



**THE OFFICIAL PUBLICATION OF THE NEW YORK STATE BAR ASSOCIATION'S COMMITTEE ON ANIMALS AND THE LAW**

## From the Chair

Over the last few months, I've had a chance to talk to many different people about the Committee on Animals and the Law. I've been talking primarily to people who were not familiar with the Committee, but were familiar with the issues that concern us – and who all had their own ideas about what the Committee should be doing. Are we doing something to stop the slaughter of retired racehorses? Do we know about the terrible conditions in their local animal shelter? Can we help them stay in their apartment with their emotional support dog?

I don't always have answers for people who have concerns about animals and the law, but in these cases I'm happy that I did. The Committee has supported legislation for several years that would impose penalties sufficiently strong to discourage owners of retired racehorses from selling them for slaughter; we're happy that a bill was finally passed by the legislature last year to do just that, and an amendment to it passed this year (see the 2022 Legislative Report on page 21). Animal shelters, often the place of last resort for abandoned and neglected dogs and cats, can do them tremendous harm if the facility is not well maintained and the animals given proper care – and the Committee supported a comprehensive bill that passed this year to establish new standards for animal shelters, ensuring that all the animals cared for in those shelters were cared for appropriately. Service animals and emotional assistance animals are increasingly brought into public places, and residential settings, by their human companions. Service animals cannot be denied accommodation in most of those places, provided the animal will not be the cause of any situation that disturbs other residents. The rules for emotional support animals are not as clear. The Committee's Special Projects Subcommittee is researching and writing a compendium of the laws, regulations and caselaw that define the rights of service animals and emotional support animals to be in

*(Continued on page 2)*

### Inside this issue:

Foreword From the Chair	1
Guide To The Use Of Service And Support Animals by COAL Special Projects Subcommittee	4
The Cold Hard Facts About Soft Warm Down by Jim D. Sarlis	11
Member Spotlight: Interview with Nora Constance Marino by Breanna C. Reilly	18
Summary Of Bills From The 2022 NY Legislative Session by COAL Legislation Subcommittee	21
2023 Student Writing Competition Announcement	28
Decolonizing Captivity: Repatriation And Reconciliation For Corky The Orca by Christian Suarez 2022 Student Writing Competition (first place)	29
The Big Cat Public Safety Act: Why The Legacy Clause Needs To Be Amended by Vanessa Beane 2022 Student Writing Competition (second place)	55

## From the Chair (continued)

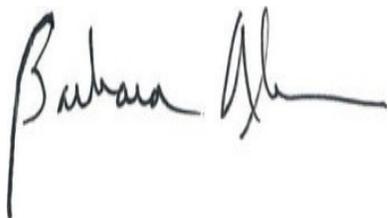
public places, on public transportation, in public and privately-owned housing, and in many other places. The Special Projects Subcommittee Report includes the first two articles that will be part of that compendium (see page 4).

And there's more – the Education Subcommittee has designed this year's long CLE program around the laws that apply to birds in agricultural settings, in gaming and sports, as a part of religious practices, when they are determined to be endangered species, and other aspects of avian laws – a first examination of this topic by the Committee. Look for this virtual program in late March, and if you miss seeing it live, the recorded program will still be available, and accessible from our Committee webpage.

All this information is are put together for you in each issue of Laws and Paws by the dedicated publications staff that works on our Committee publication. This issue of Laws and Paws will also give you access to the first place and second place winners of the annual Student Writing Competition sponsored by this Committee – both well-constructed articles that bring to our attention new issues and new aspects of animal law, researched by the law students who will soon be next generation of our colleagues in the legal profession.

I am always amazed that this Committee is involved in so many different aspects of the laws that apply to the animals in our midst. Members of the Committee on Animals and the Law deserve our thanks for all the work they put into all these projects, and the service they provide to all NYSBA members by making so much information on animals and the law available in Laws and Paws, and elsewhere on our Committee webpage.

Thank you,



Barbara J. Ahern, Chair, NYSBA Committee on Animals and the Law



Barbara J. Ahern, Esq., Committee Chairperson  
Charis Nick-Torok, Esq., Committee Vice-Chairperson  
Kirk Passamonti, Esq., Secretary; Publications Subcommittee Chairperson  
Adam Lepzelter, Esq., Issue Co-Editor  
Breanna Reilly Esq., Issue Co-Editor

## **SPOTLIGHT ON:**

### **THE SPECIAL PROJECTS SUBCOMMITTEE**

#### **GUIDE TO THE USE OF SERVICE AND SUPPORT ANIMALS**

For most of 2022, members of the Special Projects Subcommittee have been researching the laws and regulations that apply to assistance animals in different locations and situations. Issues concerning Service, Emotional Support, and Therapy Animals can often lead to highly emotional controversies, especially when the rights of individuals and the rules of society intersect with the rights of those with assistance animals. Assistance animals, and those who accompany them, are entitled to special accommodations, as provided by federal and state statutes, such as the federal Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 et seq. (1990), and similar provisions in state laws. In New York State, basic provisions are found in Article 4-B of the New York Civil Rights Law, but many other provisions of law may also apply. Although rules and regulations have been promulgated to provide clarity and promote compliance with those laws, those rules can often be buried in arcane sources, or modified by caselaw or municipal ordinances that vary from place to place, and are easily misunderstood. There are also exceptions to the general rules, many of which have been refined by court actions challenging the exception, and then that caselaw provides additional guidelines that should be consulted.

Our compendium of laws, regulations, and cases will address the full range of topics related to assistance animals and the issues that arise from their use, in employment settings, courtrooms, housing and schools. It will also address crimes against service animals, choosing/sourcing the right animal, anti-breed discrimination laws, and assistance animal retirement. We’ve chosen *Laws and Paws* as the perfect vehicle to publish each installment of our topic sections and in this installment, we are featuring articles on Facility Dogs, by Debra Hamilton and Travel By Air with a Service/Emotional Support/Therapy Animal, by Helen Lebrecht. We hope you will find these articles useful and you will share them with your colleagues, clients, and on your social media.

#### **TRAVEL BY AIR WITH SERVICE, SUPPORT AND THERAPY ANIMALS**

The Air Carrier Access Act of 1986 (“ACAA”) prohibits airlines from discriminating against passengers with disabilities. In December 2020, the U.S. Department of Transportation (“DOT”) amended its regulations to provide for an exemption of emotional support animals from the ACAA. In 2022, the DOT published the “Airline Passengers with Disabilities” Bill of Rights, which sets forth the fundamental rights of airline passengers with disabilities, permits them to bring their service animals on board the passenger compartment, and prohibits discrimination. Disabled passengers can choose to check-in for a flight on-line or curbside.

Passengers with disabilities may be accompanied by their service dogs when they travel by air. The ACAA defines a “service animal” as any breed or type of dog that is individually trained to do work or perform tasks for the benefit of a qualified individual with a disability, which includes physical, sensory, psychiatric, intellectual, or other mental disability. The first

step is to make a flight reservation well in advance of proposed travel, because airlines may limit the number of service dogs allowed in cabin. There is a limit on the number of service animals to two per passenger.

If planning to travel by air, consider that a service dog must be provided with adequate food and water, and may need to relieve itself as necessary. Thus, it is recommended to stop feeding your service dog at least six hours prior to the flight, in order to eliminate the need for the dog to relieve itself while in the air. It is a good idea to avoid airport connections, especially in crowded holiday or weekend flight times. To avoid airport connections, especially when travelling on the weekends or during crowded holidays, it is preferable to schedule a non-stop flight. Service dogs should wear tags with detailed information. One tag should contain the owner's name, mobile phone number, and address. The second tag should have the date of the most recent rabies vaccination. Another "best practice" is to ensure that the dog's microchip is in place.

The requirements under the ACAA are similar to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. (1990), to the extent that service animals are limited to dogs. ACAA did not promulgate regulations for miniature horses and the decision whether to allow a service miniature horse to accompany a disabled person on a flight is within the discretion of the airline. The December 2020 revision excludes therapy animals, thus it is less likely that airlines will provide accommodations for therapy animals

Under the ACAA, Psychiatric Service Animals are recognized as service animals. People with disabilities traveling with a service animal must be allowed to bring their psychiatric service animal with them when traveling on a plane. The work or tasks a psychiatric service dog is trained to perform can include, for example, preventing/interrupting impulsive or destructive behaviors, guiding/removing a person from a crowd when recognizing the onset of anxiety, or providing/administering deep pressure to a disabled person's abdomen to alleviate anxiety.

Emotional support animals are now classified as pets, not service animals. Even though they might provide comfort to a person, they are not trained to perform a specific task to aid a disabled person, thus they are no longer allowed in airline cabins.

Airlines may deny transport of a service dog in the following instances: (i) violation of safety requirements; (ii) too large or heavy to be accommodated in the cabin; (iii) where the service dog poses a direct threat to the health or safety of others; (iv) presentation of a significant cabin or gate-area disruption; or (v) violation of health requirements, including entry prohibition to a U.S. territory or a foreign country.

Airline staff are permitted to ask the individual with a disability who is accompanied by a service dog or miniature horse for information on the work or task the service animal has been trained to perform or accommodate. Airline staff are also permitted to observe the behavior of the service animal and confirm that the animal is harnessed, leashed, or otherwise tethered.

If planning overseas travel, it is important to research special health requirements, such as possible quarantine, which would also apply to service dogs. Overseas travel includes travel to

Hawaii and Alaska, which are not a part of the continental U.S. and thus may have special rules to prevent the introduction of new diseases.

U.S. airlines traveling to foreign countries are subject to the requirements of that foreign country regarding acceptance of service animals, and not all countries permit service animals from other foreign countries. For example, Japan, as an island nation where there is no incidence of rabies, has extremely strict rules requiring that a rabies titer be performed six months prior to entry, plus preventative rabies vaccinations within that time frame.

The ACAA does not permit breed discrimination in airline travel; however, this standard does not apply to foreign countries, which may have their own requirements and prohibitions. International requirements should be carefully researched to determine whether the destination country permits entry of the particular service animal. Such research should also include all health requirements for entry and also for departure.

In the event that a disabled passenger believes their rights are being violated, ACAA rules provides that each airline maintain Complaints Resolution Official (“CRO”), an airline employee who is an expert on disability accommodation issues. The CRO must be available, either at the airport or by telephone, and at no cost, during business operation hours. The disabled passenger may ask to speak with the CRO, and if the CRO is unable to resolve the issue, then the disabled passenger can file a complaint.

If an airline employee mistreats a service animal, the disabled passenger may complete the USDA animal welfare online complaint form, or contact:  
U.S. Department of Agriculture, APHIS, Animal Care 2150 Centre Ave.  
Building B, Mailstop 3W11, Fort Collins, CO 80525-8117C,  
Email: [animalcare@usda.gov](mailto:animalcare@usda.gov) Phone: (970) 494-7478, Fax: (970) 494-7461

Most airlines require the person traveling with a service animal to complete the U.S. Department of Transportation Service Animal Air Transportation Form, which is available as a fillable PDF at: <https://www.transportation.gov/sites/dot.gov/files/2021-01/U.S.%20DOT%20Service%20Animal%20Air%20Transportation%20Form.pdf>

The first section of the DOT Form asks for basic information regarding the owner of the service dog and the service dog itself. For most people, the name of the handler and “user” will be the same person. However, there may be instances where the handler and user may be different, so two names are required. For example, a helper may be transporting a service dog on a flight to its owner. In this section of the form you will also need to provide a written description of your service dog (including its weight) and name. A photo of your service dog is not necessary, and you do not need to carry around any type of ID card for your dog when you travel.

The animal health section of the DOT Form requires you to confirm that your service dog has been vaccinated for rabies. You must provide the date of the last vaccination, and the vaccination must be current. You must verify that your service dog does not have fleas, ticks, or

a disease that would endanger other people or animals and provide the name of your service dog's veterinarian and telephone number, but the veterinarian is not required to sign.

In addition to attesting your service dog has been task-trained, you must confirm it has been trained to behave in public. In public areas, your service dog should be under your control at all times and not exhibit disruptive or aggressive behavior like biting, barking, jumping, or lunging at others. Your service dog should also not relieve itself during the flight or in the gate area. You must also attest that to your knowledge, your service dog has not behaved aggressively or caused serious injury to another person or animal.

If you are boarding a flight that will last longer than 8 hours, you must complete an additional form, called the Department of Transportation's Service Animal Relief Attestation Form, available at:

<https://www.transportation.gov/sites/dot.gov/files/202012/Service%20Animal%20Relief%20Form.pdf>

The form provides two options: (i) your service dog will not relieve itself while on the aircraft; (ii) Your service dog can relieve itself during the flight without creating a health or sanitation issue. If you select the second option, you also have to describe how your service dog will relieve itself without creating a health and sanitation issue (for example, using a dog diaper), and you must acknowledge that you may be charged by the airline for damage caused by your service dog.

