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# MID-ATLANTIC JOURNAL ON LAW AND PUBLIC POLICY

## VOLUME 1  FALL 2012  NUMBER 1

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EDITORIAL AND SUBSCRIPTION POLICIES


It is the general policy of the Mid-Atlantic Journal on Law & Public Policy to use feminine generic personal pronouns, except if waived for a specific article at the request of an author. It is also the general policy of the Journal not to keep unpublished sources used in articles or comments beyond their use for verification of citations. Inquiries as to the location of an unpublished source should be directed to the author of the article or comment in which it is cited.

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The Mid-Atlantic Journal on Law & Public Policy is an independent journal. Within each category of this Volume, the authors’ names and articles are listed alphabetically. The views expressed in each article of this Volume do not represent the views of the Mid-Atlantic Journal on Law and Public Policy or its Editorial Board. They are solely the views of the authors.
The *Mid-Atlantic Journal on Law & Public Policy* encourages the submission of single page abstracts or completed articles on current Animal Law topics. Articles are accepted on a rolling basis.

Your abstract or article should be typed, double-spaced, and in Cambria, 11-point typeface, with 10-point footnotes. Submissions should include the author’s resume/CV as well as an abstract with a word count.

The Journal accepts all submissions only to our email address: midatlanticjournal@gmail.com. Submissions, which should provide a comparative exploration of as many states in the mid-Atlantic region as possible, will be considered for potential publication.
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INTRODUCTION

INTRODUCING THE MID-ATLANTIC JOURNAL ON LAW & PUBLIC POLICY

By: Joshua Friedman* and Gary Norman**

"We must dare to think 'unthinkable' thoughts. We must learn to explore all the options and possibilities that confront us in a complex and rapidly changing world. We must learn to welcome and not to fear the voices of dissent. We must dare to think about 'unthinkable things' because when things become unthinkable, thinking stops and action becomes mindless."

- J. William Fulbright

*M.B.A., University of Baltimore, Merrick School of Business, 2009; J.D., University of Maryland Francis King Carey School of Law, 2007; B.A., University of Maryland, College Park, 2004; Attorney Advisor, U.S. Social Security Administration, Office of Disability Adjudication and Review. Mr. Friedman is Vice Chair of the Maryland Assistive Technology Loan Program and the President of the Mid-Atlantic Lyceum, and Executive Editor of the Mid-Atlantic Journal on Law & Public Policy.

**L.L.M., American University Washington College of Law, 2012; J.D., Cleveland-Marshall College of Law, 2000; B.A., Wright State University, 1997; Staff Attorney, Centers for Medicare & Medicaid Services, Office of the Attorney Advisor. Mr. Norman is a Commissioner with the Maryland Commission on Civil Rights and the Vice President/Secretary of the Mid-Atlantic Lyceum.

The authors’ names are listed alphabetically and each author has contributed equally to this article. All errors and omissions are the authors’ own. The views expressed in this journal article do not represent the views of the Social Security Administration, Centers for Medicare & Medicaid Services, the United States government, or the State of Maryland. They are solely the views of the authors acting in their personal capacities. The authors are not acting as agents of these agencies, the State of Maryland, or the United States government in this activity. There is no expressed or implied endorsement of the views or the activities of the authors by these agencies, the State of Maryland, or the United States government.
I. INTRODUCTION

This foreword serves as an introduction to the inaugural edition of the Mid-Atlantic Journal on Law and Public Policy ("the Journal"), an independent law journal founded by the authors and edited by law students. Joshua Friedman and Gary Norman are President and Vice President/Secretary, respectively, of the Mid-Atlantic Lyceum, the parent body and founding organization for the Journal. This is the Journal's journeyman edition, which will be published in October of 2012, and includes numerous articles presented by many highly regarded individuals.

This Journal would not be possible but for the efforts of many dedicated and brilliant persons. Numerous law students volunteered to support the Journal, serving in differing roles and responsibilities. Notably, Editor-in-Chief Nathan Horne will also introduce a foreword discussing and synthesizing the articles published in this inaugural edition of the Journal.

II. HISTORICAL BACKGROUND

A. The Start of a Great Partnership

Almost a decade ago, the authors met while working for a civil rights/disability advocacy lawyer in Fairfax, Virginia but worked independently for a number of years. In 2004, Mr. Friedman began law school at the University of Maryland Francis King Carey School of Law, and Mr. Norman joined the Maryland Bar in 2005. It was not until 2009 that the duo drafted their first law journal article for Boston University's International Law Journal. Several articles followed, and both began to see their calling as authors and public policy advocates within a variety of topics.

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1 Mr. Norman has had two guide dogs over the years: Langer, acquired in August of 2001, who is now since retired, and Pilot, an active guide dog obtained in June of 2010. As a result, Mr. Norman crafted an unassociated organization into a guide dog education and advocacy non-profit for which Thomas E. Rogers served as his Chief of Staff. In light of his numerous hours of advocacy in Annapolis, Maryland, as well as his educational programs in other jurisdictions of the state, Mr. Norman joined the Animal Law Section on invitation, eventually serving as one of its most visible Chairs.


3 See, e.g., Protecting the Family Pet: The New Face of Maryland Domestic Violence Protective Orders, 40 U.BALT.L.FORUM 1 (2009), an article which eventually led to passage of legislation providing legal protection for
Since then, Mr. Friedman and Mr. Norman have been ongoing partners in numerous civil rights ventures including animal and disability rights law. They have written numerous law journal articles and other advocacy publications. Mr. Friedman and Mr. Norman are co-founders of the annual Animal Law Symposium of the Maryland State Bar Association (MSBA).

B. The Formation of the Lyceum

Both Mr. Friedman and Mr. Norman believe that civil society, including its leaders, has lost some of its civility because of a lack of people convening together for engagement opportunities. Consequently, the two formed the Mid-Atlantic Lyceum in 2011. The purpose of the Lyceum was to address issues in little known but rapidly developing fields of law, such as disability law, conflict resolution, and animal advocacy.

Prior to formation, discussions were held regarding the possibility of continuing the symbiotic partnership with the Section. The Executive Committee of the Bar Association recently approved a partnership between the MSBA Animal Law Section and the Mid-Atlantic Lyceum to address issues in little known but rapidly developing fields of law, such as disability law, conflict resolution, and animal advocacy.

animals in domestic violence scenarios; Symposium Foreword, 4 J. Animal L. & Ethics 1 (2011), setting the stage for this Journal; Taking the Maryland Bar Exam, 44 Md. Bar J. 4 (2011), an article advocating for further disability protections for test-takers at the Maryland Bar Exam; and The Norman/Friedman Principle: Equal Rights to Information and Technology Access, 18 Tex. J. C.L. & C.R. 1 (2012), discussing the advent of technological progress with regard to disability advocacy. The authors have also submitted written comments on a number of issues including accessibility, conflict resolution and animal advocacy programs.

4 Now formally sponsored and overseen by the Animal Law Section (“the Section) of the Maryland State Bar Association, the Symposium enters its third year. The next symposium will occur in April, 2013, in Baltimore, Maryland.

5 Mr. Norman is also a past Chair of the MSBA Animal Law Section. Mr. Norman, as Past Chair, established a new annual award that recognizes leadership on animal legal advocacy, legal related education, and scholarship within Maryland. The Section bestowed the first award on Caroline A. Griffin, Esq., on September 27, 2012, in Columbia, Maryland. The Mid-Atlantic Lyceum’s Robert J. Rhudy, Esq., served as the facilitator for the program of the Fall Dinner of the Section at which Ms. Griffin received the award. By leading the section, Mr. Norman has learned about the breath and the depth of the field. As an animal welfare oriented individual and as a conservationist, he has strong beliefs in expanded access to green space and to restricting unsustainable development. He has also recognized the divergence in perspectives of leaders within the field and the need to bring them together.
Atlantic Lyceum. Thomas E. Rogers and Robert J. Rhudy joined the Executive Board soon thereafter as Chief Financial Officer and Executive Board Member, respectively. These individuals have helped to further the Lyceum goals through the implementation of social activities and projects aimed at civic engagement and dialogue.

C. The Formation of the Journal

The Journal was also founded by Mr. Friedman and Mr. Norman in 2011 as a means through which to encourage civic engagement. The Journal constitutes a chief project of the Mid-Atlantic Lyceum as a platform for bringing diverse perspectives together for enhanced dialogue and decision-making, as well as improved public policy formulation. The Journal focuses on general advocacy issues, including, but not limited to, animal law. The Mid-Atlantic Lyceum directly oversees the implementation of numerous events involving the Journal, including, but not limited to, negotiating for articles presented at the annual Animal Law Symposium to be published in forthcoming editions of the Journal.

Published exclusively online, the Journal has been approved for publication by Westlaw™. At this point, the Journal has a masthead of over 20 students, most of who hail from the University of Maryland Francis King Carey School of Law. The Journal also has an Executive Board comprising of Mr. Friedman, Mr. Norman, as well the Editor-in-Chief, Managing Editor, Articles and Notes Editor. In the future, through the aforementioned Memorandum of Understanding, the Journal will serve as the exclusive publisher of articles presented at the Animal Law Section’s annual Animal Law Symposium.

Mr. Herschler, the then-Chair of the Section, vocally supported the idea and a Memorandum of Understanding was prepared to formalize the partnership. Mr. Norman initially suggested a Memorandum of Understanding to demonstrate the Lyceum’s commitment to professional transparency and moiety between the Lyceum and Section interests and the reputation of the Bar Association. Given the foregoing, the Mid-Atlantic Lyceum has worked with, and is steadily and professionally working with, the Section to develop this partnership.

All details about the Journal and its forthcoming inaugural publication are also on the Journal’s website available at http://www.midatlanticjournal.com. This website is updated with each publication.
D. Journal Honors and Awards

1. David S. Farve "Best Student Note" Award

All student notes are considered for the David S. Farve "Best Student Note" Award, which is awarded for each edition of the Journal. Professor Farve is the Professor of Law & the Nancy Heathcote Professor of Property and Animal Law at Michigan State University College of Law, and the Editor-in-Chief of the Animal Legal & Historical Center. Professor Farve is also a noted author and advocate for animal rights issues in his own right. This award is accompanied by a small honorarium from the Journal, and a limited edition, signed copy of Professor Farve’s Animal Law Book published by Aspen Publishers/Wolters Kluwer dedicated by Professor Farve.  

2. Mary Ann Norman Memorial Animal Law Fellowship

The Journal also offers the annual Mary Ann Norman Memorial Animal Law Fellowship in conjunction with the Animal Law Section for an individual to attend the annual Mid-Atlantic Animal Law Symposium. The Norman Family offers this Fellowship in memoriam of Mary Ann Norman, whose support of education and advocacy continues through her family on her behalf. The Fellow is required to attend the Symposium and draft an article covering and analyzing the legal topics discussed at the Symposium as well as a first-hand "personal experience" article for the Mid-Atlantic Lyceum’s/Journal website. The Fellow is awarded a small stipend that covers the cost of attending the Symposium, any related expenses, and the remaining balance to serve as an honorarium for the work submitted to the Journal. While any Journal staff member may be chosen for the Fellowship, this responsibility is entirely aside from staff duties on the Journal.

III. DEDICATION AND CONGRATULATIONS

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8 The book contains a personal congratulatory note from Professor Farve.
9 For the Journal’s first volume, the Fellow is Kathleen Kennedy, a 3rd year law student at the University of Maryland Francis King Carey School of Law. Ms. Kennedy is not affiliated with the Journal. Ms. Kennedy submitted an article regarding the Symposium entitled "Phoenix and the Importance of Preserving Evidence," which will be published on the websites of the Mid-Atlantic Lyceum and Journal.
The authors do gratefully wish to thank Nathan Horne, Editor-in-Chief of the Mid-Atlantic Journal on Law and Public Policy, Managing Editor Robert Wojcicki, and Senior Editors Anne Mettam and Lacey Douthat. Without these rising stars in the legal field, this Journal would simply not exist today. Furthermore, the numerous hardworking and dedicated staff members of the Journal should be doubly proud of the totality of their efforts. These individuals allocated countless hours in addition to their law school assignments, and in some circumstances studying for the bar exam, formatting, Bluebooking®, editing, revising, and shepherding this Journal from its embryonic stages into the able-bodied draft horse that it is today.

As Ray Bradbury once said “I know you’ve heard it a thousand times before. But it’s true – hard work pays off. If you want to be good, you have to practice, practice, practice. If you don’t love something, then don’t do it.” The editors and staff members of this Journal love what they do, and it shows. They committed to this project from the start and they made this Journal happen.

The authors also wish to make special mention of the contributions of Thomas E. Rogers and Robert J. Rhudy, executive board members of the Mid-Atlantic Lyceum. Noteworthy contributions of these two talented and dedicated gentlemen, whether by providing sage advice, fiscal oversight and responsibility, soliciting articles for the Journal, and forward looking advocacy, have reaped and yielded benefits far beyond these initial publication efforts. We also wish to thank the numerous individuals who have provided substantial support and assistance, whether in-kind or fiscal, in forming the Mid-Atlantic Lyceum and the Journal, most noteworthy among them our pro bono website designers Cynthia Kan and Kathy Chau, and our long-time graphic designer, John Candell.

In conclusion, we thank you for reading and supporting our Journal. If you have any questions, comments, or concerns, please do not hesitate to contact us at midatlanticjournal@gmail.com. We look forward to our next successful edition!
FOREWORD

FOREWORD TO THE JOURNAL

By: Nathan Horne

Creating something substantive out of an abstract concept is never easy, and the first edition of the Mid-Atlantic Journal on Law and Public Policy ("the Journal") was no exception. However, after weeks of work from a volunteer staff of over twenty students and attorneys; guidance from professors, attorneys, and friends in executive positions at school journals and law reviews; and, literally, thousands of emails, the Journal is publishing six well-written animal law papers in its inaugural edition. I am very proud of this fact, and I am also very proud of the people who made it possible.

"Nathan, I don’t think you quite understand. We are not asking you to staff our journal . . . we are asking you to help create it!" After reading Joshua’s email, I realized this would not simply be editing work: It would be a creative process that would entail hours upon hours of organizational work by many people over an extended period of time. Fortunately, after Joshua, Gary, and I discussed the meaning of the Journal and the Mid-Atlantic Lyceum, a strong team of editors volunteered. Most of these volunteers were students at the University of Maryland Francis King Carey School of Law who did not receive any monetary compensation or course credit for their substantial time commitment and perseverance through a difficult process.

We began by instituting a system similar to existing journals. It involved a hierarchy of staff editors, associate editors, and article/notes editors. Each team proofread and Bluebooked articles or notes, and sent it to the senior editors who continued to refine the works in progress. However, some of the articles submitted were

*J.D., University of Maryland Francis King Carey School of Law, 2012; B.A., University of Georgia, 2007 (Founded Major: Peace and Justice Studies); New York Director, Themis Bar Review; Mr. Horne is the Editor-in-Chief and co-founder of the Mid-Atlantic Journal on Law and Public Policy, and will join the Executive Board of the Mid-Atlantic Lyceum upon completion of his responsibilities with the Journal.
not typical law review articles. We had science-based submissions, as well as an activist article with slightly disturbing pictures of animal cruelty. These types of articles would not be published in a standard law journal, as they would not fit into the common journal-publication norms, nor did they lend themselves easily to the generally accepted format.

Our editors, however, worked closely with the authors to transform these articles into publishable papers. For those that were already in the journal format, this process was a time-honored tradition—edit, Bluebook, revise, repeat. For others, this entailed revising and reordering the well-cited papers, and helping the author expand on certain concepts while making others more concise. For one author, it meant working hand-in-hand with the Journal staff to turn the paper into two publications: A concise picture-less version for Westlaw, and a more expansive version, including pictures and text boxes, that was closer to the author's original intent. These challenges and the creative solutions that they brought about offered the Journal editors and authors a unique chance to look at issues holistically, which is not always present in formal journals.

1 See Muriel Tinkler's note, Transgenic Animals: Ethical Concerns Regarding Their Creation, Research, and Treatment, for a research-based analysis of the current law, science, and issues regarding DNA-altered animals.
2 See Catherine Wolfe's article, Animals Are Not Property and Should be Legally Reclassified, for a straightforward challenge to the current state of the law, which defines animals as "property" and generally treats them as such.
3 The Journal is greatly indebted to Professor Susan Hankin of the University of Maryland Francis King Carey School of Law. Professor Hankin, besides giving me excellent advice throughout the process, also introduced us to some of her past students' papers on Animal Law. We published three, and each of these came to us well-cited and previously edited: Jared Kaplan's note, Toros, Steers, Ropes, Capes, and Cowboy Boots: The Inhumane Nature of Bullfighting and Rodeos, is an in-depth look at the animal cruelty present in both bullfighting and rodeos. Mr. Kaplan's article won the David S. Favre award for Best Student Note. Stacey Kight's note, Miniature Horses in Suburbia, discusses the current predicament—companion animal or household pet?—between the increasingly popular miniature horse. Finally, Nicole Brown's article, Rat Fishing and the Disparate Treatment of Pest Animals, considers the undercurrent of human behavior towards "pest" animals in the context of the bizarre Baltimore rat-fishing contest. These papers were all originally written in Professor Hankin's seminar on Animal Law, and she pointed them out as accomplishments that could be refined and published.
4 See Wolfe, supra.
This brings up the main reason for the Journal’s existence: It allows well-written and well-rounded papers to be published even if they do not fit within the “normal” standards of legal journals. Furthermore, it allows editors the opportunity to work on a legal journal—to edit, proofread, revise, etc.—who might not have had the opportunity to hone these important legal skills, and that certainly would not have had the opportunity to make the creative-organizational decisions that these editors did. The current system of school-dependent law reviews and legal journals typically results in many outstanding, well-edited articles being published. However, it is limited by form, by authors, who must generally be professors or attorneys with very few science-based or activist papers, and by substance, as the editors do not always decide what they will publish based on what is the most interesting or unique article, but by how the article will fit into the classic law review scheme.

The Journal is not subject to these restrictions. This unique school of thought will open up avenues for more dialogue and creativity. These avenues, though perhaps not as formal as others, can successfully foster unique concepts, ambitious aspirations, and much-needed calls for change.

Moving forward, it will be important for the Journal to constantly refine our structure while continuing to embrace alternative papers and concepts. A successful inaugural publication is obviously the first stepping stone. The path towards being a groundbreaking, influential journal is, however, dependent upon continued excellence and innovation. With our current team of editors, advisors, and supporters, we have the capability to maintain our upward trajectory and improve on our initial success.

Thanks to everyone, mentioned or unmentioned, who made this Journal possible. I look forward to the next publication!

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5 As a unique example of a fascinating article that may not have fit into the classical legal journal format, see Abigail Salisbury's article, Everything Old is New Again: Reselling Vintage Fur Items Made From Endangered Species. Ms. Salisbury offers a thorough analysis of the current legal conundrum and moral questions that arise when one considers selling fur that was legal before the passage of the Endangered Species Act.
RAT FISHING AND THE DISPARATE TREATMENT OF PEST ANIMALS

By: Nicole Brown*

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“There comes a time when even the most energetic of animal lovers must part ways with the animal kingdom.”
- Robert Sullivan

I. INTRODUCTION

Of all the animals with which humans interact, one species is arguably transcendent in the number and varying types of roles its members have fulfilled: the rat. Rats are most commonly reviled as vermin due to their propensity for carrying and spreading...
disease; yet many Americans keep rats as pets. Rats are also extensively used as experimental subjects for the benefit of laboratory science, and in some corners of the world, they are used as a food source. In the corner of the world known as Baltimore, rats are even captured and killed for sport.

The broad range of possible treatments of rats is rife with tensions, uncertainties, and murky statutory schemes, which leave rats unprotected and implicitly authorize repugnant practices such as “rat fishing.” This Paper attempts to untangle these issues and provide a clear path that balances rats as pests versus rats as animals that don’t deserve unnecessarily cruel treatment: Part II describes the problems rats present in their role as pests; Part III discusses the practice, pros, and cons of Baltimore “rat fishing;” Part IV analyzes the legal ramifications of the different treatments of rats and juxtaposes them with scenarios involving comparable animals; and, Part V concludes that we should fight serious rat infestations with contraceptives, as opposed to inhumane directives such as “rat fishing.”

II. RATS AS PESTS

Rats possess a number of characteristics that earn them the enmity of most humans. The first, and likely most compelling, characteristic is that rats are dangerous. It is common knowledge that rats spread disease among humans and animals; in fact, rats have been responsible for the death of more than ten million people in the past century alone. Not only do rats themselves carry diseases, but they also transport insects, such as fleas and ticks, which may carry infectious diseases. Moreover, “they carry

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2 Id. at 148. “Rats are vectors of plague, as well as diseases such as typhus, salmonella, rabies, hantavirus, and leptospirosis.” Id.
5 See Chris Landers, Rats: They’re Everywhere, They Spread Disease – And They’re Gaining on Us, CITYPAPER (Baltimore, Oct. 18, 2006).
6 Sullivan, supra note 1 at 11.
7 Id.
microbes up from the underground streams of sewage; public health specialists sometimes refer to rats as ‘germ elevators.’”

Rats present physical threats even beyond their capacity to transmit disease. About fifty thousand people, many of them children, are bitten by rats each year. Although rats may also spread diseases, a bite can be a serious injury by itself as rats can exert a biting pressure of up to seven thousand pounds per square inch.

In addition to the physical hazards they represent, rats are a nuisance to humans in other ways, often causing inconvenience, damage to property, or financial loss. Author Robert Sullivan notes that “by one estimate, 26 percent of all electric-cable breaks and 18 percent of all phone-cable disruptions are caused by rats,” which chew on cables and wires. Moreover, they “wreak havoc on food supplies, destroying or contaminating crops and stored foods everywhere. Some estimates suggest that as much as one third of the world’s food supply is destroyed by rats.”

The presence of rats may also have negative psychological effects. Not only do they instill fear, distress, and disgust in the people who see them, but in the minds of many, rats are closely associated with poverty. Seeing rats can affect how the viewer perceives a neighborhood, and seeing them frequently can detrimentally affect the identity of a city, causing a morale problem among residents. However, it may be said that “if the presence of a grizzly bear is the indicator of the wildness of an area, the range of unsettled habitat, then a rat is an indicator of the presence of man.”

Rats follow humans. They eat what we eat, and their presence “crosses economic and social barriers.” Education is likely the most effective way of handling this part of the rat issue, by informing the public and demonstrating that the presence of rats is an unreliable indicator of the relative wealth, success, or cleanliness of a given city or neighborhood.

Due to the well-established problems rats present, people devote considerable effort and resources to eradicating them. Over $300 million is spent annually in the United States on rodent extermination.

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8 Id.
9 Sullivan, supra note 1 at 6.
10 Sullivan, supra note 1 at 7.
11 Id. Furthermore, “according to one study, as many as 25 percent of all fires of unknown origin are rat-caused.” Id.
12 Sullivan, supra note 1 at 11.
13 Sullivan, supra note 1 at 42.
14 Sullivan, supra note 1 at 2.
15 Landers, supra note 5; see also Sullivan, supra note 1 at 42.
control. In fact, many cities, Baltimore included, allocate resources to support councils and task forces specifically dedicated to rat extermination efforts. Generally speaking, the most common rat extermination method is the use of ingested poisons, most often anticoagulants, which cause the rodent to bleed to death internally.

Fumigation is another method of rat control and has the advantage of exterminating entire colonies rather than targeting individual rats as ingested poisons do. However, fumigation is less frequently used than ingested poisons due to cost and the high risk of contact with humans and non-target animals. It is most appropriately used in controlled, industrial settings. Traps and glue boards provide alternatives to poisoning. Snap traps in particular usually offer instantaneous death. Conversely, rats trapped on glue boards may be stuck for any amount of time until someone checks the board, during which time the animal may experience “trauma resulting from panic and attempts to escape such as forceful hair removal, torn skin and broken limbs.” Rats may suffocate when their faces get stuck to the board or chew off their limbs to escape.

Despite continuous efforts to reduce the number of rats, killing rats by any method may not be an effective way to control the population. Sullivan points out that not only do rats reproduce at an astounding rate, but also that “when rats are killed off, the

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18 Humaneness of Pest Control, supra note 16 at 3. Ingested poisons make up 95% of United States rat extermination efforts. Id.
19 Id. at 12.
20 Id. at 18. This statement contemplates traps which are designed specifically for rats, acknowledging that “rats caught in mouse-traps tend to be injured rather than killed.” Id.
21 Id. at 16.
22 Id. at 16-17.
23 Sullivan, supra note 1 at 11. "Rats succeed while under constant siege because they have an astounding rate of reproduction... Male and female rats may have sex twenty times a day...The gestation period for a pregnant
pregnancy rates of the surviving rats doubles and the survivors rapidly gain weight. The rats that survive become stronger.”

Sullivan also quotes David E. Davis, a famous rat researcher of the 1940s and 1950s: “Actually, the removal merely made room for more rats.”

Indeed, the Baltimore rat population has held steady over decades and generations. A 1949 study concluded that there were about 43,200 rats in Baltimore; a 2005 estimate placed the number around 48,420.

III. RATS AS SPORT

Most sources attribute the invention of rat fishing to Chuck Ochlech, a city resident who was frustrated by what he saw as the city government’s indifference to, or ineffective handling of, the ongoing rat problem in Baltimore. Wishing to draw attention to the issue (and to drum up business for his local watering hole, the now-defunct Yellow Rose Saloon), in 1993 Ochlech established a tournament modeled after more traditional fishing contests. Contestants “fished” for rats in nearby alleys using light fishing tackle and bait such as raw meat, peanut butter, and the like. Just as in standard fishing, participants reeled in their prey by the hook upon feeling a nibble on the line – but once reeled in, the rat fisherperson’s prey was clubbed to death with a blunt object, usually a baseball bat. The dead rats were brought back to the bar at the end of the contest for weighing and the awarding of prizes.

Before long, media outlets worldwide had gotten wind of Baltimore’s newest sport. Ochlech was interviewed by The New York Times, The Washington Post, and even reporters “as far away as Johannesburg, South Africa, Australia, Alaska.” The Yellow Rose skyrocketed to number eight of the top ten sites inquired about by

female rat is twenty-one days, the average litter between eight to ten pups. And a female rat can become pregnant immediately upon giving birth... One pair of rats has the potential of 15,000 descendants in a year.”

Sullivan, supra note 1 at 17.

Id.

Id.

Id.

Landers, supra note 5.

Id. Mr. Ochlech named the contest ”The Tournament of the Yellow Rose.”

Id.

Id.

Id.

Id.

Id.
tourists. The rat-fishing contest even inspired a 1998 independent short film.

City authorities frowned upon the practice of rat fishing, but instead of prosecuting the rat fisherpersons, the city implicitly ratified their actions. In 1995, the last year of the “official” tournament, the Baltimore health department insisted that the contestants use glue pads, rather than hooks, to reel in the rats. The contestants complied, but did not change the policy of beating the rodents with bats.

When the tournament did cease to be, local anecdote suggests that it was not because of pressure from government authorities; rather, the tournament’s publicity drew large crowds, including reporters and animal-rights protesters, which scared the rats away and overwhelmed the bar’s proprietor. Despite the collapse of the “official” tournament, there is reason to believe that the practice continues. Websites such as ratkill.com and warfrat.org (the official website of the Worldwide Association of Rat Fishing) remain online, and rat-fishing videos have even made their way to YouTube.

A proponent of rat fishing might argue that the activity not only heightens awareness of the problem, but also augments local extermination operations. In fact, this would not be the first time that citizens stepped forward to engage in vigilante pest control. In 1906, the city of San Francisco, in response to reports of plague after the Great Earthquake, offered a ten-cent bounty to the public in exchange for dead rats. “San Franciscans were good at catching rats, and the bounty for catching rats was so successful that it had to be cut in half.” In the 1960s, the New York Daily News began a crusade against rats, paying to train teenagers to kill rats, distributing rat poison to the masses, and inviting the public to report rat sightings. Thus, although it is rather unorthodox, the idea of private citizens assisting in municipal rodent control efforts is not completely unheard of. However, unless rat fishing is taken up as a regular pastime citywide, it is likely incapable of making an

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33 Id.
34 The Tournament (Risky BBQ Productions broadcast 1998 at Microcinefest, Baltimore).
35 Ratmen of Baltimore Go Rat 'Fishing' Again, NEW YORK TIMES (May 1, 1995), 1995 WLNR 3839922.
37 Sullivan, supra note 1 at 161.
38 Sullivan, supra note 1 at 162.
39 Sullivan, supra note 1 at 43.
appreciable dent in the surplus of rats which survive more conventional extermination campaigns.

Advocates of rat fishing might even argue that their sport is actually a safer method of extermination than the approaches usually taken by more traditional extermination authorities. For example, rat fishing does not employ chemicals or poisons. Thus, children, pets, and other animals cannot be poisoned along with the rats, whether by accidentally ingesting the materials themselves or by coming in contact with dead or dying poisoned rats. Also, compared to other, more traditional methods of rat extermination, rat fishing certainly offers a quicker, perhaps even a preferable death for its target. However, what is most salient about the practice, and what is most likely to cause an instinctive shudder in people who hear it described, is its quality of violence. Although there may be benefits to the practice, it also has a great capacity for encouraging violence against animals for entertainment purposes.

IV. RAT FISHING IN DIFFERENT CONTEXTS

A. Sport Context: Maryland Hunting Law

The natural counter to a moral argument against rat fishing is that there are contexts in which killing animals for sport is not only legal but generally socially acceptable, such as fishing and hunting. Indeed, an advocate of rat fishing might argue that, rather than prohibiting or criminalizing it, the authorities should permit the practice subject to regulation and licensing, as fishing and hunting are permitted. However, as attractive as an analogy to traditional fishing may be, the Maryland fishing statutes contemplate traditional fishing only; that is, the catching of actual fish from tidal or non-tidal water.\textsuperscript{40} Thus, although both activities employ the same equipment, traditional fishing, and the law which applies to it, are probably not sufficiently analogous to rat fishing to develop a satisfactory regulatory scheme.

On the other hand, hunting law may be a better fit. Maryland's hunting law expressly covers a number of rodents, including squirrels, muskrats, rabbits, hares, and weasels,\textsuperscript{41} and it defines “hunt” as “to pursue, capture, catch, kill, gig, trap, shoot, or attempt to pursue, capture, catch, kill, gig, trap, or shoot, or in any manner reduce any bird or mammal to personal possession.”\textsuperscript{42}

\textsuperscript{42} \textit{Id.} §10-101(k)(1). Fox chasing is expressly excluded from this definition. \textit{Id.} §10-101(k)(2).
However, the hunting code does not contemplate hunting in an urban setting, using fishing tackle. Furthermore, defining rats as “game mammals” under the law could mean that private citizens would be required to apply for licenses to kill rats in their own homes. The law does provide an exception from the licensing requirement, but it primarily applies to residents and tenants of farmland and their families hunting on their own farms. The statute expressly excludes farm employees from the exemption, suggesting that the carve-out is intended to support small family farmers by granting easier access to an additional source of sustenance.

Finally, Maryland’s primary stated purpose for requiring licensure for hunting is to “provide a fund to pay the expense of protecting and managing wildlife.” This agenda is inconsistent with the practice of rat fishing (and even rat control generally), the purpose of which is to eliminate rats entirely without regard to any notion of conservation or their utility as a food source. Because it is highly unlikely that rats would be considered a natural resource warranting protection in the same way as other forms of native wildlife, the policy goals underlying hunting law and rat fishing may be entirely incompatible.

1. **Maryland Cruelty Law**

Another argument against permitting rat fishing to fall under a regulatory scheme similar to those of fishing and hunting is that rat fishing may be cruel. Maryland’s animal abuse law prohibits the infliction of “unnecessary suffering or pain on an animal,” and to “intentionally mutilate torture, cruelly beat, or cruelly kill an animal.”

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43 Maryland law requires licensure for hunting game birds and mammals. *Id.* §10-301(b). Because there are no such restrictions on hunting “nongame” mammals absent a determination that the species is endangered or in need of conservation, *Id.* §10-2A-03, maintaining a nongame classification for rats would leave rat fishing entirely unregulated.

44 *Id.* §10-301(c)(1).

45 *Id.* §10-301(c)(1)(2).

46 *Id.* §10-301(b).

47 MD. CODE ANN., CRIM. LAW § 10-604(a)(4)(i) (LexisNexis 2012). Animal abuse is punishable by a 90-day jail sentence, a $1,000 fine, and may be subject to psychological counseling as a condition of sentencing. *Id.* §10-604(b)(1) & (b)(2).
is an act of aggravated (felony) cruelty under the law. These prohibitions presumably cover rats:

It is the intent of the General Assembly that each animal in the State be protected from intentional cruelty, including animals that are:

1. privately owned;
2. strays;
3. domesticated;
4. feral;
5. farm animals;
6. corporately or institutionally owned; or
7. used in privately, locally, State, or federally funded scientific or medical activities.

Under this broad statute, rats should be protected as feral animals. Although the statutes provide for jail time and fines for violators, the Maryland penalties for felony animal cruelty are comparatively low to those of neighboring states. Also, the Maryland Attorney General has recommended to the governor that the cruelty statute, the felony provision most likely to apply to rat fishing, should be clarified due to the ambiguity of the phrase "cruelly kills."

Of course, as noted above, rat-fishing advocates may claim that their pastime is a more humane way of killing rats than poisoning, fumigation, or trapping. Although death may occur more quickly than one of the more traditional methods, rat fishing is not necessarily humane solely by virtue of its speed. The practice manifests a certain gleefully violent quality, which seems analogous to dog or cockfighting. Rat fisherpersons could find less gruesome

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48 Id. § 10-606(a)(1) & (b)(1). Aggravated cruelty to animals is punishable by a 3-year jail sentence, a $5,000 fine, and psychological counseling as a condition of sentencing. Id. §10-606 (b)(1) & (b)(2).
49 Id. § 10-602.
50 Id. §§ 10-604(b) & 10-606(b).
52 Id.
53 Conducting dog- or cockfights is prohibited in Maryland and is subject to the penalties for aggravated cruelty to animals. Attending fights is a
ways to trap and kill rats if they wished to do so for sport, just as people who engage in dog and cockfighting could find less violent ways to demonstrate the strength, agility, and training of their animals, if that was the true purpose of their activity. However, the entertainment factor seems to set these activities apart and warrant harsh treatment under the law.

2. Baltimore’s Response to Recent Animal Abuse

In recent years, several cases of severe animal abuse shocked the city. In the case which received the most media attention, two young men were acquitted of pouring gasoline over a dog and setting it on fire in May 2009. In June, a cat’s remains were found where it had been tied to a fence while fireworks were set off under its head. In July 2009, then-mayor Sheila Dixon created an Anti-Animal Abuse Task Force (AAATF) to investigate and determine how best to reduce instances of animal abuse. Mayor Stephanie Rawlings-Blake converted the task force into a permanent Advisory Commission in October 2010. Since its inception, the Anti-Animal Abuse Advisory Commission has made recommendations that resulted in the passage of five bills in the Maryland General Assembly, raising Maryland’s ranking from 43rd to 36th among the states in terms of the strength of its animal protection laws. This response represents a clear departure from misdemeanor, although it comes with heightened penalties – one year in jail and a $2,500 fine. Md. Code Ann., Crim. §10-605(b). See also supra note 52 at 35.

