmlands of the nation.

Private organizations and individuals under their personal value system may decide to restore or create new supportive ecosystems for wildlife. For example, Cable News Network founder Ted Turner owns more than two million acres of western land where he is

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169 A benefit of using private trustees over existing nonprofit organizations is that there should not be a conflict of interest or an economic motive in fundraising overriding financial benefits to the wildlife. The duty of a wildlife trustee will be as a fiduciary to the wildlife of the area with no duty to donors, shareholders, or human organizations. This can best be accomplished when funds are donated to fund the trust. In such a case, the trustee has legal title to the trust assets, but the animals within the area, like stockholders of a corporation, are the beneficiaries of the trust. The trust side of this vision may already be possible in some states, but the legal advocate side will need some legislative support to come into being.

reestablishing natural grasslands to support the return of buffalo, prairie dogs, and wolves to land that had previously been used for agriculture and cattle ranching.[170] This is beyond saving something that exists; this is the reestablishment of diverse natural habitat for many species on the plains.

Private parties and government can work together to help bring back wildlife. For example, the Northern Bobwhite Conservation Initiative seeks to restore the bobwhite, a ground bird, to its historical range of habitat. Their goal of returning the bird to the 1980s level of population requires "the addition of 2,770,922 coveys to the current population. Achieving this population will necessitate impacting the habitat on 81.1 million acres of farm, forest, and range land."[171]

An example of government restoration is the USDA's Natural Resources Conservation Service and its conservation stewardship program.[172] This agency seeks to help individuals in their efforts to protect the environment and natural ecosystems.[173] Though wildlife is not the specific focus of this agency program, any action that restores habitat and protects ecosystems helps wildlife. It should be noted that a restoration project under this program is voluntary, and does not create legal rights for any wildlife.

Within the United States, the need for restoration and sustainable use of land come together under the broad term *sustainable agriculture*.[174] At the other end of the land use spectrum is industrial agriculture, supported by the petrochemical industry. Industrialized

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170 *See* David Pilz, *Charting the Colorado Plateau Revisited*, COLORADOCOLLEGE.EDU (2002), http://www.coloradocollege.edu/Dept/EC/Faculty/Hecox/CPWebpage/issuespage Turner.htm (last visited Oct. 26, 2010); Nate Jenkins, *Ted Turner's Land Purchases Raise Ranchers' Suspicions*, BOS. GLOBE, Dec. 2 2007, *available at* http://www.boston.com /news/nation/articles/2007/12/02/ted_turners_land_purchases_raise_ranchers_suspicions/. It should be mentioned that Turner owns Ted's Montana Grill, which specializes in buffalo burgers. *About Ted's Montana Grill*, TEDSMONTANAGRILL.COM, http://www .tedsmontanagrill.com/about.html (last visited Oct. 26, 2010).

171 Mississippi State University, *USDA-NRCS Bobwhite Restoration Project*, http://www.cfr.msstate.edu/nbci/index.asp (last visited Oct. 26, 2010).

172 Natural Res. Conservation Serv., *Conservation Stewardship Program*, NRCS.USDA.GOV, http://www.nrcs.usda.gov/programs/new_csp/csp.html (last visited Oct. 26, 2010).

173 *Id.*

174 For an explanation of sustainable agriculture, see generally Univ. of Cal., *SAREP Overview*, SAREP.UCDAVIS.EDU, http://www.sarep.ucdavis.edu/about/index.htm (last visited Nov. 5, 2010); *National Sustainable Agriculture Coalition–About Us*, SUSTAINABLEAGRICULTURE.NET, http://sustainableagriculture.net/about-us/ (last visited Nov. 5, 2010).

agriculture takes animals off the pasturelands and puts them in buildings or pens, and raises vast monocultures of corn and soybean to feed to the confined animals.[175] Since vast tracts of land are used in monoculture crops that exclude wildlife, the return of wildlife will not occur until food animals return to pastureland,[176] and farms become smaller and more diversified.[177] In this policy arena, wildlife interests are fully aligned with human interests in sustainable agriculture, often against the interests of global corporations. Big agricultural corporations profit from the imposition of industrial agriculture over sustainable, family-centered, science-informed, grass-based, and organic farms. To promote wildlife's living interest requires the removal of public support for corn and fossil fuel production and consumption, providing resources for sustainable agriculture programs.

E. Duty Toward Species

Given the existence of the ESA and the international Convention for the Protection of Endangered Fauna and Flora, the duty toward endangered species has clearly been recognized and acted upon. Numerous individual wildlife species have life and habitat because of the endangered species' habitat is protected under the ESA. The case of the northern spotted owl is a great example of an ESA listing providing protection for many additional species dependent upon old-growth forest habitat. The success of the legal duty toward species needs to be improved upon in the future.

F. Duty Toward the Individual

Should all wildlife be equal before the law? Sadly, the ethical logic of equality diminishes when faced with the reality of politics and resource limitations that define the legal world. Incrementalism is likely the path forward. The wolf will be considered a juristic person before the mole, the whale before the sardine. Politics is only partly driven by logic and ethics; it is also driven by emotion, personal experience, and money. Not all species will engender the same political support. In the political process motivations for action or opposition may be diverse. Not all species will have vested human

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175 *See generally* NICOLETTE HAHN NIMAN, RIGHTEOUS PORKCHOP (2009); MICHAEL POLLAN, THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS (2006).

176 *See generally* GENE LOGSDON, THE CONTRARY FARMER (1995).

177 *See generally* JOEL SALATIN, YOU CAN FARM: THE ENTREPRENEUR'S GUIDE TO START & SUCCEED IN A FARMING ENTERPRISE (1998).

interests arrayed either for or against them, sending armies of lobbyists to Congress for the continued use or abuse of the animals. However, there will be some species on whose behalf a coalition of political actors will fight to obtain legal rights for wildlife.

For example, a special case must be made for whales. Humans can kill them, consume them, and drive them to the edge of extinction. Currently, is there any real necessity to kill whales? A whale's complex brain justifies special treatment and enhances the weight of the animal's interests. Even though whales are significantly protected in the United States, a clearer statement of protection is needed, and a foreign policy urging other nations to change their whaling practices should be adopted.

While several of the five principles set out above may be implemented for the betterment of wildlife without making an animal a juristic person, respect for our fellow creatures will hopefully and eventually support their status within our legal system as individual juristic persons.

VI
CONCLUSION

Issues concerning wildlife have long been part of the legal system. However, the increased visibility of wildlife interests has been a recent development. The ethical obligation to allow wildlife to live their lives independent of humans is now widely accepted, and the wildlife-versus-human conflicts have been receiving heightened attention. This Article has sought to create a matrix through which legal rights for wildlife may be explored. Legal rights are obtained for wildlife when their interests are asserted within the courts or in the halls of administrative agencies. While some legal rights do currently exist, the weight of wildlife interests is sorely undervalued when balanced against human interests. As our respect for wildlife increases, the weight of their interests should increase as well.

This Article has set out five principles to focus future legal developments. We need to directly confront the reality that human land is often the home for many species of wildlife with mute voices within our legal system. Finally, the legal system needs to address the moral claim granting wildlife status as juristic persons. As juristic persons, individual wildlife will be able to share the legal stage with humans. Finally, individuals and species will be given the chance to ensure that humans managing and consuming life on earth legitimately take wildlife's interests into account.