Additional information is available from the American Veterinary Medical Association ("AVMA"), which provides answers to frequently asked questions at:

<https://www.avma.org/resources-tools/pet-owners/petcare/traveling-your-pet-faq>

## **FACILITY DOGS AND COURTHOUSE DOGS**

There are many differences between a facility dog, a service dog and a therapy dog.

Definitions:

A facility dog is trained to work with multiple people in a facility, and usually for a "normal" working day of 9:00am-5:00pm. A facility dog works full-time at a facility under the care and supervision of a staff member/handler at the facility. By comparison, service animals are trained to serve one master, in need, for a longer day. A therapy dog is trained to be used as an adjunct to therapy or to have brief visits to facilities, assisting people needing comfort.

Skills:

Facility dogs are trained to provide calming pressure across a person's lap or body. They promote participation and reduce anxiety for people in a facility environment. They are bred to become reliable and affectionate, to assist in the development of independent matriculation. Facility dogs work in places like schools, hospitals, or courts. They do not serve one person.

They are professionally trained to work with a trainer or handler to serve multiple people who need social interaction, recovery motivation, comfort, and or a feeling of safety. Some dogs that cannot become service animals for various reasons can actually become wonderful facility dogs. It enhances their lives and the lives of the people in the facility where they work, the handler who has trained them, and the people who experience their companionable assistance.

Examples of professions using facility dogs include occupational speech and physical therapy; special education; child/life specialist; and criminal justice placement, for comfort when investigating domestic violence, child advocacy/abuse, or forensic interviews. Facility dogs in schools support the emotional and social growth of students. They can also help students learn how to create and sustain healthy, learning environments.

In each location where a facility dog is used, the employer must support and approve its use. The dog must be able to safely and effectively control itself, and to be controlled by its handler.

Choosing a dog for facility training:

Dogs are chosen for this work based on their temperament and love of working with people. Their personality must be safe and steady, and they must be suitable for working in public spaces for a variety of applications.

Every facility dog needs a primary handler who must be a staff member at the facility. That staff member understands the environment in which the dog will be working. Using this information, the handler is able to help in the selection of a dog that best fits in in the environment. The handler will work with a dog at the facility and will take care of the dog, which means the dog lives with them outside of the facility.

Dogs are trained from an early age in basic obedience and socialization skills before they start training specific to their use as a facility dog. That training will start when the dog is anywhere from 18 months to 24 months. Some of the dogs are trained by prisoners; dogs trained in the prison programs are evaluated by the training program for their ability to meet the goals that will qualify them for further training as a facility dog.

Training Organizations:

Organizations that specialize in training facility dogs provide on- and offsite training for the dog, the handlers and the staff. Minimally, all facility dogs must be certified by some respected accrediting body for temperament, environmental comfort, basic obedience and various support functions, before undergoing specialized training as a facility dog within a specific environment. Despite a lack of national standards, several nonprofit organizations are respected authorities for defining the care and training protocols necessary to meet the needs of facility dogs and other service and therapy animals. Among them are Canine Companions, Courthouse Dog Foundation, Assistance Dog International and Pet Partners; there are others as well.

Facility dogs do cost money to train, integrate, and keep certified. The training might be able to be funded through GoFundMe or any number of not-for-profit or for-profit platforms.

Do they need insurance?

Insurance is another consideration, since any situation teaming humans with animals, even animals that are highly trained, carries a risk that injuries may be incurred. Most facilities using animals in animal-assisted intervention require insurance coverage for the animal, the handler and the individuals within the facility. They may have insurance coverage through their existing liability insurance, or additional insurance coverage may be needed. Individuals or facilities intending to use facility dogs should ensure that they have coverage that covers all parties that may be involved in any animal-assisted intervention.

Special considerations for courthouse dogs:

Courthouses and locations for other legal proceedings are additional places where dogs trained as facility dogs may be used. Courthouses require specialized additional training above and beyond the typical facility dog protocol. Recommendations by the Courthouse Dog Foundation, under a grant by the U.S. Department of Justice, state that dogs working in court or legal proceedings require extensive multi-year training to meet the requirements for temperament and tolerance.

In 2018 the National District Attorneys Association supported the use of courthouse facility dogs and listed guidelines for best practices in using these animals in courthouse settings:

1. The dog should be a highly trained graduate of an Assistance Dogs International [ADI] service dog organization or the equivalent thereof.
2. The dog should be tested for safe behavior around young children by someone who has expertise in canine behavior before being placed to work in this field.
3. The dog's handler should be someone with professional training, education and experience such as a forensic interviewer, deputy prosecuting attorney, victim advocate, law enforcement officer or other individuals that a prosecutor's office deems appropriate.
4. The dog's handler should receive training, testing and ongoing support in the handling of the dog from the from an ADI service dog organization.
5. The dog and handler should have the appropriate temperament and disposition to make a good courthouse facility dog team as this work requires a great deal of social interaction with people from all walks of life and in stressful situations.
6. The dog must carry a liability insurance policy with limits of not less than \$1 million.

In a multitude of settings, a significant benefit of using a facility dog is that it is trained to work with more than one person, and can provide comfort and assistance to a number of people in the environment. These dogs provide bridges between the students and the staff, the police and the victim, the court staff and the witness. They provide therapy and comfort for people in need in schools medical and group, homes, police departments, and crisis response teams. Facility dogs help people who are challenged when having to deal with difficult emotional situations.

Organizations using facility dogs typically report success in the utilization of appropriately-trained facility dogs. They come to realize how important a facility dog's presence is for the greater good of the facility, its participants and its staff.

Additional Information:

Paws with a cause-trainers

<https://www.pawswithacause.org/wp-content/uploads/2021/03/PAWS-Facility-Dog-program-2021.pdf>

Courthouse Dogs Org

<https://courthousedogs.org/#:~:text=What%20is%20a%20courthouse%20facility,children%20during%20stressful%20legal%20proceedings.>

NDAA Ok Facility Dogs

[http://courthousedogs.org/wp-content/uploads/2018/10/NDAA-Best-Practice-Resolution\\_Courthouse-Dogs.pdf](http://courthousedogs.org/wp-content/uploads/2018/10/NDAA-Best-Practice-Resolution_Courthouse-Dogs.pdf)

Facility dogs in courtroom

<http://courthousedogs.org/wp-content/uploads/2019/06/Burd-McQuiston-2019.pdf>

# THE COLD HARD FACTS ABOUT SOFT WARM DOWN

By Jim D. Sarlis

Down pillows. Down comforters and bedspreads. Down duvets, mattresses, sleeping bags -- even down jackets. Most of us don't give a second thought to how these soft, warm, comfortable consumer goods got their stuffing.

But down is a natural substance. It comes from birds.

How does that down get from the outside of an animal to the inside of those products?

The bottom line is pretty straightforward. There are three ways to gather down. One is to remove the loose down from birds naturally shedding during their molting season or collect it as debris that accumulates in the birds' nests or their environments. The second is to remove down from the skin of birds after they have been slaughtered as part of the process that converts the fowl into poultry. The third, and most problematic, is the plucking of down that is still firmly connected to a living animal.

## WHAT IS DOWN?

Down is a soft, fine, fluffy type of feathers found in bird species. Unlike regular feathers, down has a short shaft (called "rachis"), with few barbs, and without hooks. Very young birds are covered solely in a kind of down known as "natal down." Down is also found on older birds as a layer of fine feathers known as "body down" located under the tougher exterior feathers. A specialized form of down called "powder down" is found in only a few types of birds, such as parrots and herons (Campbell)(Juniper).

For birds, down serves a couple of purposes. For example, down's loose structure traps air, which helps to insulate the animal against heat loss. Bird species that go through annual temperature fluctuations typically have more down following their autumn molt. Down also contributes to the buoyancy of waterbirds.

## HOW IS DOWN USED BY HUMANS?

Humans have been using down for centuries. Native American tribes, for example, considered down to have powerful symbolic and religious significance. There are stories that portray the down feathers of an eagle as important gifts given by the bird to the story's hero. In the Ghost Dance, widespread particularly among the Plains tribes, dancers held a painted feather that was tipped with a down feather that had been painted in another color. Zuni prayer sticks were made using eagle down, and priests would use them if rain was needed, the idea being that the down resembled the fleecy clouds that signaled rain was coming. The Hopi are said to have rubbed eagle down feathers over rattlesnakes being collected for their Snake Dances, in an effort to soothe and calm the reptiles.

Down has also been used as insulation for centuries. Its properties make it a natural, lightweight, soft and cozy insulator. Russian documents from the 1600s list "bird down" among the goods sold to Dutch merchants. In Norway, nests of eider ducks were protected and used as a source of down as early as 1890. Eiders are still set up in protected areas in Iceland, various Scandinavian

countries, and Siberia, where the birds are provided with nest sites and protected from predators, and their down is collected intermittently during the nesting season without harming the nests or ducks. Colonies of more than 5,000 birds sometimes develop in such "farmed" areas; indeed, in the Novaya Zemlya archipelago of Northern Russia, an area which is in the Arctic Circle, nest densities can exceed 13,000 per hectare (more than 5,260 per acre). This method of "harvesting" or "gathering" (sometimes also called "farming") down is practiced to this day.

Although the down feathers of various species of wildfowl, gulls and other seabirds have historically been used for insulation, most insulation down now comes from domestic geese. The majority of the world's supply comes from China, typically from birds killed for their meat. Most of the rest comes from Europe and Canada, from birds harvested for meat or pâté.

In order of production volume, the largest producer of down is China, accounting for 80% of global production, followed by Taiwan, Thailand, Hungary, Poland, Russia, Ukraine, Romania, Siberia, France, U.S. and Canada (Pingel, 2009). In 2008, the value of the world trade of down and feathers was USD \$1.88 billion, and the global market is expected to reach a value of USD \$8.24 billion by 2026 (Transparency Market Research, 2018).

#### HOW IS DOWN COLLECTED?

Down is removed from the chest, lower belly, flanks and the areas not covered by the wings. It is mainly collected after slaughter (about 98% by some estimates, although that number is hotly debated), however, some percentage is still collected by "harvesting" at the time of molting or by live plucking (Kozak, Gara and Kawada, 2010).

"Harvesting," also called "gathering," is the removal of loose feathers by hand from a live duck or goose during molting, which is the period when these birds naturally lose their feathers. That's how it's supposed to go, anyway. However, any mishandling of this process will invariably result in increased fear, stress, injury, even death of the animal (EFSA Panel on Animal Health and Welfare, 2010). It is important to consider that, while the molting season is influenced by the age, breed and genetics of the bird, molting times can even vary within a flock. This means that some birds that are not molting at the time of "harvesting" end up, instead, subjected to "live-plucking."

"Live plucking" occurs outside the molting season and refers to the manual pulling of feathers that are still attached to the live bird. This procedure is a major welfare concern as live plucking results in bleeding and tearing of skin, causing pain, discomfort, stress, even death, to the birds (Gentle and Hunter, 1991). Birds may be live plucked multiple times before slaughter. It is noteworthy that, officially, live plucking is condemned by the China Feather and Down Industrial Association, as well as the European Down and Feather Association, and all other down and feather organizations. Still, cases of live plucking have been reported in China, Hungary and Poland. For example, a recent documentary of live plucking occurred in 2016 where several farms were exposed by the People for the Ethical Treatment of Animals (PETA US, 2016). However, accurate statistics on the extent of live plucking are lacking.

#### HOW PREVALENT IS LIVE PLUCKING?

A portion of the world's supply of down feathers are plucked from live birds, a practice condemned as cruel by animal welfare groups. The precise percentage of down harvested in this manner is uncertain; while some references report that it is only a small fraction of the total (less than 1% in 2011) (Hanson) a 2009 Swedish documentary reported that it might be shockingly high -- as much as 50–80% of the total supply. The documentary shows birds lying on the floor with large flesh wounds from the plucking, after which the wounds were stitched using a needle and thread without anesthetic. Although live-plucking is illegal in Canada, the United States and Europe, it is known to occur in China, Poland and Hungary (Villalobos). Public sentiment against the practice has, in some countries, been strong. Many retailers, such as IKEA and clothing manufacturer Patagonia, among others, have altered product lines to eliminate the use of live-plucked down.

#### WHAT ARE THE NEGATIVE ISSUES ASSOCIATED WITH LIVE PLUCKING?

Live plucking is the rapid pulling off of feathers from fully conscious geese or ducks, usually as they are positioned firmly between workers' knees to keep the birds on their backs during the procedure. There have also been reports of workers immobilizing birds by stepping on their necks while pulling off the feathers, causing the birds to honk and scream from the pain and terror, and exposing the birds to possible injury or even death.

While some sources -- including governmental bodies, organizations, and retailers -- contend that live plucking is extremely rare, it is believed that live plucking is underreported since it is illegal, unethical, unpopular, and often done in secret. In the oft-cited study by PETA, undercover video footage shows employees on goose farms pulling fistfuls of feathers out of live birds, often causing bloody wounds as the animals shriek in terror. The frightened animals are often squeezed upside down between workers' knees during the painful procedure—in one instance, an investigator photographed a worker who was sitting on a goose's neck in order to prevent her from escaping.