56 Interim Report, supra note 52 at 5.
58 Id. at 3-4.
the manner in which rat fishing was handled in the days of the tournament, when the authorities, even under pressure from animal rights groups, permitted rat fishing to continue with little or no interference.

3. Recommendations

Ultimately, the laws must change to prevent rat fishing. The recent cases of animal abuse are appalling. However, it is nonsensical that the city has only recently turned its attention to stamping out animal abuse when rat fishing garnered international attention in the 1990s and city officials largely ignored it. The potential harms of rat fishing almost certainly outweigh its dubious benefits. To aggressively target other forms of animal abuse, while permitting this practice to continue, serves only to invite accusations of hypocrisy. It is possible that authorities at that time turned a blind eye because they were indifferent to animal abuse in general or were swayed by the possibility of generating tourism revenue. It also seems possible that rats, as almost universally reviled pest animals, were unable to elicit the sympathy necessary to motivate change.

The similarities between rat fishing and the blood sports of dog and cockfighting dictate that the law should expressly prohibit the practice of rat fishing and carry the penalties of felony animal abuse. In accordance with the AAATF’s recommendations, penalties across the board should be heightened, ownership bans should be implemented, and the costs of caring for abused animals should be shifted from shelters to defendants. Furthermore, mandatory psychological counseling is rarely used in animal abuse cases, despite the legislature’s implication by including this provision that people who commit animal abuse may be psychologically troubled. The General Assembly should include in §10-601 of the Criminal Law a statement clarifying this view and encouraging judges to include mandatory counseling as a regular condition of sentencing.

B. Pest Context: Maryland Pest Control Law

At its inception, rat fishing purported to be all about rat control. It was invented as a response to Baltimore City’s inability to reduce the number of rats, and thus, if rat fishing is to be prohibited,
it is necessary to address the problem that inspired it in the first place. Rats are a persistent pest in Baltimore. Their numbers have not dropped significantly in the last fifty years, and between December 2007 and November 2008, there were about 8,000 calls to Baltimore’s “311 hotline” to request trapping services by the Rat Rubout squad.\(^6\) Oddly, the Maryland pest control law is devoid of any specific mention of rodents beyond their inclusion as pests by definition.\(^6\) On the other hand, animals such as honeybees, mosquitoes, nuisance birds, and San Juan rabbits are all afforded dedicated statutory subtitles.\(^6\) While it may be cause for concern that such a common pest is largely ignored by the Maryland law, the law’s silence offers an open field for innovation. The best option for solving the rat problem may be to examine the divergent treatment of two other types of pest animals in the state – deer and feral cats – and select the option that seems more appropriate for the rat context.

1. Response to Deer

Another species presenting problems for Marylanders is the white-tailed deer. Most people are familiar with deer as pests primarily due to the deer’s propensity for causing car accidents – indeed, deer have caused over $1 billion in collision-related damage nationwide in 2001.\(^6\) Deer, however, have a range of impacts on people. In Maryland alone, deer caused $7.6 million in crop damage in 2008.\(^6\) Deer-browsing (grazing) activity can eliminate seedlings and other vegetation essential to preventing soil runoff and protecting water quality.\(^6\) Through their feces, deer may spread


\(^{63}\) Id. The rest of the provisions primarily deal with compliance by professional pest control technicians with licensing requirements and product label instructions.


\(^{65}\) Id.

exotic plants not native to Maryland.\textsuperscript{67} White-tailed deer are also a host for Lyme disease.\textsuperscript{68}

Many of these problems are similar to the problems caused by rats, and as with rats, the state has responded to these challenges primarily by seeking to control the deer population. Although some contraceptive studies have been performed,\textsuperscript{69} the state encourages and vigorously regulates deer hunting as the most effective deer management option.\textsuperscript{70} Managed hunts (the true intersection of sport and pest control) and venison donation programs have been effective at controlling the population even as the number of hunters has declined.\textsuperscript{71}

\section*{2. Response to Feral Cats}

The treatment of feral cats in Baltimore provides an interesting contrast to that of deer. In 2007, there were an estimated 185,000 stray and feral cats in Baltimore.\textsuperscript{72} These cats act as a community nuisance by roaming and howling and create a risk of disease and car accidents.\textsuperscript{73} The same year, the Baltimore City Council approved legislation that would decriminalize Trap-Neuter-Return (TNR) activity\textsuperscript{74} and regulate nonprofit TNR programs.\textsuperscript{75} In TNR programs, people capture cats, vaccinate and spay or neuter lack of adequate seedling, small tree and shrub representation in the understory\textsuperscript{\textdagger}). \textit{Id.}

\textsuperscript{67} See White-Tailed Deer Plan, supra note 63.
\textsuperscript{68} \textit{Id.} at 20.
\textsuperscript{69} \textit{Id.} at 27-28. The leading deer contraceptive, Gona-Con, is an injected contraceptive that renders female deer infertile for one to four years. However, it requires retreatment for continued infertility after that period of time and is not a good option for a wide-ranging deer population. \textit{Id.}
\textsuperscript{70} \textit{Id.} at 36.
\textsuperscript{71} \textit{Id.} at 28.
\textsuperscript{73} \textit{Baltimore City Health Department Trap-Neuter-Return Program, City of Baltimore}, 2 (Feb. 2009), available at http://www.baltimorehealth.org/info/2009_03_06.TNRRegs.pdf [hereinafter \textit{Trap-Neuter}].
\textsuperscript{74} Chris Landers, Herding Cats: City Legalizes Feral Cat Trap Neuter Release Programs, \textit{City Paper} (Dec. 5, 2007), available at http://www2.citypaper.com/printstory.asp?id=14925. The original bill was City of Baltimore Council Bill 07-0753.
\textsuperscript{75} \textit{Trap-Neuter}, supra note 72.
them, and return the cats to the place where they were found – after clipping the tip from one ear so as to indicate that the cat has already been sterilized.\textsuperscript{76} The previous city policy was that feral cats who could not be adopted were euthanized,\textsuperscript{77} and anyone practicing TNR could be subject to criminal penalties for “abandoning” an animal.\textsuperscript{78}

TNR has its detractors who claim that it wrongly shifts the burden and cost of dealing with the cats from the city to the volunteer caregivers and sends the wrong message to cat owners who might abandon their cats if they see stray cats thriving in the city.\textsuperscript{79} Other critics call for feral cats to be euthanized, citing their impact on local wildlife; for example, one estimate states that “150 million free-ranging cats kill 500 million birds a year in the United States.”\textsuperscript{80} A North Carolina study conducted over seven years found that “colonies in which three quarters of the cats have been sterilized went steadily extinct in about 13 years. Colonies of unsterilized cats tended to increase in size.”\textsuperscript{81} Furthermore, as with rats, “killing the (unsterilized) cats . . . merely makes room for new ones.”\textsuperscript{82}

3. Recommendations

Between the two animals, feral cats seem more analogous to rats than deer. Although all three pests present common challenges to humans, cats and rats are both mainly found in urban settings, which is a significant factor in considering how to decrease their numbers. Furthermore, although deer are killed in order to manage their population, there is still an element of conservation at play. A 2007 survey indicated that “87% of Maryland citizens agreed or strongly agreed that deer are an important part of the balance of nature.”\textsuperscript{83} On the other hand, most people agree that, as with rats, ultimately the goal of TNR programs is to be rid of feral cats entirely.

\textsuperscript{76} Landers, supra note 73.
\textsuperscript{77} Baltimore City Health Department Trap-Neuter-Return Program (Feb. 2009), available at http://www.baltimorehealth.org/info/2009_03_06.TNRRegs.pdf.
\textsuperscript{78} Landers, supra note 73.
\textsuperscript{81} Landers, supra note 73.
\textsuperscript{82} Id.
\textsuperscript{83} White-Tailed Deer Plan, supra note 63 at 18.
Finally, the context of deer is not the appropriate lens for examining rats because killing, even if it is not generally employed by private citizens, is already Baltimore’s chosen method of rat control.

Baltimore could potentially find success by applying the basic TNR concept to rats. While actually trapping and sterilizing individual rats is not feasible, city officials could explore the option of replacing poison in rat-bait stations with an ingested contraceptive, which could yield a number of benefits. First, switching poisons with contraceptives would remove the possibility of harm to children or non-target animals such as pets. Second, permitting individual rats to remain in their colonies during their natural lifetimes would suppress the fertility of rats that had not received the contraceptive. Third, as discussed above, rats quickly grow wary of foods that make them sick. Because that would not be a risk with contraceptives – unlike poisons – rats would continue to eat the bait over the long term without having any suspicions aroused.

China developed a rat contraceptive in 2003 as a response to concerns regarding a link between rat and the disease SARS.84 Previously, the standard practice was to use chemical poisons, but that approach was unsuccessful due to rats’ rapid reproduction rates.85 It is not unreasonable to try something similar in Baltimore, particularly given that Johns Hopkins University has been at the core of rat research for many years. Baltimore would be the perfect laboratory for continued experimentation with this alternative form of pest control. As noted above, the rat population has not significantly declined in the last fifty years – although the human population of the city has. At the very least, it is time to try something new.

V. CONCLUSION

It is imperative that the law relating to animals is responsive to situations where one animal interacts with humans in a number of different roles. If the law fails to touch upon each of these functions, we risk leaving that species unprotected entirely. The law in Maryland leaves rats vulnerable to abuse because of their classification as vermin, even as great strides are being made in Baltimore to improve the treatment of other animals under the law –

85 Id.
particularly feral cats, which are also considered a pest and public nuisance.

If officials and legislators want to actually extol anti-animal abuse legislation, then it is time to turn the state’s collective attention to the predicament of rats. As seen in the cases of deer and cats, the legitimate objective of reducing a pest population does not require tolerance of shocking acts of abuse. The State of Maryland should criminalize “rat fishing,” as it is not a legitimate response to rats as pest, but rather is a sport driven by animal cruelty. Furthermore, Baltimore and other municipalities should try and eradicate rats by contraceptive, rather than poison, so that the persistent rat infestation which prompted rat fishing is no longer present to justify or support it.
EVERYTHING OLD IS NEW AGAIN: RESELLING VINTAGE FUR ITEMS MADE FROM ENDANGERED SPECIES

By: Abigail Salisbury*

I. INTRODUCTION

"There's always a way to wear fur. I wear it mostly on my back."1
-Anna Wintour, Editor-in-Chief of American Vogue

Fur has made a big comeback in the fashion industry in recent years,2 with fur pieces reappearing in high fashion. Some

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1 J.D. with Certificate in International and Comparative Law, University of Pittsburgh School of Law, 2007; B.A., Case Western Reserve University, 2004.
2 The September Issue (A&E IndieFilms and Actual Reality Pictures 2009).
designers who had previously shunned fur due to pressure from animal advocacy groups have changed their views and have embraced the material again. This evinces a significant shift in popular attitude from the “Fur is Murder” days when fur wearers feared having red paint thrown on their mink coats by animal activists. Yet despite the apparent change in opinion, many potential consumers are still wary about buying new fur apparel, feeling guilty that animals had to be killed to make it. At the same time, they do not want to buy faux fur as connoisseurs see it as a cheap substitute which lacks the luxuriousness and warmth of the real thing and is also made from petroleum products. Vintage fur is the most appealing alternative, then, for several reasons. A desire to emulate en vogue mid-century aesthetics, a reluctance to contribute to the killing of animals by creating a demand for new fur, and the appeal of wearing fur that is “recycled” or “green” (i.e. repurposing an item that already exists instead of making a new one), moves the modern buyer to satiate his or her appetite for glamour with vintage fur.

It is well-established and accepted public policy that killing endangered animals and selling their parts is undesirable in American society, because people recognize that there are a multitude of economic, cultural, social, scientific, and other types of interests served by preventing these species from going extinct. It has been a stated national goal to maintain and even increase their populations. Most understand and accept these notions, and whether or not individuals believe that killing and trafficking the parts of endangered animals is morally wrong, the general public recognizes that these activities are illegal. What is less clear, however (and what poses a major problem) is the issue of reselling items made of animals which are now protected under one or more endangered species laws. These animals were not protected at the time they were killed.

The average American is never going to head off on safari to poach leopards, but he or she may have Grandma’s Kennedy Administration era leopard coat lying in the back of a closet

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somewhere and might want to sell it for some extra money. That person, whether they know it or not, has to contend with a great deal of legislation enacted in the intervening years to regulate trade in endangered animal items. These laws make up a web of state, federal, and international regulations, and are poorly understood by the average person. Consequently, many online sellers of furs have no idea that they are trafficking in illegal items; the sellers believe that the sale of “pre-ban” items is sanctioned by law, or think that intent to break the law is required for prosecution. Potential sellers can also be emboldened and assured that they are doing no wrong because they see so many others selling similar pieces. A quick search on e-commerce sites such as Etsy or eBay, for example, will yield hundreds of vintage monkey capes, tiger coats, and other items made from animals currently protected as endangered species.

Because of this confusion and the resulting plethora of violations occurring on a regular basis, this article will attempt to clarify this area of the law so that the average person might navigate it. It will also explore the legal responsibility of the owners of the e-commerce sites which make these kinds of online transactions possible, who often turn a blind eye to this illegal activity or shift the burden of policing their sites onto the users themselves. This article will also investigate why the resale of older items matters. At first blush, many individuals believe that there are no negative effects from the resale of such products since the animals have already been dead for decades. Finally, this article will also advocate for stronger enforcement of the laws prohibiting these transactions and explain why online selling makes it easier than ever before to find violations.

This article does not take a stand on the longstanding ethical debate over whether it is acceptable to wear fur at all or to kill animals for any type of human use – apparel or otherwise. However, it does assume an interest in preventing the killing and trafficking of endangered animals in order to protect their dwindling numbers.

II. THE REGULATORY FRAMEWORK

It can be difficult for the average person, and even for those aware of the regulatory frameworks, to discern what is permitted and what is prohibited under the various laws controlling commerce in items made from endangered animals. Just the sheer number of statutes governing this area of law is daunting. For example, there is a law governing trade for marine mammals such as dolphins and walruses,\(^5\) several specific pieces of legislation concerning certain

\(^5\) Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1423h.
types of birds, protection for African elephants through regulation of the ivory trade, and a law prohibiting taking or trading some animals native to the Antarctic. This is by no means an exhaustive list, but it demonstrates the plethora of domestic laws one must navigate in order to stay on the right side of the law — and that is just the federal level. U.S. states and even localities often have their own systems of regulations specific to their geographic areas.

Knowing the statutes is one thing, but following them is another — even the federal government has been confounded by its own system. An audit revealed that garments made of endangered animal pelts were being improperly sold by the U.S. Marshals Service, whose agents were apparently unable to competently navigate the myriad regulatory schemes to distinguish which activities were sanctioned and which were not. This article will not delve into the many intricacies of the laws at the state or local level, but will make reference instead to the two main instruments which govern the types of animal material transactions taking place online in the United States today.

A. CITES

While the Convention on International Trade in Endangered Species of Wild Fauna and Flora, or “CITES” as it is usually known, was not the first attempt at international regulation in this area, it is the one which has endured. Earlier efforts were made in the form of the 1900 London Convention Designed to Ensure the Conservation of Various Species of Wild Animals in Africa which are Useful to Man or Inoffensive, as well as the 1933 London Convention Relative to the Preservation of Fauna and Flora in their Natural State [sic].

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These two earlier conventions made exceptions for the trade of items which would otherwise be prohibited but which had been purchased or taken before the laws took effect.\(^\text{12}\)

CITES was drafted in 1973\(^\text{13}\) and entered into force two years later.\(^\text{14}\) There are other international regulatory systems, but CITES is a major instrument with respect to international trade in these protected animals. Its primary purpose is to foster a system of international cooperation powered by signatory states’ own policies instituting domestic rights and responsibilities, functioning on the principle that “peoples and States are and should be the best protectors of their own wild fauna and flora.”\(^\text{15}\) More than 175 nations have become parties by signing onto CITES and putting it into force through their own processes of ratification and legislative implementation.\(^\text{16}\)

CITES can be thought of as an international system for engendering domestic legislation because its principles must be implemented through separate laws in each nation.\(^\text{17}\) It shapes, rather than replaces, domestic laws and speaks to how nations should proceed in trading with both party and non-party\(^\text{18}\) states. The Standing Committee can encourage parties to sanction non-compliant nations through collective trade embargoes, and this power has been used in the past.\(^\text{19}\) Also, under the Convention, parties with greater resources and experience have aided less able parties in capacity-building to improve compliance.\(^\text{20}\)

The Appendices to CITES list the various types and classifications of protected animals, with Appendix I including “all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation . . . .”\(^\text{21}\) Appendices II and III list animals which are in need of protection but not with the same sense of urgency as those in Appendix I.\(^\text{22}\) The instrument itself is fairly simple in its essence; its obligations merely require that “[t]he

\(^{12}\) Id.

\(^{13}\) CITES, supra note 10, art.XIX.


\(^{15}\) CITES, supra note 10, pmbl.


\(^{17}\) Sand, supra note 11 at 24.

\(^{18}\) CITES, supra note 10, art. X.

\(^{19}\) Sand, supra note 11 at 21.

\(^{20}\) Id. at 25-26.

\(^{21}\) CITES, supra note 10, art.II(1).

\(^{22}\) Id. at art. II(2) and (3).
Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof.\textsuperscript{23}

CITES distinguishes between items which were obtained prior to and subsequent to a nation becoming a party, and provides for an exception in cases\textsuperscript{24}

"[w]here a Management Authority of the State of export or re-export is satisfied that a specimen was acquired before the provisions of the present Convention applied to that specimen . . . [if] the Management Authority issues a certificate to that effect."\textsuperscript{24}

Parties are not required to provide for the issuance of such certificates permitting import or export of previously-acquired items and may determine which authority shall make these determinations according to that party’s own standards. In the U.S., the relevant authority is the Secretary of the Interior, acting through the U.S. Fish and Wildlife Service,\textsuperscript{25} and the process for obtaining the necessary certificates and permits for such objects is lengthy, confusing, and non-user-friendly.\textsuperscript{26} These factors tend to discourage applications, assuming an individual knew about the certificates or permits in the first place. Nonetheless, the process does exist.\textsuperscript{27}

\begin{flushright}
\textsuperscript{23} \textit{Id.} at art.VIII.
\textsuperscript{24} \textit{Id.} at art. VII(2).
\textsuperscript{25} 16 U.S.C. § 1537A(a) and (b).
\textsuperscript{26} 50 C.F.R. §§ 23.32-23.56.
\textsuperscript{27} 50 C.F.R. § 23.45, in relevant part:
\begin{enumerate}
\item \textit{Purpose}. Article VII(2) of the Treaty exempts a pre-Convention specimen from standard permitting requirements in Articles III, IV, and V of the Treaty when the exporting or re-exporting country is satisfied that the specimen was acquired before the provisions of CITES applied to it and issues a CITES document to that effect.
\item \textit{U.S. and foreign general provisions}. The following general provisions apply to the issuance and acceptance of pre-Convention documents:
\begin{enumerate}
\item Trade in a specimen under the pre-Convention exemption is allowed only if the importing country will accept a pre-Convention certificate.
\item The pre-Convention date is the date the species was first listed under CITES regardless of whether the species has subsequently been transferred from one Appendix to another.
\end{enumerate}
\end{enumerate}
\end{flushright}
The intertwinement of CITES and the Endangered Species Act, as well as CITES-related loopholes regarding the time of acquisition, make it difficult for an individual to enter into a commercial transaction for apparel made from an endangered species.

### B. Endangered Species Act

(3) For a pre-Convention Appendix-I specimen, no CITES import permit is required.

(4) The pre-Convention exemption does not apply to offspring or cell lines of any wildlife or plant born or propagated after the date the species was first listed under CITES.

(c) **U.S. application form.** Complete Form 3–200–23 (wildlife) or Form 3–200–32 (plants) and submit it to the U.S. Management Authority.

(d) **Criteria.** The criteria in this paragraph (d) apply to the issuance and acceptance of U.S. and foreign certificates. When applying for a U.S. certificate, you must provide sufficient information for us to find that the specimen meets all of the following criteria:

1. The specimen was removed from the wild or born or propagated in a controlled environment before the date CITES first applied to it, or is a product (including a manufactured item) or derivative made from such specimen.

2. The scientific name of the species is the standard nomenclature in the CITES Appendices or the references adopted by the CoP (see §23.23).

3. Live wildlife or plants will be prepared and shipped so as to minimize risk of injury, damage to health, or cruel treatment of the specimen.

4. For the re-export of a pre-Convention specimen previously imported under a CITES document, the wildlife or plant was legally imported.
Because of the hassle involved in selling and shipping internationally, and because it is easiest for U.S. sellers to use U.S.-based websites which draw domestic buyers, online sellers of vintage furs are likely to enter most frequently into domestic transactions in the course of regular business. There are many different domestic laws controlling trade in endangered animals and their parts, but the Endangered Species Act (sometimes referred to as the “ESA”) is the primary U.S. legislation controlling these activities. It is also representative of the principles behind most of the other laws in this area and sets forth the manner in which threatened ecosystems and animals are protected at the federal level. The ESA serves as the implementing legislation for CITES, and just as CITES itself expressly allows for parties to enact stricter and narrower domestic requirements on their own initiative, the ESA does not necessarily void or limit the scope of state laws. Rather, it provides that state laws may be more (but not less) restrictive than the federal ones.

The core goal of the ESA, as related to the sale of endangered animal furs, is to prohibit most commercial activities. It provides in the subsections relevant to the discussion in this article, that with regard to those species designated as endangered it is unlawful to import or export them; deliver, receive, carry, transport, or ship them in interstate or foreign commerce by any means whatsoever and in the course of a commercial activity; sell or offer them for sale in interstate or foreign commerce; or violate any ESA-authorized regulation pertaining to them.
The ESA does go on to carve out exceptions for pre-ESA property, but clearly states that the exception only applies, “[p]rovided, [t]hat such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity [sic].” It is permissible, for instance, to possess such an item, display it, or to will it to someone, as those activities are non-commercial, but not to sell it. There is special exempted status for “antique” items: those products made of animals protected under CITES and which have a documented age of more than 100 years old. These may be imported into the U.S. with a pre-Convention certificate if they have not been altered in any way using any endangered species parts since 1973. 34 It would be a very rare fur garment, though, which has withstood more than 100 years of accumulated wear and tear and which has not required any repairs (such as a patching with fur from a similar garment) for the last four decades. Also, it is likely that the necessary documentation – if it ever existed – would have been misplaced at some point over the years.

The other practical exception to the ESA is one of logistics. Because the ESA is federal legislation and Congress’s powers are limited by the Constitution, it only speaks to international, interstate, and Native American tribal matters. 35 The ESA does not address those transactions which are entirely intrastate in nature. Therefore, in theory, one might be able to sell a pre-ESA endangered animal item if everything about the sale took place within one’s own

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35 U.S. Const. art. I, § 8, cl. 3. “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”
state. The “theory” aspect of that statement is critical, because on a practical level it would be difficult to complete such a transaction in this modern era even if one’s state had no laws or regulations prohibiting the act. A seller would probably have to deliver the item in person, since sending it through the U.S. mail or via a common carrier could trigger federal postal regulations or in some other way amount to interstate commerce. More blatantly, if the item is listed through an online merchant or auction site, that item is essentially being advertised anywhere the Internet is available. There can be almost no realistic doubt as to the interstate commerce requirement being met when items are offered for sale on these websites.

Even something as seemingly local as putting an ad in the town paper could run afoul of the law since even many small newspapers have much of their content available online and could thus be fairly described as being part of interstate commerce. One might make the argument that only putting an advertisement on the Craigslist page for one’s city or adding a statement to an online Etsy merchant listing limiting the item to sale in a certain geographic area would be sufficient to avoid possible penalty or liability, but relying on that reasoning is certainly a risk. Whether it is a risk worth taking would be up to the individual, who would have to find a buyer willing to do the same. The method of payment also poses a problem, because credit cards and checks could be viewed as being part of interstate commerce due to the way financial institutions are organized. The intrastate loophole, inasmuch as it exists at all, is one which is being rapidly closed by technology.

III. THE POTHOLES OF GOOD INTENTIONS

Much of the literature and case law in this area is focused on intentional poaching, smuggling, and customs violations on a wider scale. The image that might come to mind when one thinks of a trafficker in endangered animal parts is that of a shadowy and callous career criminal who kills animals for profit and without concern for their dwindling numbers. It seems unlikely that a neighbor trying to be helpful by selling an elderly neighbor’s fur coat for her would be thought of in the same light as a poacher. The stay-at-home mom who wants to make extra money by reselling vintage clothing she buys at estate sales probably means no harm. However, even without nefarious intent these people can be traffickers as well.

36 U.S. Fish & Wildlife Service, supra note 34.
A. I Didn’t Mean to Break the Law!

Intent is not written into either the Endangered Species Act or CITES as a required element of any of their violations, and ignorance of the law is not a defense. Unfortunately, many people innocently run afoul of the law or misunderstand it. A consumer can often find online item listings marked as “pre ban” in which the seller has mistakenly interpreted the law as only prohibiting the sale of items made after a certain year. Even the language “knowingly violates” in the Endangered Species Act requires “that the government must only show a defendant acted with general intent to commit the act because Congress did not intend to make knowledge of the law an element of criminal violations.”

It is according to the same reasoning as the conference report cited below, and in accordance with the goal of efficient accomplishment of the law’s aims, that specific intent is not required to establish a violation of the Endangered Species Act:

[A jury] instruction on specific intent would render the Act ineffective because it would be nearly impossible to show that an accused intended to violate the Act. The Act in question is a regulatory statute to preserve endangered species, and criminal penalties attached to regulatory statutes should be construed to effectuate their regulatory purpose. Therefore, intent to sell the prohibited item – not intent to break the law, awareness of its status, or knowledge of the law’s text itself – is all that is required to meet the standard.

38 “The other jury instruction error claim by Ivey and Wallace is that the trial judge erred in failing to instruct the jury that the statute required specific intent. They argue 16 U.S.C. § 1538(c) is a statute that requires knowledge of the law by the accused. Their argument is wrong. The words of Section 1538(c) as well as its legislative history indicate Congress did not intend for it to be a specific intent crime. ‘The conferees do not intend to make knowledge of the law an element of either civil penalty or criminal violations of the [Endangered Species] Act.’ H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 26, reprinted in 1978 U.S. Code Cong & Admin. News 9484, 9493.” U.S. v. Ivey, 949 F.2d 759, 766 (5th Cir. 1991).


41 Ivey, supra, 949 F.2d at 766.
B. Refashioning

If one cannot sell one of these items, what can the owner do to maximize the ownership rights he or she does have? If one is stuck with an unsellable object, then one had might as well make the best of the situation. Perhaps it could be reworked and made new again so that the owner might get more enjoyment out of it. In fact, owners and fashion designers do precisely this for many older furs. In the fur industry this is referred to as “refashioning,” and it is a way to update a garment by cutting, refitting, and sewing the pelts into a more modern style. For example, an old-fashioned-looking full-length fur coat might be turned into a trendy fur vest or gilet, with the extra fur used as trim on other garments or accessories. This appears to be a sensible plan for many.

However, a person wishing to refashion might have to be careful. Some readings of the ESA suggest that it may have divested owners of the right to refashion:

That analysis does not speak to the age of the fur; it is very broad and all-encompassing. Such an interpretation could very well be read to imply that refashioning of these garments is flatly prohibited. The furrier would have to at least receive the item to work on it, deliver it perhaps several times to various specialists and may well have to carry it, transport it, or even ship it across state lines – all actions that seem to fall into the ambit of “apparel [being] made or sold.” Each of these steps, however, is specifically prohibited under the ESA, which does not specifically state that the item must change owners for transactions tangential to it to fall under the category of prohibited commercial activities.

IV. ARGUMENTS AGAINST REGULATING PRE-LEGISLATION FUR

In exploring the legal issues surrounding the sale of vintage fur, it is important to pause and examine what the policy considerations might be in this area and how they affect the debate. At first, such a comprehensive ban may seem pointless or unfair, but it is based on sound reasoning and provides for the most efficient administration of the law. It also sends an implied message that this sort of commercial activity is so heinous that it must be stopped altogether, placing a stigma on objects made from endangered species in a way that may reduce demand.

A. It Doesn’t Make any Sense!

Perhaps, one could argue, it is unreasonable to ban all endangered furs regardless of provenance, and therefore legislators must not have meant to make the sale of pre-enactment items illegal (assuming that such an exception could be inferred from the statutory language). This argument does not comport with historical legislative practice, however, “When Congress has meant to exempt lawfully taken items from the retroactive application of statutory prohibitions, it has taken care to do so explicitly.”

Despite the fact that a total legal prohibition on selling vintage endangered furs may seem harsh under certain circumstances, it does provide us with a clearer rule and does follow a logical pattern. If there was no complete ban, the potential for concocting a fraudulent story about inheriting an item or finding it somewhere would be high. Even if the person is honest, it is unlikely that he or she kept receipts for the merchandise for decades upon decades, or handed slips of paper down to descendants like family heirlooms. The problem is just as bad for law enforcement. In order to show that a given item was actually produced recently, federal prosecutors would have to consult experts in each case to identify the age of the fur each time. This would be very cumbersome, slow, and expensive. It is easy to see the inefficiency and cost involved in taking such a case to trial. The proceedings would amount to a battle of the expert witnesses, with both sides paying experts’ fees, conducting depositions of furriers, scientists, and other specialists, and calling them to the stand at trial to testify as to the age of every item every time. After all that effort, it still might not even be possible to satisfy the burden of proof by ever conclusively establishing the date of production.

Rulings in this area of law have endorsed the wisdom of complete prohibition. Similar laws exist to protect the feathers, not just fur, of endangered animals; as might be expected, parallel issues arise in analyses of their provisions. The same “time-of-taking” concept as above was evaluated in the context of the illegal sale of feathers taken before the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act took effect:

“The legislative draftsmen might well view evasion as a serious danger because there is no sure means by which to determine the age of bird feathers; feathers recently taken can easily be passed off as having been obtained long ago.”

In other words, the total-ban system is much more manageable, as no one has to worry about sorting out the permissible fur from the non-permissible fur. The alternative is a process which would be inefficient and prone to error and dishonesty. With a complete ban, on the other hand, battles of the experts are not necessary, and a bright line and easily-followed rule is established and known to all.

The total ban is more efficient, predictable, and equitable. If a garment is identified as having been made from an animal currently protected by the relevant legislation, then it simply cannot be put into commerce. Gray areas are removed, replaced by black and white definitions of right and wrong, creating a reliable, predictable, sensible, and efficient system.

B. It’s a Victimless Crime

One might question the purpose or effectiveness of applying the immense reach of this regulation intended to address modern conservation policy to items made from the fur of endangered animals which were killed decades ago. After all, the animal is already dead; no living animal is now harmed by selling its hide. Initially, this argument might be persuasive since the apparent goal of legislation like the ESA is to protect living animal populations from extinction. However, what at first seems like a simple issue becomes much more complex upon further analysis. Selling the remains of dead animals does indeed harm living ones.

1. Monkey See, Monkey Do

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46 16 U.S.C. §§ 668-668d.
48 Andrus, supra, 444 U.S. at 58.
The very foundation of the fashion industry rests on the principle that people want to follow trendsetters and obtain real or perceived status by copying their apparel and accessories. The many millions of glossy magazines sold to fashion-conscious consumers serve as proof of this idea each time they tell us what is “in” this season. Fast fashion manufacturers put out knock-offs of the designer gowns worn by starlets at events such as the Academy Awards within days so that fans may imitate their idols.

In keeping with that principle, a person who would never have thought of wearing vintage fur prior to seeing a celebutante wearing a monkey fur wrap on the red carpet may suddenly feel a need to have one for herself. Making vintage endangered species items available for legal sale would create a market with a finite number of goods, and once the garments became status symbols, demand would soon outpace supply.49 There are only so many 1930s-era capelets that can be dug out from the attics of grandmas, and there will always be sellers willing to utilize more dubious methods to profit from those who are determined to get what they want.

In examining the reasoning behind the statutes banning the sale of feathers from protected bird species, regardless of when they were taken, the Supreme Court took this concept into account and characterized Congress’ actions as a matter of legislating around inherent greed and temptation, which for some would be irresistible:

The prohibition against the sale of bird parts lawfully taken before the effective date of federal protection is fully consonant with the purposes of the Eagle Protection Act. It was reasonable for Congress to conclude that the possibility of commercial gain presents a special threat to the preservation of eagles because that prospect creates a powerful incentive

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49 One need only look to the fairly recent trend of feather hair extensions, made from the same rooster tail feathers that are used by fly fishermen. Once the hair industry’s supply ran out, those wanting the extensions turned to bait shops, exhausting their supply, as well.

both to evade statutory prohibitions against taking birds and to take a large volume of birds.\textsuperscript{50}

In other words, where there is a strong enough demand, people will seek to profit by becoming suppliers. They may not care where they got the fur, have too much concern over the exact species used to make the garment, or bother to find out that species’ population status. In fact, there would be an incentive to break the law and obtain as many pelts as possible.

Still, it could be argued that the average person would not want an illegal gorilla coat or some other similar item and therefore would not try to obtain one. What use would it be? Simply wearing it outside would be dangerous, taking the risk each time that someone might become sufficiently moved to contact law enforcement.\textsuperscript{51} This is true, but there are many illegal things that people still seek out and use despite the risks of being caught with them. Drug users abound in this country despite the high risk of prolonged incarceration and the efforts of the War on Drugs.

For some people, it may be the very illicit nature of the item which draws them to it. Not being able to showcase it does not diminish this allure. How is the person who wears the illegal coat about town any different from the many people who possess stolen artwork? Showing it off would be an admission of a criminal act for anyone who knew what the piece was or cared to look into the matter.\textsuperscript{52}

\section{2. Procurement}

Even if there was such a demand for these endangered furs that people would be willing to kill living animals, some argue that it would not matter. The assumption behind this belief is that there is virtually no real availability of new furs due to diligent efforts by various government agencies. It would thus be effectively impossible to obtain new garments made from these endangered animals in America:

It would be impossible as a practical matter for such apparel as tiger or leopard coats to be cut, manufactured or sold in the United States, even

\textsuperscript{50} Andrus, supra, 444 U.S. at 58.
clandestinely. To do so would require the joint conspiratorial activities of too many persons, needed to design, prepare, assemble, sell and transport the contraband furs, and the risks are simply too great. A new tiger or leopard coat may not be purchased at this time in the United States.\footnote{Fur Information and Fashion Council, Inc., supra, 364 F.Supp. at 19.}

However, it should be noted that the District Judge in that case was writing in 1973, at a time when fax machines were not yet in common use and the World Wide Web was still in the distant future. The average person of that time could scarcely have imagined the enormous leaps in communications technology made since that time. Indeed, the judge goes on to note just a few sentences later: "40% of the NY market continues to view television in black and white."\footnote{Id.} There is a world of difference between black and white TV and an iPhone equipped with Skype. Today it may well be possible, or even simple, for a person to obtain illegal animal skins and establish a conspiracy with others to bring them to market. In an age when people in Kenya can pay bills using their mobile phones,\footnote{Frank Langfitt, Mobile Money Revolution Aids Kenya’s Poor, Economy, NPR (Jan. 5, 2011), http://www.npr.org/2011/01/05/132679772/mobile-money-revolution-aids-kenyas-poor-economy.} e-mailing someone in Africa to ask about the particulars of procuring a lion hide is not necessarily farfetched.