Live plucking causes birds considerable pain and distress. Once their feathers are ripped out, many of the birds, paralyzed with fear, are left with gaping wounds—some even die as a result of the procedure. Workers often sew the birds' skin back together without using any anesthetics (PETA, Down Production).

In a follow up a few years later, PETA found the same and worse violations. To prevent the geese from fleeing, workers stepped on their delicate wings and necks and tightly bound their feet together. They even put them in chokeholds while ripping out their feathers and swung them by their wings (PETA, Exposed).

According to PETA, whenever parts of animals are used in the fashion industry, corners are cut and abuse is commonplace. Although, for example, The Wildlife and Countryside Act 1981 prohibits the unethical sourcing of various animals, and the Convention on International Trade in Endangered Species of Wild Flora and Fauna compels signatories to ensure that the trade of wild animals does not threaten their survival, PETA and other animal-welfare groups realize that it is difficult or even impossible, without appropriate controls in place, to track feathers back to their source because the physical products all look the same.

When a Swedish TV documentary on a show called “Kalla Fakta” or “Cold Facts” informed viewers that from 50 to 80 percent of the world’s down market comes from live-plucked birds, this triggered fervent rebuttals of these estimates from the European Down and Feather Association and the China Feather and Down Industrial Association. However, IKEA, the Swedish seller of popular home goods, cancelled its orders from China and stopped importing from there when it discovered that the down was from live-plucked birds. As a result of the public reaction to the report, European companies that deal with down-filled products have pledged to review their sourcing and policies regarding live-plucked down. The industry may take years to change, but it can and will change if consumers demand to know that the down they buy did not cause birds harm.

Live plucking violates laws enacted in various countries. Live plucking is deemed unacceptable by the United Kingdom’s Royal Society for the Prevention of Cruelty to Animals (“RSPCA”), which is the oldest and largest animal welfare charity in existence, and the first to introduce laws to protect animals from pain and suffering, as well as Australia’s RSPCA, the US SPCA, PETA, and other organizations worldwide. It can lead to bleeding wounds, pain, suffering and distress to birds – even death. Consumers can help reduce this unnecessary suffering by making informed purchasing decisions.

#### WHAT IS THE RESPONSIBLE DOWN STANDARD?

In response, the Responsible Down Standard (RDS) was put forward to combat this concern. It is a set of practices, conventions, and goals that is advocated by the Textile Exchange, a global nonprofit that creates leaders in the preferred fiber and materials industry. The stated purpose, in their own words, is: “We envision an enriching global textile industry that protects people and planet by positively impacting climate, soil health, water, and biodiversity.” They further state their purpose as “developing, managing, and promoting a set of leading industry standards, as well as collecting and publishing critical industry data and insights that enable brands and retailers to measure, manage, and track their use of fibers and materials.” The RDS is also embraced by the RSPCA (Royal Society for the Prevention of Cruelty to Animals).

The goal is to ensure that down and feathers come from animals that have not been subjected to any unnecessary harm. The hope is that the standard can be used to reward and influence the down and feather industry to incentivize practices that respect the humane treatment of ducks and geese. Educating the public on the RDS is perceived as a meaningful way to drive demand for strong animal welfare practices. The standard also provides companies and consumers with a tool to know what is in their products, and to make accurate claims. It also gives them a credential they can cite to elevate their reputation in the consumer’s mind that these companies adhere to ethical standards.

#### WHAT IS THE GLOBAL TRACEABLE DOWN STANDARD?

Similarly, the Global Traceable Down Standard (TDS or Global TDS), embraced by the National Science Foundation (NSF), seeks to accomplish the same goals. The National Science Foundation (NSF) is an independent federal agency created by Congress in 1950 "to promote the progress of science; to advance the national health, prosperity, and welfare; to secure the national

defense.” The clothing brand Patagonia, in collaboration with others, helped develop the TDS label.

Though similar to RDS, TDS also requires that “parent farms” where birds are raised to produce eggs, get audited, while RDS considers this optional. Choosing a product certified by the NSF implies the company complies with strict standards and procedures imposed by NSF, from extensive product testing and material analyses to unannounced plant inspections, such that the product is thoroughly evaluated before it can earn certification.

## THE OBJECTIVES OF THE RDS AND TDS

In summary, the Global Traceable Down Standard (Global TDS) and Responsible Down Standard (RDS) are intended to help companies demonstrate that down in garments and other household and commercial products come from a responsible source that respects animal welfare and can be transparently traced. Among their objectives are the following:

- To ensure to the highest possible extent that down and feathers do not come from animals in a supply chain that have been subjected to any unnecessary harm.
- To reward and influence the down and feather industry for practices that respect the humane treatment of ducks and geese.
- To provide companies with a tool to know what is in their products, and to make accurate claims.
- To ensure the chain of custody for certified materials as they move through the supply chain.

## KEY POINTS OF THE RDS AND THE TDS

- Protecting animal welfare of the birds from hatching to death.
- Providing a certification process so that only products with 100% certified down may carry the RDS or TDS logo.
- Credible certification because a professional third-party audits each stage in the supply chain.
- No live plucking.
- Chain of custody monitoring of down and feathers is maintained at all times, from the farm to the final product.

## SUMMARY AND CONCLUSION:

As always, the almighty dollar can greatly influence the policies, practices, and outcomes in the industry. Consumers can make it a point to purchase down products that contain only down collected from down-accumulating nests or harvested after slaughter for food purposes, and not from live plucking. After all: where demand goes, so goes supply. To accomplish this, consumers can visit the Responsible Down Standard, Traceable Down Standard, National Science Foundation, or related websites to see which companies are certified under the RDS or the TDS, or ask the retailer to disclose their certifications. Where certification systems are in

place, their standards must be publicly available and participating farms must be subject to regular as well as unannounced on-farm audits to ensure animal welfare is not compromised.

Many companies now advertise their adherence to these standards and their websites proudly proclaim their certifications and processes.

#### References:

AgriFutures Australia (2017) Ducks.

Campbell, Bruce; Lack, Elizabeth (1985). *A Dictionary of Birds*. Carlton, England: T and A D Poyser. ISBN 978-0-85661-039-4.

Conlon, Scarlett (May 21, 2018), The Guardian, Fashion, The ethics of wearing feathers: it's not just live-plucking that's a problem | Fashion | The Guardian.

#### Convention on International Trade in Endangered Species of Wild Flora and Fauna

EFSA Panel on Animal Health and Welfare (2010) 'Scientific opinion on the practice of harvesting (collecting) feathers from live geese for down production', EFSA Journal, 8(11), pp. 1–57. doi: 10.2903/j.efsa.2010.1886.

Gentle, M. J. and Hunter, L. N. (1991) 'Physiological and behavioural responses associated with feather removal in Gallus gallus var domesticus.', Research in veterinary science, 50(1), pp. 95–101.

#### Global Traceable Down Standard (Global TDS), Global Traceable Down Standard | NSF International

Juniper, Tony; Parr, Mike (2003). *Parrots: A Guide to the Parrots of the World*. London: Christopher Helm. p. 17. ISBN 978-0713669336.

Kozak, J., Gara, I. and Kawada, T. (2010) 'Production and welfare aspects of goose down and feather harvesting', World's Poultry Science Journal. Cambridge University Press on behalf of World's Poultry Science Association, 66(4), pp. 767–778. doi: 10.1017/S0043933910000723.

PETA US (2016) Exposed: Despite 'Responsible Down Standards', Farms Still Live-Plucking Geese.

PETA Down Production: Birds Abused for Their Feathers | PETA [www.peta.org/features/down-investigation](http://www.peta.org/features/down-investigation)

PETA Exposed: Farms Still Live-Plucking Geese Despite 'Responsible Down Standards' ([peta.org.au](http://peta.org.au)) [www.peta.org.au/news/exposed-live-plucking-down/](http://www.peta.org.au/news/exposed-live-plucking-down/)

Pingel, H. (2009) 'Waterfowl production for food security', in IV World Waterfowl Conference. India, pp. 11–13.

Responsible Down Standard (RDS), Responsible Down Standard (RDS) - Textile Exchange

RSPCA What are the animal welfare concerns with the production of down (feathers)? – RSPCA Knowledgebase [www.kb.rspca.au/knowledge-base/what-are-the-animal-welfare-concerns-with-the-production-of-down-feathers/](http://www.kb.rspca.au/knowledge-base/what-are-the-animal-welfare-concerns-with-the-production-of-down-feathers/)

The Wildlife and Countryside Act 1981

Transparency Market Research (2018) Global Down and Feather Market.

Villalobos, Alice. Down with Live-Plucked Down: Live-plucked Down-filled blankets and other items should not be used due to the inhumane practice of acquiring the feathers. (Jan. 4, 2010).

Down With Live-Plucked Down (veterinarypracticenews.com)

Jim D. Sarlis concentrates on Elder Law and Trusts & Estates, and recently presented a NYSBA CLE webinar on Pet Trusts. While his office is now in Rosedale, Queens, he was born and raised in Hell's Kitchen in Manhattan, where he attended Columbia University, Fordham University School of Law, and NYU School of Law's Master of Laws (LL.M.) program in taxation. Mr. Sarlis has been a guest lecturer at New York Law School on the subject of Will Drafting, and has taught Real Estate Law and Legal Writing in the ABA-governed paralegal program of the City University of New York. Mr. Sarlis is admitted to the New York State Bar, the Federal Courts for the Southern and Eastern Districts of New York, and the U.S. Tax Court. His household has included a lovable dog named Cody, and a playful cat named Snickers.

**NYSBA COMMITTEE ON ANIMALS AND THE LAW**  
**MEMBER SPOTLIGHT: NORA CONSTANCE MARINO, ESQ.**

**INTERVIEW BY BREANNA C. REILLY, ESQ.**

**What made you decide to become an attorney?**

I come from a family of attorneys, so I guess it was kind of “in my blood” to begin with. On top of that, the idea of “fighting for justice” was extremely appealing to me. Law seemed like a noble and meaningful profession.

**Tell us about some of the various positions you have held throughout your legal career, thus far.**

I went out into private practice almost right away after becoming an attorney. I worked for a firm for a mere nine months before deciding to try it on my own. I was bartending at the time, so I had a reliable source of income, so it seemed like a reasonable decision at the time. That was over 20 years ago, and I have never had to go back and “get a job”.

**I understand you were a Legal Commentator on “The Jane Velez-Mitchell Show” on the HeadLine News Channel, tell us more about that.**

I met Jane Velez-Mitchell through a mutual animal rights activist friend. She had her show on HLN at the time, and said they were always looking for good lawyers for commentary. One day, I got a call, to see if I could be at the studio that afternoon to act as a commentator on her show. Of course, I jumped at the opportunity. It was a great experience, and I was invited back several times. Jane’s show finally went off the air on HLN, but as I am sure you know, she is rocking it now with UnChained TV, which is an all-animal rights and vegan network.

**What does your current law practice consist of?**

My practice consists mostly of personal injury and civil rights cases. Of course, I have a stray case here and there that doesn’t fall into either of those categories, and of course, I take on animal rights cases when the opportunity presents itself, usually pro bono or low bono.

**Was there any specific event, person or animal in your life that initially sparked your interest in animal rights and animal law?**

I’ve always loved animals, since being a kid, but like every other American kid, I was raised on meat, dairy, eggs, etc. In 2004, I was at Penn Station waiting for a train, and I noticed a small group of people gathered around a table that had a TV on it. I wandered over there to see what it was, just killing time. Well, it was a table with a volunteer from Farm Sanctuary (which of course I had never heard of at that time) who was showing the documentary, “Meet Your Meat”, one of the first documentaries about factory farms, narrated by Alec Baldwin. I watched a few minutes of it, and that moment changed my life forever. I started crying right there, threw my

lunch in the garbage (which contained some animal product), grabbed as much literature as I could, and became vegan, instantly. I wanted no part of this unimaginable torture and suffering. Being vegan also turned into my becoming a full blown animal rights activist, and I also used (and continue to use) my position as a lawyer to do what I could on behalf of animals, as well.

**What advice do you have for attorneys wanting to be more involved in the animal law or animal rights community?**

Do not be afraid to just “take it on.” You don’t need to be an attorney with a not-for-profit, or have a big firm behind you, to take on animal rights cases. If a case comes your way and you want to take it on, do it. If you need some help, reach out for it. I’m always happy to give advice or otherwise help.

**In your experience working on animal law issues, what would you consider the biggest challenge?**

The law itself is the biggest challenge. For centuries, animals have been viewed as “chattel,” which is just a fancy legal word for property. In other words, the law does not distinguish a dog or a horse, from a table or a lamp. This is a grave injustice, and major inaccuracy, that must be rectified. Animals are sentient beings, individuals, that are emotional and intelligent, and the law must perceive them as such. Every case matters, so even when we lose, we are still making progress. It’s not a demolition project – it’s a “chipping away” project. Every case that is brought is another chip. I am hopeful that someday, the “animals as chattel” notion will be ancient history.