An argument of impossibility also is likely based on an assumption that the furs would have to be imported from other nations since most of these creatures are indigenous to Africa or Asia. This assumption, of course, overlooks the fact that there are many non-native endangered species living in the United States as well. Last year’s intense media coverage of the unfortunate story surrounding the dramatic police pursuit of 56 dangerous animals on the loose in Ohio illustrates this fact. Their owner had released his endangered wolves, bears, big cats, and monkeys prior to committing suicide; sadly almost all of the animals were later shot by local law enforcement officers.\footnote{Josh Jarman, Quan Truong, Jim Woods and Brenda Jackson, Sheriff: 56 exotic animals escaped from farm near Zanesville; 49 killed by authorities, THE COLUMBUS DISPATCH, Oct. 19, 2011, http://www.dispatch.com/content/stories/local/2011/10/18/Wild-animals-loose-in-Muskingum-County.html.} Depending on widely-varying state laws, these types of animals can in some instances be legally kept as exotic pets, and can even be housed in unsecure facilities like the aforementioned Ohio farm. Since it is much easier to gain access...

C. It’s an Unfair Taking!

In the phrase that has come to be called the “Takings Clause,” the U.S. Constitution provides that “private property [shall not] be taken for public use, without just compensation.”\footnote{U.S. CONST. amend. V.} In the context of a ban on commercial use of pre-ESA items, it is not a physical removal of an item from a person’s possession which is at issue, but rather the legislative limitation of certain uses or rights associated with ownership of that item. This type of situation is known as a partial regulatory taking\footnote{Robert Meltz, \textit{The Endangered Species Act (ESA) and Claims of Property Rights “Takings},” Congressional Research Service, Apr. 21, 2011, at 6-7, http://www.nationalaglawcenter.org/assets/crs/RL31796.pdf.} which does not necessarily run afoul of the Constitution.\footnote{Courts generally assess these situations individually by using the facts-specific \textit{“Penn Central} balancing test,” which analyzes the “economic impact, the degree of interference with investment-backed expectations, and [the] ‘character’ of the governmental behavior in question. \textit{Id.}\footnote{Andrus, supra, 444 U.S. at 61.} See Omar N. White, \textit{Endangered Species Act’s Precarious Perch: A Constitutional Analysis under the Commerce Clause and the Treaty Power}, 27 ECOLOGY L.Q. 215 (2000).} Indeed, the urgency and special nature of conservation legislation has sometimes completely obscured concern over the issue of takings: “[A] traditional legislative tool for enforcing conservation policy was a flat proscription on the sale of wildlife, without regard to the legality of the taking.”\footnote{For a discussion of intrastate, rather than interstate, applications, see Bradford C. Mank, \textit{Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?} 36GA L. REV. 723 (2002).} With respect to the rights of those who possess lawfully-acquired pre-ESA garments and accessories, the law may have removed quite a few of the sticks in their bundle of property rights, but some twigs do remain. The ESA’s constitutionality has been questioned,\footnote{See Omar N. White, \textit{Endangered Species Act’s Precarious Perch: A Constitutional Analysis under the Commerce Clause and the Treaty Power}, 27 ECOLOGY L.Q. 215 (2000).} but its restrictions on interstate\footnote{For a discussion of intrastate, rather than interstate, applications, see Bradford C. Mank, \textit{Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?} 36GA L. REV. 723 (2002).}\footnote{Andrus, supra, 444 U.S. at 61.} and international commercial trade in these items have survived takings challenges on the basis that they do not totally prohibit economic activity in...
relation to such items. The restrictions on alcohol imposed by
Prohibition could be an apt analogy, although the ban on alcohol
relied on a constitutional amendment.\textsuperscript{64} The ESA does not take away
the owners’ rights to possession or intrastate commerce,\textsuperscript{65} nor does
it ban use, bequest, display, or activities for which one has been
granted a permit.\textsuperscript{66} Some of these actions may be limited by state or
local laws, removing more of the owners’ sticks, but at the federal
level on its own there is not a total taking. Even if there were, that
would not necessarily be unconstitutional:

“[I]n the case of personal property, by reason of the
State’s traditionally high degree of control over
commercial dealings, [one] ought to be aware of the
possibility that new regulation might even render his
property economically worthless . . . .”\textsuperscript{67}

As time goes by, the original purchasers of these items will pass
away, and those who inherit them will never have had any right to
reasonably expect to derive economic benefit from them in the first
place.

V. AREAS FOR IMPROVEMENT

The current regulatory system is a start, but it could most
certainly be better. It should be much easier for people to report
offenders and navigate the Byzantine system of regulations, of
course, but procedural issues and lax enforcement can effectively
defang the laws.

A. Federal Standing Requirements

What can the average citizen do if he or she sees a violation
and wants to put a stop to it? In theory, unless other actions have
been commenced by authorized officials or certain time periods
have not tolled, anyone can bring suit under the Endangered Species
Act by virtue of its citizen suit provision, which states in relevant part:

[A]ny person may commence a civil suit on his own
behalf (A) to enjoin any person, including the United
States and any other governmental instrumentality

\textsuperscript{64} U.S. Const. amend. XVIII, implemented by National Prohibition Act (1920, repealed 1933).
\textsuperscript{65} U.S. v. Kepler, 531 F.2d 796 (6th Cir. 1976).
\textsuperscript{67} Id. (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)).
or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.\textsuperscript{68}

However, not everyone wants to or can be private attorneys general. Not only is the average citizen unlikely to bring suit due to the immense expense, effort, and time which would be involved, but also case law has established that despite the citizen suit provision, plaintiffs must show separate Article III\textsuperscript{69} standing.\textsuperscript{70}

[T]he irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an “injury in fact” – an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” . . . Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” . . . Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”\textsuperscript{71}

Unless a plaintiff can show those elements, the suit cannot survive early motions to dismiss or motions for summary judgment\textsuperscript{72} and the court will not be able to assess the actual dispute. That added requirement, while in keeping with the reasoning of other cases requiring independent standing to take advantage of similar citizen suit provisions,\textsuperscript{73} both makes it much more difficult to successfully sue and also perhaps even nullifies what seems to be the plain language of the Endangered Species Act itself. The Act seems to be at odds with pertinent case law:

We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws,

\textsuperscript{68} Endangered Species Act, 16 U. S. C. § 1540(g).
\textsuperscript{69} U.S. CONST. art.III.
\textsuperscript{71} Id. at 560–61 (citations omitted).
\textsuperscript{72} Panel, Legal Standing for Animals and Advocates, 13 ANIMAL LAW 61, 66 (2006).
\textsuperscript{73} See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987).
and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.\textsuperscript{74}

It would appear, then, that the Endangered Species Act’s citizen suit provision seeks to permit the exact opposite of what is prohibited by that long line of holdings, often creating “a complete barrier to the courtroom.”\textsuperscript{75} The apparent conflict with regard to standing makes it difficult for average people to enjoin perceived violations, uses up valuable judicial time and resources, and increases litigants’ costs.\textsuperscript{76} A suit to enjoin the sale of endangered animal furs might not withstand these rigorous standing requirements. In short, standing hurdles must be lowered if the private attorney general clause of the Endangered Species Act is to have any meaningful legal effect.

Easing the standing requirements would ease the unnecessary and burdensome strain on litigants and federal courts, and would honor Congress’s plain language intention of permitting citizen suits under the Endangered Species Act. Since the minimum requirements to show standing have been well established in case law, it seems unlikely that any modifications to the tests would happen on the judiciary’s own initiative.\textsuperscript{77} It would be necessary, then, for the legislature to step in and take measures to modify the standards. This action does not seem to be contemplated by Congress at present, and in any event, there are signs that such an attempt by Congress might be struck down anyway:

The Court’s holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III. I agree that it would exceed those limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public’s nonconcrete interest in the proper administration of the laws.\textsuperscript{78}

Thus, the current standing requirements will likely remain in place for the foreseeable future unless and until some fundamental shift takes place. Creative lawyering and possibly a shift in focus from federal to state actions may be a way forward in the meantime.\textsuperscript{79}

\textsuperscript{74} Lujan, supra, 504 U.S. at 573-74.
\textsuperscript{75} Legal Standing for Animals and Advocates, supra note 72 at 66 (2006)
\textsuperscript{76} Id.
\textsuperscript{77} Lujan, supra, 504 U.S. at 572-73
\textsuperscript{78} Id. at 580-81 (Kennedy, J., and Souter, J., concurring).
\textsuperscript{79} Legal Standing for Animals and Advocates, supra note 72 at 73.
B. Simplicity, Consistency and Cooperation

In the Endangered Species Act, Congress stated that “all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purpose of this Act.”\(^{80}\) However, the interrelated and overlapping nature of regulations at the international, national, state and local levels makes them difficult for an individual—even one trained in the law—to navigate. It is unrealistic to expect that an online seller is going to seek out and ultimately find, read, and comprehend hundreds of pages of densely-worded legislation and then process all of that information in relation to his or her own situation just to sell a vintage fur for extra money. Even the websites for the relevant government authorities are not helpful for someone who just wants to ask, “Is this thing that I want to do going to get me in trouble?”

Instead of bombarding people with facts and circuitous statutes, it would be better to provide the public with clear statements of what is acceptable and what is not. The permit process and other interactions with these governmental bodies could be made much simpler overall. The Frequently Asked Questions (FAQs) portions of the agency websites should have realistic scenarios with instructions on how to proceed in a given situation and an easily-found “Contact Us” button that leads citizens to a properly and frequently monitored email address for any other questions. For those who are frustrated by having no simple way to report perceived violations in online sales, a user-friendly online form with a place to paste a link to an offending webpage would be very helpful; such a “tip” system might actually save time and effort on the part of various governmental bodies and law enforcement agencies.

In order to achieve the ESA’s goal of conservation as articulated above, it would behoove those responsible to follow the spirit of another objectives policy in the ESA, which states, “Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.”\(^{81}\) It is unclear why cooperation was only specifically mentioned in the context of water resource issues; it would seem that interagency cooperation would be beneficial in all aspects of implementation and enforcement of this type of legislation.

\(^{80}\) 16 U.S.C. §1531(c)(1).
Producing more regulations at all levels is not the solution, as the overlapping and seemingly conflicting proliferation of rules can easily confuse the public. In fact, it might be better to merge all pertinent endangered animal laws into one system, inasmuch as that is possible without infringing upon states’ rights. The goals should be consistency and collaboration; available resources must be put into cooperative efforts with other agencies and entities. Implementing outreach programs to help laypeople understand the laws would increase the public’s understanding and would make the relevant agencies and their processes less opaque in practice. Perhaps some of that work could be accomplished in conjunction with various non-governmental conservation groups. Also, it is likely that working with the online merchant websites themselves to raise users’ awareness of the legal issues involved in selling animal products would have a great impact on the unlawful sales of vintage endangered animal items.

C. Hold e-Commerce Sites Responsible

Both Etsy\textsuperscript{82} and eBay\textsuperscript{83} have statements on their sites against the sale of endangered species parts. For eBay, however, the best guide to navigating the policies and laws in this area came not from the site itself, but from a user,\textsuperscript{84} and Etsy makes it the user’s job to find and report offenders (called “flagging”\textsuperscript{85}). Even after flagging, listings may remain on the site until the issue is resolved. While crowdsourcing compliance is certainly helpful, these entities must take a more active role in prevention.

In perhaps the most well-known example of an e-commerce entity taking action against illicit activity on its own site, Craigslist imposed screening requirements and ultimately removed the “adult

\textsuperscript{82}EtsyDOs and DON’Ts: Prohibited Items, http://www.etsy.com/help/article/483#prohibited (last visited Apr. 9, 2012).


services” section from its listings. The move followed media scrutiny and extensive criticism of the section by law enforcement and the public, however, and it is difficult to say whether such a measure would have been taken absent the outside pressure.

Surely, as facilitators of the transactions, these types of online merchant websites have a high level of responsibility for what is being bought and sold through their services. Not unlike the owner of a consignment shop, they reap a fee and often a portion of the sale price, depending on the specific site’s policies, when an item listed on their site is sold. If that consignment shop owner took in a tiger coat from someone and hung it up for sale in the shop window, he or she would have some degree of legal responsibility for offering that illicit item for sale. In the same way, online merchant sites should be held accountable for aiding and abetting the illegal transactions which take place using their resources. They provide a medium for advertising the item, make it possible for the illegal sales agreement to take place, profit from the transaction, and complete the arrangement by collecting funds after the fact. In cases involving international sales, the online merchant services could even be opening themselves up to charges of smuggling, since they facilitate the sale of illegal merchandise prior to exportation. Although third-party businesses like PayPal, which allow for the online exchanges of funds, theoretically play a part in these transactions, they may be too removed from the actual action to be held to account.

D. Stronger Enforcement of Existing Laws

The online marketplace and increasing popularity of vintage items creates a larger pool of suppliers and buyers, but it also makes it easier than ever before to monitor and police these transactions. Traditionally, law enforcement would have had to allocate a portion of its limited resources to follow up on a tip or conduct undercover “sting” operations to find people selling these types of illegal

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88 U.S. v. James, 998 F.2d 74 (2d Cir. 1993).
goods and would have to catch someone in the act or raid a store or home. Today, however, an officer is only a click of the mouse away from finding as many violations as he or she would care to take action against. Most sellers make no effort to hide the identity of what they are advertising. Instead, they emphasize the type of endangered animal from which the item was made as a selling point. As suggested earlier in this article, were the responsible agencies to create user-friendly ways for people to report listings which they believe to be illegal, it would crowd-source some of the searching work and would give the public an empowering sense of participation in the process.

VI. CONCLUSION

Conservation of endangered species is a serious matter. It is unfortunate that the enthusiasm of those wanting to follow fashion trends has contributed to the drastic depopulation of once-plentiful but now-endangered animals, threatening their very survival. In the past, unregulated demand for status garments and accessories has resulted in dangerously low numbers of many of the world’s most beautiful creatures, and has driven some to extinction. Today, we fortunately recognize the importance of preserving these animals, and the United States has an extensive network of international, national, state, and local regulations to address the problem. Laws exist that are aimed at protecting endangered species from being hunted to extinction in the name of fashion.

As remnants of that earlier time, however, many serviceable items made from those endangered species still exist, and it is important for those who own such things to be able to determine what they are and are not able to do with them. As a general statement, while there are various loopholes and exceptions available to potential buyers and sellers, it is probably best to avoid trying to purchase or profit from these items. While such a complete ban on commerce in this area does create many restrictions and eliminate most opportunities for profit, it is the best approach for conserving these endangered animals, and provides a more predictable and efficient result should a legal issue arise.

There is still room for improvement, however, and until there is a reliably easy way to bring successful citizen suits under the Endangered Species Act, efforts directed at the federal system should be refocused. By encouraging interagency cooperation and outreach, as well as standardization and simplification of the various

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91 Ivey, supra, 949 F.2d at 762.
levels of regulation, it will be possible to better enforce existing laws and allow the public to understand and aid in achieving conservation goals. It should not only be the sellers and buyers of these endangered animal items who are prosecuted under the laws, though, and it is well past time for the online services enabling these transactions to be held accountable as well. Hopefully, these efforts will help ensure that in the future there will be only one way to sell fur from endangered animals, and that is not at all.
NOTES

TOROS, STEERS, ROPES, CAPES, AND COWBOY BOOTS: THE INHUMANE NATURE OF BULLFIGHTING AND RODEOS*

By: Jared Kaplan*

“Think occasionally of the suffering of which you spare yourself the sight”
– Albert Schweitzer1

I. INTRODUCTION

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1 Ethan Smith and Guy Dauncey, Building an Ark: 101 Solutions to Animal Suffering (2007), 60.
I. INTRODUCTION

In his famous novel Death in the Afternoon, Ernest Hemingway romantically described a bullfight in Spain: “Bullfighting is the only art in which the artist is in danger of death and in which the degree of brilliance in the performance is left to the fighter’s honor.” As Hemingway’s sentiments exemplify, bullfighting in Spain has often been described as an art form. The dusty bullfighting ring has not been viewed as a meager sports arena, but instead as a cultural pageant, painted with beautiful colors and costumes. The Matadors—or “fighters”—are brought out to the ring under the cover of great fanfare and a drum-roll. Dressed in the familiar costume known as the traje de luces or ‘suit of lights,’ the Matadors majestically ride out on horseback, remove their hats, and bow. Yet, hidden behind this cultural celebration is the villain, the “opponent” of the heralded matador—the bull, an animal that has been “subjected

2 Ernest Hemingway, Death in the Afternoon (1932), 26.
4 Id.
5 Id. at 3.
to what is perhaps the worst and most widespread form of animal abuse.” In fact, bullfighting is one of the oldest forms of animal cruelty disguised in the form of entertainment and culture, resulting in the killing of thousands of bulls every year. Consequently, “for years, animal rights groups in Europe have tried to get Spain to ban bullfighting.”

The efforts of these groups led to a historic measure taken by Spain in 2010. In response to a petition signed by 180,000 Spanish citizens, the Parliament of Catalonia voted to approve a bullfight ban. Although the ban only applies to one of Spain’s provinces, the measure still represents a great victory for animal welfare groups. In response to the growing anti-bullfighting sentiment in Spain, American rodeo promoters have begun to offer rodeos in Spain as an alternative to bullfighting. The belief is that seeing “cowboys rope and ride broncos” will provide an analogous level of entertainment and culture, with minimal animal cruelty.

Yet, this proposal relies on a flawed assumption—that American rodeos, unlike Spanish bullfights, are a significantly less cruel form of entertainment and cultural expression. Under the guise of promoting “rough-and-tough exercises of human skill and courage in conquering the fierce untamed beast of the Wild West,” rodeos commit daily acts of animal cruelty in many ways analogous to bullfighting in Spain. For example, “cows and horses are often prodded with an electrical ‘hotshot’... causing intense pain.”

Rodeo animals are frequently “discarded from rodeos and sold for

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8 Id.
10 Id.
11 Catalonia is one of the seventeen autonomous communities that make up the Kingdom of Spain.
13 Id.
14 Id.
slaughter.”\(^{17}\) Despite the documented instances of animal cruelty in both American rodeos and European bullfights, the laws in both Spain and the U.S. have consistently failed to provide protection for animals, most notably through exemptions from anti-cruelty statutes.\(^{18}\)

Therefore, based on a comparison of bullfighting in Spain and the rodeo in the U.S., this paper argues that both activities have been able to sacrifice the welfare of animals—in the name of cultural affirmation and societal entertainment—because of lapses in the laws in both the U.S. and Europe. Section II of this paper reviews the historical significance of Spanish bullfighting, explains how the current treatment of bulls and horses involved in Spanish bullfighting is inhumane, and analyzes the strengths and weaknesses of the different laws that regulate Spanish bullfighting. Section III explains how the rodeo transformed into a deeply treasured American tradition, discusses the numerous examples of physical and emotional abuse that rodeo animals endure, and explores the effectiveness of the laws that regulate U.S. rodeos. Section IV highlights the numerous similarities that exist between Spanish bullfighting and American rodeos, most notably with respect to the abuse of animals. Section V rejects the notion that the U.S. rodeo is a superior alternative to Spanish bullfighting—in regards to diminishing animal cruelty—and instead, offers solutions that seek to balance the cultural heritage of both sports with the need to provide enhanced protections for the animals involved. Instead, Spanish provinces and U.S. states should follow the recent developments in their respective countries and consider whether these activities are still in conformity with the evolving morals of the 21st century. Finally, this paper concludes by positing that, at a minimum, society must consider whether the evolving morals of the 21st century are consistent with the harming of animals for human pleasure.

\(^{17}\) The Humane Society of the United States, interview with C.G. Haber, D.V.M., Rossburg, Ohio, 1979.
II. TORO, TORO! THE NUMEROUS INSTANCES OF ANIMAL CRUELTY IN SPANISH BULLFIGHTS

Bullfights in Spain are deeply entrenched in the Spanish culture. As a result, lawmaking bodies in Europe and Spain have been reluctant to create laws that prohibit or deter bullfighting.\(^{19}\) Although individual provinces and cities in Spain have made progress in combating the cruelty of the practice, bullfighting has largely been able to continue unregulated.\(^{20}\) The unfortunate result of the desire to preserve this celebrated form of Spanish culture is the emotional and physical abuse of thousands of bulls and horses every year.\(^{21}\)

A. The Origins of Bullfighting in Spain

The origins of the modern day Spanish bullfight can be traced back to the time of 2000 B.C., in which bulls were worshipped as superhuman creatures.\(^{22}\) Historians also point to the cave drawings in Spain, which show Palaeolithic men fighting and killing bulls.\(^{23}\) During the Roman era, bull cults were created “with bulls being the object of both worship and sacrifice.”\(^{24}\) As a result, these cults viewed killing bulls as a method of garnering life-supporting strength, faith, and prayer.\(^{25}\) Even after these cults were disbanded due to the growing influence of Christianity, vestiges of bull worship


\(^{20}\) Id.


\(^{22}\) John Fulton, Bullfighting (1971), 5.

\(^{23}\) Id. at 3.

\(^{24}\) Ogorzaly, supra note 3, at 15.

\(^{25}\) Joseph Campbell, The Masks of G-D: Creative Mythology (1968), 211. One of these Roman bull cults was “the sacrificial cult of Mithras.” J.M. Roberts, History of the World (1993), 204. A Mithraic priest would slay a bull on a special religious platform; the bull’s blood “was [then] used to anoint the faithful...endowing them with strength, fertility . . . and immortality.” Kathleen Wheaton, Spain (1987), 102.
still remained.\textsuperscript{26} For example, when individuals were married in what is now modern day Spain, they would engage in the “medieval nuptial bed.”\textsuperscript{27} As part of the custom, the wedding party would rope a bull; the bride and groom would then stick darts into the bull.\textsuperscript{28} It is for this reason that many associate the modern bullfight with the celebration of marriage and affirmation of life.\textsuperscript{29}

In the Middle Ages, the Catholic Church began to use the bull as a representation of the devil: a figure with cloven feet and horns.\textsuperscript{30} Accordingly, many believed that the slaying of the bull was symbolic for the killing of the devil.\textsuperscript{31} By the late Middle Ages, every celebration and holiday involved a bullfight.\textsuperscript{32} Bull killing became an occupation of both commoners and outsiders.\textsuperscript{33} It was not until 1466 that bullfighting would undergo a significant change: bullfighting became an activity solely practiced by the Spanish nobility.\textsuperscript{34} The art of bullfighting became a display of prowess, royalty and wealth.\textsuperscript{35}

In the 1700s, bullfighting transformed into a spectator sport for the people; bullfighting was no longer limited to just Spanish nobility.\textsuperscript{36} It was around this time that the first record of bullfighting on foot occurred. Francisco Romero, who is credited with laying the framework for the modern bullfight, introduced the use of a red cloth in order to infuriate the bull.\textsuperscript{37} Romero is also credited with

\begin{footnotesize}
\begin{enumerate}
\item Timothy Mitchell, \textit{Blood Sport} (1991), 41.
\item \textit{Id.}
\item \textit{Id.}
\item Ogorzaly, \textit{supra} note 3, at 14.
\item Campbell, \textit{supra} note 25, at 20.
\item Ogorzaly, \textit{supra} note 3, at 16. Bullfighting’s deep roots in Catholicism have lead many commentators, such as Ogorzaly to affirm, “The bullfight today continues th[e] tradition as a quasi-religious ritual.” \textit{Id.}
\item Angus MacKay, \textit{Spain in the Middle Ages: From Frontier to Empire, 1000-1500} (1977), 170.
\item Ogorzaly, \textit{supra} note 3, at 20.
\item \textit{Id.} at 19-20 (discussing how in the 15th-century, “bullfighting emerged as the nearly exclusive preserve of the nobility”).
\item Americo Castro, \textit{The Spaniards: An Introduction to Their History} (1971), 593. For example, Castro claims that bullfighting became “an homage to chivalry, motivated by the books of chivalry, without any other purpose that of the exemplary display of course and noble effort.” \textit{Id.}
\item Ogorzaly, \textit{supra} note 3, at 22. Bullfighting began to lose popularity amongst the Spanish nobility, primarily because Phillip V and his Queen greatly detested the blood sport \textit{Id.} Bullfighting instead began to be supported by both commoners and peasants. \textit{Id.}
\item “Bullfighting: A Tradition of Tragedy,” \textit{PETACampaigns, available at} www.peta.com/cmp/ccircfs6.html. Although today a red cape is used, Francisco Romero’s original invention was a red cloth tied to the end of a
\end{enumerate}
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substituting the spear for a sword. Bullfighting continued to evolve in the 18th century, including several innovations that are still used today. Most notably, Joaquin Rodriguez Costillares was the first matador to wear an embroidered red suit, known today as the “suit of lights.” The modern bullfight has undergone some additional minor changes, including alterations in footwork and technique, introduction of a variety of weapons, horse padding, and female bullfighters.

While bullfighting has undergone a large amount of alterations throughout its several thousand-year history, the one consistency has been the cruelty to bulls. From 1948 to 1993, hundreds of bulls lost their lives for every four matadors killed in the ring. One large change is the authenticity of the fight. Ultimately, the bull is in such a weakened state by the time he enters the ring that “[a] little league team would have a better chance against the 2005 World Champion Chicago White Sox than any bull has in the arena.”

B. The Life of a Bullfighting Bull: Dismal at Best

The life of a bullfighting bull is tragic and disheartening. In any given year, over 40,000 bulls are stabbed and killed in Spain’s bullrings. Even before the bull is eventually killed in the ring, it must endure an immense amount of trauma, pain, and distress. Because the bull is handicapped before he is forced to fight for his life in the ring, critics of bullfighting have referred to the sport as a “misnomer, as there is usually little competition between a nimble, sword-wielding matador and a confused, maimed, psychologically tormented and physically debilitated bull.” Additionally, the

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38 Ogorzaly, supra note 3, at 23.
39 Id.
40 Id.
41 Fulton, supra note 22, at 13.
42 Ogorzaly, supra note 3, at 24.
44 Ogorzaly, supra note 3, at 24–25.
46 Id.
extreme pain and mental anguish horses undergo when used during bullfights is often overlooked.48

1. Life Before the Fight

A fighting bull lives a dismal life before it is forced to fight in a ring and must endure physical, emotional, and psychological abuse. First, at the age of two years old, bulls undergo a test for bravery.49 The test assesses “how well a bull responds to a ‘threat to his security.’”50 If a bull responds to the harassment by charging, he is rewarded with three more years of life until he is eventually killed in the bullring.51 Those bulls that fail the test are immediately killed.52 Much of the abuse the bull experiences is done to ensure that the bull plays his role as a convincing dangerous beast, yet in actuality poses little threat to the matador.53

Second, the majority of bulls are subjected to horn shaving, one of the most painful and rampant forms of abuse.54 The horn shaving process is completed with several painful tools including a hacksaw, file and sometimes a blowtorch.55 Without anesthetic, between five to ten centimeters of the bull’s horns are sawed off.56 The “exposed inner matter of each horn” is subsequently “stuffed back down towards the roots.”57 Horn shaving is not only painful, but also affects a bull’s ability to function normally, making them less dangerous to matadors. Essentially, “a bull’s horns are a sort of antennae” and “mutilating them amounts to depriving him of all his spatial perception.”58 Horn shaving is also emotionally abusive and traumatic.59 Although horn shaving is against Spanish corrida law, it is nevertheless still a common practice.

Third, since the late 1940’s bulls have been “confined to paddocks where they [receive] insufficient exercise–their weight consist[s] of fat rather than muscle.”60 These practices are still

48 Ogorzaly, supra note 3, at 8.
49 Id. at 3.
50 Id.
51 Id.
52 Id.
53 Id.
54 McCormick, supra note 7, at 42.
55 Ogorzaly, supra note 3, at 3.
56 Id.
57 Id.
58 Starozinski, supra note 43, at 1.
60 Robert Graves, “The Decline of Bullfighting,” in A Thousand Afternoons:
ongoing, “with more and more bulls born and raised in smaller and smaller spaces, and fed on pellets.”

A direct consequence of this practice has been the retarding of muscular development; bulls are in such a weak state that they often fall to their knees—from muscle exhaustion—in the ring. Furthermore, bulls are now more susceptible to diseases: in 1995 and 1996, thousands of Spanish bulls contracted tuberculosis. Bulls are also weakened from overfeeding. The purpose of this practice is to make the bull bloated, diminishing the bull’s agility and maneuverability.

Finally, bulls endure a vast array of other physical abuses tantamount to torture. Bulls are regularly beaten in the loins with sandbags, given constipating fodder, and injected with Novocain into their kidneys. Unfortunately, the list of abuses continues. Sometimes bulls have “400-pound sandbags dropped on their shoulders, while others are made to carry weight well beyond their frames.” Others “have their nostrils plugged to interfere with their breathing.” Bulls are also sometimes “given massive doses of Epsom salts to induce diarrhea, pain, and lack of coordination.” Petroleum jelly is rubbed in the eyes of bulls in order to blur their vision. Needles are sometimes inserted into the bull’s scrotum. Finally, bulls are usually drugged “either to subdue them if they are excitable or to stimulate them if they are docile.”

A study conducted at Salamanca University in Spain “found that 20% of the bulls used for fighting are drugged before they step into the ring.” Out of 200 bulls, the study found that “one in five had been given anti-inflammatory drugs, which masks injuries that could sap animals’ strength.”

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61 Ogorzaly, supra note 3, at 5.
62 Id.
63 Starozinski, supra note 43, at 1.
64 McCormick, supra note 7, at 43.
65 Ogorzaly, supra note 3, at 5.
66 McCormick, supra note 7, at 44.
67 Graves, supra note 60, at 116.
68 McCormick, supra note 7, at 44.
69 Hemingway, supra note 2, at 48.
70 Ogorzaly, supra note 3, at 5.
71 Id.
73 Id.
74 Id.
76 Id.
Ultimately, this abuse is the result of bullfighting promoters viewing bullfighting as primarily a moneymaking machine. The only way for promoters to make money, however, is for the bull to lose and the matador to declare victory. As one bullfight promoter notes, it is critical “to make the bull less dangerous . . . . This fight-fixing has got progressively more sophisticated. And the modern matador wants no risk at all–never mind being killed, they don’t want any wounds . . . .” The aforementioned abuses are viewed as necessary preparations and reductions to convince spectators that “the bull, frightened . . . [and] looking for a way out is actually “wild, uncontrollable, [and] unstoppable.” As a result of mistaking a bull’s fear for ferocity, spectators often have their “humanitarian instincts numbed.”

2. Eventual Death in the Ring

When the bull reaches the age of four, he is led to his death in the bullfighting ring. A traditional bullfight event in Spain usually involves six afternoon bullfights, with each fight lasting from fifteen to twenty minutes. Each fight consists of a matador (from the Spanish matar, to kill), his cadrilla –made up of three banderilleros (named for the weapons they carry, the banderillas), and two horse-mounted picadors (named for their weapons, the pics). Once the bull enters the ring, he is immediately harassed by the three banderillas–“they will try to weaken the bull by forcing him to chase them until he smashes into a burladero, the narrow wooden shield behind which these men are safe from the bull.”

After the bull is winded, the picadors enter the ring on horseback. Every picador rides a horse who has been blindfolded and whose saddle is covered in bulky prophylactic foam rubber.
Each *picador* also carries with them a long pole (a *pic*[^89]) that is very sharp and "shaped like a triangular pyramid, 'with straight edges of . . . cutting steel'."[^90] The *picadors* attempt to stab the bull with their lances in the muscular area of the bull's shoulders.[^91] This causes an immense amount of pain and a great deal of bleeding.[^92] In *The Dangerous Summer*, Hemingway wrote of "*picadors* bleeding the bull half dead, putting the cutting steel of the *pic* into the same hole and twisting and turning it . . . to bring his neck down so he would be able to be killed properly."[^93] The *pic*, however, is often placed in the wrong part of the bull. A study found that "often the jabs [are] not placed in the fleshy part of the bull's neck" and instead "tend to wrongfully land on the highest part of the . . . neck, the shoulders, or the back."[^94] However, jabs in these locations "can damage muscles, nerves, lungs, and ribs, which . . . will weaken the bull but not lower his head."[^95] Thusly, these jabs are completely useless for the *matador*, but extremely painful for the bull.

Next, the *banderilleros* attack the bull with their *banderillas*, "wooden stick[s] 27 inches long and tipped with a barbed iron point."[^96] They resemble small harpoons.[^97] The goal of the three *banderilleros* is to stab their *banderillas* into the muscular hump between the bull's shoulders.[^98] The pain of one barb is excruciating for the bull; however, six barbs in total are inserted into the bull.[^99]

Lastly, there is the final showdown with the *matador*.[^100] At this point, "the bull is weak and tired, and his breathing is labored."[^101] He is "already riddled with wounds, the *pics* in his back swaying as he moves, and, morbidly decorated as they are with ribbons, increasingly discolored by blood."[^102] The *matador* takes his large sword and drives it into the area between the bull's shoulder blades, piercing the bull's aorta.[^103] However, "killing the bull on the
first attempt is [only] fifty percent luck.” Tragically, when the matador “drives the sword too low down on the neck . . . he can puncture a lung and the bull will ‘vomit profusely.’”\textsuperscript{104} If the matador stabs the bull’s spinal cord, the bull will be permanently paralyzed.\textsuperscript{105} If the matador does make a clean or good kill, “the president of the corrida will give the matador permission to cut off the bull’s ear, or both ears, or even the tail.”\textsuperscript{106} Once the bull is dead, “a team of mules or horses will drag his lifeless carcass out of the arena” to be “carved up.”\textsuperscript{107} Although it was once believed that the meat from the bulls was donated to the poor, this is not true.\textsuperscript{108} The meat is actually sold to butchers or to the Civil Guardia.\textsuperscript{109}

3. \textit{Horses, the Frequently Overlooked Secondary Victim of Bullfights}

Bulls are not the only victims of bullfights. Every year, more than 200 horses are killed in bullrings.\textsuperscript{110} Horses used “in bullfights are blindfolded and sometimes have wads of newspaper stuffed in their ears so they don’t become scared by the charging bull or noise of the crowd.”\textsuperscript{111} Additionally, horses are provided with padding because the bull often gores them.\textsuperscript{112} Padding of the horse “began in the 1920’s thanks to the decisive influence of the Queen of Spain . . . who not only hated the bullfight but especially could not stomach seeing horses disemboweled ‘with their intestines hanging out of their abdomen.’”\textsuperscript{113} Horses are also “drugged with morphine or heroin before a fight to dull their reflexes, to desensitize them.”\textsuperscript{114} Some also believe that horses “have even had their vocal cord cut to keep them quiet if gored.” One matador claims that he has never “heard a gored horse cry out.”\textsuperscript{115} As Hemingway morbidly noted, it is

\begin{itemize}
\item \textsuperscript{104} Fulton, supra note 22, at 170.
\item \textsuperscript{105} Id.
\item \textsuperscript{106} Smith, supra note 87, at 30.
\item \textsuperscript{107} Id.
\item \textsuperscript{108} Ogorzaly, supra note 3, at 10-11.
\item \textsuperscript{109} Fulton, supra note 22, at 186. The Civil Guardia is a peacekeeping arm of the Spanish military that has both military and police functions. “Guardia Civil,” Spanish Vida, 2011, available at http://www.spanishvida.com/spain-today/police/guardia-civil/.
\item \textsuperscript{110} Id.
\item \textsuperscript{111} “Running of the Bulls...” supra note 47.
\item \textsuperscript{112} Ogorzaly, supra note 3, at 8.
\item \textsuperscript{113} Id. at 9.
\item \textsuperscript{114} Fulton, supra note 22, at 114.
\item \textsuperscript{115} Id.
\end{itemize}
incredibly common to see a bullfighting horse “tripping over its own entrails.” 116 Thus, while the abuse of bulls is often the paramount justification for prohibiting bullfights in Spain, horses are undoubtedly also the victims of the sport as well.