**What is one of your fondest and/or most rewarding memories from your practice, specifically in animal law?**

There are two that come to mind. First was when I received the decision from the Appellate Decision on the Alliance case. Like most attorneys, I went right to the end to see if the lower court was affirmed or not (the lower court dismissed my case). It was affirmed. I was pretty devastated. A colleague of mine was on the phone with me, who then pointed out, “you know, Nora, you got two dissents...you’re going to the Court of Appeals.” I remember just saying, “whaaat”? The second thing that comes to mind was a case I took on to help a family, who lived in NYC housing, keep their dog. The mother’s pit bull, an emotional support dog, got into a small scuffle with another dog on the grounds, and a complaint was made. NYCHA sent the mother a letter, telling her to remove her dog, or she would be evicted. Someone brought this issue to me, saying, “it should just take a letter, really...” Well, I took it on, and it turned into full blown litigation for a couple of years. But at the end of the day, we won, and my client was able to keep her beloved dog. That was all done pro bono, and when we found out that the family could stay together, it was a most joyous moment.

**Many people in the animal law community are familiar with *The Alliance to End Chickens as Kaporos, et. al. v. New York City Police Dep’t, et. al.* case. Tell us about your experience as the attorney for The Alliance to End Chickens as Kaporos.**

Do you have a few hours? Lol... It started out when I was contacted by a colleague, Jessica Astrof, from the NYC Bar Animal Law Committee in 2014. She wanted to represent the Alliance, who was looking for pro bono legal assistance at the time. My colleague was not a litigator, so she reached out to me. “Sure, I’ll help” I said, not knowing that this case would change and take over my life for the next four years. At that time, I had never even heard of Kaporos.

Up until that time, all the protests against the mass chicken slaughter were really just about the animal cruelty. So, I thought about it, and it hit me – there had to be some health code violations that also took place during this event. My colleague and I literally poured through the NYC and NYS Health Codes, one by one, to figure out what laws were violated by this event. This was just the beginning of four years of intense legal research and writing. Jessica ended up moving out of state, so then the litigation was totally just on me. As I’m sure you know, the case went to the State’s highest court, the Court of Appeals. I cannot even count how many briefs I wrote in total. While in the end we lost the case, my theory and approach opened up a whole new way of attacking not just Kaporos, but all live animal markets throughout the state – the health code aspect. Then once COVID-19 hit, and it was believed to have originated from a live animal wet market, it really solidified the dangers of intensely confining and slaughtering animals. So, I am happy to say that I feel that my work lives on. And I am still not done with this.

### **How did you get involved in NYSBA COAL?**

I have been a member of NYSBA for many, many years. I got an email about my membership, that had a request for committees. In a bitter sweet way, I understood that many animal law committees are in high demand – which is so amazing – but I was not optimistic about being chosen for the committee, because of that high demand. But I applied anyway. When I got on the committee, I was thrilled! I posted about it on social media. I was so proud to be a part of NYSBA COAL!

### **What pets do you currently have?**

My fur family includes Palmer, my 9-year-old 75-pound dog who I rescued when he was 6. I also have three cats, plus ferrets that I feed. I’ve had many rescue dogs over the years (six in total, including Palmer), and have also fostered many others, including a couple of litters of puppies!

### **What do you enjoy doing for fun?**

I am a singer and a musician! I sing in a rock band called “Sound Judgment,” although we took a break a few months ago from live performances, and are now in the process of recording some originals. One of the originals is an animal rights song about factory farming – I’m hoping to get a video done on that one. I’m also working on another act, of covering songs from the 1930s and 40s. I just love those songs – they are a reflection of a much simpler time.

**NYSBA COMMITTEE ON ANIMALS AND THE LAW  
LEGISLATION SUBCOMMITTEE REPORT:  
SUMMARY OF BILLS FROM THE 2022 NY LEGISLATIVE SESSION**

For New York State Bar Association Committee on Animal Law (COAL) memoranda taking a position on a bill please go to <https://nysba.org/2021-and-2022-legislative-memoranda/> [nysba.org]. To find the text of a particular bill, please go to the public access portion of the Legislative Retrieval Service (LRS), at <http://public.leginfo.state.ny.us/navigate.cgi> [public.leginfo.state.ny.us].

**I. Bills Signed into Law**

**S.1130 (Gianaris) / A.4283 (L. Rosenthal)**

This bill amends the Agricultural and Markets Law and General Business Law to prohibit the sale of cats, dogs and rabbits in retail pet stores. It authorizes collaboration with entities such as municipal pounds, shelters, humane societies, and animal protective organizations to provide space to showcase cats or dogs for the purpose of adoption. Its purpose is to eliminate the supply chain for puppy mills. It was signed into law on December 15, 2022 with the commitment of Chapter Amendments. Specifically, the sponsors agreed to allow retail pet shops to collect fees for showing pets available for adoption and to allow two years for its implementation. The COAL did not take a position.

**S.1289-B (Brooks) / A.4978-B (Englebright)**

This bill adds a new Section 6715 to the Education Law, requiring veterinarians to notify animal owners in writing of all side effects of prescribed medications dispensed to an animal. The bill does not distinguish between pets, livestock, or wildlife. It will take effect on June 14, 2023, one hundred and eighty days from the day it became law. The COAL did not take a position on this bill.

**S.4839-B (Biaggi) / A.5653-B (L. Rosenthal)**

This bill amends the General Business Law by adding Section 399-aaaa to prohibit the manufacture, knowing import, sale or offer for sale of any cosmetic product or any component of it developed or manufactured using cosmetic animal testing. The bill defines “cosmetic” as including any item applied to the human body for cleansing or beautifying. The bill defines “cosmetic animal testing” as “the internal or external application of a cosmetic, either in its final form or any ingredient thereof, to the skin, eyes, or other body part of a live non-human vertebrate.” The bill gives the Attorney General enforcement powers and provides for civil penalties ranging from \$500 to \$5,000 for a first violation, and \$1,000 for each additional day of continued violation. It is effective January 1, 2023. The COAL supported.

**S.6870-B (Addabbo) / A.6246-C (Paulin)**

This bill provides a comprehensive standard of care for municipal animal shelters, not for profit humane societies, Society for the Prevention of Cruelty to Animals (SPCA) and animal shelters.

It amends the Agricultural and Markets Law by adding a new Article 26-C titled “Regulation of Animal Shelters.” It will take effect December 15, 2025, three years from the date it became law. The goal is to provide adequate, uniformed and comprehensive standards of care to ensure animal health and wellbeing in shelter/rescue care. The COAL supported.

**S.7783 (Addabbo) / A.8777 (Pretlow)**

This bill is a chapter amendment to S.1442-B/A.4154-B, signed into law as Chapter 645 of the Laws of 2021, and it makes the changes that the governor negotiated with the sponsors as a condition of signing the bill in 2021. The bill amends Agriculture and Markets Law Section 382, which prohibits the slaughter of racehorses and racehorse breeding stock, by providing that race horse owners who can demonstrate proper documentation of a transfer of ownership of the horse to a party with no financial or familial relationship to the them will be protected from liability. The prior version of Section 382 imposed a presumption of liability on the owner, who could however rebut that presumption by showing proper documentation of a transfer of ownership of the horse sent to slaughter. This bill became effective on February 24, 2022. The COAL did not take a position on the bill.

**S.8315-A (Gianaris)/ A.9284-A (Glick)**

This bill amends Insurance Law Section 3421 to make it unlawful to exclude, limit, restrict or reduce coverage under any homeowner’s insurance policy based on the ownership of any specific dog breed (or mixture of breeds). It is effective March 16, 2023, the 90<sup>th</sup> day after it became law. It solely applies to policies issued, renewed, modified, altered or amended on or after that date. It does not affect existing policies. The COAL supported.

**S.8973 (Hinchey)/ A.9296 (McDonald)**

This bill amends the Agriculture and Markets Law Section 117 to allow a dog control officer or a peace officer to return a licensed dog seized by the officer to its owner of record instead of delivering the dog to a municipal pound or shelter. It is effective immediately, December 15, 2022. The COAL supported.

**Bills passed by both houses but not yet delivered to the Governor**

None.

**II. Bills on which COAL took a position that were not passed by the Legislature in 2022**

**S.90A (Kaminsky) / A.696A (Zebrowski)**

This bill proposes significant revisions to the Agriculture and Markets Law related to the crimes of animal fighting and promoting animal fighting. It conforms the associated penalties to New York’s penal code. Two notable changes include the establishment of multi-layered offenses related to the facilitation of animal fighting, including the possession of bait animals, and the addition of Section 351-c (Promoting animal fighting in the third degree), a class C-felony. By increasing the penalties for all animal fighting related activities and defining the enterprise related offenses which establish grounds to invoke the federal Racketeer Influenced and Corrupt

Organizations Act (RICO), this legislation addresses many of the weaknesses undermining the current law. The COAL supported.

**S.418 (Hoylman) & A.1518 (L. Rosenthal)**

These bills are not same. Both bills seek to amend the Environmental Conservation Law Sections 11-0536, 71-0924, and 71-0927 to add giraffes and all species of rhinoceros to the species already protected by provisions prohibiting their sale (or intent to sell), trade, or barter. The bills also increase the penalties for violations. Despite being a species at risk of extinction, giraffes are not protected under federal law and only two subspecies of rhinoceros are protected under current New York law. The bills have a discrepancy in their Section 4s regarding regulatory changes for implementation. The COAL supported.

**S.960 (Krueger) / A.2152 (L. Rosenthal)**

This bill amends the definition of “aggravated cruelty to animals” to eliminate the element of the severity of the physical injury caused to an animal as the basis for a criminal charge and conviction. Specifically, it proposes amendments to the elements of the crime of aggravated cruelty to animals under the Agriculture and Markets Law Section 353-a (1) by eliminating the requirement that the injury to the animal be “serious.” Prosecutors report that some Courts refused to find defendants guilty because by the time the case involving the animal is before the Court, the animal has recovered from its serious injuries, although the other elements of the aggravated cruelty charge have been met. This change would make it more likely for charges to be sustained regardless of an animal's recovery from the act of cruelty. The COAL supported.

**S.1148 (Kaminsky) / A.6107 (Zebrowski)**

This bill directs the Commissioner of the Department of Agriculture and Markets to establish licensing and educational standards for individuals providing training services for companion dogs by adding new Section 113-a to the Agriculture and Markets Law (AML). Trainers of service and police dogs as defined in AML Section 108 are excluded from the bill. The bill prohibits anyone convicted of violating New York’s animal cruelty laws from obtaining a companion dog training license. The bill establishes a licensing scheme under the Department of Agriculture and Markets. Current New York Law does not regulate or address, in any way, the credentials, knowledge or experience of individuals advertising themselves as dog trainers. The COAL supported.

**S.1484 (Serrano) / A.3283 (L. Rosenthal)**

This bill requires nuisance wildlife control operators (NWCOS) to include in their reports to the Department of Environmental Conservation (DEC) the incidents and reasons when lethal, rather than non-lethal methods, were used. The bill also requires that the DEC’s list of NWCOS include any enforcement actions taken against NWCOS that are related to violations of nuisance wildlife control laws and regulations and that the list be made available to the public. These changes are made by an amendment to Environmental Conservation Law Section 11-0524

(Nuisance wildlife control operators). The goal is to increase transparency through the proposed reporting requirements. This will allow the public to make informed choices among NWCs and to select those who have demonstrated to be committed to using humane, non-lethal methods for managing nuisance wildlife whenever possible. The COAL supported.

**S.2176 (Sepulveda) / A.456 (L. Rosenthal)**

This bill amends Agriculture and Markets Law Section 353-a (Aggravated cruelty) to extend protection to wildlife, in addition to companion animals, who are already protected. The violation of Section 353-a is a felony. Currently, felonious conduct, if perpetrated against wildlife, is a misdemeanor. It is logically inconsistent to afford a pet rabbit, rat, frog, etc. protections they would not have if living as wildlife or to condemn more lightly pain and suffering because it is inflicted upon wildlife. The bill, similarly to penal laws, focuses upon the conduct being proscribed rather than upon the nature of the victim. The COAL supported.

**S.2783 (Sepulveda) / A.715 (L. Rosenthal)**

This bill authorizes emergency medical care personnel to provide basic first aid to dogs and cats found on the scene of an emergency situation. Although first responders frequently tend to animals, New York's law presently does not address this situation. Specifically, this bill amends Public Health Law Section 3103 (Immunity from liability) and adds a new Section 3018 (Basic first aid to dogs and cats). Additionally, the bill amends Education Law Sections 6702, 6703 and 6705 related to the practice of veterinary medicine by identifying the emergency first responders authorized to act and by allowing them to provide treatment to a dog or cat if no persons require medical attention at the time. The bill states that to be authorized to provide a treatment to an animal, a first responder must be trained to provide the same treatment to a human. The proposed law strikes a balance between the need to provide life-saving medical care to dogs and cats in an emergency and the need to ensure that medical professionals treat humans first. The COAL supported.

**S.3525-A (Bailey) / A.5315-A (L. Rosenthal)**

This bill adds new Article 22-B, Section 858-a to the Judiciary Law to provide that in any civil or criminal proceeding regarding the welfare of an animal, the court may appoint a volunteer special advocate to represent the interests of the animal and to help ensure the well-being of any living animal victim. The advocate will provide to the parties and the court information and recommendations relating to the interest of the animal. The list of potential advocates, consisting of supervised law students and attorneys, would be maintained by the Office of Court Administration. The COAL supported.

**S.3835 (Addabbo) / A.1903 (L. Rosenthal)**

This bill requires licensed pet dealers that house animals on their premises to have and maintain fire protection systems, including an automatic sprinkler system connected to municipal water supply, that meets the standards set forth in the legislation. The scope of the bill is restricted to buildings that are not zoned as residential. Specifically, this bill amends the Agriculture and Markets Law by adding Section 409 (Fire protection requirements for pet stores.) The COAL supported with recommendations.

**S.4081-A (Hinchey) & A.1769 (Lupardo)**

These bills are not same. These bills amend Agriculture and Markets law Section 373 to require that a newly vacant property be inspected for any animals that might be left on the premises. The bills would require an owner, lessor, or designee of property that has become vacant as a result of an eviction, foreclosure, forfeiture or default on a mortgage, trust deed or land sales contract, or abandonment to inspect such property within three days of such vacancy (Assembly bill) or within three days of when such person knew or should have known of such vacancy (Senate bill) to see if any animals were left behind in the premises. If an owner, lessor, or designee discovers an animal that appears to have been abandoned, that person must notify a dog control officer, a police officer, or an agent of a duly incorporated society for the prevention of cruelty to animals. The person who discovers the animal will not be deemed to be owner of such animal. Violators would be subject to fines of \$500 to \$1,000. The COAL supported the Senate version of the bill.

**S.4459 (Addabbo) / A.3467 (L. Rosenthal)**

This bill amends the Environmental Conservation Law Sections 11-1101, 11-1901 and 11-1903 to prohibit the use of wildlife leg-gripping traps, which are used to trap furbearing animals such as beavers, raccoons, foxes and coyotes. These traps are triggered by springs once an animal steps into them, clamping onto the animal's limb and holding the animal in place until it is discovered by the trapper. Leg-gripping traps inflict tremendous pain on animals and also present significant risks of catching non-target species, including humans and family pets, as they cannot discriminate between their victims. More humane alternatives exist and are readily available. The COAL supported.

**S.4840-B (Biaggi) / A.5542 (Englebright)**

This bill prohibits the use of wild animals as defined in Environmental Conservation Law (ECL) Sections 11- 0103(6)(e) (for example, non-human primates, lions, tigers, bears, lemurs, wolves, alligators and other animals) from being used in circuses or traveling animal acts by adding a new Section 11-0541 to the ECL. Exceptions are made for facilities accredited by the Association of Zoos and Aquariums, and wildlife sanctuaries. Livestock and companion animals are not covered by the bill. The COAL supported.

**S.5058 (Reichlin-Melnick) / A.5728 (Glick)**

This bill prohibits the use of lead ammunition in the hunting or management of wildlife on state-owned land. Specifically, it amends Environmental Conservation Law Section 11-0901, Subdivision 3 by adding a new paragraph h prohibiting the use of lead ammunition on state owned/controlled lands. The proposed ban is limited in scope, applying only to public lands and land area that contributes surface water to the water supply of New York City. It is not a ban on hunting in these areas—rather, it requires the use of alternatives to lead ammunition. Its purpose is to reduce lead exposure in humans and wildlife. The COAL supported.

**S.5156 (Brooks) / A.1549 (L. Rosenthal)**

This bill adds new Section 837-w to the Executive Law to establish and maintain an Animal Cruelty Crime Database. The database would be available to law enforcement entities, district attorneys, humane societies, Societies for the Prevention of Cruelty to Animals (SPCAs), dog and cat protective associations, and animal control officers. The COAL suggested comprehensive amendments to this bill.

**S.4999 (Skoufis) / A.3066 (Epstein) Opposed**

This bill requires the Department of Agriculture and Markets to issue code red and blue alerts for companion animals to bring those animals indoors whenever a code red or blue alert has been issued. Specifically, the legislation repeals and adds a new Section 353-d of the Agriculture and Markets Law (Code red and blue alerts for companion animals during extreme weather events). The COAL opposed because there would be unintended consequences from the proposed legislation, including the elimination of current statutory life-saving protections afforded to companion animals left unattended in vehicles, exposing them to grave danger of serious injury and death.

**S.5439 (Brisport) / A.703 (L. Rosenthal) Opposed**

This bill adds new Section 399-bbbb to the General Business Law prohibiting, with exceptions, the sale and manufacture of fur products. The bill prohibits the commercial sale, procurement, manufacturing, retail display, giving, donating, trade, or other distributions of a new or used fur product within New York State. Violators would be subject to \$500 to \$1,000 fines with potential liability for attorney's fees. Definitions of fur and fur products include exceptions for types of leather, cowhide, and sheepskin products. Used furs held by individuals not normally engaged in the fur business, non-profit organizations, manufactures of used fur products, thrift stores and pawn shops are also excepted. Subdivision 5 exempts manufacture, sale, and distribution of fur products that conform with a religious or cultural practice. The undefined terms, "religious" and "cultural practice" can virtually eliminate the effect of the bill's prohibitions as catch-all exceptions. Unlike the previous exceptions, subdivision 5 has potential

for unintended, harmful consequences undermining the sponsors' intent and the bill's purpose. The COAL opposed the passage and enactment of this legislation in its present form.

**S.6005 (Sanders) / A.7852 (Hunter)**

This bill authorizes the Division of Veteran Affairs to provide eligible veterans with financial assistance for purchasing, training and the upkeep of service as well as emotional support dogs. Specifically, this legislation amends the Executive Law by adding a new Section 368-a to provide grants to veterans suffering from PTSD and/or traumatic brain injury for the purchase and training of a service dog and/or an emotional support dog. It also provides monetary monthly assistance for the upkeep of the dog. The COAL supported.

**S.6419 (Brisport) / A.1302 (L. Rosenthal)**

This bill amends the Social Services Law (SSL) to increase eligibility and income deductions for disabled people who have guide dogs, hearing dogs and service dogs by repealing SSL Section 303-a and adding new SSL Section 131-y. This bill defines a service dog more broadly than the Americans with Disabilities Act (ADA) definition does. The bill affects deductions from declared income in two ways. First, a dog's veterinary expenses can be added to a dog's food expenses as necessary living expenses for the purpose of determining the amount of federal security income benefits and/or additional state payments that eligible disabled people may receive. Second, the monthly minimum income deduction for eligible disabled people goes up from \$35 to \$50, although there is no limit on the actual amount that an eligible disabled person can deduct as necessary living expenses for the amount spent on veterinary care and dog food. This bill also expands the beneficiaries under the SSL by including those who receive supplemental nutrition assistance program benefits, medical assistance for needy persons, and/or additional state payments under the same SSL chapter. The COAL supported.

**S.6484 (Skoufis) / A.341 (Zebrowski) Opposed**

This bill expands the definition of circumstances under which it is deemed lawful for a judge to order that a dangerous dog be euthanized or permanently confined. Specifically, this legislation amends the Agricultural and Markets Law Section 123 to clarify the circumstances where a dangerous dog is considered to have caused the death of another animal without justification and while trespassing on another person's property. The COAL opposed.

# NEW YORK STATE BAR ASSOCIATION COMMITTEE ON ANIMALS AND THE LAW

---

## **2023 STUDENT WRITING COMPETITION ANNOUNCEMENT**

The Committee on Animals and the Law of the New York State Bar Association is very pleased to announce the 14th Annual Student Writing Competition. **The deadline for submission is Friday, July 7, 2023.**

The Committee on Animals and the Law was established to provide information resources for the New York State Bar Association's members and the public about non-human, animal-related humane issues, which arise from and have an effect upon our legal system. This competition seeks to foster legal scholarship among law students in the area of animals and the law. This competition provides law students with an incentive and opportunity to learn more about this area of law.

Law students (which include J.D., L.L.M., Ph.D., and S.J.D. candidates), are invited to submit to the Committee on Animals and the Law, an article concerning any area of Animal Law. All submissions will be reviewed by a panel of attorneys and other professionals practicing or otherwise involved in animal law. The winners will be chosen in accordance with the competition rules.

The **first-place** winner will receive \$1,000 and a Certificate of Achievement. The **second- place** winner will receive \$500 and a Certificate of Achievement. The **third and fourth place** winners will receive a Certificate of Recognition.

The Committee also reserves the right to offer the winners (and other entrants), at the Committee's discretion, the opportunity to publish his/her paper in the Committee's Laws & Paws publication. Offers to publish are purely within the discretion of the Committee. The Committee in no way guarantees entrant's the opportunity for publication.

Questions? Send an email to the NYSBA Staff Liaison, Leanne Evans, at: [levans@nysba.org](mailto:levans@nysba.org)

**DECOLONIZING CAPTIVITY:  
“REPATRIATION AND RECONCILIATION” FOR CORKY THE ORCA**

Christian Suarez  
UCLA School of Law  
Class of 2023

## *Decolonizing Captivity: “Repatriation and Reconciliation” for Corky the Orca*

### **PART I: The Animal as Client**

#### **I. Introduction**

One of my earliest memories of an animal is of meeting an orca. I was six years old when my family took me to SeaWorld San Antonio for a special birthday surprise—dinner by the orca pool with a “Happy Birthday” serenade by an orca. I can still picture sitting in the dreamlike ambience of candlelight and the cool turquoise glow of the orca tank. The trainer blows a silver whistle. The orca, a few yards away at the edge of the tank—their head a gleaming obsidian and white apparition against splashes of aquamarine. Then they open their mouth and let out a string of chirps and whistles. In my child’s mind, that was the sound of pure animal joy.

For much of my childhood, I cherished that memory. I held onto the magic feeling of having been so close to that orca that night. We had surely beheld each other in friendship. Then, as I became more invested in animal protection and aware of the tragedy of captivity for sea mammals, the memory became bittersweet and began to haunt me. I had been in the presence of a captive animal whose life was filled with grief, frustration, isolation, deprivation, boredom. I do not remember the orca’s name and so cannot say with certainty whether they still live.<sup>1</sup> Yet I often wonder to myself what their life was like. Were they healthy? What was their favorite food, and did they get enough of it? Was their mother alive and did they get to have a relationship with her? What kind of orca emotion reverberated in that “birthday song”? Was it actually a moment of conditioned excitement in an otherwise bleak existence? Or was it a cry for help? A release of

---

<sup>1</sup> Based on the history of orcas that were kept at SeaWorld San Antonio around 2001, the orca I encountered was likely one of the following: Kyuquot (M - born in captivity), Keto (M - born in captivity), Kayla (F - born in captivity), Winnie (F - captured in Iceland), Unna (F - born in captivity). Only Kyuquot is alive today at 30 years old. *SeaWorld San Antonio's History*, ORCA POD WIKI (last visited Feb. 26, 2022), [https://orcapod.fandom.com/wiki/Category:SeaWorld\\_San\\_Antonio%27s\\_History](https://orcapod.fandom.com/wiki/Category:SeaWorld_San_Antonio%27s_History).

anger? After the performance, did the orca swim back to their lonely glass cell and lull themselves to sleep with memories of their mother's song?

As an undergraduate Animal Studies major, I was brought back to my childhood love for orcas when I read a study about cultural transmission among orcas in an ethology class. I learned how orcas share and pass down culture in the form of repertoires of calls and whistles, food and hunting preferences, choice of mates, and even what they do for fun. Each tight knit matriarchal pod, led by an older female, builds its own cultural traditions within and across generations. This discovery was a confirmation of my childhood intuition of the wondrous nature of orcas. As someone who is defined by and treasures the Mexican culture passed down by the strong matriarchs in my family, I felt even more drawn to orcas and their deeply cultural lives centered around multigenerational maternal bonds and the sharing of care and wisdom.

Now, as a law student who aspires to a career in animal law, I feel called back to address the plight of captive orcas and unearth paths to legal recognition of their dignity. Through this paper, I want to symbolically take on the orca I met 20 years ago as my client. I have chosen Corky the orca as my client for the unique opportunity she poses as one of the last wild-caught orcas in captivity in North America and because she has been in captivity longer than any other living orca. A main facet of my client-centered approach to representing Corky will be a focus on family and culture as crucial to orca wellbeing, the deprivation of which is inherent to the exploitative project of captivity. What does it mean for an animal to suffer a cultural loss? What are the legal actions and remedies, if any?