Bullfighting has been able to persist in Spain due to ineffective European and Spanish laws. 117 There are several different governing bodies that regulate bullfighting in Spain, including the European Union ("E.U."), the Spanish Federal Parliament, autonomous community parliaments, and city governments. Although the E.U. and the Spanish Federal Parliament have carved out exceptions for bullfighting 118 –allowing it to continue without difficulty– several autonomous communities, cities and towns have begun to take an active role in banning bullfighting in their localities. 119

1. The E.U.: Turning a Blind Eye to Spanish Bullfighting

Notwithstanding the numerous steps taken by the E.U. to protect animal welfare in Europe, bullfighting has continued to fall through the cracks. Paradoxically, the E.U. has otherwise “shown [strong] leadership and commitment to various animal welfare issues by introducing improvements in the way both farm and wild animals are treated.” 120 For example, in 1999, the E.U. “prohibited all battery egg production from 2012.” 121 Moreover, the E.U. prohibited

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116 Hemingway, supra note 2, at 7.
120 “For a Bullfighting-Free Europe,” supra note 117.
the veal crate in 2007, the gestation crate (starting in 2013), and has enacted more humane laws for farm animals.\textsuperscript{122} The E.U. also now requires that pigs “be provided with manipulable material . . . to satisfy natural rooting behaviors.”\textsuperscript{123} Additionally, the E.U. has implemented strong laws that limit the time period that farm animals can be put in continuous transport.\textsuperscript{124}

Pursuant to the Treaty of Rome, “the founding document of the European Community,” the E.U. currently maintains the power to curb the abusive practice of bullfighting.\textsuperscript{125} The Treaty “was recently amended to recognize that animals, including \textit{farmed animals}, are sentient beings, and that all European Union legislation and member states must pay full regard to the welfare requirements of animals in the formulation and implementation of the community’s policies on agriculture, research and transport.”\textsuperscript{126} However, the E.U. has provided numerous loopholes and exemptions in its regulations for Spain.\textsuperscript{127} For example, the E.U. has carved out an exemption in the Treaty of Rome, which states, “The [Treaty] . . . respects . . . the customs of the member states relating in particular to religious rites, cultural traditions and regional heritage.”\textsuperscript{128} Bullfighting falls into this category as a protected cultural tradition.\textsuperscript{129}

Much of the reason why the E.U. has been reluctant to impose restrictions on bullfighting is a result of Spain’s strong lobbying industry. The owners of bull-breeding farms “comprise a powerful lobby” that has heavily influenced the E.U.,\textsuperscript{130} successfully arguing that “Spain would not be Spain without [bullfighting].”\textsuperscript{131} In

\begin{footnotes}
\footnotetext[125]{\textit{Animal Rights: Current Controversies and New Directions}, eds. Cass R. Sunstein and Martha Nussbaum (2004), 222.}
\footnotetext[126]{\textit{Id. See} Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Nov. 10, 1997. (Emphasis added).}
\footnotetext[127]{Igra, \textit{supra} note 18.}
\footnotetext[128]{\textit{Id.}}
\footnotetext[129]{\textit{Id.}}
\footnotetext[130]{\textit{Fodor’s Spain 2010,} ed. Caroline Trefler (2010), 119.}
\footnotetext[131]{For a Bullfighting-Free Europe, \textit{supra} note 117.}
\end{footnotes}
fact, the E.U. even “subsidizes the breeding of fighting bulls” by providing “breeders [with] 200 Euros per bull per year on top of national subsidies.”132 Furthermore, the Spanish Federal Parliament has also applied strong pressures on the E.U.: Juan Carlos, the King of Spain, has stated, “The day the E.U. bans bullfighting is the day when Spain leaves the E.U.”133 Moreover, Spain’s Ambassador to the E.U., Francisco Javier Elorza Cavengt, has been very influential, claiming he “'bullet-proofed'” bullfighting by advocating for animal welfare legislation that specifically exempts respected cultural traditions.134 As a result, the E.U. has failed to provide any protections for bulls. In 2007 the E.U. merely “urge[d] Spain to end bullfighting” but it did not press the issue.135 Accordingly, those seeking to diminish the cruelty of bullfighting will likely need to rely on another regulatory body to enact influential legislation.

2. Federal Laws in Spain: Proactive for Many Animals Except for Bulls

Spain has provided minimal protection for bulls on the federal level, although it has shown a proclivity for improving the welfare of other animals. In 2007, the Spanish Federal Parliament enacted the Spanish Animal Welfare Act.136 The purpose of the law was to "lay the groundwork for a system of animal welfare and the offenses and penalties, and to ensure compliance with the rules on the protection of animals on the farm, during transportation, testing and sacrifice.”137 However, the Act specifically exempts all "bullfighting shows" throughout Spain.138 The Spanish Parliament has been proactive in protecting bullfighting in Spain.139

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136 Spanish Animal Welfare Act, supra note 118.
137 Id.
138 Id.
139 Anita Brooks, “Catalonia votes to ban all forms of bullfighting in nationalist move,” The Independent, Jul. 29, 2010, available at
Parliament passed “a law protecting bullfighting as a ‘cultural value’ to fend off” potential future prohibitions. The law includes “tax breaks to bullfight organizers” and establishes a substantial fine for those who violate the law. Furthermore, in 1992 the Minister of the Interior, Jose Luis Corcuera, presented new legislation repealing a 1929 law, which prohibited “children under the age of fourteen from attend[ing] bullfights.” As a result of the legislation, children are now “legally desensitized to animal suffering [at] an early age.”

The Spanish Parliament has provided some regulations for the treatment of bulls, but they are rarely followed and seldom enforced. For example, horn shaving and “other acts of willful injury are illegal, but the law is flagrantly violated.” The majority of regulations involving the actual bullfight tend to focus on procedure as opposed to specific treatment of the bulls. In fact, some laws actually require a certain amount of cruelty be inflicted: “By law, bulls … must receive a minimum of two pics each.”

Outside of bullfighting and cruelty against bulls, Spain has been relatively active—and in some instances progressive—in enacting animal welfare legislation. Spain often sends government officials and government sponsored charity workers to the Animal Legal Defense Fund’s program in London, England. Spain has also been active in protecting male piglets from cruel forms of castration. Spain recently amended Article 337 of the country’s Criminal Code, creating “much harsher penalties for animal abusers


140 Id.
141 Id.
142 Id.
143 Id.
146 Id. at 29.
in Spain.” This includes being “punished with [a] penalty of three months to one year imprisonment and disqualification from one to three years for the exercise of profession, trade, or business that is related to animals.”

This statute, however, excludes bullfighting.

Lastly, the Spanish Government recently enacted a law that is truly novel. Spain became “the first country to extend legal rights to apes.” The Spanish Parliament’s voted to approve “resolutions committing the country to the Great Apes Project, designed by scientists and philosophers who say that humans’ closest biological relatives also deserve rights.” However, Spanish citizens were perplexed “that members of [Parliament] should dedicate their efforts to trying to turn the country of bullfighting into the principal defender of apes.” A recent Time Magazine article posed a similar question: “How can Spain be so progressive in its treatment of one animal species, and so . . . traditional in its treatment of another?”

Therefore, the fact that Spain’s Parliament has repeatedly protected other animals besides bulls, demonstrates that the country does feel strongly about animal welfare, but believes that bulls are not worthy of the same or similar protections. Subsequently, cultural tradition appears to override the pain bull’s experience.

3. Autonomous Community Legislation and Anti-Bullfighting Cities

Unlike the E.U. and Spanish Federal Parliament, several of Spain’s autonomous community and city governments have proactively championed the banning of bullfighting in Spain. First, two of Spain’s autonomous communities have enacted legislative


150 Id.

151 Id.


153 Id.

154 Id.

bullfight prohibitions within their provinces. In 1991, the Canary Islands “banned bullfighting . . . as part of a wider law that aimed to protect domestic animals, singling out a ban on dog fights and the phasing out of cock fights.” However, because the Canary Islands are not seen as having a significant bullfighting tradition, the law received little resistance from mainland Spain. The scope of the law has also recently come into question. The law may not be as protective as it appears because, as one official recently argued, a “fighting bull is not a ‘domestic animal’ and hence the law [should] not ban bullfighting.”

Next, in 2010 Catalonia’s Parliament banned bullfighting “because of its alleged cruelty to animals after a citizens popular movement collected sufficient signatures to force a parliamentary vote on the issue.” The ban will take effect starting in 2012. Catalonia’s ban, in contrast to the Canary Islands, is viewed as a significant victory for anti-bullfighting advocates. Catalonia is “anchored in northern mainland Spain” where “bullfighting . . . enjoy[s] a strong . . . following.” Although a significant step, animal advocates have still accused the Catalan government of being hypocritical. Catalonia has refused to ban the activity known as bolus, “where fireworks are tied to the horns of a bull before it is run through a town.”

Catalonia’s bullfighting ban has influenced other autonomous communities to enact similar legislation. For example, Andalucía has recently put forward a motion to implement an analogous law. This motion is surprising, as Andalucía “is one of

157 Brooks, supra note 139.
160 Id.
161 Brooks, supra note 139.
162 The Reader, supra note 159.
163 Id.
the most noted [regions] for its bullfights.”\textsuperscript{165} Andalucía has also been designated as the region “of greatest concern to animal rights groups because it has no laws prohibiting cruelty to animals.”\textsuperscript{166} Andalucía’s regional parliament has agreed to give the ban serious consideration.\textsuperscript{167} In order for the ban to be implemented, “at least 75,000 signatures calling for bullfights to be outlawed have to be received from the voting public in Andalucía.”\textsuperscript{168}

Second, numerous cities and towns in Spain have declared themselves ‘anti-bullfighting cities,’ enacting legislation to ban bullfighting in their provinces. In 2009, “Barcelona declared itself an anti-bullfighting city following a series of public protests and a petition of more than 250,000 Catalan names.”\textsuperscript{169} Several resort towns in Spain, including Tossa de Mar, Vilamacolum, and La Vajol have banned bullfights.\textsuperscript{170} In total there are 70 ‘anti-bullfighting cities,’ the majority located in Catalonia.\textsuperscript{171}

Therefore, an examination of the laws regulating bullfighting in Spain demonstrates how influential smaller cities and towns can be in prohibiting bullfighting. The E.U. has willfully ignored the tragic treatment of bulls, while simultaneously providing enhanced rights for other animals. Similarly, the Spanish Federal Parliament has attempted to provide an animal with more rights – in some cases, acting progressively – yet has continuously excluded bulls. Although the ‘anti-bullfighting cities’ and autonomous communities’ bans are strictly limited to their own provinces, a powerful movement has emerged as a result of these localities leading the way. Protests are being staged at almost every bullfighting festival, and more Spanish provincial governments are considering bullfight

\begin{footnotes}
\item[165] Id.
\item[167] The Reader, supra note 164.
\item[168] Id.
\item[170] Dr. Steven Best, supra note 145.
\item[171] Id.
\end{footnotes}
The fire for improved treatment of bulls in Spain certainly has been kindled.  

III. THE AMERICAN RODEO: SUBJUGATING ANIMALS IN THE NAME OF FRONTIER SPIRIT

Like bullfighting in Spain, the American rodeo has maintained popularity because of its recognition as a cultural phenomenon, closely tied to patriotism and nationalism. In fact, many Americans view the rodeo as one of the country’s last grips on the traditions that helped shape America. Consequently, many states have been unwilling to ban or impede the rodeo. Instead, states have provided exceptions from their animal anticruelty statutes or deferred heavily to the professional rodeo organizations to regulate themselves. As a result, thousands of bulls, horses and calves have been subjected to mental trauma, physical abuse and painful deaths.

A. The Development of Rodeos in the United States

America has always maintained a love affair with the American cowboy. This fixation began in the late 19th century with the development of the cowboy myth, in which society viewed the cowboy as “the hero of, ostensibly, the last American frontier.” Long after the Wild West was nothing more than an anecdote, the mystique of cowboys still remained. This was primarily the result of the growing range cattle business in the United States. The

172 Id.
173 Id.
174 Quaid, supra note 15.
175 Id.
176 Allen, supra note 18.
177 Id.
178 Quaid, supra note 15.
179 See, e.g., The Dallas Cowboys, the University of Wyoming Cowboys, and the Marlboro Man.
181 Id.
182 Id.
range cattle drivers, or cowboys, were required to maintain a high level of precision and skill in order to complete their jobs.\textsuperscript{184}

Professional rodeos are undoubtedly a direct descendant from the cowboy life and occupation, including traits and instincts that the working cowboy and the professional rodeo contestant share.\textsuperscript{185} By the early 20th century, the U.S. was fascinated with the cowboy's sports-manlike instincts and skills.\textsuperscript{186} Consequently, people came from all over the U.S. to watch the cowboy complete his work.\textsuperscript{187} In response to this growing interest, cowboys from various ranches began competing in cowboy games – to more effectively entertain their growing audience – pitting their skills against one another.\textsuperscript{188} This admiration for the cowboy's life and work influenced individuals, such as William F. Cody, to bring cowboy games into the public eye as entertainment.\textsuperscript{189}

In the early 20th Century, rodeo began its transformation into a competitive spectator sport.\textsuperscript{190} In order to legitimize the rodeo as an actual sport, rodeo promoters formed the Rodeo Association of

\textsuperscript{184} Fredriksson, \textit{supra} note 180, at 9. The unique skill sets of cowboys are well documented in historical accounts. As one journalist explains, the cowboy occupation was said to require “a strong constitution…an active mind…a steady nerve . . . [and] a fearless spirit.” Thomas Holme, “A Cowboy’s Life,” Chatauquan 19 (Sept., 1894): 731. The cowboy was thus not viewed as “any wild and reckless man” who could merely handle a gun, but instead was “an occupation that required certain very special qualifications.” Fredriksson, \textit{supra} note 180, at 9. However, the cowboy profession was purely seasonal and as a result, cowboys began to seek other occupations in order to generate a supplementary income. Holme, \textit{supra} note 184, at 731-32. This desire for an ancillary occupation, as well as the cowboy’s desire to be self-employed directly led to the first rodeos in the United States. \textit{Id.}

\textsuperscript{185} Fredriksson, \textit{supra} note 180, at 9. \textit{See also} John Baumann, “Experiences of a Cow-Boy,” Lippincott’s Magazine 38 (Aug., 1886): 314 (describing how the “cowboy was said to be possessed of ‘sportsmanlike instincts’ which were manifested in the execution of his daily tasks with his fellow cowboys, even though not yet in any kind of competitive situation”).

\textsuperscript{186} Arthur Chapman, “The Cowboy of Today,” World’s Work 8 (Sept., 1904): 5772. Spectators who came to see the cowboys were fascinated with the “cowboy at play, even more, in the contests of professional skills he staged in connection with the completion of a trail drive.” Fredriksson, \textit{supra} note 180, at 10.

\textsuperscript{187} \textit{Id.}

\textsuperscript{188} \textit{Id.} at 10-11.

\textsuperscript{189} \textit{Id.} at 10.

\textsuperscript{190} \textit{Id.} at 21.
Official rodeo events included bronco riding, bull or steer riding, calf roping, steer roping, steer decorating, steer wrestling, team roping and wild-cow milking. Professional rodeos began to develop a noble position in the eyes of the media as well. Several publications featured cover stories on the rodeo, and new publications were developed to cater to the growing rodeo enthusiast, helping the sport gain greater acceptance amongst a large portion of the American public. By the late 1930s, the rodeo sport expanded all over the United States. In 1936, New York’s Madison Square Garden’s nineteen-day rodeo was seen by a quarter of a million spectators. Rodeos in Cheyenne, Wyoming; Pendleton, California; and Denver, Colorado each boasted over 100,000 spectators. The rodeo had shifted from an organized amateur sport to a serious professional competition.

191 Id. at 21-22. In the early 20th century, the popularity of the rodeo actually declined. This was chiefly due to the rodeos growing reputation as an organized circus. While the focus was still on the cowboy’s skills, the rodeo also intertwined “circus and carnival elements of the touring wild west shows” including “military drill teams, Bedouins and Cossacks, snake charmers, sword swallowers, and the like.” Id. The carnival like atmosphere painted “rodeo’s image as one of ‘wild, loose figured men who . . . followed the unorganized shows at the turn of the [20th century].” As a result of the show being less focused on the cowboy’s skill sets and prowess, rodeo’s popularity declined. Id.

192 Fredriksson, supra note 180, at 22.


194 Fredriksson, supra note 180, at 53. For example, Hoofs and Hornswas created in 1931, and devoted “its pages . . . to rodeo, listing upcoming shows.” Id. at 55. Moreover, The Western Horseman magazine advertised itself as the “Official news of the Palomino Horse Association, the Contra Costa Horseman’s Association, the Hayward Rodeo, the Livermore Rodeo, Atascadero Golden Spur Club, the Mother Lode Rodeo, [and] the Reno Rodeo.” Id.

195 Id. (asserting that these “well-written articles on rodeo and rodeo cowboys...undoubtedly did much to help the sport and its participants gain acceptance and popularity in wider and wider circles”).


198 Id.

199 Fredriksson, supra note 180, at 57.
The U.S. rodeo also expanded and gained popularity as a result of its function as a morale builder during World War II. Rodeo promoters “were able to take a negative set of conditions and make it work in favor of the sport and of the country as a whole.” Essentially, “the competing cowboys represented, to the people at home, the fighting men overseas, and parallels were drawn between fighting the enemy and conquering the animal in the arena.” Rodeos were now infused with the sights, sounds and colors of patriotism. The rodeo sport also gained widespread popularity in U.S. Army camps through all-soldier rodeo competitions. All in all, the rodeo had become synonymous with patriotism, an association the sport still maintains today.

200 Id. at 65. Even though the majority of rodeo cowboys were drafted into military service, the profession was able to survive as a result of the “enlisted cowboys [ability to] retain their competitive [western] spirit even as soldiers.” Id. Cowboys turned soldiers viewed battle as a rodeo competition. As one ‘soldier-cowboy’ boasted, “I'll ride those fighter planes for day money every time I climb aboard and show those Japs [sic] they are just riding for mount money.” This and That,” Hoofs and Horns 12, no. 6 (Dec., 1942).

201 Fredriksson, supra note 180, at 67. Fredriksson claims that the rodeo, like other sports such as baseball, maintained a unique purpose during World War II. Id. Ultimately, “rodeo spectators identified with the contestants, and because courage was such a vital element in the competition as well as in war, some of that quality was instilled in them at every rodeo they attended.” Id. Similarly, “it was stressed that those cowboys who were not in the armed services owed it to their fellow contestants who were serving their country to keep the sport alive in their absence.” Id. The remaining participants were encouraged to “make the public feel that you are THEIR boys, just as they feel toward the men in uniform.” Chuck Martin, “The Place of Rodeos in National Defense,” Hoofs and Horns 11, no. 9 (Mar., 1942): 4.

202 Fredriksson, supra note 180, at 69.


204 “All Soldier Rodeo,” Hoofs and Horns 12, no. 5 (Nov., 1942): 10. Rodeo’s popularity grew rapidly after it was first introduced to army bases during WWII. Id. Soldiers themselves became willing participants. Id. By 1944, military officers “could obtain information on how to organize an army-camp rodeo.” Fredriksson, supra note 180, at 70. The fact that the rodeo was being brought into armed service camps demonstrated the growing popularity of rodeo: first, “the high degree of participation by the soldiers demonstrated the influence [rodeo] had by now achieved;” and second, “holding rodeo at military camps, where men from all over the country were stationed, served to make the interest nationwide in scope.” Id. The rodeo also served as a morale builder for the soldiers. In a letter to the
The momentum that the rodeo enjoyed in the first half of the 20th century continued into the latter parts of the 20th century as well. Rodeo events exploded in numbers and the attendance and participation grew as well. Rodeo continued to receive a large amount of national publicity, as “coverage by national magazines nearly doubled” in the latter half of the 20th century. The sport was regularly featured in national publications such as *Time*, *Newsweek*, *Life*, *The Saturday Evening Post* and *Sports Illustrated*. Moreover, rodeo’s growing popularity was exemplified by its spread into collegiate athletics. As a result of the formation of the National Intercollegiate Rodeo Association (NIRA), rodeo became a standard collegiate sport at numerous schools in the western United States. Young children began to train at young ages to earn rodeo scholarships, and rodeo began to attract men who were entirely committed to a career in rodeo. Although the rodeo has undergone some changes, the sport’s events, association with patriotism and cowboy mystique still remain intact.

secretary of the RAA, one U.S. Army colonel posited, “The rodeo held in [our] locality ‘was one of the finest morale builders for the army of any other community event’.” “Real Job Lies Ahead for Rodeo Profession,” *RAA Bulletin*, notes. 6, no. 3 (Mar., 1942); *Hoofs and Horns*, no. 10 (Apr., 1942): 12. The 1944 Madison Square Garden Rodeo was even “recorded by the Office of War Information for broadcast to U.S. Armed forces overseas.” Jerry Armstrong, “The Collegiate Cowboy’s Column,” *Western Horseman*, no. 1 (Jan-Feb., 1945): 14.

Fredriksson, *supra* note 180, at 78.

Fredriksson, *supra* note 180, at 88. Beyond the desire to “celebrate old-times values by witnessing a recreation of the old west” the audience continued to grow because of another phenomenon: “the inherent lack of identification with rodeo events.” *Id.* Unlike other sports such as tennis and basketball where “it [was] relatively easy to take up and become reasonably proficient” it was “extremely difficult for the average spectator to find an opportunity not only to learn rodeo events but also to become a skilled rider or roper.” *Id.* at 88-89. This factor continued to make rodeo “an attraction unlike any other spectator sport.” *Id.*

Fredriksson, *supra* note 180, at 88. As a result of the growing commitment of rodeo contestants, the sport of rodeo was further given society’s stamp of approval. *Id.*
B. Roping, Wrestling, Shocking and Tackling: The Widespread Animal Cruelty in Rodeo

The American rodeo is rampant with animal cruelty that is often overlooked mainly due to the cultural appreciation of the sport. As a result, loopholes and exemptions for rodeos in State and Federal law have been created.\textsuperscript{212} Cruelty to rodeo animals has occurred ever since competitions were first organized in the U.S. For example, numerous occurrences of steers suffering broken bones and then being killed have been reported.\textsuperscript{213} Unfortunately, animal cruelty at rodeos has not decreased over time, but instead has been exacerbated.

Rodeo animals undergo a significant amount of mental and emotional anguish before, during, and after rodeo events.\textsuperscript{214} Anti-rodeo advocates “argue that rodeo exploits animals’ reaction to pain, fear, and stress.”\textsuperscript{215} Even without being physically struck, “the noise, alien surroundings and stress of being chased can cause extreme fear.”\textsuperscript{216} Dr. Temple Grandin, a noted animal behaviorist, argues, “Fear for an animal is ‘so bad’ . . . that it is worse than pain.”\textsuperscript{217} He further claims, “The single worst thing you can do to an animal emotionally is to make it feel afraid . . . . Even an animal who is completely alone and giving full expression to severe pain acts less

\textsuperscript{212} Allen, supra note 18.
\textsuperscript{213} Article Circle Productions, “Using range animals for rodeo sports,” The Latham Foundation, 2011, available at http://www.arcticproductions.com/From_Cheyenne_to_Pendleton/Animal_Rights_and_the_Rodeo.html. For example, in the audience of the South Dakota rodeo were two distinguished guests who both witnessed the brutal killing of a steer: President Calvin Coolidge and the First Lady Grace Coolidge. Id. Ironically, the First Lady was a staunch animal rights supporter, and as a result, a letter from the Anti-Rodeo League was immediately sent to President Coolidge to advocate for future legislation. Id.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
incapacitated than an animal who’s scared . . . An animal in . . . panic can’t function at all.”\textsuperscript{218}

Many of these animals are in a constant state of fear.\textsuperscript{219} For example, during the Omak Stampede Suicide Race at the rodeo in Omak, Washington, “event horses are forced to plunge over a cliff (62 degree angle) and run at high speed almost straight down for 225 feet into a river, which they must cross and then gallop another 500 yards uphill.”\textsuperscript{220} The horses that take part suffer incredible panic and fear.\textsuperscript{221} Since 1984, “twenty horses have died, and numerous others have been [emotionally] traumatized.”\textsuperscript{222} Similarly, the stress incurred by horses during Chuckwagon Races—a race in which “several teams of horses [pull] wagons in a figure eight course . . . and [race] at high speeds to the finish line”—has resulted in nearly 50 horses dying from heart attacks.\textsuperscript{223}

Rodeo animals also suffer emotional duress even before making it to the rodeo. The animals “endure the stress of being forced to constantly travel in cramped trucks and trailers that are often improperly ventilated; feeding and watering does not always occur regularly.”\textsuperscript{224} In 2005, horses destined for a rodeo event were being herded across a bridge; however, fear caused some of them to jump into the water, while others were also pushed into the river.\textsuperscript{225} Nine horses died as a result.\textsuperscript{226} Rodeo animals undoubtedly suffer a great deal of stress and fear, which causes them to live in a state of panic.\textsuperscript{227} Although the public relations department of the Professional Rodeo Cowboys Association (“PRCA”) claims that “most

\begin{itemize}
\item \textsuperscript{218} Temple Grandin and Catherine Johnson, Animals in Translation: Using the Mysteries of Autism to Decode Animal Behavior (Scribner, 2005), 190.
\item \textsuperscript{219} Canadian Television Staff, “Calgary Stampede kicks off with fireworks, parade,” CTV Online, Jul. 9, 2010, \emph{available at} http://www.ctv.ca/CTVNews/Canada/20100709/stampede-calp-roping-100809/.
\item \textsuperscript{220} Allen, supra note 18.
\item \textsuperscript{221} Id. supra note 18.
\item \textsuperscript{222} Id.
\item \textsuperscript{223} VHS, supra note 215.
\item \textsuperscript{224} In Defense of Animals [IDA], “Rodeo: Facts,” 2011, \emph{available at} http://www.idausa.org/facts/rodeos.html.
\item \textsuperscript{225} “Deadly Accidents at the Calgary Stampede,” CBC News Online, Jul. 4, 2005, \emph{available at} http://www.cbc.ca/news/background/calgary_stampede/.
\item \textsuperscript{226} Id. supra note 18.
\end{itemize}
[rodeo animals] actually enjoy what they are doing,"228 the aforementioned instances of emotional trauma and cruelty make this assertion difficult to accept.

In addition to the fear generated by emotional stress, rodeo animals also are forced to endure a significant amount of pain and often succumb to death. While "rodeo cowboys voluntarily risk injury by participating in events, the animals they use have no such choice,"229 Author Gerald Carson asserts that rodeos are simply "cruelty packaged as Americana" and "our modern recreational equivalent of the public hanging."230 Even if equating the rodeo with a public hanging is exaggerated, the rodeo nevertheless "hinges on the violent subjugation of living animals, some of which are deliberately incited to frenzied violence by raking them with spurs, constricting the genital region with leather straps, or by thrusting an electric prod into the rectal area."231 Author W.K. Stratton explains, "Without question, rodeo exploits animals for the entertainment of humans, causing injury and death to hundreds of horses and cattle each year."232

The rodeo events that cause the most serious injuries include: (1) bucking; (2) steer wrestling; (3) wild horse roundups and races; and (4) calf-roping.233 These events cause serious injuries, often resulting in the death of rodeo animals, as a direct consequence of the use of electric prods, ropes, and ill-fitting saddles during bucking;234 pushing animals to race at high speeds resulting

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230 Fredriksson, *supra* note 180, at 160.
231 Serpell, *supra* note 228, at 225.
234 Id. at 117 (during bucking events, “horses and bulls break their legs, and injuries to the skin are common from bucking straps”). See also Hattie Klotz, "Bucking Bronco Dies in Corel Center Rodeo," The Ottawa Citizen, Aug. 9, 1999 (during a Can-Am Rodeo, a terrified and screaming young horse burst out of a chute and “slammed into a fence and broke her neck”); Renate Robey, "Horse Euthanized After Show Accident," Denver Post, Jan. 16, 1999 (in the National Western Stock Show, “a horse crashed into a wall and broke his neck, and another horse broke his back after being forced to buck”); Steve Lipsher, "Veterinarian Calls Rodeos Brutal to Stock," Denver Post, Jan. 20, 1991 (According to veterinarian Dr. Cordell Leif, who has
in deadly levels of exhaustion;\textsuperscript{235} and forcing animals to undergo unnatural bodily contortions during steer wrestling\textsuperscript{236} and calf-roping.\textsuperscript{237} All of these injuries are avoidable and are staged merely for their supposed entertainment value.

witnessed numerous injuries, “Bucking horses often develop back problems from the repeated poundings they take from the cowboys. There’s also a real leg injury where a tendon breaks down. Horses don’t normally jump up and down”).

\textsuperscript{235} “Another Horse Dies at Stampede,” CFCN-CTV, Jul. 13, 2001. For example, “by the end of the nine-day Calgary Stampede in Alberta, Canada, six animals were dead, including a horse who died of an aneurism and another who suffered a broken leg.” \textit{Id.} The next year, “six more animals died . . . in the Chuckwagon” races. “Stampede Animal Deaths Worry Humane Society,” CBC News Online, Jul. 15, 2002. During the 2004 Suicide Race at the Omak Stampede in Washington (State), three horses were killed. \textit{Id.} In the past 20 years, 19 horses have lost their lives during the Omak Stampede. \textit{Id.}

\textsuperscript{236} See, e.g., IDA, \textit{supra} note 224. During a steer-wrestling event, one cowboy –the hazer– “keeps the steer running in a straight line while a second mounted cowboy chases the steer, grabs him by the horns and forcibly twists the steer’s neck and slams him to the ground.” \textit{Id.} At the Houston Rodeo, “a bull suffered from a broken neck for a full 15 minutes before he was euthanized following a steer-wrestling competition.” “Steer suffers broken neck during top wrestling run,” Houston Chronicle, Mar. 17, 2006, \textit{available at} http://www.chron.com/disp/story.mp
dl/rodeo/3732050.html. A local newspaper wrote that the broken neck resulted from “cowboys violently twist[ing] the heads of steers weighing about 500 pounds” and “bring[ing] them to the ground.” \textit{Id.} At a rodeo at the California State Fair, a “crowd of rodeo fans watched in dismay” as a half-ton bull “writhed in the dirt.” Todd Milbourn, “Cal Expo officials call request to ban rodeo events unnecessary,” Sacramento Bee, Jul. 24, 2006, \textit{available at} http://www.sacbee.com/content/news/story/14281253p-15089436c.html. As one bystander recounted, “He was spitting stuff out of his mouth, rolling around, and trying to get his legs to move.” \textit{Id.} The bull’s back was broken–he was shot dead the next day at a ranch near Marysville, California. \textit{Id.} Likewise, at the 2000 Grand National Rodeo at San Francisco’s Cow Palace, a bull “snapped its neck, lost consciousness and had to be put down.” \textit{Id.}

\textsuperscript{237} Lipsher, \textit{supra} note 233. The injuries caused during calf roping may be the most severe. During the event, four-to five-month old calves that are running “have their necks snapped back by the [rope] lasso, often resulting in neck injuries.” \textit{Id.} Since the event is timed, the calf is forced to run at top speeds–“reaching speeds of up to thirty miles per hour.” IDA, \textit{supra} note 224. The calf bursts out of the gate to “escape handlers who twist and yank their tails.” \textit{Id.} The calf then “is stopped so violently by a rope around its neck that it is often jerked completely off its feet and slammed to the ground.” Larson, \textit{supra} note 233, at 116. Even when the calf is able to
Many veterinarians have witnessed the severity of the injuries to rodeo animals first hand. For example, Dr. Robert Fetzner—an USDA veterinarian who works as the Director of Slaughter Operations for Food Safety and Inspection—claims that while working at the meat inspection plant in Cheyenne, Wyoming, he witnessed “lots of rodeo animals [going] to slaughter. [He] found broken ribs, punctured lungs, hematomas, broken legs, severed tracheas and [broken necks].”238 Another veterinarian explains, “the rodeo folks [used] to send me their animals to the packing houses where I have seen cattle so extensively bruised that the only areas in which the skin was attached was the head, neck, legs and belly.”239 He also saw rodeo animals with “as much as two to three gallons of free blood accumulated under their detached skin.”240 Dr. Temple Grandin similarly recounts, “a bucking horse that badly broke its front leg in the rodeo was shipped, with its leg dangling, across two states in a transport truck with other horses.”241 As a result, “it died before it could be humanely slaughtered.”242 Unfortunately, these shipping injuries have become recurrent in the rodeos.243

Since most of the animals that participate in rodeos “are relatively tame . . . [and] not aggressive by nature . . . they are maintain its footing, “competitors slam the [calf] to the ground to stun them so they can tie their legs together.” IDA, supra note 224. A former rodeo competitor, Dr. Peggy Larson D.M.V., has personally found that “the timed events cause injury because time is more important than the welfare of the calf.” Larson, supra note 233, at 116. Dr. T.K. Hardy, a veterinarian and calf-roper states, “Two or three calves are injured in each [calf-roping] practice session and have to be replaced.” Id. at 118. (Emphasis added). Considering that a competing calf roper must spend hours practicing, numerous calves are injured even before the rodeo begins. Id. Bud Kerby, an owner and operator of Bar T Rodeos Inc. even “agrees that calf roping is inhumane” and should be “phased out.” Patrice St. Germain, “PETA: Rodeo Cruel to Animals; Rodeo Fans Say Animals Treated Well,” St. George Spectrum, Sep. 15, 2001. Likewise, Keith Martin, the executive director of San Antonio Live Stock Exposition “told the San Antonio Express-news, ‘Do I think it hurts the calf? Sure I do. I’m not stupid.’” “Choosing Champions,” San Antonio Express-News, Feb. 6, 2000.

238 Interview with Dr. Robert Fetzner, Director of Slaughter Operations for Food Safety and Inspection (FSIS) for the United States Department of Agriculture (USDA) (Sept. 9, 1998).
239 Id.
240 Id.
241 Interview with Dr. Temple Grandin, Professor at the College of Veterinary Medicine, in Colorado (Sept. 23, 1998).
242 Id.
243 Id.
physically provoked into displaying ‘wild’ behavior in order to make the cowboy look brave.”

Cowboys use several pain inducing tools “to irritate and enrage animals used in rodeos.” First, the flank, or bucking strap “is tightly clinched around [the] abdomens of [horses and bulls], which causes them to buck vigorously to try to rid themselves of the torment.” The flank strap is often paired with “spurring,” which “causes the animals to buck even more violently.” The flank strap causes numerous injuries including open wounds and burns from skin irritation, and chaffing.

Second, steers and horses are “often prodded with an electrical ‘hotshot’ while in the chute to rile them, causing intense pain.” Dr. Peggy Larson claims that bovines react much differently to electrical shocks than humans, because “cattle are highly susceptible to electrical current.” For example, Dr. Larson explains how “stray voltage is a common occurrence in dairy barns,” in which “the cows are affected, but the humans cannot feel the electrical current.” Thus, animals forced to participate in rodeo events are vulnerable to both emotional and physical injuries, and even death. Even before and after rodeos events, animals are still inflicted with pain when being transported and housed with other rodeo animals.

C. Laws Regulating the Rodeo: Is the Fox Guarding the Henhouse?

Much of the reason why the rodeo –and the animal cruelty associated with it– has been able to persist throughout the U.S. is because of weak federal and state anticruelty statutes that exempt rodeo from the reach of the law. In fact, many states defer to the

244 PETA, supra note 229.
245 Id.
247 Dr. Peggy Larson, e-mail, supra note 16. Webster’s Dictionary defines “spurring” as the act of “Urg[ing] a horse forward by digging one’s spurs into its sides.” Merriam-Webster’s Collegiate Dictionary 1210 (11th ed. 2003).
249 PETA, supra note 229. But see Fredriksson, supra note 180, at 157 (rodeo supporters argue that while “the hotshot, or electric prod has long been a controversial piece of equipment” it’s better than using the traditional “whips and clubs . . . to move cattle through chutes”).
250 Id.
251 Id.
252 Allen, supra note 18.
PRCA’s own standards, rules, and normal husbandry practices in order to determine whether animal cruelty has occurred. Although some states and cities have been progressive in attempting to protect rodeo animals, most rodeo animals remain at the mercy of the PRCA’s own regulations which, as shown below, are rarely enforced.

1. Federal Law’s Inadequate Protection for Rodeo Animals

There is only one federal law regulating the rodeo in the United States. The Animal Welfare Act (“AWA”) was signed into law in 1966 and is the only federal law “that regulates the treatment of animals in research, exhibition, transport and by dealers.” The law seeks to establish “minimum acceptable standards” for treatment of animals in the aforementioned fields. In accordance with the AWA, the Federal Government “shall promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors.” These standards “include minimum requirements: handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species where the Secretary [of Agriculture] finds necessary for humane handling, care, or treatment of animals.” Regrettably, the AWA exempts rodeos from all of its minimum standard requirements.

2. State Laws: Exemptions and Deference to the PRCA

Like the AWA, many states where the rodeo is popular have provided exemptions in its anticruelty statutes, often deferring to

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253 Id.
254 Id.
255 See infra note 286.
257 Id.
259 Id. § 2143(a)(2)(A).
260 Id. § 2132(h).
the PRCA’s own rules and accepted husbandry practices.\textsuperscript{261} Several states, however—especially where rodeo is not as popular—have made strides in prohibiting rodeo entirely, or those acts that it deems unnecessarily cruel.\textsuperscript{262}

3. Exemptions for Rodeos from States’ Animal Anticruelty Statutes

First, there are several states that have exempted rodeos from their anticruelty statues. Especially since the word “rodeo is not always defined . . . the term [is able to] encompass a wide number of activities.”\textsuperscript{263} For example, Alaska exempts “accepted dog mushing or pulling contests or practices or rodeos or stock contests.”\textsuperscript{264} Arkansas excludes from its felony cruelty law both “generally accepted animal husbandry practices” and “generally accepted training for or participating in a rodeo, equine activity, or competitive activity.”\textsuperscript{265} Arizona’s cruelty statute says that any “activity involving the possession, training, exhibition or use of an animal in the otherwise lawful pursuits of . . . rodeos [and] shows . . . shall be exempt” from criminal liability.\textsuperscript{266} In North Dakota, the term “cruelty” in its statute determining the humane treatment of animals “does not include . . . any show, fair, competition, performance, parade” or “a rodeo.”\textsuperscript{267} Virginia excludes rodeo animals from laws regulating the transportation of animals.\textsuperscript{268} Several states not only

\begin{itemize}
  \item \textsuperscript{261} Allen, \textit{supra} note 18.
  \item \textsuperscript{262} \textit{Id.}
  \item \textsuperscript{263} \textit{Id.}
  \item \textsuperscript{264} Alaska Stat. § 11.61.140(e) (LexisNexis 2011).
  \item \textsuperscript{265} A.C.A. § 5-62-105(5)-(7) (LexisNexis 2010).
  \item \textsuperscript{266} A.R.S. § 13-2910.05 (LexisNexis 2011).
  \item \textsuperscript{267} N.D. Cent. Code, § 36-21.1-01(5)(d)-(e) (LexisNexis 2011). \textit{See also} Or. Rev. Stat. § 167.335 (LexisNexis 2009) (Oregon excludes from its animal abuse statute “Animals involves in rodeos or similar exhibitions”); Rev. Code Wash. (ARCW) § 16.52.185 (LexisNexis 2011) (stating how Washington’s animal cruelty law does not apply “to accepted husbandry practices...and usual course of rodeo events”); Idaho Code § 25-3514 (LexisNexis 2011) (Idaho empts from its animal cruelty laws “exhibitions, competitions, activities, practices or procedures normally or commonly considered acceptable”); Iowa Code § 717D.3 (LexisNexis 2011) (Iowa law providing an exemption for rodeos from its laws regulating animal contest events); Minn. Stat. § 346.155 (LexisNexis 2011) (exempts rodeos from Minnesota laws regulating animals); Tex. Occ. Code § 2152.002 (LexisNexis 2010) (Texas law excludes rodeos from its laws regulating circuses, carnivals and zoos).
  \item \textsuperscript{268} 2 V.A.C. § 5-150-10 (LexisNexis 2011).
\end{itemize}
exempt rodeo from their anticruelty statutes, but also establish rodeo as the official state sport or specific rodeo events as the official state rodeo.\textsuperscript{269}

Next, several states defer to the PRCA in order to determine whether animal abuse has occurred. Kansas provides an exemption from its animal cruelty statutes for “rodeo practices accepted by the Rodeo Cowboys Association.”\textsuperscript{270} Nevada’s cruelty statute does “not apply with respect to an injury to or the death of an animal that occurs accidentally in the normal course of: (a) carrying out the activities of a rodeo or livestock show; or (b) operating a ranch.”\textsuperscript{271}

Because of its Mexican cultural influence, New Mexico excludes from its statute “the use of commonly accepted Mexican and American rodeo practices, unless otherwise prohibited by law.”\textsuperscript{272} Furthermore, if there is a dispute as to what constitutes “commonly accepted rodeo practices, the New Mexico livestock board shall hold a hearing to determine if the practice in question is . . . commonly accepted.”\textsuperscript{273} Lastly, Utah’s statute states, “A live, nonhuman vertebrate creature that is owned, kept, or used for rodeo purposes” is not considered an animal—as defined by the statute—“if the conduct toward the creature, and the care provided to the creature, is in accordance with accepted [rodeo] practices.”\textsuperscript{274} All in all, states have provided minimal protection for rodeo animals and have often deferred to the PRCA for determining when cruelty has occurred.

4. States and Cities that Have Increased Protections for Rodeo Animals

Although many states have provided exemptions for rodeos from their animal anticruelty statutes, a smaller group of states and cities have created laws and ordinances in order to better protect rodeo animals.

First, several states have enacted stronger laws to protect rodeo animals. In California, for example, a licensed veterinarian

\textsuperscript{269} See, e.g., Fla. Stat. § 15.0391 (LexisNexis 2011) (Florida not only exempts rodeos but also designates the “Silver Spurs Rodeo...in Osceola County...[as] an official state rodeo”); Wyo. Stat. §§ 6-3-203, 8-3-119 (LexisNexis 2011) (exempts rodeo from animal cruelty statutes and rodeo is designated as the official state sport).
\textsuperscript{273} Id.
\textsuperscript{274} Utah Code Ann. § 76-9-301(1)(b)(j) (LexisNexis 2011).
must be present at or on-call for rodeo events. The veterinarian has the power to “for good cause, declare any animal unfit for use in any rodeo event.” Additionally, any rodeo animal injured during the course of any rodeo event must “receive immediate examination and appropriate treatment.” California’s statute also prohibits the use of electronic prods or similar devises unless necessary to protect participants and spectators. Any person who violates the statute can be required to pay a fine. Under Rhode Island’s detailed rodeo laws, persons convicted of cruelty to animals are banned from participating in state rodeo events. Other states have implemented laws that target only one aspect of the rodeo. For example, Ohio law bans the use of “twisted wire snaffles, unpadded bucking straps, unpadded flank straps, electric or other prods, or similar devices.” Wisconsin law forbids the use of “a bristle bur, tack bur or like device; or a poling device used to train a horse to jump which is charged with electricity.”

Second, several cities have enacted ordinances that directly affect or entirely restrict rodeo. The ordinances regulate various aspects of the rodeo, including prohibiting prods or shocking devices, providing for medical care, banning curb bits, and outlawing beating, tormenting, overloading, or overworking any animal.

276 Id.
277 Id.
278 Id.
279 Id.
283 See, e.g., Pittsburgh, Pa., Ordinance 29-1992, §§ 635.04-.08 (1992) (an ordinance that bans “electric prods or shocking devices, flank or bucking straps, wire-tie downs, and sharpened or fixed spurs or rowels. Furthermore, a Pittsburgh rodeo must have at least one licensed veterinarian present; the veterinarian has “complete and unilateral authority over the treatment and utilization of rodeo animals and/or livestock.” If during the [rodeo] “it is the decision of the veterinarian that an animal is unable to be utilized, that decision shall be communicated to the stock contractor for compliance.” Also, a humane agent must be given sufficient access to rodeo animals and receive adequate notification of all rodeos that will take place in the city. Failure to adhere to Pittsburgh’s ordinance can result in a fine and/or imprisonment); Larson, supra n. 233, at122 (citing Baltimore City Ordinance, § 10-407 (1998)) (an ordinance in Baltimore City, Maryland “prohibits the use of any chemical, mechanical, electrical, or manual device that is likely to cause physical injury or suffering.” Additionally, “Curb bits (commonly used in Western saddle
However, St. Petersburg, Florida is the only jurisdiction in the U.S. to entirely ban rodeos within its city limits.\textsuperscript{284}

Overall, several states—albeit in areas where rodeo is less popular—and cities have led the way in ensuring greater protections for rodeo animals.

5. The PRCA’s “Sixty Rules” Governing Animal Welfare

As mentioned, several states defer to the PRCA’s rules and normal husbandry practices when determining whether animal cruelty has occurred.\textsuperscript{285} However, this poses a large danger for rodeo animals because the PRCA fails to enforce its own animal welfare rules consistently, if at all.\textsuperscript{286} Also, there is a direct conflict of interest for the PRCA: they are both the regulators and regulatees and thus must sanction their own kind.\textsuperscript{287}

The PRCA “claims to have nearly 60 rules governing animal welfare during rodeos including the requirement that a veterinarian be present at all times.”\textsuperscript{288} However, the veterinarian treatment is often reserved for after the events have ended.\textsuperscript{289} The PRCA “does not go into specifics as to what qualifications are necessary” or how veterinarians should evaluate animals.\textsuperscript{290} For example, in his official report, a veterinarian at a PRCA event described a bull that had

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\textsuperscript{283} St. Petersburg City Code § 17-198 (2009).
\textsuperscript{285} See supra nos. 270 to 274.
\textsuperscript{286} Allen, supra note 18.
\textsuperscript{287} Id.
\textsuperscript{288} Id.
\textsuperscript{289} Id.
snapped its neck as dying from “normal animal behavior.”

Additionally, the PRCA’s rules often allow a judge to override the opinion of a veterinarian that an animal can no longer compete.

The majority of the PRCA’s rules are also “repetitive and have nothing to do with animal welfare, nor do they require the use of ‘humane euthanasia.’” The rules do not prohibit any specific abuse or torment inflicted on animals during the rodeo. As a result of these shortcomings, “the American Veterinary Medical Association (AVMA) no longer supports the PRCA rules on humane treatment of rodeo animals.”

The PRCA does offer a few noteworthy rules: “(1) spurs must be dulled and rowels cannot be locked; (2) ‘sore, lame, sick or injured’ animals or those with ‘impaired eyesight’ should not participate; (3) sharp objects can no longer be placed under the cinch, saddle girth, or flank strap; and (4) prods or other such devices cannot be used during the rodeo event itself.” However, these rules are poorly enforced, and even when imposed, the penalty is merely a potential “disqualification from a particular event or rodeo and a minimal fine.” One example of the PRCA failing to enforce its own rules is the continuous widespread use of the electric prod.

Furthermore, pursuant to the PRCA’s rules, “Animals cannot be confined or transported in vehicles for a period beyond 24 hours without being properly fed, watered and unloaded.” However, this rule is not heavily enforced and animals are often “kept wallowing in their own filth without food and water . . . for hours.” The PRCA also only governs, at most, a third of U.S. rodeos. Consequently, there are more than “a thousand . . . rodeos that lack a governing body’s oversight or authorization.” Thus, federal, state and city ordinances provide differing levels of protection for rodeo animals.


292. Turk, supra note 290.

293. Allen, supra note 18.

294. Id.

295. Larson, supra note 233, at 122.

296. Allen, supra note 18.

297. Id.

298. IDA, supra note 224.

299. Id.

300. Id.

301. Id.
However, since most rodeos occur in states that provide exemptions for rodeos or defer to the PRCA’s rules, the fox is left to guard the henhouse and, therefore, thousands of animals remain unprotected.

IV. THE SIMILARITIES BETWEEN SPANISH BULLFIGHTING AND AMERICAN RODEOS

A comparison of rodeos and bullfighting exemplifies more similarities than differences. While there are a few notable differences that exist between the two activities, bullfighting and rodeos, both exceed an acceptable threshold of cruelty to animals. Accordingly, replacing bullfighting with rodeos is a not a productive solution: it merely exchanges one form of animal cruelty for another.

First, both activities have established themselves as important parts of their respective country’s cultures, and have provided significant economic revenue. As a result, both the U.S. and Spain have been wary of outlawing rodeos and bullfighting, respectively. In Spain, while many Spaniards view other acts of animal cruelty as unacceptable, the Spanish community still views the “art” of bullfighting to be a fundamental aspect of Spain’s way of life. To bullfighting aficionados, the blood and gore are secondary elements to the grace and courage on display. Spain has not only treasured bullfighting, but it has also invested large amounts of money in preserving its structures. Bullfighting’s label as a fundamental piece of Spanish culture has transformed the sport into a large source of revenue for Spain. Although attendance has waned over the past several years, about 31 million spectators still attend bullfights. Yearly ticket sales exceed over $100 million. Similarly, bullfighting also serves as a large source of jobs for the Spanish community. The Spanish government views these sources of revenue and employment as incredibly significant and thus, over 530 million Euros is provided to the bullfighting industry yearly.

303 Id.
305 Nicholson, supra note 302.
306 Id.
307 Id.
Likewise in the U.S., the rodeo has entrenched itself as a critical aspect of American culture. The sport has been described as both a “national pastime” and “great American tradition.”\textsuperscript{308} Rodeos are celebrated as America’s final weakening grasp to the roots that helped build the U.S., including the 19th century ranching business and cattle drives.\textsuperscript{309} America continues to be infatuated with the cowboy mystique.\textsuperscript{310} As in bullfighting in Spain, rodeo spectators view the cowboys as rock star athletes; individuals who are blessed with incredible talent.\textsuperscript{311} Thus, the harm incurred by rodeo animals is perceived to be similar to the injuries a football player experiences on the gridiron.\textsuperscript{312} Furthermore, because of its role as a morale builder during World War II, rodeo has become synonymous with the sights and sounds of American patriotism.\textsuperscript{313} Additionally, as in Spanish bullfighting, rodeos have served as a profitable industry.\textsuperscript{314} The PRCA sanctions over 800 annual rodeos, which generate revenues over $22 million.\textsuperscript{315} These rodeos are attended by almost 20 million spectators and millions more television viewers.\textsuperscript{316} The National Rodeo Finals has a higher attendance than the Super Bowl of the National Football League; over 170,000 spectators attend the event annually.\textsuperscript{317}

Second, in the case of both activities, greater protections have been given to both animals on the city and state level, as opposed to the Federal—or E.U.—level. In Spain, the E.U. has imposed few restrictions on bullfighting.\textsuperscript{318} Even in the wake of criticism from the international community, the E.U. Commission has affirmed that it has no plans to reform its legislation providing exemptions for

\begin{thebibliography}{99}
\bibitem{309} Ralph Clark, "Rodeo History," \textit{About.com}, available at http://rodeo.about.com/od/history/a/rodeohistory1.htm.
\bibitem{310} \textit{Id.}
\bibitem{311} Fredriksson, \textit{supra} note 180, at 67.
\bibitem{314} Wooden and Ehringer, \textit{supra} note 308. Wooden and Ehringer posit, “Contemporary rodeo has evolved into a much publicized big-time [business] phenomenon even as it strives to stay close to its fundamental cowboy roots.” \textit{Id.}
\bibitem{315} \textit{Id.}
\bibitem{316} \textit{Id.}
\bibitem{317} \textit{Id.}
\bibitem{318} Igra, \textit{supra} note 18.
\end{thebibliography}
bullfighting.\textsuperscript{319} On the contrary, the E.U. has taken numerous steps to preserve bullfighting in Spain. Similarly, while Spain's federal laws have taken affirmative steps to diminish animal cruelty, these laws have notably exempted bullfighting.\textsuperscript{320} Spain's federal laws have instead focused its efforts on making bullfighting less harmful for the matadors and horses.\textsuperscript{321} The few federal laws that do protect bulls, such as forbidding horn shaving, are rarely enforced.\textsuperscript{322} Conversely, Spain's autonomous communities and cities have led the charge in eliminating bullfighting.

Like Spain, the U.S. rodeo has been free from federal regulation.\textsuperscript{323} The Animal Welfare Act, the only federal legislation applicable to rodeos, provides an exemption for rodeo events and husbandry practices.\textsuperscript{324} Moreover, as in Spain, state and city governments have led the way in protecting rodeo animals.\textsuperscript{325} Although several states have taken steps to ensure the continuation of the rodeo—through exemptions from the law, deference to the PRCA or establishing rodeo as the official state sport—other states such as California and Rhode Island have thoroughly regulated rodeos.\textsuperscript{326} In addition, only St. Petersburg, Florida has entirely prohibited rodeos.\textsuperscript{327} Other cities such as Baltimore, Maryland\textsuperscript{328} and Pittsburgh, Pennsylvania\textsuperscript{329} have taken extensive steps to prohibit painful devices and events. Although not entirely prohibiting rodeos like anti-bullfighting cities in Spain, these states have nevertheless made a significant impact in diminishing animal cruelty during rodeos.\textsuperscript{330}

Next, in both countries, a change in perspective seems to be spreading, albeit greater in Spain. In Spain, a large growing anti-bullfighting sentiment decrying the treatment of bulls and horses in

\textsuperscript{319} Id.
\textsuperscript{321} Id.
\textsuperscript{322} Ogorzaly, supra note 3, at 4.
\textsuperscript{323} AWA, supra note 256,
\textsuperscript{324} Id.
\textsuperscript{325} See supra notes 275-282.
\textsuperscript{326} See supra notes 156, 159.
\textsuperscript{328} Larson, supra note 233, at122.
\textsuperscript{329} Pittsburgh, Pa., Ordinance 29-1992, supra note 283.
\textsuperscript{330} Larson, supra note 233, at122.
the bullfighting ring is rapidly spreading.\textsuperscript{331} Much of the diminishing popularity in bullfighting stems from newer generation's detachment from the activity's cultural significance.\textsuperscript{332} According to a 2009 Gallup survey, only 27 percent of Spaniards expressed any interest in bullfighting, while 72 percent expressed no interest at all.\textsuperscript{333} Anti-bullfighting groups such as \textit{For a Bullfighting-Free Europe} and \textit{CAS International} have held numerous protests and Anti-Bullfighting Summits.\textsuperscript{334} The Spanish bullfighting industry has countered these efforts by pumping over $2 billion in lobbying funds yearly.\textsuperscript{335} As in Spain, many groups in the U.S. have helped lead an anti-rodeo movement. Organizations such as \textit{People for the Ethical Treatment of Animals} and \textit{Showing Animals Respect and Kindness} have attempted to educate and inform the public about rodeo animal abuse.\textsuperscript{336} However, unlike in Spain –where support for bullfighting has notably decreased– the U.S. rodeo fan base has continued to expand.\textsuperscript{337} Professional rodeo events are legitimized and generate comparable profits.\textsuperscript{338} Some commentators have even described professional bull riding as the “next big American pastime.”\textsuperscript{339}

Lastly, it is undoubtedly evident that in both the rodeo and bullfighting, thousands of animals are harassed, traumatized, physically harmed, and killed. As previously documented, several thousand bulls are killed every year in Spanish bullfighting rings.\textsuperscript{340} Even before the bull enters the ring, it undergoes numerous abuses\textsuperscript{341} Upon entering its final destination, the bull is merely a


\textsuperscript{332} Id.

\textsuperscript{333} Id. See also “For a Bullfighting-Free Europe,” \textit{supra} note 117 (a 2006 Gallup poll showed that only 7 percent of Spaniards consider themselves bullfighting fans, while 82 percent of Spaniards between 15 and 24 years of age were not interested in the sport at all).


\textsuperscript{337} Clark, \textit{supra} note 309.

\textsuperscript{338} Id.

\textsuperscript{339} Id.

\textsuperscript{340} Socolovsky, \textit{supra} note 9.

\textsuperscript{341} Id.
shell of its former self; the bull is in such a weakened state that it can barely support its own body mass.\textsuperscript{342} Additionally, while the audience perceives the bull’s actions in the ring as signs of aggression, this is simply a highly touted misconception.\textsuperscript{343} The bull spends much of its life tied up in a confined space, and thus, the crowd noise, coupled with painful stabs, places the bull in a state of extreme fear.\textsuperscript{344} Similarly, the animal cruelty that results at U.S. rodeos is indisputably evident. Animals are tackled and killed during rodeo practices and events.\textsuperscript{345} As in bullfighting, rodeo animals are not naturally wild; painful techniques and tools are utilized to irritate the animals.\textsuperscript{346} Calves as young as three months old are taken from their mothers and are tied up and roped.\textsuperscript{347} However, there is one notable difference between Spanish bullfighting and American rodeo: while the central mission of bullfighting is to kill the bull, the harm done to rodeo animals is an unintended—though recurrent—effect of the sport. Notwithstanding this difference, both events are unacceptably cruel to animals.

V. SUGGESTIONS FOR IMPROVING THE WELFARE OF BULLFIGHTING BULLS, HORSES, AND RODEO ANIMALS

As a society, we should not be looking to replace bullfighting with the rodeo, as both activities are currently unacceptably abusive. Instead, we must provide solutions that can prevent or at least minimize this cruelty from occurring in the first place. At first blush, a prohibition of both activities would seem to be the most beneficial solution for all the animals involved. Yet, it is difficult to reconcile a forceful ban of bullfighting in Spain and rodeo in the U.S., while the global community simultaneously supports other desires, sports, and activities that are also cruel to animals.\textsuperscript{348} Moreover, both the rodeo and bullfighting are indisputably a critical part of the history of their respective countries. It is also apparent that both activities provide thousands of jobs and generate significant revenue through tourism.\textsuperscript{349} Accordingly, solutions that aim to hamper the

\begin{itemize}
\item \textsuperscript{342} Id.
\item \textsuperscript{343} Ogorzaly, supra note 3, at 5.
\item \textsuperscript{344} Id. at 6.
\item \textsuperscript{345} PETA, supra note 229.
\item \textsuperscript{346} Id.
\item \textsuperscript{347} Id.
\item \textsuperscript{348} Edward Lewine, Death and the Sun: A Matador’s Season in the Heart of Spain (2005), 56.
\item \textsuperscript{349} See, e.g., Jeff Pearlman, “American sports can learn from Spain’s ban on bullfighting,” Sports Illustrated, Aug. 5, 2010, available at
perpetuation of animal mistreatment must balance the desire to preserve cultural history and economic viability.

Spain should look to the way Portugal has reformed its bullfighting practices. Instead of entirely prohibiting bullfighting, Portugal has implemented “bloodless bullfights” in order to preserve a cultural tradition, while concurrently protecting bulls. As part of the Portugal Protection of Animals Law it is now illegal to kill a bull in a bullfight arena. As a result, the amount of bulls that are mistreated in Portugal has dramatically decreased. Spain should also prevent horses from being used, which are in grave danger of being gored and killed. Next, laws that are already in place, such as a prohibition on horn shaving, must be strictly enforced and harshly penalized. Lastly, other autonomous communities, cities and towns should continue to lead the way for greater rights for bulls. Considering the political clout that the pro-bullfight lobbyists maintain, greater change can occur on a smaller and more gradual scale—as exemplified by Catalonia and the Canary Islands.

Next, other states in the U.S. should consider enacting legislation similar to that of California. Tools that cause an immense amount of pain, such as electric prods, must be outlawed in every state. Also, state legislatures should no longer defer to the PRCA for determining when animal cruelty is being committed. The PRCA’s conflicts of interest place animal welfare secondary to ensuring the continuity of the sport. Next, non-PRCA veterinarians must be in attendance at every event, in order to ensure that an animal is not gratuitously harmed, or in peril of serious injuries. Finally, certain rodeo events should be modified or abolished entirely. While many rodeo promoters claim that rodeo events are simply a celebration of authentic cowboy work, several of today's events and methods have


351 Id.

352 Id.
never been used on a ranch.\textsuperscript{353} For example, a cowboy would never use a bucking strap to get his horse to buck out of fear of injury to his animal.\textsuperscript{354} Also, calves are rarely roped and are never choked or dragged like they are in rodeo events.\textsuperscript{355} Accordingly, even if the claim that the rodeo should be preserved because of its ties to American heritage is legitimate, those events that have no cultural significance—and are especially cruel—should be abolished. This includes events such as bucking, steer wrestling and mule diving.

VI. CONCLUSION: A NEED FOR CONTINUED DISCUSSION AND ACTION

Ultimately, the question regarding the balancing of animal welfare and cultural tradition will continue to be asked: Is it right for people to kill or harm animals for human pleasure? No individual requires red meat, leather clothing, hunting, fishing, attending bullfights or watching rodeos for survival.\textsuperscript{356} Hence, as author Edward Lewine questions, “Are carnivores, leather wearers, sportsmen, bullfighting aficionados [and rodeo enthusiasts] behaving in a moral way?”\textsuperscript{357} Similarly, can the same society that asserts that the killing of thousands of bulls and rodeo animals is unacceptably cruel, simultaneously accept the slaughtering of 90,000 cows and calves every 24 hours for meat consumption?\textsuperscript{358} The answers to these questions are controversial and complex, but ones in which society cannot shy away from in the near future.

Numerous jurisdictions have faced these difficult issues head-on, vociferously championing the notion that the mistreatment of bulls and rodeo animals is in direct contravention with a modern understanding of the humane treatment of animals. Undoubtedly, critics will refer to the often-cited arguments of historical tradition and profitability as reasons for preserving both bullfighting and rodeos. Nevertheless, hiding behind the status quo of historical tradition simply shrugs away a modern understanding of an

\textsuperscript{353} Larson, supra note 233, at 115.
\textsuperscript{354} Id.
\textsuperscript{355} Id.
\textsuperscript{356} Lewine, supra note 348, at “authors note.”
\textsuperscript{357} Id.
animal’s ability to experience pain.359 Similarly, a claim that a community’s profitability is dependent on the infliction of pain upon non-consenting animals cannot, as Mark Twain once wrote, be given “sufficient justification.”360 As a society, we must instead engage in the arduous task of lowering our hands from our eyes and ears, diminishing the ability to conceal ourselves within the comforting principle of “out of sight, out of mind.” Thus, whether in the Mediterranean plateaus of Spain or the wheat belt of the Midwestern U.S., jurisdictions must pursue policies that diminish the harm to both bulls and rodeo animals and at a minimum, give a voice to those animals that lack the ability to advocate for themselves.

359 Dr. Ray Greek, “The History of Medical Progress,” In Defense of Animals Reports, 2012, available at http://www.idausa.org/ir/reports/animalpain.html (the traditional notion that animals do not feel pain, originally asserted by Descartes, has been supplanted by a modern perspective that “all vertebrates... have the same nerves that humans have”).

360 Mark Twain and Shelley Fisher Fishkin, Mark Twain’s Book of Animals (2010), 139 (in a letter of support to the London Anti-Vivisection Society, a group vehemently opposed to vivisection on animals, Mark Twain wrote: I believe I am not interested to know whether Vivisection produces results that are profitable to the human race or doesn’t. To know that the results are profitable to the race would not remove my hostility to it. The pains which it inflicts upon unconsenting [sic] animals is the basis of my enmity towards it, and it is to me sufficient justification of the enmity without looking further").
MINIATURE HORSES IN SUBURBIA

By: Stacey Kight*

“Are these animals who work for us in one way or another throughout their entire lives, sensitive and capable of trust, courage, and generosity of spirit? Or are they fast cows without horns?”

–John Hettinger1

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I. INTRODUCTION

Following their reintroduction to the Americas in the late fifteenth century, horses have galloped through history and straight into the hearts of Americans today. Horses embody the spirit of the American West, conjure revered traits such as speed, courage, loyalty, and strength, and are found in nearly every facet of popular media. For thousands of years horses have been an essential resource to mankind for power and transportation. Yet despite the advent of technology, which has now rendered the working horse all but obsolete, Americans continue to own, use, and enjoy their horses by the millions. It suffices to say that our love affair with the animal is no secret.

America's love of horses also includes a rather smaller facet—literally—involving the miniature horse, a particularly petite member of the equine family. Though similar to ponies because of their small stature, miniature horses stand anywhere from twenty-

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2 See generally JULIET CLUTTON-BROCK, HORSE (Marion Dent et al. eds., 1st ed. 1992) (surveying the development of horses and their roles in society).
3 See, e.g., Wild Free-Roaming Horses and Burros Act, 16 U.S.C.A. § 1331 (1971) (declaring wild free-roaming horses and burros as living symbols of the historic and pioneer spirit of the west); DEANNA STILLMAN, MUSTANG: THE SAGA OF THE WILD HORSE xii (2009) (“With all due respect to our official icon, the eagle . . . it is really the wild horse, the four-legged with the flying mane and tail, the beautiful, bighearted steed who loves freedom so much that when captured he dies of a broken heart, the ever-defiant mustang that is our true representative, coursing through our blood as he carries the eternal message of America.”).
4 See, e.g., HOPE B. WERNES, THE CONTINUUM ENCYCLOPEDIA OF ANIMAL SYMBOLISM IN ART 220, 227 (2003) (describing horses as symbols of power, social status, and nobility as well as their association with war, physical prowess, and bravery).
5 See Lafcadio H. Darling, Legal Protection for Horses: Care and Stewardship or Hypocrisy and Neglect? 6 ANIMAL L. 105, 107 n.9 (2000) (“American society and popular culture is replete with references to horses and use of horses as symbols.”).
6 See CLUTTON-BROCK, supra note 2, at 22-23, 52-53.
8 See CLUTTON-BROCK, supra note 2, at 8 (“Although there is great variation in size between different breeds of domestic horse, they all belong to one species- Equuscaballus.”).
eight to thirty-eight inches in height (measured at the shoulder) and are always referred to as miniature “horses,” as opposed to ponies, because of their “proportions, character and size.”9 The small horses have “tenacious natures packaged in such small, yet dynamic bodies . . . [whose] spirit is enormous in comparison to their size.”10

Their popularity continues to grow since their introduction into the United States in the late nineteenth century.11 They have reared their little heads in popular culture, from Hasbro’s “My Little Pony” toy craze of the 1980’s and subsequent My Little Pony movie and television series, to John Steinbeck’s The Red Pony.12 We see them in circus performances, parades, and the occasional television sitcom or morning talk-show,13 “Small equines make more sense than ever,”14 when faced with dwindling land resources and the rapidly increasing pace of livelihood.

Yet, when faced with land zoning and restrictive covenants, miniature horses are often classified as “livestock.”15 No bigger than a Great Dane, tiny horses do not belong in the ranks of cattle and swine – which are precluded from suburban ownership. As an alternative, when regulating ownership of miniature horses through local ordinances, municipalities should recognize the actual differences of tiny horses, such as their scaled-down size, needs, interactions with their owners, and the differences in potential public safety and nuisance issues that might arise from keeping a miniature horse in the neighborhood.16

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9 Cheryl A. Lekstrom, Miniature Horses in History, in 1 THE MINIATURE HORSE IN REVIEW 5, 6 (Toni M. Leland ed., 2nd ed. 1999). It is a common misconception that Miniature Horses were bred down from full-size horses, but a study of the American Miniature Horse Registry Stud book reveals that many of the founding Miniatures were recorded as sired by registered Shetland Ponies. See JOHNNY ROBB & JAN WESTMARK, THE BIG BOOK OF SMALL EQUINES: A CELEBRATION OF MINIATURE HORSES AND SHETLAND PONIES 7 (2009).
10 ROBB & WESTMARK, supra note 9, at 3.
11 See infra notes 18-19 and accompanying text.
12 Id. at 4.
14 ROBB & WESTMARK, supra note 9, at 4.
15 See infra Part V.A.
16 The decision of a municipality to permit or prohibit a miniature horse within city limits is irrelevant in this paper; the focus is on the reasoning for why the miniature horse is permitted or prohibited and whether that reasoning is tailored to the unique needs and qualities of a miniature horse.
Accordingly, Part II begins with an overview of the miniature horse, focusing on its historical development and significance in society, particularly as a backyard pet in suburban communities. Part III provides background on the issues of differentiating between livestock and pets in classifying animals through statutes. Part IV illustrates these issues as they pertain to miniature horses through a series of case studies, local ordinances, and state law. Part VI concludes that miniature horses should not be precluded from residential areas due to equine and livestock associations, but rather regulated in a manner that considers their small size and dualistic nature as household pets and miniature livestock, as well as the issues presented by keeping such an animal in the close confines of a residential neighborhood.