## II. Corky's Story

On a stormy December night in 1969, a group of fishermen kidnapped a four year old Northern Resident orca from her family after her pod sought shelter in Pender Harbour, on the Sunshine Coast north of Vancouver, British Columbia.<sup>2</sup> The fishermen were motivated by the recent rise in demand for wild-caught marine mammals from aquaria around the world.<sup>3</sup> As the storm raged through the night, the fishermen kept the orcas and other members of her A5 pod entrapped in fishing nets.<sup>4</sup> By morning, she and half of her pod remained trapped inside, with the rest of her family just outside the nets.<sup>5</sup> Buyers arrived and six orcas were selected, including the four-year-old, who was separated from her mother for the first time in her life.<sup>6</sup> After a harrowing journey by truck, ferry, and plane, the young orca arrived in the now defunct Marineland of the Pacific in Los Angeles County.<sup>7</sup> Her captors named her Corky.

Corky's once vast and dynamic oceanic world was gone. And so was her beloved family, alongside whom she would have spent her entire life. She now found herself in a barren concrete tank where the constant droning of filtration pumps and the reverberating calls of other traumatized whales created a sonic and visual purgatory. For a few years, Corky was joined by four other members of her family, who were captured from the same cove.<sup>8</sup> But by 1972, three of Corky's relatives had died and only she and her cousin Orky remained.<sup>9</sup>

---

<sup>2</sup>*Corky's Capture*, ORCA LAB (last visited Mar. 1, 2022), <https://orcalab.org/free-corky-campaign/corkys-story/corkys-capture/>.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>*From Freedom*, ORCA LAB (last visited Mar. 1, 2022), <https://orcalab.org/free-corky-campaign/corkys-story/from-freedom/>.

<sup>9</sup>*Id.*

Starting in 1977, at around age 11, Marineland began to breed Corky with Orky.<sup>10</sup> Her first calf was the first live orca calf to be born in captivity.<sup>11</sup> Tragically, he died 16 days later after failing to nurse and contracting pneumonia.<sup>12</sup> By 1986, Corky had been pregnant seven times, which meant she had been almost continuously pregnant for ten years.<sup>13</sup> Her live calves all died due to complications arising from Corky's inability to teach them to nurse, which she would have learned had she given birth in the wild and had her mother and grandmother to guide her.<sup>14</sup> Corky's longest surviving calf lived only 46 days.<sup>15</sup>

In 1987, Corky and Orky were moved to SeaWorld San Diego.<sup>16</sup> After 17 years living in a small tank together at Marineland, this was the two orcas' first time around whales that were not members of their A5 pod.<sup>17</sup> Life at SeaWorld was more hectic and fast-paced, as Corky was forced to participate in more demanding entertainment performances.<sup>18</sup> A year and a half after moving to SeaWorld, Orky died and Corky's only remaining family members were the two orcas Orky had fathered.<sup>19</sup> After one of the calves, Orkid, lost her mother in a tragic accident, Corky became her surrogate mother and the two have remained close ever since.<sup>20</sup> Corky would also go on to become SeaWorld's main performing orca, "Shamu."<sup>21</sup>

Today, Corky is approximately 57 years old. Her longevity is a marvel for a captive orca, but would be approximately middle-aged for a wild female orca, who are known to live up to

---

<sup>10</sup>*Corky's Babies*, ORCA LAB (last visited Mar. 1, 2022) <https://orcalab.org/free-corky-campaign/corkys-story/corkys-babies/>.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>*Move to SeaWorld*, ORCA LAB (last visited Mar. 1, 2022), <https://orcalab.org/free-corky-campaign/corkys-story/move-to-sea-world/>.

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

100 years.<sup>22</sup> Corky’s health has fluctuated over the years—she has suffered from kidney problems, no longer ovulates, her teeth are worn down, and she is almost blind in one eye.<sup>23</sup> SeaWorld still puts Corky on display in its up-close orca encounters.<sup>24</sup> When not on display, Corky is kept in one of the back tanks with Orkid and the other captive orcas, who together spend their time circling their tanks day in and day out.<sup>25</sup> After 54 years in captivity, Corky is the longest surviving captive orca in the world.<sup>26</sup>

### III. Corky’s Ideal Client Preferences

In recent years, the Whale Sanctuary Project (“WSP”) has emerged as a kind of salvation that could one day soon be offered to captive orcas. WSP is in the process of creating seaside sanctuaries in North America for whales, belugas, and dolphins that are retired from entertainment facilities or rescued from the wild and need rehabilitation or permanent care.<sup>27</sup> The organization is steadily moving towards the realization of a seaside sanctuary on the coast of Port Hilford, Nova Scotia which it hopes will serve as the “gold standard” for many more in the future.<sup>28</sup> As such, WSP provides a helpful framework for envisioning the ideal preferences and needs of Corky. The Nova Scotia sanctuary will cover more than a 100 acres of netted-off water space.<sup>29</sup> This will offer expansive space and depth for the orcas to swim, dive, and experience a natural marine environment for the first time in many of the future residents’ lives.<sup>30</sup>

---

<sup>22</sup>*Corky Today*, ORCA LAB (last visited Mar. 1, 2022), <https://orcalab.org/free-corky-campaign/corkys-story/corky-today/>.

<sup>23</sup>*Id.*

<sup>24</sup>*Id.*

<sup>25</sup>*Id.*

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

<sup>27</sup>*The Sanctuary & Our Global Vision*, WHALE SANCTUARYPROJECT (2022), <https://whalesanctuaryproject.org/the-sanctuary/>.

<sup>28</sup>*Frequently Asked Questions about the Sanctuary*, WHALE SANCTUARYPROJECT(2022), <https://whalesanctuaryproject.org/faq-sanctuary/>

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

On the other side of the continent, along Corky’s native Sunshine coast, Paul Spong has been working to develop a seaside sanctuary specifically tailored for Corky.<sup>31</sup> Spong is the director of OrcaLab, a whale research station on Hanson Island in British Columbia whose work focuses on the life history of the Northern Resident orcas.<sup>32</sup> In 1984, Spong launched the “Free Corky” campaign to attempt to repatriate Corky, the last surviving Northern Resident captive orca, to her family and community in the waters where her A5 pod still make their home.<sup>33</sup>

In recent years, Spong’s campaign has focused on retiring Corky to a seaside sanctuary, rather than setting her free into open water.<sup>34</sup> In 2018, in partnership with Spong and OrcaLab, Michael Reppy, the director of Dolphin Spirit Project, purchased Pacific Outback Resort—a former fishing lodge on Double Bay, Hanson Island, British Columbia.<sup>35</sup> Double Bay and the lodge meet the ideal requirements Spong and his team identified for Corky’s repatriation: “a pristine and protected bay, with good tidal flow for clean water, and room to create an approximate 50 acre netted enclosure with depths up to 80’, and a deep water channel to the dock.”<sup>36</sup> Moreover, the future sanctuary is adjacent to Blackfish Sound, which Corky’s A5 pod

---

<sup>31</sup>*Corky*, DOLPHINSPIRIT (last visited Mar. 30, 2022), <https://dolphinspirit.org/corky>.

<sup>32</sup>*Id.*

<sup>33</sup>*Site Search in British Columbia*, WHALE SANCTUARY PROJECT (2022), <https://whalesanctuaryproject.org/site-search-in-british-columbia/>.

<sup>34</sup>*About Corky*, ORCA LAB (last visited Apr. 1, 2022), <https://orcalab.org/free-corky-campaign/about-corky/>. “In recent years, acknowledging the difficulties involved in accomplishing this (‘owner’ intransigence, Corky’s age and condition) we have modified our goal by proposing that Corky be “retired” to a facility in the ocean, where she would feel the ocean around her, and be able to reconnect with her family and community. Corky would hear familiar voices from long ago, and have opportunities to interact with her kin. We can’t know precisely what would happen following her return, as this would be determined by Corky and the other orcas. She would continue to receive human care, including from Sea World staff who know her well. There are many compelling reasons for doing this. In fairness, we owe it to Corky, and to her family to make the attempt to reunite them. Corky’s return to the ocean will also give us an opportunity to learn details about orca society that we will never know otherwise.”

<sup>35</sup>*Purchase Of Fishing Lodge At Double Bay For Corky Sanctuary!*, DOLPHINSPIRIT (Oct. 2018), <https://dolphinspirit.org/news>. The lodge will be renovated as a headquarters for Corky’s caregivers and as the “Ocean Conservation and Educational Center.”

<sup>36</sup>*Id.*

frequents, making it perfectly situated for Corky’s reconnection with her family.<sup>37</sup> It is currently in construction phase to bring it up to standards as a sanctuary.<sup>38</sup>

WSP and OrcaLab’s work raises something important to know about my client. While we as orca advocates would like to release freed orcas into the open seas, this may not be in their best interest.<sup>39</sup> This is most true of orcas like Corky who have spent decades in captivity and have grown dependent on constant human care.<sup>40</sup> For such orcas, lifetime care is necessary to provide them with an existence that is as close as possible to that of their wild pod members.<sup>41</sup>

In prioritizing the needs of my orca client, a main thrust of this paper will work on envisioning how to achieve legal restitution of the cultural loss Corky and her family have suffered, a family that is uniquely both orca and human, as we will see. This will be explored in turn through three strategies of litigation, legislative reform, and shareholder resolution activism, each one anchored in a legal theory of “Repatriation and Reconciliation” —a marriage of animal law and Indigenous law that reforges multispecies matriline. The ideal outcome of my successful representation of Corky via these decolonial anticaptivity strategies would be realized through WSP and OrcaLab’s sanctuary framework, which would allow retired orcas like Corky to finally live in dignity and form strong bonds of kinship among each other and the wild family members that come to visit them.

---

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

<sup>39</sup>WHALE SANCTUARYPROJECT, *supra* note 28.

<sup>40</sup>*Id.*

<sup>41</sup>*Id.*

## **PART II: Freeing Corky Through “Repatriation and Reconciliation”**

### **I. Protecting Orca Culture Through Decolonial Legal Reform**

In securing protections and justice for animals through the law, proposed legal reforms often focus on the animal as an individual subject of rights, seeking to attain personhood status based on a species’ intelligence or capacity to suffer. When animal lawyers do seek to remedy the harms humans have perpetrated against a distinct group of animals, they may speak in conservationist terms, of a species as a whole. Alternatively, the harmed animals have been forced together by the circumstances of their shared exploitation, and the bonds of motherhood or family do not have the legal force one would like them to have.

Resident orcas like Corky, who live in lifelong matrilineal family groups with traditional dialects and customs, provide a fruitful case study for developing legal reform that materially improves the lives of animals based on their membership in distinct families with culture. Cultural rights are recognized by international law, chief among them Article 27 of the Universal Declaration of Human Rights, which states that “everyone has the right freely to participate in the cultural life of the community.”<sup>42</sup> Like many legal principles that are extendable to animals as our scientific understandings of them grow, this right to culture should be respected for cultural animals such as orcas and become a tool in the legal advocacy of animal lawyers. In Corky’s case, her status as a cultural being and member of the A5 pod family warrant her release from captivity to a seaside sanctuary.

Further, another unique aspect of resident orcas is their relationship to the Indigenous peoples of the Pacific Northwest, particularly among the Coast Salish peoples. The Coast Salish

---

<sup>42</sup>*Universal Declaration of Human Rights*, UN (last visited Mar. 22, 2022) <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

are a cultural group of several Indigenous nations that share the same linguistic family.<sup>43</sup> They have lived alongside the Salish Sea and its orcas in what is present-day western Washington and southwestern British Columbia for more than 10,000 years.<sup>44</sup> Orcas have a sacred significance among the cultures of the Coast Salish tribes, featuring prominently in their varied cosmologies, spirituality, art, and storytelling.<sup>45</sup> Among the Indigenous nations of the region, resident orcas are often seen as the guardians of the sea, symbolizing positive values including compassion, luck, and family.<sup>46</sup> To many Coast Salish, resident orcas embody “the strength of love and the bonds of family because of their strong group behavior.”<sup>47</sup> This respect for and kinship with orcas speaks to the ecological harmony that Indigenous communities have actively fostered with the Northern and Southern resident orcas, whose families have also drawn sustenance from the Chinook salmon of the Salish Sea for millennia.<sup>48</sup> Indeed, regional conservationist organizations increasingly recognize the importance of looking to the Coast Salish “for knowledge and understanding of the history, location, and behaviours of the Pacific Northwest’s orca populations, as well as to their leadership, when developing protection and recovery actions.”<sup>49</sup>

The sociocultural centrality of orcas among the Coast Salish has potential consequences for the way the settler law of the United States and Canada could one day conceive of resident

---

<sup>43</sup> *Coast Salish People & Language*, BURKE MUSEUM (last visited Mar. 17, 2022), <https://www.burkemuseum.org/collections-and-research/culture/contemporary-culture/coast-salish-art/coast-salish-people>.

<sup>44</sup>*Id.*

<sup>45</sup> *Orcas of the Pacific Northwest*, GEORGIA STRAIT ALLIANCE (last visited Mar. 17, 2022), <https://georgiastrait.org/work/species-at-risk/orca-protection/killer-whales-pacific-northwest/>.

<sup>46</sup>*Id.* See also, Rena Priest, *What Happens to Them Happens to Us* (May 12, 2020), <https://hakaimagazine.com/features/what-happens-to-them-happens-to-us/>. (“They are the first harvesters of salmon, and, like Coast Salish tribes, they are matriarchal. Most remain by their mothers’ sides for their entire lives. The matriarchs are the keepers of the wisdom—the decision-makers, the leaders on whom the survival of their pods depends.”)

<sup>47</sup>*Id.*

<sup>48</sup> “Although remains of many marine mammals can be found at historical Salish village sites, killer whales are rarely found at these sites. This has been attributed to their special significance in aboriginal culture. In British Columbia, non-First Nation anglers once considered killer whales to be nuisances and competition for salmon. About 1 in 4 killer whales that were captured in the 1960s and 1970s showed evidence of having been previously shot and wounded.” *Salish Sea*, EPA (Jun. 2021), [epa.gov/salish-sea/southern-resident-killer-whales](https://epa.gov/salish-sea/southern-resident-killer-whales).

<sup>49</sup> *Orcas of the Pacific Northwest*, *supra* note 45.

orcas as legal persons. The Coast Salish, like many Indigenous peoples across the globe, “incorporate an understanding of personhood that is non-anthropocentric...and [structure] the social world...around conceptions of animal personhood.”<sup>50</sup> Indigenous animal personhood “refers to the idea that animals are active individuals capable of intentional social interaction...such as reciprocal exchange,” rather than the passive, mechanistic objects that Western law and ontologies classify them as.<sup>51</sup> As animal lawyers are too well aware of, this latter regime of classifications engenders our current reality of industrialized animal suffering.

According to Canadian animal law scholar Maneesha Deckha, “the principles that can be deduced from narratives about culture and society in Indigenous oral traditions should be regarded as ‘law’,” including those that ascribe social and legal personhood to animals.<sup>52</sup> Deckha believes this decolonial and de-anthropomorphizing move within the law could materially improve the conditions of animals by gradually dismantling their property status.<sup>53</sup> In Canada, this development could come about through the federal government’s policy of Reconciliation, which refers to the “mainstreaming of Indigenous worldviews as a way to reshape settler colonial institutions to mitigate their ongoing harms.”<sup>54</sup> According to Indigenous scholars, such “state-sponsored reconciliation must include a genuine engagement with Indigenous legal traditions.”<sup>55</sup>

---

<sup>50</sup> Maneesha Deckha, *Unsettling Anthropocentric Legal Systems: Reconciliation, Indigenous Laws, and Animal Personhood*, JOURNAL OF INTERCULTURAL STUDIES, 41:1, 77, 83 (2020) (internal quotations omitted).

<sup>51</sup> *Id.* “[Indigenous communities] typically include animals as members of the same general ontological category as humans, insofar as they consider animals to be conscious, sentient beings who possess volition, plan and deliberate, interact socially and communicate with each other and with humans.”

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 80. Deckha’s central thesis is that “Reconciliation means respect for Indigenous legal orders which means respecting animals as legal subjects and ending their property object status.” *Id.* at 87. This premise is also supported by international law: “Article 27 of the United Nations Declaration on the Rights of Indigenous Peoples, which instructs states to ‘establish and implement, in conjunction with Indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to the Indigenous peoples’ laws, traditions, customs, and land tenure systems...’, as implicitly extending rights to the nonhumans who are treated like legal and social persons within Indigenous legal traditions.” *Id.* at 85.

<sup>55</sup> *Id.* at 82.

The concrete effect of the Canadian government’s genuine engagement with Indigenous conceptions of nonhuman personhood would be their actual implementation into law through legislation, regulations, and judicial precedent that place animal dignity over extractive industrialization. This more-than-symbolic legal empowerment of First Nations would permit them to more forcibly combat the exploitation of their land, resources, and nonhuman relatives with a legally enforceable arsenal of their millennia-old legalities.<sup>56</sup>

A similar model of decolonial and de-anthropomorphizing reconciliation should be advanced within the United States’ legal system by animal lawyers. The ancestral coasts of resident orcas and the Coast Salish span the settler legal regimes of Canada and the United States. This region provides a unique site for centering a transnational decolonial mode of legal advocacy for animals and the Indigenous communities that commune with them as social and legal persons.<sup>57</sup> For resident orcas and Coast Salish families, their shared ability to freely practice their sea-based cultures, particularly surrounding a shared millennia-long reliance on Chinook salmon, is increasingly imperiled by the legally enabled marginalization created by extractive colonial relationships to land and sea. For both communities, their dignity is directly entwined with free cultural expression, and thus securing cultural rights is also a project in demanding interspecies justice for those who have been stripped of dignity.<sup>58</sup>

---

<sup>56</sup> *Id.* at 85.

<sup>57</sup> Coast Salish have formed transnational coalitions before, such as the signing of a treaty to make a Trans Mountain Kinder Morgan pipeline expansion illegal in Coast Salish Law. *See Coast Salish Nations Sign International Treaty To Protect The Salish Sea*, TSLEIL-WAUTUTH NATION SACRED TRUST INITIATIVE, (Sept. 23, 2014), <https://twnsacredtrust.ca/coast-salish-nations-sign-international-treaty-to-protect-the-salish-sea/>.

<sup>58</sup> The harmonization of resident orcas and Coast Salish cultural interests here uplifts the ability of certain orcas and humans to thrive at the expense of the Chinook salmon. As an endeavor in animal law, this project is sensitive to the elevation of certain animal interests at the expense of others, particularly on the basis of higher intelligence, and ultimately champions those that bring about total animal liberation. Here, prioritizing the access of Coast Salish tribes and resident orcas to Chinook salmon appears to be the lesser of two “evils” when it comes to respecting the salmon’s ability to flourish. The salmon fishing engaged in by orcas and Coast Salish is more ecologically sound compared to the overfishing, habitat degradation, and declining salmon runs caused by extractive Western fishing and environmental practices. For example, the decline of Chinook salmon populations caused by damming of the Snake River directly threatens the existence of two animal populations—the Chinook salmon and the endangered

The capture of Northern and Southern resident orcas for captivity in the 1960s and 70s was the direct result of colonial property-based legal classifications overriding Indigenous animal personhood and kinship through brute force. This cultural theft lives on in the corporate institution of SeaWorld and other for-profit aquaria that continue to hold these orcas and their descendants captive.

The surviving orcas, including Corky, are the stolen relatives of their pods and the Coast Salish. In the case of Corky, her northern resident A5 pod coexists in kinship alongside numerous Coast Salish tribal groups. She lived the first four years of her life alongside her mother Stripe, nursing and learning her pod's songs and customary behaviors, such as playfully rubbing her belly against the pebbled beaches shared by the Coast Salish tribes. She is living cultural patrimony that was stolen from her multispecies family. In fact, the cultural aspect at play here is uniquely double layered: resident orcas like Corky are the cultural patrimony of the Coast Salish precisely because they are treasured as cultural beings with tight knit families.

In centering Corky as my animal client, the ideal outcome of representation would honor her identity as a deeply cultural being with an identifiable family—her A5 pod—as well as the Coast Salish who guard over them. I have consolidated her most fundamental need into the following statement, what I envision as the most urgent outcome of legal activism on her behalf, that may be achievable through a decolonial framework of reconciliation through repatriation:

*I am reunited with my A5 pod family and able to practice our Northern Resident orca culture in a seaside sanctuary located in my ancestral Salish Sea, under the guardianship of the Coast Salish.*

---

southern resident orcas whose existence hinges on the salmon. *See Southern Resident Killer Whales Depend on Chinook Salmon for Survival*, ORCA SALMON ALLIANCE (last visited May 2, 2022), <http://www.orcasalmonalliance.org/about.html>. (“Today, most west coast river systems associated with wild Chinook salmon runs are experiencing only a small fraction of their historical fish returns. The tribal adage says ‘No fish, no blackfish.’ Indeed without more Chinook salmon, the Southern Residents simply will not survive or recover.”).

## II. Animals as Cultural Patrimony Under the Native American Graves Protection and Repatriation Act

Congress passed the Native American Graves Protection and Repatriation Act (“NAGPRA”) in 1990.<sup>59</sup> It provides a right for Native American lineal descendants, Indian tribes, and Native Hawaiian organizations to request the repatriation of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony from museums and other federally funded institutions.<sup>60</sup>

### A. The Lummi’s NAGPRA Suit to Bring Sk’aliCh’elh-tenaut Home

One Coast Salish tribe—the Lummi—and their environmentalist attorneys with Earth Law Center believe NAGPRA could grant freedom to wild-caught captive orcas. Two Lummi tribal elders, Tah-Mahs (Ellie Kinley) and Squil-le-he-le (Raynell Morris), have brought an unprecedented suit under the law against the Miami Seaquarium to demand the repatriation of southern resident orca Sk’aliCh’elh-tenaut, also known as Tokitae or Lolita, to the Salish Sea she was stolen from in the 1970s.<sup>61</sup> The two plaintiffs are bringing this suit in order to fulfill their “XaxalhXechnging” (sacred obligation) and because they view Sk’aliCh’elh-tenaut as their relative—“the Southern Resident orcas are considered sacred family members of the Lummi tribe and are the embodiment of spiritual and cultural power and tradition.”<sup>62</sup> In fact, the Lummi term for “orca” is “qwe’lhol’mechen,” which means “our relatives under the water,” an etymology that powerfully underscores the millennia of daily kinship between resident orcas and

---

<sup>59</sup>The Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001-3013.

<sup>60</sup>*Id.*

<sup>61</sup> Lynda V. Mapes, *Lummi tribal members could sue under repatriation act to free captive orca in Miami*, SEATTLE TIMES (Jul. 27, 2019), <https://www.seattletimes.com/seattle-news/environment/lummi-nation-could-sue-under-repatriation-act-to-free-captive-orca-in-miami/>.

<sup>62</sup>*Invitation to Discuss the Release of Sk’aliCh’elh-tenaut*, EARTH LAW CENTER (Jul. 9, 2020), [https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/5f21fb177e95bc28bbe949b6/1596062493345/Invitation-to-Discuss-the-Release-of-SkaliChelh-tenaut\\_Earth-Law-Center.pdf](https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/5f21fb177e95bc28bbe949b6/1596062493345/Invitation-to-Discuss-the-Release-of-SkaliChelh-tenaut_Earth-Law-Center.pdf).

the Lummi.<sup>63</sup> In bringing this suit, Tah-Mahs is painfully conscious of the culture-stripping, multispecies impacts of settler state legal violences, noting how “[Sk’aliCh’elh-tenaut] was taken from her family and her culture when she was just a child, like so many of our children were taken from us and placed in Indian boarding schools.”<sup>64</sup>

To bring this NAGPRA action, Tah-Mahs and Squil-le-he-le are claiming that Sk’aliCh’elh-tenaut is cultural patrimony of the Lummi tribe and that her captor Miami Seaquarium, as an institution that has received federal funding for disaster relief, manatee rehabilitation, and coral reef research and exhibition, must repatriate her to the Lummi and her native Coast Salish waters.<sup>65</sup> While using NAGPRA to win the release of a captive animal may initially appear to be a stretch of the law’s purpose, the plan is in fact feasible according to NAGPRA experts involved in the implementation of the law. Tim McKeown, who worked for eighteen years writing NAGPRA regulations, notes that while “[the lawsuit] may be pushing the envelope a little...it also fits the purpose of the law, which is to return to cultural use tribal possessions now in commercial venues.”<sup>66</sup>

In this way, the NAGPRA suit to repatriate Sk’aliCh’elh-tenaut relies on the tools of the oppressor (or captor)—the property paradigm—to return Sk’aliCh’elh-tenaut to the Lummi as

---

<sup>63</sup>EARTH LAW CENTER, *supra*, note 62, at 3. “The entire Southern Resident Killer Whale population are *qwe ‘lhol’mechen*, our ‘relations below the waves.’ J, K, and L pods have been in a reciprocal relationship since time immemorial with the Lummi people. Teachings indicate not only deep cultural and spiritual connections between *qwe ‘ihol’mechen* and *Lhaq ‘temish* (Lummi people), but also kinship bonds. The Lummi term for ‘orca’ is *qwe ‘lhol’mechen*, which translates loosely to “our relations under the waves.’ *Lhaq ‘temish* and the *qwe ‘lhol’mechen* have shared deep spiritual connections, kinship bonds, and cultural affinity since time immemorial.”

<sup>64</sup>*Free Sk’aliCh’elh-tenaut*, EARTH LAW CENTER (last visited Mar. 24, 2022), [www.earthlawcenter.org/free-skalichelhtenaut](http://www.earthlawcenter.org/free-skalichelhtenaut).