II. SIGNIFICANCE OF THE MINIATURE HORSE

The modern miniature horse is the result of roughly four hundred years of selective breeding.\textsuperscript{17} Purchases and sales records of miniature horses in America date back to the early 1800s, but documentation of the miniature horse dates as far back as the fifteenth century in the Renaissance period.\textsuperscript{18} Various European countries introduced miniature horses to the United States in the late 1800s.\textsuperscript{19} Dubbed “pit ponies,” the horses had to be smaller than thirty-four inches because mine tunnels were only thirty-six inches high.\textsuperscript{20} As machinery gradually reduced the need for the pit pony, enterprising American breeders began selecting stock for attractive pet qualities, such as small stature and excellent conformation.\textsuperscript{21} Also during this time was the development of a more refined miniature horse with origins tracing back to Argentina.\textsuperscript{22} The selective breeding was pioneered by the Falabella family and resulted in the Falabella breed, which stands at an average height of twenty-eight inches, is known for its “stamina, presence, and a

\textsuperscript{17} See Lekstrom, supra note 9, at 6.
\textsuperscript{18} Id. at 9.
\textsuperscript{19} See DONNA CAMPBELL SMITH, THE BOOK OF MINIATURE HORSES: BUYING, BREEDING, TRAINING, SHOWING, AND ENJOYING 1-3 (2005). Then-called “midget” horses, the animals were brought over from Holland and Great Britain, among others. Id. at 2.
\textsuperscript{20} Id. at 3.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 8.
tractable personality,” and has been enjoyed by icons such as Frank Sinatra, Nelson Rockefeller, and the Kennedy family.\textsuperscript{23}

Popular primarily as a companion animal, miniature horses are relatively new to the American scene, having only been officially recognized and nationally registered since 1971.\textsuperscript{24} Described as “the fastest growing breed in America,”\textsuperscript{25} the American Miniature Horse Association (AMHA) has nearly 185,000 miniature horses in its registry to date.\textsuperscript{26} Many attribute the increasing popularity of miniature horses to their versatility and charming dispositions.\textsuperscript{27} In the words of one aficionado, miniature horses are "big fun in a small package."\textsuperscript{28}

The roles of the Miniature Horse vary tremendously, from backyard pet, to show horse, to therapy animal.\textsuperscript{29} Their small size allows them to be taken nearly anywhere, and they require only a fraction of the living space needed compared to their full-sized counterparts.\textsuperscript{30} However, their small size also limits their use as a riding animal; it is recommended that a mini should not be ridden by anyone over seventy pounds.\textsuperscript{31} For those over seventy pounds, miniature horses can be trained to pull carts, and do so in a variety of contexts.\textsuperscript{32} Above all, the inexpensive upkeep and gentle

\textsuperscript{23} Id. at 8-9. In some cases, the terms "Falabella" and "Miniature Horse" are used interchangeably, though the Falabella is technically a breed of miniature horse.

\textsuperscript{24} Id. at 9. The American Miniature Horse registry, established in 1971, registered nine hundred horses before the books were closed in 1973. Id. On the other hand, the American Kennel Club, a national dog registry, was first established in 1884. History of the American Kennel Club, Am. Kennel Club, http://www.akc.org/about/history.cfm (last visited Mar. 18, 2011).

\textsuperscript{25} See Lekstrom, supra note 9, at 10.

\textsuperscript{26} Association Information, Am. Miniature Horse Ass’n, http://www.amha.org/index.asp?KeyName=110 (last visited May 15, 2011). For a miniature horse to be registered it must meet the Association’s standard of perfection and stand no taller than thirty-four inches at the withers after the age of five. Id.

\textsuperscript{27} See supra note 9 and accompanying text.

\textsuperscript{28} ROBB & WESTMARK, supra note 9, at 41.

\textsuperscript{29} Id. at 45.

\textsuperscript{30} Id. at 131 (noting that the tiny horses can be readily transported by minivan).


\textsuperscript{32} See, e.g., Ted Garman, Basics of Driving, in 1 MINIATURE HORSE IN REVIEW 105-115 (Toni M. Leland ed., 2nd ed. 1999) (“Driving a Miniature is every bit as exciting as driving a larger horse. There is a terrific sense of freedom and a very special interaction. You can drive country roads, obstacle courses
dispositions of the animals make them “perfect pint-size companion[s].” One owner described her miniature horse as “a cross between a dog, horse, and human” while recounting stories of how she gave the horse a shower in the master bathroom and brought him into the kitchen during the winter. Another miniature horse, “when not visiting nursing homes, church groups, clinics, hospitals, or schools . . . can be found riding the carousel at amusement parks, hanging out at the beach, or even strolling the aisle of a grocery store in a shopping cart.”

Miniature horses are often compared to large dogs, given their small size and docile temperament. An example of such comparison is found in the opinion of Judge Fortunato in *Ridgewood Homeowners Ass’n v. Mignacca.* In the case, the Ridgewood Homeowners Association brought an action against the Mignacca family enjoining them from keeping their pet miniature horse, Sonny, on their four-acre lot in the Ridgewood neighborhood and the issue hinged on the determination of Sonny as a “pet” or as “livestock” under the association’s restrictive covenant. Over the course of the bench trial, the court learned of Sonny’s behavior, habits, and growth potential through testimony and direct observation. The court noted that Sonny will never [stand] higher than 3 feet from the ground and his weight will never exceed 150 pounds. The animal . . . is gentle, amiable and not high strung or vicious in the least. His stature and weight will never reach that of a Great Dane, a Bull Mastiff, or a Saint Bernard; and it is unlikely that any training could make him into a guard or attack animal along the and dressage patterns, or show him off in parades and marathons, or simply make a trip to your mailbox.

33 *Robb & Westmark,* supra note 9, at 131.
34 *Id.* at 151 (quoting Heidi McStay).
35 *Id.* at 48.
37 *Id.* at 1, 6. The covenant stated “No animals, livestock or poultry of any kind shall be raised, bred, or kept on any lot, except that two dogs and/or two cats may be kept provided that they are not kept, bred or maintained for any commercial purpose.” *Id.* at 6. The legislature defined “livestock” as “domesticated animals which are commonly held in moderate contact with humans which include, but are not limited to, cattle, bison, *equines,* sheep, goats, llamas, and swine (emphasis supplied)” and “pets” as “domesticated animals kept in close contact with humans, which include, but may not be limited to, dogs, cats, ferrets, *equines,* llamas, goats, sheep, and swine (emphasis supplied).” *Id.*
38 *Id.* at 2.
lines of a Doberman Pincher, a German Shepherd, or a Pit Bull.\textsuperscript{39} In response to the Association's complaint about the noise Sonny makes, the court countered that "it is difficult to believe that Sonny could be heard from a distance, as his neigh, such as it is, is more akin to a cat's meow and apparently does not occur very frequently according to [the owner]."\textsuperscript{40} As to the allegations of nuisance, the court found that "not one shred of evidence was produced, either by way of emitting noxious odors, disturbing the peace or by creating an eyesore."\textsuperscript{41} The court further noted that Sonny's noise level could never rise greater than that of "usual Ridgewood activities, such as ... barking dogs."\textsuperscript{42} In nearly every context, the issues of keeping Sonny on the property were nearly equivalent to issues of keeping a large dog.

The miniature horse has also grown in popularity as a service animal for the disabled. Primarily trained by the Guide Horse Foundation, "seeing-eye horses" are still a relatively recent development since the Foundation has only been operating since 1999.\textsuperscript{43} Although dogs remain the most common type of service animal, and the only one officially recognized by the Americans with Disabilities Act (ADA), miniature horses offer several advantages over their canine counterparts, such as strength and longevity of life.\textsuperscript{44} For example, where a service dog can only work for eight to ten years, a service horse can work for twenty to thirty years.\textsuperscript{45} Although full size horses are also capable of serving as guide animals, the large animals seem to be impractical for people with disabilities living in urban or suburban settings.\textsuperscript{46} Miniature horses, on the other hand, could be practical because their serviceable population is not limited to those who live in rural and agricultural areas.\textsuperscript{47} While such service horses are frequently brought indoors,

\textsuperscript{39} Id.
\textsuperscript{40} Id. at 3.
\textsuperscript{41} Id. at 7.
\textsuperscript{42} Id.
\textsuperscript{43} See Robert Adair, Monkeys and Horses and Ferrets...Oh My! Non-Traditional Service Animals Under the ADA, 37 N. Ky. L. Rev. 415, 429 (2010) (discussing the increasing use of nontraditional service animals and their regulation, or lack thereof, under the ADA). Seeing-eye dogs, on the other hand, have been used in the United States for over eighty years. Id.
\textsuperscript{44} See Julie Raw, Seeing-Eye Ponies, TIME, Jan. 29, 2001, at 14.
\textsuperscript{45} Id.
\textsuperscript{46} Adair, supra note 43.
\textsuperscript{47} The American Miniature Horse Association recommends up to three miniature horses per acre with supplemental hay and feed. See Big Versus Small, Am. Miniature Horse Ass’n (2007), http://www.amha.org/index.asp
the Guide Horse Foundation requires that guide horses stay outside when they are off-duty, meaning that recipients of a miniature service horse must have some form of outdoor accommodation and space for the animal.48

A recent amendment to the ADA’s service animal provisions recognizes the growing use of seeing-eye horses. The Act’s definition of service animal is limited to “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability.”49 However, a separate provision mandates that “[a] public entity shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability.”50 In doing so, the public entity may consider factors such as the miniature horse’s obedience under the handler, and any safety requirements necessary for safe operation.51

III. LEGAL IMPLICATIONS OF DEFINING THE MINIATURE HORSE

A. The Distinction between “Farm Animal” and “Household Pet”

Courts have repeatedly struggled to determine whether certain animals constitute livestock or pets for purposes of zoning restrictions. In State v. Nelson, the Minnesota Court of Appeals held that an ordinance barring keeping “livestock” in a residential area did not prevent the resident from keeping a rooster as a pet.52 The ordinance expressly prohibited the “raising or handling of livestock or animals causing a nuisance,” and while the State argued that roosters were undisputedly livestock, the court found that “the term livestock [was] defined as separate from chickens.”53 A study of similar state statutes regulating animals revealed that when lawmakers intended to reach chickens, they would use the term

KeyName=123 (last visited Apr. 7, 2011).
51 Id.
52 499 N.W.2d 512, 514 (Minn. Ct. App. 1993).
53 Id.
“poultry,” often in conjunction with “livestock.” Ultimately, the ambiguity in the ordinance weighed in favor of the rooster’s owner. The meaning of “livestock” was not entirely certain, so the court gave it a less inclusive meaning and held that the term as it was used did not reach chickens or other poultry.

Similarly, in City of Peoria v. Ohl, the owner of a Vietnamese pot-bellied pig challenged an ordinance prohibiting “farm animals” in a residential district. Like the ambiguities in Nelson, the court noted that the proscription in the present case was “ambiguous and open-ended.” Not only did the ordinance fail to state whether all animals in the enumerated families were prohibited, or just farm animals belonging to those families, but the language was also so overbroad that a literal construction could result in prohibiting any animal found on a farm, including common household pets like cats and dogs. Instead, the court found that the ordinance did not seek “to prohibit the animals themselves, but only the use of the animal for farming purposes in residentially zoned areas.”

Despite the enumeration of specific livestock animals, the court construed the ordinance liberally and held that it neither prohibited all animals on a farm, nor all members of the animal families listed. Instead, the ordinance only prohibited animals kept for farming purposes. Because the state failed to allege that the owner was keeping the pig for purposes other than as a pet, the pig-owner won.

In the course of legal confrontations between resident animal owners and municipal authorities, a high level of deference is afforded to the prohibitive ordinances. Pet-owning litigants are often unsuccessful when challenging the proscriptive effect of a municipal ordinance. For example, in Town of Atlantic Beach v. Young, the owner of two pygmy goats and a pony failed to convince the court that her animals were household pets and thus an exception under the ordinance. Though the ordinance carved out an exception for household pets to the general ban of animals, the
court concluded that while the language clearly provided for such an exception “certain animals such as horses and goats will not be permitted even within the exception.” Even though the owner confined the animals to the house, they were *de facto* prohibited by the ordinance. When the owner challenged the ordinance on arbitrary and unreasonable grounds under the Fifth and Fourteenth Amendments, the court pointed to the city’s police power in protecting the health, safety and welfare of its citizens. Accordingly, the court held that prohibitions on the keeping animals other than house pets under the ordinance was reasonably related to the health and welfare of local citizens, and was not a violation of due process.

The tension created by these cases can be traced back to the ambiguities of legally interpreting what constitutes a “livestock” animal and what constitutes a “household pet.” The differences between the two are cast in sharp relief by the growing number of “unusual” household pets, such as miniature horses, which either have not been expressly accounted for in the municipal provisions, or call the existing language into question. Meeting notes from a Planning Commission in the city of Arden Hills, Minnesota, illustrates such an example. There, the zoning code’s definition for domestic, farm, and wild animals did not directly address miniature horses, and consequently left “room for interpretation on the definition for animals.” Under the zoning code, domestic animals are “common household pets, such as dogs and cats, other animals kept for amusement, companionship, decoration, or interest,” and farm animals are “animals traditionally kept or raised on a farm for the purpose of providing food or products for sale or use, such as

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65 *Id.* at 689.
66 *Id.*
67 *Id.* at 690.
68 *Id.* at 691.
69 A survey by the American Veterinary Medical Association estimated that the number of “unusual” household pets, including miniature horses, is nearly doubling every five years, and will have surpassed two million by 2001. *See* Huss, *supra* note 54 at 119 (citing Sean L. McCarthy, *Exotic Pets’ Popularity Brings Trouble: Rare Diseases, Care Raise Concern*, Ariz. Republic (Phoenix) A1 (July 21, 2003) (citing to survey by the American Veterinary Medical Association)).
70 Memorandum from James Lehnoff, City Planner to Mayor and City Council of Arden Hills (Sep. 24, 2007), available at http://www.ci.arden-hills.mn.us/ (follow City Council information to Archived Agendas, Packets and Minutes, then select 2007, then Item 7A: Miniature Horse Classification).
71 *Id.*
cattle, horses, goats, sheep, swine, fowl, bees, and animals raised for fur.\(^72\) The city’s efforts to fit the miniature horse into this legal definition is the heart of this paper—while the miniature horse could conceivably be kept for “amusement, companionship, decoration or interest,” it did not fall within the realm of a traditional household pet.\(^73\) Nor did it really belong in the farm animal class because of its use as a companion animal.\(^74\)

The ensuing Draft Planning Commission meeting minutes summarize the essential issues: one Commissioner asked whether the animal would be kept as a pet; another suggested that the code currently permits dogs larger than the miniature horse; some Commissioners protested on the grounds of nuisance and that they are not a common animal in an urban setting; and yet others favored the option of a variance request which would permit miniature horses on a case-by-case basis.\(^75\) Ultimately, the Planning Commission erred on the side of caution and agreed to classify miniature horses as farm animals and review the ordinance for additional information on domestic and farm animals.\(^76\)

Despite the great lengths to which courts have gone to distinguish livestock and pets, the case outcomes can still hinge on something as trivial as which dictionary the court references. For example, in *Zoning Commission of Town of Danbury v. Grandieri*, considering the absence of a “livestock” definition, the Connecticut Circuit Court held that a pet pony was not “livestock” as contemplated by the exclusionary provision of the ordinance.\(^77\) In so holding, the court studied the connotations of “livestock” at length.\(^78\) The court concluded that “livestock” was plural in nature, and found that this plural form best fit the connotations of the ordinance itself.\(^79\) The Oregon Court of Appeals conducted a similar study in

\(^{72}\) *Id.*
\(^{73}\) *Id.*
\(^{74}\) *Id.*
\(^{75}\) *Id.*
\(^{76}\) *Id.*
\(^{77}\) 208 A.2d 357, 357 (Conn. Cir. Ct. 1964).
\(^{78}\) *Id.* at 358. The Court first looked at the definition of “stock” in the Webster’s International Dictionary of 1901; then to the word “livestock” as defined by the Webster’s Collegiate Dictionary of 1960; “livestock” as found in the Webster’s Third New International Dictionary of 1961; and finally, “livestock” defined by 3 Burrows, Words and Phrases Judicially Defined. *Id.*
\(^{79}\) *Id.* at 359. (reasoning that it would be impossible to reconcile the permitted uses of farming, truck gardening or nursery gardening with a prohibition against keeping a single animal which could conceivably be a necessary accessory to permitted uses such as a horse-drawn plow, harrow, or agricultural equipment).
deciding whether llamas fell within such classification absent a definition of “livestock” in the ordinance. The court cited Webster’s New Collegiate Dictionary, which defined “livestock” as “domestic animals used or raised on a farm, especially those kept for profit,” but ultimately relied on a third-party interpretation that llamas were “livestock” per se.

The interpretation of “household pet” is as convoluted as “livestock.” While the Vermont Supreme Court Decision of Morgan v. Kroupa defined pets as animals having minimal economic value but substantial emotional value, other courts have looked to the human-animal relationship. As the Massachusetts Appeals Court said, “it cannot be gainsaid that domestic pets bring warmth, harmony and companionship to their owner’s household.” One court reckoned that, while pets are “considered personal property and, as such, are replaceable, that fact of the matter is that they are property with personality” and “capable of providing invaluable love, friendship, and companionship.” Another court noted that pets “occup[y] a special place somewhere in between a person and a piece of personal property.” All indicate the tremendous value we attribute to the human-animal relationship.

B. Statutory Classifications of Miniature Horses

Various types of enacted ordinances and regulations that expressly address miniature horses are amendments adopted at the request of a prospective resident miniature horse owner, or the

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81 Id. at 31.
82 701 A.2d 630 (Vt. 1997).
85 Corso v. Crawford Dog and Cat Hospital, Inc., 415 N.Y.S.2d 182, 183 (Civ. Ct. 1979); see also Rabideau v. City of Racine, 627 N.W.2d 795, 798 (Wis. 2001) (“Labeling a dog ’property’ fails to describe the value human beings place upon the companionship that they enjoy with a dog. A companion dog is not a fungible item, equivalent to other items of personal property. A companion dog is not a living room sofa or dining room furniture. This term inadequately and inaccurately describes the relationship between a human and a dog.”).
86 See, e.g., Roger L. Hardy, A Big Win For Little Horses, DESERET MORNING NEWS, Sep. 26, 2005, at B01 (describing how a resident petitioned City Council to approve ordinance allowing miniature horse under conditions more stringent than those of ordinary household pet).
city’s failed attempts to remove an existing miniature horse from the neighborhood. Despite the fact that all registered miniature horses must meet the same standards of confirmation and stand no taller than thirty-four inches at the shoulder, they enjoy a broad range of animal classifications. The classification that most blatantly disregards the miniature horse’s potential as a household pet is that of “livestock” or “farm animal.” While a miniature horse could arguably fall within the literal construction of either term, the classifications when used as prohibitive umbrellas lump miniature horses alongside nearly every other animal found on Old McDonald’s farm. Generally livestock are valued not for their substantive interactions with people but rather their economic worth, making this broad classification problematic because it fails to recognize the essential companionship that some miniature horses provide for their households and families.

87 See infra notes 124 - 131 and accompanying text.
88 Compare Steven Amick, Molalla Ready to Reclassify Miniature Horses as Pets, THE OREGONIAN, Jul. 10, 2001, at B02 (“All horses are considered livestock under a city ordinance that prohibits keeping farm animals within 100 feet of anyone’s home. But miniature horses might more appropriately be classified as pets, City Administrator Gene Green said.”). And Chao Xiong, She Fought City Hall and Won Respect: But Arden Hills Denied 10-Year-Old’s Request to Classify Miniature Horses as Domestic Animals, STAR TRIBUNE, Sep. 25, 2007, (“The Arden Hills City Council voted unanimously on Monday night to deny the 10-year-old city resident’s request to classify miniature horses as domestic animals so she could keep one in her yard.”).
89 See, e.g., Yadkinville, N.C., CODE OF ORDINANCES § 8-2-2(15) (2005) (defining “livestock” to include horses, miniature horses, ponies, mules, cattle, goats, sheep, and other hoofed animals excluding swine); Hancock County, Ind., CODE OF ORDINANCES § 156.121 (2009) (defining “farm animals” to include horses, cattle, pigs, sheep, goats, mules, donkeys, miniature horses, and miniature donkeys among others).
90 A miniature horse could be considered “livestock” as defined as “any domestic animals raised for home use, consumption, or profit, such as a horse . . .” because it is a member of the equine family. 18 U.S.C.A. § 2311 (West 2006). Likewise, a miniature horse could also be considered a “farm animal” as defined as any animal being raised on a “plot or tract of land devoted to the raising of domestic or other animals or . . . devoted to agricultural purposes” because it can be kept under such circumstances. See also Long, infra note 118, at § 3[a].
91 See Restatement (Third) of Torts: Liab. Physical Harm § 23 (P.F.D. No. 1, 2005) (“[L]ivestock such as cows, horses, and pigs are of substantial economic value, while pets such as dogs and cats provide essential companionship for households and families.”); see also Part IV.
1. **Classifications Based on Size**

Some cities keep miniature horses within the livestock classification, but distinguish them based on their size.\(^{92}\) Greenville, Texas, for instance, breaks down livestock into three categories—large, medium, and small—and includes miniature horses within the medium category alongside goats, sheep, and donkeys.\(^{93}\) Though miniature horses do not enjoy the same “pet status” as dogs and cats in that their ownership is subject to an enclosure and minimum land requirement, this classification at least distinguishes them from their larger equine counterparts and other traditional livestock animals.\(^{94}\) This is ideal because it balances the closer proximity in which miniature horses are kept with the animal’s fundamental need for a minimum amount of enclosed pasture.

Heath, Texas takes a bright-line approach, defining large livestock as animals “generally exceeding 500 pounds,” such as mules, horses, cows, llamas, and swine, and small livestock animals as those “generally less than 500 pounds,” such as miniature horses, goats, and emu.\(^{95}\) The Fullerton, California municipal code also recognizes miniature horses as small livestock, but instead categorizes them with animals such as poultry, rabbits and potbellied pigs.\(^{96}\) Of the two, the California classification more accurately captures the nature of keeping a miniature horse by categorizing it with other non-traditional household animals that have received “pet” status and are valued for their companionship qualities.\(^{97}\)

Other cities have articulated the miniature horse as an equine related to, but distinct from, the general horse population.

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\(^{92}\) See, *e.g.*, **AUSTIN, TEX., CODE § 3-1-1** (1992) (defining “livestock” as horses, mules, cows, swine, sheep, and goats, other than a miniature breed, and “miniature livestock” as livestock that meets the published breed definition for registration by a nationally recognized breeding association).

\(^{93}\) **GREENVILLE, TEX., CODE OF ORDINANCES § 4.01.001** (1990).

\(^{94}\) See *id.* at § 4.05.003- 005 (requiring livestock animals to be properly enclosed and making it unlawful to keep livestock within certain distance of any neighboring residence). See also **Byram v. Main**, 474 A.2d 1295, 1296 (Me. 1984) (noting that a donkey has been held to be a pet, though its status as pet was not at issue in the case).

\(^{95}\) **HEATH, TEX., CODE OF ORDINANCES § 93.02** (2005).

\(^{96}\) **FULLERTON, CAL., MUNICIPAL CODE § 15.17.030(K)** (2009).

\(^{97}\) See Part III.B.
For example, Ferguson, Missouri, has a code that unambiguously distinguishes horses from miniature horses: Horses are “a large solid-hoofed herbivorous mammal of the genus and species Equus caballus, family Equidae, domesticated by man and generally used as a beast of burden or for riding” and miniature horses are “a domesticated, solid-hoofed herbivorous mammal of the genus and species Equus caballus, family Equidae, which measures no more than thirty-four (34) inches at the withers in height and weighing no more than three hundred fifty (350) pounds.”

The classification makes no reference to a “pet” status of miniature horses. Instead, miniature horses are prohibited in residential areas, unless the owner has both obtained a permit and has a minimum amount of land.

Likewise, the town of Elizabeth, Colorado amended its municipal code addressing horses, livestock, and domesticated animals to include a definition of the miniature horse as “a smaller version of the horse determined by the height of the animal, which is usually less than 34-38 inches, as measured at the wither, and retaining horse characteristics.” Neither ordinance recognizes keeping a miniature horse as a single pet for a suburban household, but both ordinances utilize narrow definitions that reflect the miniature horse’s unique needs and, perhaps, potential as a household pet.

2. Hobby Animals

Miniature horses have also been lumped into extraneous animal classifications. For instance, the town of Elk Ridge, Utah includes miniature horses in the definition of “Hobby Animals” alongside chickens, ducks and pigeons. However, a nuance of the distinction is found in Elk Ridge’s subsequent provisions for livestock, in which miniature horses are also incorporated into the regulation. Whereas the miniature horse as a hobby animal is only permissible as a single animal allowed per lot with the requisite amount of space, in a livestock context residents may keep up to two

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98 Infra note 180, FERGUSON, Mo. CODE OF ORDINANCES § 6-1 (2008).
99 See id. at § 6-22.
100 ELIZABETH, Colo., ORDINANCE 10-07 § 16-1-20 (2010).
101 ELK RIDGE, UTAH, CODE § 10-18-5 (2009); see also WINFIELD, IND., CODE OF ORDINANCES § 156.040 (1997) (regulating hobby farms and distinguishing the animals kept thereon as livestock raised or bred primarily for personal enjoyment and not for commercial gain).
horses per half-acre owned.\textsuperscript{103} Thus, the code recognizes both the use of the miniature horse as a family pet for a suburban household as well as its agricultural use as a miniature equine.\textsuperscript{104} This two-prong classification comes closest to addressing the issue of a miniature horse’s pet-livestock distinction by recognizing the animal’s roles and physical needs in both contexts.

3. Exotic Animals

Another classification of the miniature horse is as an “exotic animal.” Arguably such a definition lends itself to being overbroad because many “exotic animals” are also wild and thus inherently dangerous. For instance, Tulare, California, lumps all wild, undomesticated, and exotic animals into one long definition and in doing so, bans ownership of miniature horses alongside the ownership of moose and tigers.\textsuperscript{105}

Notwithstanding the relative uniformity of miniature horses as a whole, there is a tremendous amount of variation in how communities classify the animal in legislation and municipal ordinances. To define the miniature horse is to balance its qualities as an equine and a barnyard animal with its docile temperament and low maintenance, characteristic of household pets. But to truly

\textsuperscript{103} Id.

\textsuperscript{104} The Elk Ridge code is arguably the most effective way to acknowledge the miniature horse’s unique role as a household companion for suburban families while not precluding it from regulation as an equine animal and part of the horse family. The amendment was actually a result of a miniature horse owner petitioning the City Council to distinguish miniature horses from horses and regulate the keeping of them in the city accordingly. See generally Brian Flinchpaugh, Ferguson is Neigh-borly to Miniature Horse Owners, SUBURBAN JOURNALS (Mar. 18, 2008), http://www.stltoday.com/suburban-journals/article_3f5eb7fc-f3b1-564e-9619-c9e6e44c032f.html.

\textsuperscript{105} TULARE, CA, CODE OF ORDINANCES § 6.12.150 (2001). The full definition goes as such: WILD ANIMAL, UNDOMESTICATED ANIMAL or EXOTIC ANIMAL means any mammal, amphibian, reptile or bird, which is of a species usually not domesticated, due to size, wild nature or other characteristic, or which is dangerous to humans. By way of example, but not limited to: monkey, chimpanzee, orangutan and gorilla, deer, elk, moose, zebra, bison, giraffe, camel, llama, pigmy goat, potbelly pig, miniature horse, wallabies, kangaroo, koala, ferret, mink, weasel, otter, porcupine, prairie dog, fox, skunk, squirrel, jackal, dingo, wolverine, wolf, coyote, or crossbreed of coyote-dog or wolf-dog, emu, ostrich, peacock, panther, leopard, tiger, lion, lynx, bobcat, bat, poisonous reptile, poisonous amphibian, crocodile, alligator, seal or bear. Id.
understand the miniature horse is to recognize that a miniature horse can be livestock or a household pet. Miniature horses are best benefitted by classifications that attribute the animal dual-statues as livestock under certain circumstances, and as pets or hobby animals under other circumstances.

IV. REGULATORY IMPACT ON MUNICIPALITIES

The majority of disputes involving pet miniature horses are at the local municipal level. Miniature horses living in suburban backyards often implicate issues such as ambiguities in zoning language, restrictive ordinances and nuisance laws which are then considered or resolved by city councils or county courts. Within this section are cases that illustrate such issues and violations at the local municipal level, and illustrate the unique way in which a miniature horse can function as a service animal in suburbia. These cases demonstrate the unpredictable nature of miniature horse regulation and the problems that stem from the ambiguities of terms such as “livestock” or “household pet.”

The primary issues implicated by suburban horse ownership are, first, some owners of miniature horses can have close and substantive interactions with their miniature horses, much like the owners of dogs kept as household pets. Second, miniature horses have scaled-down physical needs, but cannot live solely indoors; an owner must have a minimum amount of pasture to maintain the animal. The American Miniature Horse Association recommends up to three minis per acre. Third, due to their production of excrement and propensities such as neighing, miniature horses have the potential to compromise public health and/or become a nuisance when kept in a residential area. Whereas courts are

108 See Toni M. Leland, Horse Keeping for the Newcomer, THE MINIATURE HORSE IN REVIEW, VOLUME 1, 20 (Toni M. Leland ed., 2nd ed. 1999) (“Good management of [the] Miniature Horse is in everyone’s best interest. A healthy horse . . . is less likely to disturb the immediate neighbors. . . . [e]ven though they are so much smaller than their big cousins, they are still equines and can be viewed as a nuisance and/or a health hazard in a non-agricultural area.”). The average one thousand pound horse produces roughly forty to fifty pounds of manure per day. See Jenifer Nadeau, How to Properly Manage Manure, EXTENSION ARTICLES (2006), available at
limited to the facts of a case, the local governing bodies can hear a variety of community and evidentiary testimony. Thus, municipal legislation is the more effective vehicle to address these issues.

A. Prohibitive Zoning Ordinances Outlaw Miniature Horses

Well-settled law states that the government may interfere with private property in a "bona fide exercise of its police power subject to due process requirements." The exercise of the police power need only be rationally related to a legitimate state interest; thus, ordinances relating to the regulation of animals for purposes of health, safety, or general welfare are generally upheld on constitutional grounds if drafted carefully by the municipality. The language and nature of these restrictions vary greatly, depending on the intent of the ordinance or covenant drafter. The law may impose a complete ban on keeping animals and pets; it may limit the number of pets allowed, or perhaps focus on prohibiting or limiting the construction of animal and pet housing structures.

For example, the Illinois Appellate Court upheld an ordinance that allowed only one dog in any single family unit in a multiple family dwelling, but two dogs in a single family residence. The California Supreme Court upheld a broader animal

http://digitalcommons.uconn.edu/ansc_ext/3. Based on that average horse ratio, miniature horses average about five to seven pounds of manure a day, or one point two tons per year. Dogs, on the other hand, produce less than a pound of waste per day, averaging only two hundred and seventy four pounds per year. See Matt Hickman, Help Your Dog Become a Composter, CNN.COM (Feb. 26, 2011), http://www.cnn.com/2011/LIVING/02/26/mnn.dog.composter/index.html. (Manure management systems are highly recommended for preventing the "stench" which often leads to complaints by the neighbors.).


110 Id.

111 See generally Mark S. Dennison, Enforcement of Restrictive Covenant or Lease Provision Limited the Keeping of Animals or Pets on Residential Property, 93 AMJUR Trials 193 (2004) (discussing pet restrictions and means of their enforcement).

112 Id. at § 11.

113 See Village of Carpentersville v. Fiala, 425 N.E.2d 33, 34-36 (lll. App. 2d Dist. 1981) (finding adequate statutory authority to support enactment restricting number of dogs permitted). A similar ordinance limiting households to four dogs, only two of which could weigh over twenty-five
ban in *Nahrstedt v. Lakeside Village Condominium Ass’n*, where the court found the condominium association’s restrictive covenant prohibiting cats, dogs, and other animals (though domestic fish and birds were permitted) was valid and enforceable against the individual condominium owner who sought to keep her two indoor cats in the condo.\(^{114}\) Alternatively, the earlier discussed *Ridgewood* case illustrates regulation by indirect means such as prohibiting animal housing under a provision in the restrictive covenant prohibiting the maintenance of “structures for housing animals, kennels or otherwise.”\(^{115}\)

Other ordinances regulate the species of animals permitted within the boundaries of the community or in certain types of zoned property.\(^ {116}\) Zoning law of this nature generally turns on the distinction between animals raised as livestock for agricultural purposes and animals kept as household pets.\(^ {117}\) In determining whether the keeping of animals is an agricultural use, courts frequently look to dictionary definitions and regulatory definition of the terms “farm,” “agriculture,” and “livestock.”\(^ {118}\) For example, *Barnes v. City of Anderson* was an action initiated by the city against a resident who kept a Vietnamese potbellied pig, Sassy, in the house contrary to the local zoning code which prohibited keeping livestock in a residential district.\(^ {119}\) The code stated that “[d]omestic animals kept for farm purposes, especially those marketable animals, and raising or breeding of domestic animals, such as cattle, horses, sheep, goats, and ponies, etc.” which raised the issue of whether the resident’s maintenance of the pig constituted prohibited “raising” of pounds was upheld by the Supreme Court of South Dakota. See *City of Marion v. Schoenwald*, 631 N.W.2d 213, 215 (S.D. 2001) (reasoning that if the city can lawfully restrict the number of pets per home, it may also limit the size of at least some of those pets in light of maintaining health, safety and general welfare of the community and right to abate nuisances).

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\(^{114}\) 878 P.2d 1275, 1278 (Cal. 1994).

\(^{115}\) 813 A.2d 965, 971 (2003) (barring the Mignacca family from keeping Sonny because of the shed they were building for him in the backyard).

\(^{116}\) See Huss, *supra* note 109, at 1137.


\(^{118}\) See generally Steven B. Long, *Construction and Application of the Terms “Agricultural,” “Farm,” “Farming,” or the Like, in Zoning Regulations*, 38 A.L.R. 5th 357, § 2 (1999) (“The results reached by the courts in the various cases considered have, of course, depended to some extent upon the wording of the zoning regulations involved.”).

\(^{119}\) 642 N.E.2d 1004, 1005 (Ind. App. 2nd Dist., 1994).
a domestic animal. The court held that the policy was intended to exclude farming activities in the city, and reasoned that if the phrase “farm purposes” did not modify the word “raising” in the ordinance, dogs and cats would be livestock as well, and thus prohibited from the residential district. The court acknowledged that Sassy was a pig and “pigs are farm animals,” but reckoned that all parties to the case agreed that Sassy was a pet and clearly not used for farming purposes. Thus, her removal from the residential district would not be in furtherance of the policy of the ordinance preventing farming in such areas, and so the owner prevailed in keeping her pet pig.

The Los Angeles Times chronicled one case at length: It involved the devoted miniature horse owner Patty Fairchild, her 29-inch-tall stallion Ragtime, and the city of Thousand Oaks, California. In 1987, the Thousand Oaks City Council declined to exempt the miniature horse from zoning laws governing the keeping of horses and ordered Fairchild to remove the animal. The City filed criminal charges when Fairchild refused, but the county municipal court judge dismissed the charges on the grounds that the zoning code regarding horses was poorly worded and thus unenforceable. On appeal, a three-judge panel upheld the decision. As a result, the city adopted a new ordinance that prohibited a single horse on a lot smaller than 20,000 square feet - the stipulation which had rendered the initial charge unenforceable. However, even under this revised ordinance, a municipal judge ruled that because of Ragtime’s diminutive size, the miniature horse was considered a domestic pet under city laws.

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120 Id. at 1006.
121 Id.
122 Id.
123 Id.
125 Id. The controversy itself started when a neighbor complained to city officials about the smell of the horse. Id.
126 Id.
127 Id. The judges ruled that the city ordinance, which prohibited the keeping of two horses on less than 20,000 square feet of property, failed to specify restrictions against keeping a single horse, regardless of its size. Id. Subsequent to this ruling, both Thousand Oaks and the Homeowner’s Association of Fairchild’s community filed civil suits seeking injunctions to have the horse removed. Id.
regulations and thus permitted to remain in the neighborhood. In response, the city further amended its definition of “livestock” to include “horses, mules, burros, jacks, jennies . . . and any miniature specimen of these animals.” The city chose not to pursue Ragtime’s case further but city officials were clear that miniature horses were unwelcome in the densely populated area.

A more recent case took place in Oklahoma, as the family of Dakota, a 30-inch-tall miniature horse, sought to keep him in their suburban gated community. The city generally barred the keeping of horses, but it did have three exceptions: (1) if the land was in an agricultural zoning district; (2) if the property was larger than two acres; or (3) if the neighborhood’s homeowner covenants permitted it. Because the covenants of Dakota’s neighborhood permitted “household pets,” the case turned on whether Dakota fell within this classification. A municipal judge found the city ordinance clear and ruled that whether or not Dakota qualified as a “household pet” under the neighborhood’s covenant was a question for the jury. Following trial, the jury found that Dakota was, in fact, a household pet pursuant to the covenants and allowed the family to keep him in

129 See Miniature Horse Wins Court Fight Over Home, L.A. Times, Aug. 18, 1989, at 9, available at 1989 WLNR 2638899 (“Ragtime, a 27 ½-inch-high miniature horse, is a household pet, not a barnyard animal, and so may continue living in a Thousand Oaks House, a Ventura Superior Court judge ruled Thursday.”). The trial was a dog and pony show, literally. For purposes of demonstrating the docile and domesticated nature of the miniature horse, both Ragtime and a subpoenaed Great Dane were brought into the courtroom before Ventura Municipal Judge John J. Hunter. The Dane “bumbled and panted about the courtroom with typical canine ebullience,” and compared to the well-mannered Ragtime, “[t]he contrast was remarkable.” Al Martinez, Victory on a Ragtime Wednesday, L.A. TIMES, Jan. 14, 1989, at 2 available at 1989 WLNR 2565250.


131 Pet Issue is Back in the Saddle, L.A. TIMES, Mar. 16, 1990, at 1, available at 1990 WLNR 3569581. The disposition of this suit is unknown to this writer.


133 See Tim Stanley, Little Horse Spurs Big Fuss: A Broken Arrow Family is Fighting the City to Keep a Miniature Horse in its Backyard, TULSA WORLD, July 13, 2008, available at 2008 WLNR 14251218.

134 Id.

the backyard. The case spurred a flurry of questions and concerns from the community about the keeping of miniature horses and ultimately resulted in an amendment of the city ordinance that made it a misdemeanor to keep “any . . . horse, including miniature or dwarf varieties” on less than an acre of grazing land.

B. Regulations Regarding Miniatures Horses as Service Animals in Suburbia

Cases have also arisen by way of the miniature horse’s role as a service animal, as directly implicated in Access Now, Inc. v. Town of Jasper, Tennessee, and indirectly implicated in the previously discussed Ridgewood Homeowners Association v. Mignacca. In Town of Jasper, a mother sought an exemption from a prohibitive municipal ordinance for a miniature horse that she kept on the property for her nine-year-old daughter, who suffered health problems. The mother originally applied for a permit to keep the horse on her property, but the town denied the application for health and safety concerns. After the mother acquired the miniature horse, the city cited her for violation of the municipal ordinance that prohibited keeping a horse within 1,000 feet of any residence, and ordered her to remove the animal. The mother

136 See Tim Stanley, Jury Says Nay to City in Pet Case; Man Gets to Keep His Mini-Horse, TULSA WORLD, Feb. 6, 2009, available at 2009 WLNR 2409500 (“A six-member jury found Broken Arrow resident Greg Copeland not guilty Friday of a city misdemeanor charge for keeping his pet miniature horse, Dakota on his property.”); c.f. Tim Stanley, Pet Horse Forced to Leave Coweta Home, TULSA WORLD, May 24, 2009, available at 2009 WLNR 9873272 (“A Coweta ordinance, however, specifically forbids the keeping of horses within the city except on properties zoned for agricultural use,” thereby precluding miniature horse owner from keeping mini on residential property).
137 BROKEN ARROW, OK, CODE OF ORDINANCES§ 5-22 (2010); see also Susan Hylton, BA Panel Rewrites Animal Ordinance, TULSA WORLD, April 21, 2010, at A14, available at 2010 WLNR 8304668.
140 268 F. Supp.2d at 973-975.
141 See id. at 974-975.
142 Id. at 975
filed suit under the ADA in the district court, but the court found the
girl was not disabled under the ADA and never reached the issue of
reasonable accommodation for a miniature horse under the ADA. 143

*Ridgewood* involved a family fighting to keep a miniature
horse for the benefit of the child who had substantial health
issues. 144 The Mignacca family bought Sonny for their nine-year-old
son who suffered from bacterial meningitis that caused extensive
scarring and weakened limbs. 145 The boy’s involvement with the
horse brought him both enjoyment and improved self-esteem; but
the restrictive covenants of the community were at odds with the
Lilliputian animal. 146 Specifically, Sonny’s classification as a
permitted “pet” or a prohibited “livestock” animal led the court to
observe that the boy and his family had “close contact with Sonny
and treat[ed] him as a pet . . . in almost daily routines with him
involving feeding, training, grooming, playing, and showing,” and
concluded that the intent of the restrictive covenants was not to bar
a household pet such as Sonny, but to prevent residents from
engaging in “the business of keeping and raising animals in a farm-
like setting for commercial purposes.” 147

To the great dismay of the suburban miniature horse
community, the Supreme Court of Rhode Island reversed the
decision. 148 The court grounded its decision in the covenant’s
unambiguous proscription of structures for keeping animals (which
was violated by the Mignacca’s construction of a shed for the horse)
and interpreted the livestock-pet distinction as “barring outdoor
animals such as horses but not indoor pets.” 149 Despite the lower
court’s findings that Sonny was “gentle, amiable and not high strung
or vicious;” that “his neigh, such as it is, is more akin to a cat’s
meow;” and he was effectively invisible from the street, the court
enjoined the Mignacca family from keeping him on their Ridgewood
property. 150

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143 *See Adair, supra* note 43, at 429.
144 *Ridgewood Homeowners Ass’n v. Mignacca*, No. 01-PC 2615, 2001 WL
145 *Id.*
146 *Id.* at *5.
147 *Id.* at *7-*8. (This trend of interpretation is not very uncommon, as this
paper shows.) *See* Part III.B.
148 *See* Ridgewood Homeowners Ass’n v. Mignacca, 813 A.2d 965, 978 (R.I.
2003) (Remanded with instructions).
149 *Id.* at 972-974.
150 *Id.* at 977.
C. State Public Health and Safety Regulations Affect Miniature Horse Ownership

Inherently intertwined in the classification of miniature horses are the restrictions and regulations of their upkeep, this subsection focuses on how cities have tackled the issues of a miniature horse’s scaled-down physical needs and the nuisance and public health concerns that can arise from keeping one in a residential neighborhood. Cities generally employ one of two methods when regulating how much land an owner must have in order to keep a miniature horse: (1) by way of addressing the keeping of miniature horses specifically, or, (2) through a permissible livestock-property ratio that takes the small size of the miniature horse into account.\(^{151}\)

An example of specifically distinguishing the miniature horse is found in the ordinances of Elk Ridge, Utah. The ordinance provides that residential dwellers may keep a maximum of one miniature horse (kept as a hobby animal and not for commercial purposes) per lot, so long as the animal is afforded 1,500 square feet of land and is at least fifty feet back from any adjacent residence.\(^{152}\) Horses and miniature horses not kept as hobby animals, on the other hand, must be on at least a half-acre of property.\(^{153}\) Similarly, Ferguson, Missouri requires that a miniature horse owner must obtain a permit from the city, have a minimum of one acre of property, keep no more than two miniature horses per acre, provide sufficient fencing to contain the miniature horse, and have any

\(^{151}\) Two means of miniature horse regulation not mentioned in this subsection include an indirect approach and permissible accessory use. The indirect approach involved a city’s amendment of its general proscription of animals running at large to also include a proscription against keeping any horse on a single lot less than two acres unless the property was in an agriculturally owned district, thus precluding most suburban miniature horses. See Charlie Cox, Horse Country? Danville Ponders Pony in Subdivision, CENTRAL KY NEWS, Nov. 30, 2008, available at http://articles.centralkynews.com/2008-11-30/news/24866894_1_deed-restrictions-miniature-horse-country. Another city regulated miniature horse as an accessory use in a residential district so long as they were “compatible and common to the district in which it is located therewith and [did] not alter the character of the premises.” DEWEY-HUMBOLDT, ARIZ., CODE OF ORDINANCES § 153.066 (2008) (categorizing ostriches, miniature horses, llamas, alpacas, sheep, goats, emus, or animals of other similar size and weight as accessory use and permitting up to five animals per acre).

\(^{152}\) ELK RIDGE, UTAH, CODE § 10-18-5.

\(^{153}\) Id. at § 10-18-6.
housing accommodations for the horse set back a minimum of fifty feet from every property line.\textsuperscript{154} Both ordinances are excellent examples of how a city can effectively address the scaled-down needs of a miniature horse as compared to a full-size horse.

The alternative method employs a more generalized livestock-to-property ratio that permits owning a certain number of animals per acre, which may vary depending on the animal. For instance, in Parker Texas “the minimum lot size for large animals is 1.8 acres;” but “two miniature horses shall be considered the same as one large animal.”\textsuperscript{155} Similarly, Anne Arundel County, Maryland mandates that a person may not keep livestock on less than 40,000 square feet, and the ratio of livestock to land may not exceed one animal unit per 40,000 square feet.\textsuperscript{156} While a “horse” is considered one animal unit, “4 ponies, burrows, miniature horses or donkeys” also equal one animal unit.\textsuperscript{157} In a similar fashion, the city of Rosemount, Minnesota regulates horses by specifically providing that residents must have a minimum of 2.5 acres to keep a horse and may not keep more than one horse per acre, but the code provides an exception for miniature horses, allowing up to three per acre.\textsuperscript{158} Though these regulations do not alter the minimum-land requirement to reflect the lesser needs of a miniature horse, they do reflect the miniature horse’s scaled-down maintenance by permitting a resident to keep more of them on the same amount of land as compared to keeping a full-sized horse.\textsuperscript{159}

Some cities include additional provisions specific to owning miniature horses in residential areas that address concerns of public health, safety and nuisance.\textsuperscript{160} For example, Ferguson, Missouri requires that “[n]o person shall keep a miniature horse in any

\textsuperscript{154} Ferguson, Mo., Code of Ordinances § 6-22.
\textsuperscript{155} Parker, Tex., Code of Ordinances § 92.03 (2008) (The code also conditions the requisite amount of net grazing area for each animal upon the existence and use of a stable; animals provided a fully enclosed stall inside a barn, suitable for care and feeding, require only a half-acre of net grazing area, while a field-only animal requires a full acre of net grazing area).
\textsuperscript{156} Ann Arundel County, Md., Code § 18-4-104 (2005).
\textsuperscript{157} Id.
\textsuperscript{158} Rosemount, Mn, Code § 7-4B-10 (A) (2004).
\textsuperscript{159} However, their small size and relatively minimal land needs also lend themselves to abuse by horse owners seeking to keep more animals than the property and/or community can handle. See, e.g., Mitch Tobin, Horses Spark Legal Tussle, AZ Daily Star, Jan. 9, 2006, at B1 (“Presumably, the minis produce one-fifth the waste of full-size horses. Even so, the county says the [owners in question] cannot have five times as many animals.”).
\textsuperscript{160} See, e.g., supra note 154.
manner which is detrimental to the public health, safety welfare or to that of the miniature horse.” Other cities, such as Heath, Texas, utilize broad language in provisions for preventing public nuisances such as rendering it an unlawful public nuisance for any person to allow an animal enclosure to become offensive by reason of odor or disagreeable because of flies, or to keep any animal which disturbs any ordinary person nearby through frequent or long continued noise. Given the miniature horse’s steady production of manure and propensity to become a nuisance by way of manure-related odor and flies, these ordinances are critical to address the issues that can arise from keeping a miniature horse on a smaller property with neighbors nearby.

V. CONCLUSION

The ‘American Dream’ nearly always includes a reference to children and a home with a white picket fence. Most do not expect to see a miniature horse grazing behind that white picket fence! But, as the diminutive and docile companion animal grows in popularity, the sight will become increasingly common. In light of their growing numbers, it is imperative for local communities to address the set of issues that arise from keeping a miniature horse in the neighborhood. While it is not ideal to regulate miniature horses solely as household pets, given their unique requirements, it is increasingly important to recognize and consider their role as a companion animal. Due to their small size and the close proximity in which they may be kept near (or sometimes inside) the residence of the owner, the nature of human interactions with a pet miniature horse can be very different than interactions with full-sized horses. The basic needs of pasture and upkeep for miniature

161 Id.
163 Though this is generally a colloquial reference, an example of its embodiment can be found in Aaron C. McKee’s article title, The American Dream- 2.5 Kids and a White Picket Fence: The Need for Federal Legislation to Protect the Insurance Rights of Infertile Couples, 41 Washburn L.J. 191 (2001).
166 See supra Part II.
horses are also a fraction of their larger counterparts.\textsuperscript{167} For a family living on an acre lot, it is quite easy to keep a miniature horse in the backyard as a pet.

However, miniature horses “...are not house pets. They are horses, and they need to be treated like horses.”\textsuperscript{168} Although frequently compared to Great Danes, miniature horses produce nearly 1.1 more tons of waste per year, require pasture for maintenance, and cannot be kept primarily inside the house.\textsuperscript{169} Owners may also use miniature horses in a manner identical to horses of any size—such as being owned en masse on a farm for commercial purposes.\textsuperscript{170}

Achieving the balance between regulating the miniature horse as both a household pet and a tiny livestock animal is necessary to properly meet the needs of the animal and the concerns of the public regarding health and nuisance. The ideal combination is where miniature horses are kept as hobby animals only when one horse is kept in the backyard, and as livestock only when there more than one is animal involved, or the animals are kept for commercial purposes. Also ideal is a minimum land and enclosure requirement that reflects appropriate concessions to their size; one miniature horse does not equal one full sized horse, nor does it equal one large-breed dog. Regardless of whether or not miniature horses are allowed in a residential area, the key element is that the reasons for which the miniature horses are permitted or prohibited reflects their growing role as a companion animal and household pet, their scaled-down physical needs, and their potential for nuisances when maintained within the close confines of a residential neighborhood.

\textsuperscript{167} See, supra note 148.
\textsuperscript{169} See supra note 80.
\textsuperscript{170} See, e.g., Sevil Hunter, A Little Horseplay, Reno Gazette-Journal, April 30, 2004, at E1 (“The small horses have become big business in Northern Nevada and the West, where ownership has more than doubled in the last decade ... Price tag for a mini: $500 to $100,000.”).
TRANSGENIC ANIMALS: ETHICAL CONCERNS REGARDING THEIR CREATION, RESEARCH AND TREATMENT

By: Muriel Tinkler*

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I. RESEARCH METHODOLOGY

For the purposes of this paper, my research strategy included reading and/or reviewing the various types of references: books; journals; white papers; case law; federal and state statutes related that affect transgenic animals; patents and patent applications; peer reviewed articles; and internet searches. The paper below analyzes a summary of what I have found: starting with (1) an introduction to transgenic animals; (2) issues with the research and treatment of transgenic animals; (3) risks and public reaction to transgenic animal research; (4) the future of transgenic animal research; and, ending with (4) a brief conclusion of the transgenic animal topic.

II. INTRODUCTION TO TRANSGENIC ANIMALS

Transgenic animals are animals that are altered when DNA is introduced from another gene or species into their bodies. This can be done in a variety of ways. These animals are used in research and in various applications to help benefit humans, the environment, agriculture and industry. This paper focuses on current methods of creation, research, treatment and laws affecting these animals and provides suggestions for improvements in these areas.

The following list of definitions is helpful in the understanding of what transgenic animals are and how they are used in research. These definitions are also used in this paper and throughout the cited references:

Table 1: Definitions

<table>
<thead>
<tr>
<th>Definition</th>
<th>Description</th>
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<tbody>
<tr>
<td>Bioinformatics</td>
<td>An interdisciplinary research area that applies computer and information science to solve biological problems. However, this is not the only definition. The field is being defined (and redefined) at present, and there are probably as many definitions as there are</td>
</tr>
</tbody>
</table>
bioinformaticians & bioinformaticists.¹

Genetic engineering
A process in which recombinant DNA (rDNA) technology is used to introduce desirable traits into organisms. A genetically engineered (GE) animal is one that contains a rDNA construct producing a new trait. While conventional breeding methods have long been used to produce more desirable traits in animals, genetic engineering is a much more targeted and powerful method of introducing desirable traits into animals. In January 2009, FDA issued a final guidance for industry on the regulation of genetically engineered (GE) animals.²

Gene targeting
The process of disrupting or mutating a specific genetic locus in embryonic stem (ES) cells, usually with the intention of making knock-out or knock-in mice.³

Genomics
A branch of biotechnology concerned with applying the techniques of genetics and molecular biology to the genetic mapping and DNA sequencing of sets of genes or the complete genomes of selected organisms, with organizing the results in databases, and with applications of the data (as

¹ University of Minnesota, Graduate Programs in Bioinformatics, (December 20, 2011), http://www.archive-it.org/collections/2699;jsessionid=87BDEA5CC0BBCA3D6CED09F92675842C.
in medicine or biology)\(^4\)

**Knock-in mice**
An experimental line of mice, produced from embryonic stem cells in which a reporter gene has been inserted into the genome, in such a position that the expression, or activity, of a gene under investigation can be monitored.\(^5\)

**Knock-out mice**
A commonly used type of animal model, a mouse population resulting from embryonic stem cells in which a normally functional gene has been switched off, or replaced by a non-functional form of the gene. The function of such a gene can be understood by studying the characteristics of animals unable to produce the gene product.\(^6\)

**Mutagenesis**
An event capable of causing a mutation.\(^7\)

**Nuclear Transfer**
The introduction of the nucleus from a cell into an enucleated egg cell (an egg cell that has had its own nucleus removed). This can be accomplished through fusion of the cell to the egg or through the direct removal of the nucleus from the cell and the subsequent transplantation of that nucleus into the enucleated egg cell. The donor nucleus used for nuclear transfer may come from an undifferentiated embryonic cell or from a differentiated adult cell

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\(^6\) *Id.*

\(^7\) Princeton University, *Wordnet: A lexical database for English*, (last visited Aug. 18, 2012), http://wordnetweb.princeton.edu/perl/webwn?s=mutagenesis&o2=&o0=1&o8=1&o1=1&o7=&o5=&o9=&o6=&o3=&o4=&h=. 
(somatic cell); in the latter case, the technique is called somatic cell nuclear transfer (SCNT).8

Proteomics

A branch of biotechnology concerned with applying the techniques of molecular biology, biochemistry, and genetics to analyzing the structure, function, and interactions of the proteins produced by the genes of a particular cell, tissue, or organism, with organizing the information in databases, and with applications of the data9

Transgenic Organism

An organism that has foreign DNA stably integrated into its genome.10

Xenotransplantation

Transplantation of an organ, tissue, or cells between two different species (as a human and a domestic swine).11

III. ISSUES SURROUNDING RESEARCH OF TRANSGENIC ANIMALS

A. Types of Animals Used

Transgenic animals contribute to human welfare through medical, agricultural and industrial applications.12 Class 800, subclass 13 focuses on the types of animals used as transgenic

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nonhuman animals. Subclass 13 lists three distinct types of nonhuman transgenic animals: (1) mammal, (2) bird, and (3) fish. Subsection 14 focuses on mammals and is further divided into four types of mammals: (a) bovine (b) sheep (c) swine, and (d) mouse. Subsection 19 discloses the use of birds used as transgenic animals. Subsection 20 discloses the use of fish used as transgenic animals.

Currently, in order to use animals in research, one must comply with the Animal Welfare Act, which requires that minimum standards of care and treatment be provided for certain animals bred for commercial sale, used in research, transported commercially, or exhibited to the public. However, laws still protect research facilities from disclosing any information on these animals.

B. Creating Transgenic Animals

The United States Patent and Trademark Office currently lists four methods of creating a transgenic non-human animal: (1) breeding, (2) retrovirus, (3) microinjection of a nucleus, and (4) microinjection of DNA.

Class 800, subclass 22 involves “breeding to produce a double transgenic nonhuman animal.” As of January 2012, a search for applications and patents in subclass 8, entitled “Nonhuman Animals,” provides 44 applications and patents that directly relate to this field. United States Patent number 7,294,755 entitled “Genetic Modification of Male Germ Cells for Generation of Transgenic Species and Genetic Therapies” is an example of such a patent. This patent, issued on November 13, 2007, involves the breeding of a genetically modified male mouse with a female mouse to produce a transgenic progeny. A gene mixture was delivered into the testis of the male mouse to genetically modify its germ cells.

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14 Id.
15 Id.
18 United States Patent number 7,294,75 by Readhead et al.
Class 800, subclass 23 is “Via Retrovirus.” A search for applications and patents in subclass 23 provides 44 applications and patents that directly relate to this field. An example of such a patent is “Method for Producing Transgenic Birds and Fish.” This patent, issued on January 29, 2008, involves infecting an embryo with a retrovirus to produce a transgenic animal.

Class 800, subclass 24 is “Via microinjection of a nucleus into an embryo, egg cell, or embryonic cell.” A search for applications and patents in subclass 24 provides 195 applications and patents that directly relate to this field. The patents and applications in this subsection mainly focus on cloning. An example of this type of patent would be “Production of Ungulates, Preferably Bovines that Produce Human Immunoglobulins.” This patent, issued on October 26, 2010, involves the cloning of a cow.

Class 800, subclass 25 is “Via microinjection of DNA into an embryo, egg cell, or embryonic cell.” A search for applications and patents in subclass 25 provides 390 applications and patents that directly relate to this field. An example of this type of patent would be “Transgenic Non-Human Animal for Use in Research Models for Studying Parkinson’s Disease.” This patent, issued on April 8, 2008, involves microinjecting DNA into the fertilized egg of a fish to produce a fish with a fluorescence shown only in the heart.

C. How Are Transgenic Animals Used?

1. Goals for these Animals

According to class 800 of the Patent Classification System, transgenic animals are used: (1) to test drug efficacy (2) to manufacture a protein which is then to be isolated or extracted, and (3) as a model for human disease.

The use of transgenic animals for testing drug efficacy can be found in class 800, subclass 3. As of January 7, 2012, subclass 3 consists of 1,392 applications and patents.

In class 700, subclass 4 the use of transgenic animals to manufacture a protein that is then to be isolated or extracted can be found. This subclass is then further divided into three areas: (a) the protein is isolated or extracted from blood or serum (b) the protein

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19 Search conducted January 2012.
20 United States Patent number 7,323,619 by Baltimore et al.
21 Search conducted January 2012.
22 United States Patent number 7,820,878 by Goldsby et al.
23 Search conducted January 2012.
24 United States Patent number 7,355,095 by Tsai et al.
is an immunoglobulin, and (c) the protein is isolated or extracted from milk.

The use of transgenic animals as a model for human disease can be found in class 800, subclass 9. This subclass is further divided into three areas: (a) cancer (b) immunodeficiency disease, and (c) Alzheimer’s disease.

2. Drug and Industrial Production

In January 2009, the U.S. Food and Drug Administrations (FDA) issued final guidance for industry on the regulation of genetically engineered animals. Generally, the FDA regulates genetically engineered animals and must approve them before they are allowed on the market.25

The FDA’s website describes how new traits can be introduced producing an engineered animal for use in human pharmaceutical research. The milk from the offspring of the goats is purified to create a drug that is used to treat human disease.26

3. Food

The Polish Academy of Sciences has performed a study on how transgenics can improve food production.27 It lists the most important targets as: animal growth rate and meat production, milk yield and milk quality, wool production and quality, resistance to diseases, better or controlled reproduction, and digestion of normally non-digestible feeds or antinutrients, e.g., phytic acid-less phosphate released to environment. Research shows that the use of transgenic animals in food will most likely not cause ill effects in humans. A study by the American Society of Animal Science specifically states:

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it appears unlikely that the addition of a transgene that alters the physiological balance of an animal would raise concerns. . . . The addition of the genome of a single gene that affects the physiology of the animal without impairing the health of the animal is unlikely to affect the food safety of the flesh. The only exception may be transgenes coding for allergens. However, because the transgene product is known, testing can be performed when it is available and useful.  

4. Human Benefits

Regarding the use of transgenic animals for humans, this paper focuses on the medical benefits. The first benefit to humans is xenotransplantation. Many people die every year due to lack of replacement organs. Transgenic pigs may provide these needed organs.

Second, nutritional supplements and pharmaceuticals benefit from transgenic animals. Products such as insulin, growth hormone, and blood anti-clotting factors may soon be or have already been obtained from the milk of transgenic cows, sheep, or goats.

Third, the use of transgenic animals benefits human gene therapy:

Human gene therapy involves adding a normal copy of a gene (transgene) to the genome of a person carrying defective copies of the gene. The potential for treatments for the 5,000 named genetic diseases is huge and transgenic animals could play a role. For example, the A. I. Virtanen Institute in Finland produced a calf with a gene that makes the substance that promotes the growth of red cells in humans. While it could be argued that all of the uses of for transgenic animals are for “human benefit,” there are a few that directly benefit the medical health of humans. Below, you will find discussions

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30 Id.

31 Id.
surrounding how transgenic animals are used in disease control and xenotransplantation.

i. Disease Control

Transgenic animals are often used as models for various human diseases. The most common animal used as a disease model is the mouse. "More recently, transgenic models of disease have become more refined and are currently being used to study the pathological mechanisms behind the disease rather than to just provide a model of the disease."

In particular, Alzheimer’s disease is a very popular research trend for transgenic animals. Genetically modified mice, flies, fish and worms have been developed to reproduce aspects of the human histopathology. In general, histopathology deals with the tissue changes that are characteristic of a disease. The findings of these studies have been translated to human therapy.

Skin disease is currently being researched at Harvard University's School of Medicine using transgenic animals. In fact, Harvard offers “Transgenic Mouse & Animal Models” as a core focus in medical school within its Skin Disease Research Center.

ii. Xenotransplantation

The FDA defines xenotransplantation along with its benefits and ethical concerns:

Xenotransplantation is any procedure that involves the transplantation, implantation or infusion into a human recipient of either (a) live cells, tissues, or organs from a nonhuman animal source, or (b)

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human body fluids, cells, tissues or organs that have had ex vivo contact with live nonhuman animal cells, tissues or organs.\textsuperscript{36}

The U.S. National Library of Medicine National Institutes of Health, offers an excellent summary of the history of xenotransplantation:

The present historical review reports the clinical experiences of transplantations from animal to human. The first transplantation attempts were made without any knowledge of the species barrier. The pioneers of xenotransplantation realized xenotransfusions as early as the 16th century, then cell and tissue xenotransplantations in the 19th century. At the beginning of the 20th century, xenotransplantation of testicles became the latest craze. At the same time, and later in the 1960s, organ xenotransplantations were attempted, with disappointing results. Mathieu Jaboulay, Serge Voronoff, Keith Reemtsma, James Hardy, Denton Cooley, Thomas Starzl, Christiaan Barnard and Leonard Bailey were among the pioneers of xenotransplantation. Recent trials concerned above all tissue and cell xenotransplantations. Nowadays, with encapsulation, transgenesis, and cloning, great advances have been made for controlling xenograft rejection, but ethical questions linked to the risk of infections have become a major preoccupation within the scientific community and the general population.\textsuperscript{37}

There are several risks associated with nonhuman primate xenotransplantation in humans; health concerns centered on the transmission of infectious diseases though are a major concern. For instance, there are many infectious diseases of animals that can be transmitted to humans via routine exposure or consumption like mad cow disease and rabies. And, several viral outbreaks have been transmitted from animals to humans, including Ebola, Hanta virus


and influenza. Xenotransplantation further increases these risks in the following ways: "a) surgery disrupts the normal anatomical barriers to infection; b) transplant recipients are usually iatrogenically immunosuppressed; and c) patients’ underlying disease(s) may compromise their immune response to infectious agents." \(^{39}\)

The risk of spreading infectious diseases to humans can be reduced by “procuring source animals from herds or colonies that are screened and qualified as free of specific pathogenic infectious agents and that are maintained in an environment that reduces exposure to vectors of infectious agents.” \(^{40}\)

5. **Environmental Effect**

While genetically engineered micro-organisms have been used to help the environment, including mineral leaching and recovery \(^{41}\), enhanced oil recovery, \(^{42}\) pollution control, \(^{43}\) and the degradation of toxic chemicals. \(^{44}\)

Studies related to the environmental effects of releasing genetically altered animals into the wild are less certain and raise several concerns. However, much of the research that has been done is only theory, and no one really knows what would happen if an accidental release of genetically altered animals actually entered the wild population. One such study focuses on salmon. This study states possible concerns including: the establishment of feral populations of genetically engineered salmon which can potentially drive out native species/stocks through displacement and/or predation; and, “the greatest concern” being genetic effects on

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\(^{39}\) Id., at 3-4.

\(^{40}\) U.S. Dept’ of Health & Human Services, Food and Drug Administration, PHS Guideline on Infectious Disease Issues in Xenotransplantation. OMB Control No. 0910-0456 at 23, Expiration Date 1/31/2013, (last visited January 19, 2001).


\(^{42}\) Id., Page 119-123.

\(^{43}\) Id., Page 123-127.

interbreeding.45

6. Agricultural & Industrial

Transgenic animals are used in various types of agricultural and industrial procedures. In agriculture, transgenic animals have been used for milk production. However, the use of transgenic animals as commercially available livestock has been relatively unsuccessful. In general, it is well known in the art that commercially available is defined as something that is for purchase by the general public (or target audience). The goals for commercially useful transgenic livestock can be classified as follows:

(i) the use of livestock as 'bioreactors', to produce large quantities of completely foreign proteins such as human pharmaceutical proteins; (ii) modification of a secreted animal product, such as milk or wool, to supply an existing or anticipated commercial market; (iii) more profound modification of metabolism to increase feed conversion efficiency, or to improve the quality of a product such as meat or to confer resistance to disease without excessive loss of feed efficiency. Sadly, the results obtained so far have fallen very far short of expectation and have not been commensurate with the effort expended and costs incurred.46

Despite the fact that transgenic animals have not as yet been fully successful as commercially available livestock, there have been successes in other areas.

For instance, various uses for increased milk production has led to advances in industrial uses.

In 2001, two scientists at Nexia Biotechnologies in Canada spliced spider genes into the cells of lactating goats. The goats began to manufacture silk along with their milk and secrete tiny silk strands from their body by the bucketful. By extracting polymer strands from the milk and weaving them into thread, the scientists can create a light, tough, flexible material that could be used in such applications as military uniforms, medical microsutures, and tennis racket

strings. Toxicity-sensitive transgenic animals have been produced for chemical safety testing. Microorganisms have been engineered to produce a wide variety of proteins, which in turn can produce enzymes that can speed up industrial chemical reactions.47

According to actionbioscience.org, additional uses for this increased milk production have proved helpful for industry:

a) breeding: Farmers have always used selective breeding to produce animals that exhibit desired traits (e.g., increased milk production, high growth rate). Traditional breeding is a time-consuming, difficult task. When technology using molecular biology was developed, it became possible to develop traits in animals in a shorter time and with more precision. In addition, it offers the farmer an easy way to increase yields.

b) quality: Transgenic cows exist that produce more milk or milk with less lactose or cholesterol, pigs and cattle that have more meat on them, and sheep that grow more wool. In the past, farmers used growth hormones to spur the development of animals but this technique was problematic, especially since residue of the hormones remained in the animal product.

c) disease resistance: Scientists are attempting to produce disease-resistant animals, such as influenza-resistant pigs, but a very limited number of genes are currently known to be responsible for resistance to diseases in farm animals.48

D. Patenting Transgenic Animals

1. A History of Patenting Living Things

The history of genetic research started way before the mid 1980’s. In fact:

nineteenth-century attitudes have several important implications for the practice of science in the


48 Id.
twentieth. The most significant of these, so far as recumbent DNA research is concerned, relates to the questions of allegiance and accountability... In 1852... Sir Lyon Playfair, lecturing retrospectively on results of the Great Exhibition (The Chemical Principles Involved in the Manufactures of the Exhibition...), posed the question directly: to what does science owe its ultimate allegiance? His answer was 'To the sublime truth'... But if the ultimate allegiance was to truth, the next step followed logically: this allegiance was not to society.49

The history of patenting living things did not start with the patenting of animals. In fact, the Plant Patent Act of 1930 addressed two concerns. The first concern being that plants, even those artificially bred, were products of nature for purposes of patent law. The second concern being that plants are not amenable to the written description. The Plant Patent Act focused on the work of the plant breeder. In other words, it was the work of the plant breeder 'in aid of nature' that was patentable invention.50

Table 2: Chronology of Major Research51

<table>
<thead>
<tr>
<th>Period</th>
<th>Description</th>
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<tbody>
<tr>
<td>1865, 1900-1940</td>
<td>Transmission genetics (Mendelian genetics)</td>
</tr>
<tr>
<td>1940-1960</td>
<td>Nature and properties of hereditary material</td>
</tr>
<tr>
<td>1960-1975</td>
<td>Mechanisms of gene action (code, regulation, development)</td>
</tr>
<tr>
<td>1975-1985</td>
<td>New genetics (based on technology of nucleic acids)</td>
</tr>
<tr>
<td>1985-1990</td>
<td>Inverse genetics (genetic analysis going from genotype to phenotype, from gene to characteristic)</td>
</tr>
<tr>
<td>1990-2000</td>
<td>Transgenesis (horizontal transfer of genes (transgenic plants and animals; human gene therapy))</td>
</tr>
</tbody>
</table>

1995-2000 Genomics (molecular dissection of the genome of the organisms (from bacteria to human beings: the Human Genome Project))

1997-2000 Cloning in mammals by nuclear transfer techniques

Microorganisms

Section 2105 of the Manual of Patent Examining Procedure (MPEP) briefly discusses the act of patenting micro-organisms. The Supreme Court decided in the case of Diamond v. Chakrabarty held that microorganisms produced by genetic engineering are not excluded from patent protection. It is clear from the Supreme Court decision and opinion that the question of whether or not an invention embraces living matter is irrelevant to the issue of patentability. Instead, the decision on patentability centers around whether the living matter is the result of human intervention.”\(^{52}\)

Multi-cellular plant based organisms

Section 2105 of the MPEP states a brief history and reasoning surrounding the patenting of plant-based multi-cellular organisms:

The standard of patentability has not and will not be lowered... the Supreme Court held that patentable subject matter under... newly developed plant breeds, even though plant protection is also available under the Plant Patent Act (35 U.S.C. 161 - 164) and the Plant Variety Protection Act (7 U.S.C. 2321 et. seq.). J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc., 534 U.S. 124, 143-46, 122 S.Ct. 593, 605-06, 60 USPQ2d 1865, 1874 (2001) (The scope of coverage of... is not limited by the Plant Patent Act or the Plant Variety Protection Act; each statute can be regarded as effective because of its different requirements and protections). See also Ex parte Hibberd, 227 USPQ 443 (Bd. Pat. App. & Inter. 1985), wherein the Board held that plant subject matter may be the proper subject of a patent... even though such subject matter may be protected under the Plant Patent Act or the Plant Variety Protection Act...Following the reasoning in Chakrabarty, the Board of Patent

\(^{52}\) 447 U.S. 303, 206 USPQ 193 (1980).
Appeals and Interferences has also determined that animals are patentable subject matter. In Ex parte Allen, 2 USPQ2d 1425 (Bd. Pat. App. & Inter. 1987), the Board decided that a polyplaid Pacific coast oyster could have been the proper subject of a patent... if all the criteria for patentability were satisfied...Shortly after the Allen decision, the Commissioner of Patents and Trademarks issued a notice (Animals - Patentability, 1077 O.G. 24, April 21, 1987) that the Patent and Trademark Office would now consider non-naturally occurring, nonhuman multi-cellular living organisms, including animals, to be patentable subject matter...\(^5\)

**Transgenic Animals**

On April 3, 1977 the Board of Patent Appeals and Interferences refused to grant a patent on a process to make an oyster more edible to eat by putting them under pressure.\(^5\) While the Board said the claims in question were obvious, it also said that the mere fact that a multi-cellular animal was involved was not a bar to patentability. The issue was not whether the subject matter was a product of nature, but instead, "whether the subject matter is made by man."\(^5\) Days after the Allen decision, on April 21, 1987, the PTO announced that it would accept applications for "non- naturally occurring nonhuman multi-cellular living organisms, including animals."\(^5\)

2. **The Patent Classification System**

The classification system used by the United States Patent Office classifies patents on living things under CLASS 800, "Multicellular Living Organisms and Unmodified Parts Thereof and Related Processes." The Office describes Class 800 as: "This is the class for living multicellular organisms (nonhuman animals and

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\(^5\) Id.

plants) and separated or severed parts thereof that have not undergone any modification or treatment subsequent to their separation. These organisms or parts thereof may be genetically modified. This class also includes processes of producing said multicellular organisms and of using said organisms (nonhuman animals) in testing and protein production processes.\textsuperscript{57}

Specifically, sub-classes 3-25 focus on non-human animals. More specifically, sub-classes 4-7 focus on: Method of using a Transgenic Non-human Animal to Manufacture a Protein which is Then to be Isolated or Extracted. Sub-classes 9-12 focus on non-human animals as models for diseases, wherein 10-12 specify specific diseases (cancer, immunodeficiency disease, and Alzheimer’s). Sub-classes 13-20 focus on transgenic non-human animals, with sub-classes 14-20 specifying mammal; bovine; sheep; swine; mouse; bird, and fish. It is important to note that sub-section 8 simply states “nonhuman animal”, where sub-sections 9-20 are under sub-section 8.

Sub-classes 21-25 focus on the making of a transgenic nonhuman animal. Patents are classified under four separate methods of making transgenic nonhuman animals: (1) involving breeding to produce a double transgenic nonhuman animal; (2) via retrovirus; (3) via microinjection of a nucleus into an embryo, egg cell, or embryonic cell; and (4) via microinjection of DNA into an embryo, egg cell or embryonic cell.

IV. RISKS AND PUBLIC REACTION TO TRANSGENIC ANIMAL RESEARCH

A. Risks for Humans

The FDA has performed research and considered public comments expressed in PHS- sponsored public workshops on xenotransplantation regarding the use of non-human primate xenotransplantation. Based on their review, and consultation with NIH, CDC, HRSA, and the DHHS Working Group on Xenotransplantation, the FDA has agrees on the following environmental concerns:

(1) the use of nonhuman primate xenografts in humans raises substantial public health safety concerns within the scientific community and among the general public;
(2) current scientific data indicates that human

\textsuperscript{57} Also, see Appendix A.
subjects, including individual xenotransplant recipients, their close contacts, and the public at large, would be exposed to significant infectious disease risk by the use of nonhuman primate xenografts; and that

(3) further scientific research and evaluation is needed in order to obtain sufficient information to adequately assess and potentially to reduce the risks posed by nonhuman primate xenotransplantation.\footnote{58 U.S Dep’t of Health & Human Services, Food and Drug Administration, Guidance For Industry: Public Health Issues Posed by the Use of Nonhuman Primate Xenografts in Humans (1999), at 5, Available at http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Xenotransplantation/ucm092866.pdf}

Informed consent is required for participation when humans are exposed to transgenic animals. However, Occupational Safety and Health Administration (OSHA) guidelines must be met in order to ensure or minimize the risk to humans.\footnote{59 University of Pennsylvania Environmental Health & Radiation Safety, Biosafety Manual, (last visited Jan. 2, 2012), http://www.ehrs.upenn.edu/programs/bio/bsm/biohazards.html.}

There is much research discussing the benefits to humans and even the effects on animals. Unfortunately, there is not much research discussing the effects on the humans who perform the research on these animals. Ironically, it appears that the only ones focusing on this issue are the animal rights groups. Animal Aid is the United Kingdom’s largest animal rights group that campaigns against all forms of animal abuse and investigates and exposes animal cruelty.\footnote{60 About Animal Aid, ANIMAL AID, http://www.animalaid.org.uk/h/n/ABOUT/ (last visited Sept. 4, 2012).}

That group has found that when 90-90 percent of genetically altered mice are destroyed “many of the animal technicians responsible for killing all the 'waste' animals find it traumatic and are left feeling 'physically and emotionally exhausted.'”\footnote{61 Bred to Suffer – Transgenic Animal Disease Models, ANIMAL AID, http://www.animalaid.org.uk/h/n/CAMPAIGNS/experiments/ALL/313/ (last visited Sept. 4, 2012).}

B. Adequate Oversight

In regulatory oversight of xenotransplantation products, including live organs, tissues, or cells from a nonhuman source or
xenotransplantation product materials used in encapsulated form or in which nonhuman live organs, tissues or cells have ex vivo contact with human body fluids, cells, tissues or organs that are subsequently given to a human recipient.\textsuperscript{62} In the case of xenotransplantation clinical trials, the primary responsibility for designing and monitoring the conduct rests with the sponsor, the clinical investigator, or any party designated by the sponsor to fulfill the recommended function.\textsuperscript{63}

C. Treatment of Animals

The Canadian Council on Animal Care (CCAC) performed a study on animal welfare and issued guidelines. These guidelines focus on the review of protocols. The guidelines surrounding these protocols focus on both the parent generation and the progeny.\textsuperscript{64}

A first group of protocols involve laboratory animal management. Specific animal welfare concerns include: “the extent of discomfort experienced by the parents during the experimental procedures; the effect of the expression of the transgene on the created transgenic animal; and the effects on their progeny.”\textsuperscript{65} All-creatures.org provides an example of how these animals are treated: A large number of animals have to undergo surgery - many die - in order to produce a few ‘successes’. In fact, between 85 and 99 percent of genetically altered embryos die before they are born. Only 0.5 to 4 percent of the embryos transferred to foster mother animals are born alive and many transgenic animals that are born alive die at an early stage with a range of malformations and severe health problems.\textsuperscript{66} A second group of protocols involve the need for ethical review. First, the CCAC notes the absence of an informed sense of the


\textsuperscript{63} Id.


\textsuperscript{65} Id.

processes involved. While many groups, such as the CCAC, require an ethical review, it is still unclear what an “ethical review” consists of in the United States, as according to the FDA, the person who sets up the tests determines the parameters.

D. Religious Issues in Transgenic Research

Religious concerns regarding transgenic animals include not only ethical issues surrounding how the animals are treated. Thus, religions can be for or against transgenic animals. One point of view is that God gave humans dominion over the earth. This way of thinking is referred to as the “Great Chain of Being.” This refers to the “lesser status” of animals as it compares to human beings. Within the Great Chain of Being is a natural hierarchy. Cultures who believe in this idea look at it as a ladder, the order of which is pre-ordained. “Plants occupy the lower rungs, nonhuman animals are further up the ladder, humans are even higher up and the upper rungs are occupied by angelic forms with God atop the whole.”

There is another school of religious thought that is against transgenic research. These religious followers are against transgenic research because they feel that “God laid down the structure of creation and any tampering with it is sinful; and, manipulating DNA is manipulating ‘life itself’—and this is tampering with something that God did not intend humanity to meddle with.”

E. Do People Actually Want Transgenic Animals?

Theories surrounding what people want changes from time to time. Emerging technology in this area may be intriguing to some and frightening to others. In Gregory Pence’s book entitled Flesh of My Flesh, Leon R. Kass’s essay, The Wisdom of Repugnance, touches on this subject. “People are repelled by many aspects of human

67 Buy, supra note 64.
70 Id.
72 Leon R. Kass, The Wisdom of Repugnance, in Flesh of My Flesh: The
cloning. They recoil from the prospect of mass production of human being . . . but] Revulsion is not an argument; and some of yesterday’s repugnance’s are today calmly accepted—though, one must add, not always for the better.”

V. THE FUTURE OF TRANSGENIC ANIMALS

There is both hope and concern for all for the possibilities surrounding genetic research. Parents may choose inheritable genetic modifications so “future children might enjoy lives free of genetic contributions to burdensome or deadly disease and disability,” but there is the possibility that they could choose poorly. In the eyes of the health care profession, would inheritable genetic modifications “constitute the latest breakthrough in promoting individual well-being and public health, or a revival of old eugenic programs dressed in new garb?” Various communities—families, research groups, health care professional groups, religious and secular affinity groups, ethnic and racial identity groups—will encounter issues associated with IGM [inheritable genetic modifications] as they impact their lives in communities. Because genetic modifications concern the individual good and common good, the political community is necessarily implicated. However, “it is not obvious how the political community could best vindicate its mission given the perplexing array of questions posed for individuals and private communities . . .”

A. Change Through Social Pressure

Various grass roots organizations around the world, like People for the Ethical Treatment of Animals (PETA), have organized to inform the public about the abuses toward transgenic animals. Many of these animal activist groups oppose the use of transgenic research on animals. PETA’s outright protests and opposition of using transgenic animals for research have been heard loud and

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73 Id. at 20.
75 Id. at 243-44.
76 Id. at 244
77 Id.
clear by governments and have been cited in many government funded papers.

According to animal activists, any animal research project implies a potential violation of six widely subscribed moral norms and values. These are the following: respect to animals as they are, perform good science, be a good citizen, have responsibility for future generations, have responsibility for environment and show respect for life style and religious orientation of people. Under the first category, the breeding of animals under caged conditions, feeding them prepared diets, handling them for experiments and sacrificing their lives are violations of biological species specific life. Inducing pain, causing suffering, anxiety, stress or impairing their psychological wellbeing are abuses which deviate even more from the norm of reverence to life. Induction of heritable deviations of the wild type genome-transgenic animals, genetically modified organisms, present the latest class of violation against the normal norm. In addition to aspects of behavioural and genetic naturalness, aesthetic naturalness also appear to be important. For example, a mouse bearing a grafted human ear is repulsive to many. The nude mouse, a research animal well accepted within the subculture of molecular biologists, also triggers a strong gut response in lay public. The animal identification methods practiced for laboratory animals like clipping, notching ears, fingers, toes and cutting of tissues from the tail to check the transgenesis of new born mice amount to deliberate mutations in the eyes of animal lovers.78

B. Change in Government Agencies

In light of the FDA’s research, they are performing the following in order to improve the risks associated with xenotransplantation:

(1) an appropriate federal xenotransplantation

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advisory committee, such as a Secretary's Advisory Committee on Xenotransplantation (SACX) currently under development within the DHHS, should address novel protocols and issues raised by the use of nonhuman primate xenografts, conduct discussions, including public discussions as appropriate, and make recommendations on the questions of whether and under what conditions the use of nonhuman primate xenografts would be appropriate in the United States. 

(2) clinical protocols proposing the use of nonhuman primate xenografts should not be submitted to the FDA until sufficient scientific information exists addressing the risks posed by nonhuman primate xenotransplants. Consistent with FDA Investigational New Drug (IND) regulations [21 CFR 312.42(b)(1)(iv)], any protocol submission that does not adequately address these risks is subject to clinical hold (i.e., the clinical trial may not proceed) due to insufficient information to assess the risks and/or due to unreasonable risk.

(3) at the current time, FDA believes there is not sufficient information to assess the risks posed by nonhuman primate xenotransplantation. FDA believes that it will be necessary for there to be public discussion before these issues can be adequately addressed.79

When using xenotransplantation, potential source animals should be housed in facilities built and operated under the following conditions: adequate barriers, veterinarians on staff with expertise in infectious diseases; procedures in place to insure human care of all animals, a documented health surveillance system, and the facility should be subject to inspection.

In addition to these screenings and regulations for the source plant facilities, the FDA recommends the following: pre-xenotransplantation screening for known infections agents, herd-colony health maintenance and surveillance, individual source animal screening and qualification, procurement and screening of nonhuman animal live cells, tissues or organs used for xenotransplantation, archives of source animal medical records and

specimens, and disposal of animals and animal by-products. Other solutions include various agencies issuing guidelines. For example, there have been guidelines out for recumbent DNA research since the 1970s.

VI. CONCLUSION

The use of micro-organisms, multi-cellular organisms, and eventually animals, have been used over hundreds of years to benefit human health, the environment, and industry. Only in the last one hundred years have we been able to perform genetic engineering on living things for our benefit, and only in the last thirty years that we have published research on genetic engineering of animals. In most cases, it is still too early to know what the long terms effect will be to our environment, to us, and to the animals researchers have altered.

The current uses of these animals are for primarily human benefit; it is hard to discern any benefit at all to the animals. Many of these animals are discarded as rubbish and killed inhumanely. Also, animals subject to experiments could be subjected to toxic chemicals, diseases, and surgeries, among other things.

The future for transgenic animals is still uncertain. While there are many grass roots organizations fighting for their rights, the courts still appear to be in favor of secrecy for the research facilities under the First Amendment. It is also unclear if more public awareness for the suffering of these animals would help. As discussed above, after a while, the public could become desensitized to the suffering of these animals, as is the case with slaughterhouses and the inhumane treatment of livestock for food. However, it does appear that the individual government agencies are making the most effort to change. It is becoming more and more likely to see quotes and statements in the white papers of government agencies, such as the FDA and NIH, discussing public concern surrounding the treatment of transgenic animals. In any case, in order to make any changes in the treatment of transgenic animals, there needs to be a holistic approach to change from all parties, including regulators, manufacturers, and the public.

EDITORIAL

ANIMALS ARE NOT PROPERTY AND SHOULD BE LEGALLY RECLASSIFIED

By: Catherine L. Wolfe*

I. ANIMALS ARE NOT PROPERTY AND SHOULD BE GIVEN THEIR OWN LEGAL CATEGORY – SEPARATE FROM INANIMATE OBJECTS

II. THE EVOLVING AND INCREASINGLY IMPORTANT ROLES ANIMALS PLAY IN OUR LIVES

* This is the shortened version of a longer, more detailed opinion-article. The complete version is available online, with pictures, text, and numerous examples, at http://www.midatlanticjournal.com. The comprehensive article on the Journal's website reflects the original intent of the author and she respectfully suggests that you read that version as well if you are interested in the theme.

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"The greatness of a nation and its moral progress can be judged by the way its animals are treated."

-Mahatma Ghandi

I. ANIMALS ARE NOT PROPERTY AND SHOULD BE GIVEN THEIR OWN LEGAL CATEGORY – SEPARATE FROM INANIMATE OBJECTS

Our civil laws classify everything into two categories – “Human” or “Property.” Currently animals are classified as Property – or, to be more precise, the sub-category of “personal property.” As such, animals are treated the same as inanimate objects. That classification is unrealistic and no longer accurately reflects our society’s view towards animals and the roles animals play in our lives. A new, third category should be created for animals so that their special qualities may be recognized and more appropriately addressed. That category should be entitled “Animals,” and should fall between Humans and Property.

While this may sound like a novel idea it really is not because our criminal laws have long recognized the difference between animals and inanimate objects. Specifically, harming an animal is animal cruelty while harming an inanimate object is the completely different crime of malicious destruction of property.

Our civil laws should be brought into conformity with our criminal laws so that animals receive better treatment and care than inanimate objects under our civil laws, just as they do under our criminal laws. The way to achieve that is by creating a new and separate category, under our civil laws, to be called “Animals.”
II. THE EVOLVING AND INCREASINGLY IMPORTANT ROLES ANIMALS PLAY IN OUR LIVES

Animals are profound and treasured elements of many people's lives. Today, animals are such an integral part of our society that it is difficult to conceive of life without them. They are no longer just "pets"\(^1\) or "livestock," or "game species." Instead animals play a broad spectrum of roles in our lives and the lines between those roles are now often blurred.

For example, service-animals who assist people with physical or mental challenges (e.g., "seeing-eye dogs" for people who are visually impaired, or hearing-aid dogs who assist people who are hearing impaired) are also companions and a means of socializing with other people. They are much more important, and quite different, than mere tools. As service animals they comfort, love, guide, and protect the people they assist.

Also, the species of animals used as service animals grows constantly as we discover talents and capabilities in animals that we never knew existed. Now, miniature horses, pot-bellied pigs, monkeys, and other species have also been recruited into the ranks of service animals. Just the other day, the author received a request for legal assistance for a visually impaired gentleman in connection with his "service parrot."

Animals also guard property and serve in law enforcement (e.g., police dogs, drug detection dogs, horses in mounted units, and border patrol dogs and horses). Therapy and emotional-support animals provide love and comfort to vast numbers of people suffering from innumerable conditions and afflictions, all the way from depression, autism, and epilepsy, to cancer. Search and rescue dogs save people whose lives are in peril while dogs and pigeons have served in the military for centuries. Both have carried messages in combat, and dogs have also been used to detect landmines or the presence of the enemy. And, of course, they have loved and comforted military troopers from time immemorial.

Dogs are also being used to locate cancers not yet detectable by even the most sophisticated and advanced medical equipment. And they are trained as service animals for people who suffer from epilepsy because they can actually sense when a person is about to suffer a seizure – before the person him- or herself is aware that a seizure is imminent. Consequently the dog can alert the person that

\(^1\) The term "companion animals" has begun to replace the term "pets" in the vernacular of those of us who consider animals as "companions" rather than property. For that reason, the author will use the term "companion animals" in this paper, rather than the term "pets."
he or she is about to suffer a seizure, and they can then assist the person in getting to a safe location and position before the onset of the seizure. During the seizure the dog remains with the person, and as the seizure subsides, the dog is there to comfort the person as he or she recovers.

III. THE PROBLEM: OUR LEGAL SYSTEM'S FAILURE TO ACCOMMODATE THE EVOLVING AND INCREASINGLY IMPORTANT ROLES ANIMALS PLAY IN OUR SOCIETY

Legally, animals are categorized as Property for purposes of determining causes of action, liability, and damages. As discussed below, this is unfortunate for both the animals and the people who love them.

As property, animals are legally subjected to ownership by people and ownership laws. When property owners sustain damage to their property (including animals) they are legally obligated to minimize ("mitigate") the damage. For example, if someone damages a chair that you own and you choose to repair it, but the repair cost exceeds the fair market value of the chair, then you are only entitled to recover the monetary difference between the fair market value of the chair before the damage and its fair market value after the damage ("economic damages"). In most jurisdictions you are not entitled to any repair costs that exceed the fair market value before the damage, nor are you entitled to any compensation for emotional distress ("non-economic damages") if the chair was a cherished family heirloom and its damage was emotionally upsetting to you.

As property, animals are treated the same way under the law. If your companion animal is injured by another person you are only entitled to the economic difference between the fair market value of your companion animal before its injury and after its injury. You are limited to recovery of your economic damages only. Thus, you are legally barred from recovering the cost of veterinary treatment to restore your companion animal's health if it would be less expensive just to get a new pet. As an example, if you own a dog or cat that is a mixed-breed or over the age of 1 year, its fair market

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2 As property, animals are subject to “ownership,” However, there is an increasing trend towards viewing the relationship between animals and their care givers as one of “guardianship” or “stewardship.” The author prefers this newer view because it comports with re-classification of animals as Animals and recognition that they are more than just property. Nevertheless, for purposes of this article, the author uses the terms of ownership because that is the current state of the law.
value is probably $0 because so many of them are available for free on the open market (i.e. out of the newspaper classified advertisements, bulletin boards at many businesses, outside of stores where people literally give away whole litters, free). Since your companion animal is technically worth nothing, you are not entitled to recover any costs for veterinary treatment since, under the law, it would be more cost-effective to let your companion animal die and get a new one for free. Stated another way, after your companion animal is injured, it is a financial liability – it has a negative value because it will cost more to restore its health (often thousands of dollars) than it will cost you to simply replace it with a free companion animal.

A good example of this is a matter the author dealt with several years ago when she was consulted by a family who were the guardians of a wonderful black lab named Squirt. He was viciously attacked by another dog, and critically wounded. Since Squirt was about 7 years old, his fair market value was $0. Seven-year-old labs are abundant and readily available for free. Furthermore, as with many older dogs, they are usually financial liabilities because they are prone to health issues that require (or will require) monetary expenditure to treat.

The fact that Squirt’s family viewed him as a family member, rather than a piece of property, and spent approximately $4,000 in veterinary costs to save him, was irrelevant. As far as most state laws are concerned, it would have been less expensive for his family just to let him die, and get another seven-year-old lab for free, than to spend the money they did to give him a full recovery. Consequently his family was not entitled to any damages (economic or non-economic) from the owner of the dog who attacked him. Squirt’s situation clearly demonstrates the injustice of our current system’s failure to allow for redress of economic and non-economic damages for animals.

Although a growing number of courts have broken with this tradition and allowed for recovery of some economic damages such as veterinary treatment and costs, they are in the minority. Such decisions are still the rare exception rather than the rule.

Our current legal system fails to account for the unique relationship animals play in our lives. Animals give us unconditional love, companionship, and devotion (to say nothing of entertainment), and yet the law treats them as if they lacked the foregoing qualities, and are nothing more than inanimate objects. It is long past time for us to make radical changes in our laws to keep pace with the changing times and the flood of new knowledge that is
emerging at a staggering rate about the extraordinary characteristics and abilities of animals.

When most laypeople learn that, legally, their companion animals or other animals are “property,” they are aghast. The state of the law in this regard is difficult to explain and impossible to justify because it simply does not reflect reality or even common sense. It fails to account for the nature of animals as living creatures rather than as inanimate objects. By perpetuating this nonsensical rule of law, we as lawyers fail the people who care about the welfare of animals as well as the animals themselves. There simply is no good reason to continue this rule of law and if we do so we jeopardize the public’s faith in us as well as the entire legal system.

The founders of our great nation designed a government that is flexible so that it could change with the times and the needs of our society. Their design was so wonderful that it has held for over 200 years. Its flexibility has allowed it to remain sturdy through its ability to change. For the most part, the government they created has stood our country in good stead and produced fair and just laws. However, animals are one area where our government and laws have failed to keep pace with the changes in our society, and the time is long overdue for significant changes – changes that are imperative to achieve justice, both for the people who “own” animals, and for the animals themselves. There is only one solution: the reclassification of animals into a new category that distinguishes them from inanimate objects and recognizes their unique place in our society.

IV. THE SOLUTION: ANIMALS SHOULD BE LEGALLY CLASSIFIED AS “ANIMALS”

Animals would be a better classification for animals than Property. If animals are given their own legal category, they will not be treated the same as inanimate objects. Instead, they will be subject to laws specifically designed for them as living, feeling, sentient, beings. Increasingly (albeit slowly), courts have been recognizing the injustice of the law and treating animals as more than mere property, and in some cases allowing for economic damages and sometimes even non-economic damages.

In Murray v. Bill Wells Kennels, Ltd., a dog named Brandy died an agonizing death after being deprived of her diabetes medication while being boarded at a kennel facility. The young lady who owned Brandy returned from out of town just as Brandy

3 Wayne County Circuit Court No. 95-536479-NO (Michigan, 1997).
ANIMALS ARE NOT PROPERTY

expired. In fact, she testified that she believed that Brandy had struggled to stay alive as long as she did in order to see her beloved mistress one last time— to say goodbye. Brandy’s owner was devastated by Brandy’s death. She sued the boarding facility to recover her “damages,” including her own emotional pain and suffering. Legal precedent mandated that Brandy be treated as "property" and that such damages be denied.

However, the judge in that case, the Honorable Kaye Tertzag, realized that the law is not always just and refused to be bound by a rule of law he recognized as unfair. In holding that the issue of the owner’s emotional pain and suffering would go to the jury, he stated:

“[T]he view equating a living, breathing animal to chattel is archaic and does not withstand the test of critical analysis. Slavish adherence to a worn-out doctrine without serious, critical analysis does the law no good and, indeed, engenders public disrespect for the law.”

Judge Tertzag was correct— blindly adhering to the rule of law that treats animals as property is a disservice to the public and promotes public scorn.

One of the first cases in the United States to recognize and accept the uniqueness of animals was New York in Corso v. Crawford Dog and Cat Hospital, Inc.

Even today, over three decades later, the Corso decision remains a profound proclamation of reality and a sterling example of the judiciary’s flexibility.

In Corso, the Plaintiff had her dearly beloved fifteen-year-old poodle euthanized by Defendant—veterinary hospital. Plaintiff arranged for Defendant to give her poodle’s body to an organization through which she had arranged an “elaborate funeral...including a head stone, an epitaph, and attendance by Plaintiff’s two sisters and a friend.” Plaintiff planned to visit her dog’s grave in the future.

Much to Plaintiff’s distress, she discovered not her beloved dog’s body in the casket that was delivered to the funeral, but the body of a dead cat. During the bench trial Plaintiff testified as to her “mental distress and anguish, in detail, and indicated that she still feels distress and anguish.” In its decision the Court stated:

This court now overrules prior precedent and holds that a pet is not just a thing, but occupies a special place somewhere in between a person and a piece of personal property. . . . In ruling that a pet such as a dog is not just a thing I believe the Plaintiff is entitled to damages beyond the market value of the dog. A

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4 415 NYS2d 182, 183 (NY Civ Ct, 1979).
pet is not an inanimate thing that just receives affection, it also returns it. I find that Plaintiff Ms. Corso did suffer shock, mental anguish and despondency due to the wrongful destruction and loss of the dog's body. . . . This decision is not to be construed to include an award for the loss of a family heirloom which would also cause great mental anguish. An heirloom while it might be the source of good feelings is merely an inanimate object and is not capable of returning love and affection. It does not respond to human stimulation; it has no brain capable of displaying emotion which in turn causes a human response. Losing the right to memorialize a pet rock, or a pet tree or losing a family picture album is not actionable. But a dog, that is something else. To say it is a piece of personal property and no more is a repudiation of our humaneness. This I cannot accept.5

As the Corso Court expressly stated, animals hold a “special place somewhere in between a person and a piece of personal property.” That “special place” should be formally recognized as a category in between Humans and Property and should be called “Animals.” “Animals” would then be subject to their own set of laws – independent of those that apply to Humans or to Property.

V. ARGUMENTS THAT HAVE BEEN RAISED IN OPPOSITION TO A NEW CATEGORY FOR ANIMALS

There are numerous arguments that opponents, and even proponents, of animal rights have waged against a new category for animals. These arguments are specious for the reasons summarized below.

A. Sub-Categorization

Some people claim that there is no need for a new category for Animals. They argue that the same results may be achieved by simply leaving animals in the Property category, but sub-categorizing them and creating a different set of laws for them within the Property category.

This argument is counter-productive and counter-intuitive. As discussed above, the Property category is entirely inappropriate

5 Id. (emphasis added).
for animals. Creating a sub-category of Property will only compound the problem by further in-graining the idea of animals as property. As previously discussed, treating animals as any kind of property is unrealistic and does nothing but engender disrespect for the law.

B. Semantics

Some people oppose the idea of re-categorizing animals, arguing that if animals are not treated as “property” then they will be treated as “humans.” That is a non-sequitur. The point of creating a third and distinct category called “Animals” is to acknowledge that animals are neither Property nor Human. Hence the need for and appropriateness of a third, distinct category called Animals.

C. Ownership Promotes the Love and Care of Animals

Some people contend that classification of animals outside the Property category would diminish the care that people would give their animals because people value what they “own.” They assert that if people “own” animals as Property they will be more inclined to protect and care for their animals.

To the contrary, classifying animals as “Property” demeans them by treating them as possessions or commodities, rather than the living creatures that they are. Worse yet, the fact that they are “property” that requires food, water, shelter and veterinary care in order to live, often transforms them from a desirable piece of “property,” into an inconvenience, and then a burden. Too often the animals, as property, are then neglected, abused, or discarded altogether. Elevating animals to their own category with more stringent laws then those that apply to inanimate property will more likely discourage people from simply discarding animals that no longer interest them.

Children are a prime example of how a higher classification can increase worth within our society. Our children are not our property. They have no monetary or fair market value. To the contrary, they are enormous financial liabilities. The cost of their care, feeding, housing, education, etc. is staggering. And yet, we love them despite the costs, and even enjoy spending money on them (often vast amounts). The fact that they are not our property is entirely irrelevant to our love for them. We provide them with all of life’s necessities, and lavish them with all of the luxuries we can afford because we love them with all our hearts, in spite of their negative economic value.
Many people feel the same about animals – they love them despite their lack of monetary value or even a negative monetary value since they, like children, require monetary expenditures to feed them, shelter them, and maintain their health. To many people the value of an animal does not lie in its fair market value, but rather in its love, companionship, and devotion. These are all qualities that you cannot put a price on - they are quite literally, priceless. Placing them in a classification between Humans and Property will more accurately reflect our values and should increase the standard of care that we require for them.

D. Classifying Animals as Property Gives Owners Greater Control Over Their Animals

Opponents of legally reclassifying animals also argue reclassification would give them less control over the welfare of their companion animals and that their rights in their animals could be easily terminated. Nothing could be further from the truth.

If animals are given their own category, and laws tailored to benefit them and their owners, then the legal bond between them could and should be radically strengthened. Specifically, the owners’ rights could be changed from “property rights” to rights more akin to parental rights which are legally much stronger. In fact, terminating parental rights in a child is a herculean task; one accomplished only under the most extreme circumstances and with the utmost effort.

Animals are not children/humans, and the author does not suggest creating a legal bond equivalent to that of the parent-child relationship. However, as our society has changed to the point that many people view their companion animals as family members, our legal system should evolve to accommodate that societal change. That should be done by creating a legal bond between owners and their companion animals that is significantly stronger than an owner's relationship to his or her property.

E. Reclassifying Animals Would Open a Floodgate of Litigation

A final argument against a separate category for animals is that it will result in a flood of litigation. This argument, while not immediately dismissible by common sense, has already been proven incorrect.

In the handful of states that have formally recognized the special characteristics of animals, and allowed for the recovery of
veterinary costs (economic damages) and/or pain and suffering (non-economic damages) by the animals’ owners, multitudes of lawsuits have not materialized, nor have any million dollar verdicts been awarded, to the author’s knowledge. As an example, one of the landmark cases in awarding non-economic damages was Rodrigues v. State. The Rodrigues Court awarded emotional/mental distress damages to a family whose companion animal allegedly died as the result of the defendant’s negligence.

Eleven years later in Campbell v. Animal Quarantine Station, the Supreme Court of Hawaii observed:

Since our holding in Rodrigues there has been no “plethora of similar cases”: the fears of unlimited liability have not proved true. Rather, other states have begun to allow damages for mental distress suffered under similar circumstances.

The argument that a separate category for animals will result in a flood of litigation is simply an argument from those who fear change and have nothing else to argue. In this circumstance, change is possible, it is correct, and it is necessary.

VI. CONCLUSION

The criminal laws of our states recognize the difference between animals and inanimate objects. Our criminal laws treat injury to an animal as animal cruelty, while damaging an inanimate object is the completely separate crime of malicious destruction of property. Unfortunately our civil laws have failed to acknowledge the same difference and continue to categorize animals as Property, just like inanimate objects.

Our civil laws have failed to recognize the emotional attachment that people develop to animals (and vice versa) and the non-economic rewards that are derived from such relationships. Instead of changing to accommodate the explosion of knowledge concerning animals, our typically flexible legal system has yielded little. For the most part it still retains the traditional Property classification of animals, which merely perpetuates the artificial and unrealistic treatment of animals as inanimate objects rather than treating them as the living, breathing, and loving creatures that they are.

Currently, all 50 states have different legal schemes governing, and even defining animals. Some states define animals as

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“vertebrates” (animals with backbones), and others limit them to specific species such as cats, dogs, horses, birds (other than “poultry”), etc. The time has come for a uniform code to govern animals as a separate and distinct category. The legal system favors uniformity and has achieved it across the country in a number of areas, such as commercial transactions with the UCC (Uniform Commercial Code), and the Uniform Child Support Act. I propose that a nationwide code/act be developed and adopted by all 50 states to implement a uniform legal categorization of animals as “Animals” for purposes of determining cause of actions, liability, and damages.

Categorizing animals as Animals rather than Property will not only result in the allowance of both economic and non-economic damages for their owners, but hopefully promote more respect for animals as living creatures. Hopefully, that in turn will engender kinder, more compassionate treatment for animals of all kinds.