<sup>65</sup>EARTH LAW CENTER, *supra* note 62; NAGPRA defines “cultural patrimony” as “an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.” 25 U.S.C. §3001. Definitions (3)(D).

<sup>66</sup> SEATTLE TIMES, *supra* note 61. (“In terms of a situation where people pay to see something and putting it back in its cultural context, that is exactly what NAGPRA is for.”).

their object of cultural patrimony. However, the category “cultural patrimony” provides space for making a legally plausible equivocation with the Lummi conception of kinship with orcas as beings that cannot and should not be controlled, possessed, or alienated. NAGPRA defines “cultural patrimony” as an “object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe...and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.”<sup>67</sup> Thus, by claiming that an orca is their cultural patrimony, the Lummi are able to say that Sk’aliCh’elh-tenaut was never owned by an individual member of the tribe, but rather, belonged to them in the familial way that kin belong to one another. When fishermen caught Sk’aliCh’elh-tenaut and sold her to her captors, they took living cultural patrimony that was inalienable to begin with by virtue of Sk’aliCh’elh-tenaut’s millennia-long cultural importance as a resident orca, a force which long predates the settler colonial captivity industry.

Were a judge to bestow the Lummi with ownership-based authority over Sk’aliCh’elh-tenaut’s fate, the Lummi would be free to reinstate her Indigenous legal status as their “relation under the waves,” rather than an object. The Lummi and orca caretakers would then be able to more fully honor Sk’aliCh’elh-tenaut’s dignity and wellbeing as a relative and nonhuman person.<sup>68</sup> They would retain final say over Sk’aliCh’elh-tenaut’s repatriation and retirement to a seaside sanctuary, including her diet and veterinary care, which would no longer be influenced by profit-driven motives as they are at SeaWorld.

---

<sup>67</sup> 25 U.S.C. §3001. Definitions (3)(D).

<sup>68</sup> See Section C, *infra*, for how this legal transubstantiation from object to kin can be given more force in Corky’s case were she to be repatriated to Canada via NAGPRA.

The viability of legally recognizing a marine mammal as cultural patrimony is further underscored by a unique case involving the Okinawa dugong. In *Dugong v. Rumsfeld*, plaintiffs consisting of the Okinawa dugong, American and Japanese environmental groups, and three individual Japanese citizens brought an action under the National Historic Preservation Act (“NHPA”) against the Department of Defense.<sup>69</sup> The Department of Defense was involved in the proposed construction of a military facility that would threaten Okinawa dugongs and their critical habitat.<sup>70</sup> The court agreed with the dugongs’ defenders, holding that the Okinawa dugong is protected by Japan’s Law for the Protection of Cultural Properties, the equivalent of the U.S. National Register of Historic Places, and is property within the meaning of the NHPA.<sup>71</sup> Thus, the court accepted Japan’s classification of the Okinawa dugong as a “monument” and allowed the dugong on the National Registry of Historic Places.<sup>72</sup>

In its letter of intent to sue, Earth Law Center explicitly grounds its NAGPRA suit in the *Dugong* holding, noting that not only is there “precedent for the United States government to...accept an animal as ‘cultural patrimony,’ but also to accept the classification of such from

---

<sup>69</sup> *Dugong v. Rumsfeld*, 2005 WL 522106 (N.D. Cal. 2005); “The Okinawa dugong is a small, isolated population of the dugong species found in the waters off the eastern coast of Okinawa. The animal is central to the creation mythology, folklore, and rituals of traditional Okinawan culture. In Japan, the Okinawa dugong is a protected “natural monument” under the country’s “Law for the Protection of Cultural Properties.” *Dugong v. Rumsfeld Case Summary*, NOAA (last visited Apr. 16, 2022), [https://coast.noaa.gov/data/Documents/OceanLawSearch/Dugong%20v.%20Rumsfeld\\_Case%20Summary\\_PDF.pdf](https://coast.noaa.gov/data/Documents/OceanLawSearch/Dugong%20v.%20Rumsfeld_Case%20Summary_PDF.pdf)

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*; For an in-depth discussion of the case and its foundations in Japanese cultural protection law see Mitsuhiko A. Takahashi, *Okinawa Dugong v. Rumsfeld: extraterritorial operation of the U.S. military and wildlife protection under the National Historic Preservation Act*, (2004) *Environs: Environmental Law and Policy Journal* 28: 181–197. (“The Japanese Cultural Properties Law establishes five categories of “Cultural Properties” to protect: (1) Tangible Cultural Assets; (2) Intangible Cultural Assets; (3) Folk Culture Properties (Tangible and Intangible); (4) Monuments; and (5) Groups of Historical Buildings. Monuments consist of three categories: Historical Sites, Places of Scenic Beauty, and Natural Monuments...The Natural Monument system in Japan was established in the early 20th century to protect animals, plants, and geological features important to science, as well as to the national heritage...But, even though Japan [now] has a set of conservation laws, the Natural Monument designation is still legally significant because of its emphasis on the interrelation of natural and cultural values...[T]he Natural Monument system under the Cultural Properties Law typically requires protecting animals and plants that hold not only scientific, but cultural value.”).

another sovereign nation.”<sup>73</sup> As such, the Lummi Nation is a sovereign nation that has declared Sk’aliCh’elh-tenaut to be of great value “as a sister, a daughter, an auntie as well as the embodiment of spiritual and cultural power and tradition.”<sup>74</sup> The suit acknowledges the tension between U.S. legal classifications and Lummi tradition, that while “‘object of cultural patrimony’ does not appear in the Lummi lexicon, it can be understood that Sk’aliCh’elh-tenaut belongs to the Lummi people as both a family member and as the embodiment of necessary cultural and spiritual weight and meaning.”<sup>75</sup> The suit also situates Sk’aliCh’elh-tenaut not as a lone object of cultural patrimony, but as a member of the L-Pod family, cultural patrimony of the Lummi, who has been a stolen relative since 1970.<sup>76</sup>

### **B. A NAGPRA Lawsuit Could Bring Corky Home**

Filing suit under NAGPRA against SeaWorld could also be a viable method of achieving Corky’s ideal client goal: repatriation to a seaside sanctuary in her native Salish Sea.<sup>77</sup> In terms of Corky’s cultural significance and kinship with the Coast Salish people, the facts and arguments to be made are highly similar.<sup>78</sup> Like Sk’aliCh’elh-tenaut and her L-pod, Corky and her A5 pod family have a reciprocal kinship with the Coast Salish that could qualify her as cultural patrimony under U.S. jurisprudence.

The main variation, and potential difficulty, would likely arise in establishing standing. Although Corky’s capture site was in Pender Harbour, British Columbia, it is plausible that the

---

<sup>73</sup>EARTH LAW CENTER, *supra* note 62, at 2.

<sup>74</sup>*Id.*

<sup>75</sup>*Id.*

<sup>76</sup>*Id.*

<sup>77</sup> J. Edward Moreno, SeaWorld has received federal funding most recently for COVID relief. *SeaWorld seeking federal worker retention loan*, THE HILL (Apr. 29, 2020), <https://thehill.com/business-a-lobbying/495334-seaworld-seeking-federal-worker-retention-loan-after-laying-off-95/>. Like Miami Seaquarium, it also likely receives funding for its rehabilitation efforts. *See Commitment to Animal Rescue, Rehabilitation, and Return*, SEAWORLD (last visited April 12, 2022), <https://seaworldentertainment.com/commitment/animal-rescue-rehabilitation/>.

<sup>78</sup> There would also likely be room to argue that the longevity of Sk’aliCh’elh-tenaut and Corky as cultural patrimony is threatened by their captivity, as orcas are known to live much longer in the wild.

Lummi or another similarly situated Coast Salish tribe—a U.S. Indian tribe whose ancestral waters are shared by Corky’s A5 Pod—could bring a NAGPRA suit on her behalf.<sup>79</sup> Although the southern resident orca is admittedly a more “American” orca, given that its range has been known to extend into northern Californian waters, finding the right tribal member plaintiffs for Corky should be feasible. The total range of northern resident orcas overlaps with the southern resident range and spans the entire Salish Sea, with sightings well into Washington.<sup>80</sup> It is thus likely that at least one Coast Salish tribe fitting the statutory definition of “Indian tribe” has fostered a similar relationship of reciprocal kinship with northern resident orcas and Corky’s A5 pod. In the event that a U.S.-based Coast Salish tribe fails to attain standing on behalf of northern residents, there could even be ground for an Alaskan Indigenous tribe to bring suit for Corky, as the northern residents’ northernmost range amply covers Southeast Alaska.<sup>81</sup>

It is unclear whether the proposed NAGPRA suit on behalf of Sk’aliCh’elh-tenaut, spearheaded in 2020, will fully evolve into litigation. In any event, following in its footsteps on Corky’s behalf would be the last chance lawsuits of its kind could be brought on behalf of captive orcas. Sk’aliCh’elh-tenaut and Corky are the last survivors of the resident orcas captured from the Salish Sea in the 1960s and 70s. Harnessing the force of the Coast Salish people’s deep bond with these two stolen orca daughters provides a once-in-lifetime opportunity for legal recognition of Indigenous animal kinship in the United States. Were Sk’aliCh’elh-tenaut and/or Corky deemed cultural patrimony under NAGPRA, the effects would reverberate far beyond the

---

<sup>79</sup> “Indian tribe” means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.]), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. U.S.C. §3001. Definitions

<sup>80</sup> “Northern resident population appears to spend the majority of its time from Campbell River and Alberni Inlet northwest to Dixon Entrance, but has been sighted as far south as Grays Harbor, Washington, and as far north as Glacier Bay, Alaska.” *Recovery Strategy for the Northern and Southern Resident Killer Whales (Orcinus orca) in Canada*, ENVIRONMENT AND CLIMATE CHANGE CANADA (2018), <https://www.canada.ca/en/environment-climate-change/services/species-risk-public-registry/recovery-strategies/northern-southern-killer-whales-2018.html>.

<sup>81</sup> *Id.*

reunion of two orcas with their home waters. Such holdings would be a watershed moment at the intersection of the Indigenous rights, animal law, and rights of nature movements to counter nearly four centuries of settler legal dominion and violence over Indigenous peoples and animals on the continent.

### C. NAGPRA as a Path to Multispecies Canadian Reconciliation

In the event that a NAGPRA suit on behalf of Corky were to win, Section 3005 of the law provides that “the return of cultural items covered by this chapter shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items.”<sup>82</sup> Corky’s representative tribe would thus likely be able to designate the 40-acre inlet Paul Sprong and partners at OrcaLab are preparing for Corky at Double Bay, Hanson Island, British Columbia and take an active role in her repatriation and transition to life back home.<sup>83</sup> There, Corky would be able to be visited by her family in a natural, expansive environment while receiving the human care she has grown dependent on. Moreover, there would also be space for a tribe local to the Hanson Island, British Columbia area to take on a permanent daily role in Corky’s care and wellbeing. In fact, OrcaLab and partners have already taken steps to “promote the rich cultural heritage of Indigenous first nations, such as the ‘Namgis,” and are in discussions with the ‘Namgis Council for their approval and blessing for Corky’s sanctuary.<sup>84</sup> The ‘Namgis, like the Lummi, have had a kinship with resident orcas since

---

<sup>82</sup>25 U.S.C. § 3005. Repatriation.

<sup>83</sup> For example, The Whale Sanctuary Project is currently drafting a comprehensive operational plan, grounded in and guided by Lummi ancestral wisdom as well as science, to safely bring Sk’aliCh’elh-tenaut home. *Sk’aliCh’elh-tenaut*, EARTHMINISTRY (last visited Apr. 20, 2022), <https://earthministry.org/skalichelh-tenaut/>.

<sup>84</sup> *Purchase Of Fishing Lodge At Double Bay For Corky Sanctuary!*, DOLPHIN SPIRIT (Oct. 2018) <https://dolphinspirit.org/news>.

The Whale Sanctuary Project has also collaborated with local First Nation communities on the subject of whale sanctuaries, with an explicit Reconciliation angle. *See Site Search in British Columbia*, WHALE SANCTUARY PROJECT (Oct. 26, 2019), <https://whalesanctuaryproject.org/site-search-in-british-columbia/>. (“...Whale Sanctuary Project president Lori Marino was invited to speak at Vancouver’s Roundhouse Community Centre. The theme of the evening was “Reconciliation,” and it was introduced by Chief Bob Chamberlin of the Kwikwasut’inuxwHaxwa’mis First Nation. Chief Chamberlin talked about his work in helping to bring about reconciliation between his people

time immemorial. Unsurprisingly, this is also evident in the ‘Namgis word for orcas—the “side-by-side tribe”—stemming from the ‘Namgis’ observation of resident orcas’ tight knit, lifelong family groups swimming alongside each other in their shared ancestral waters.<sup>85</sup>

Released to the care of OrcaLab and the ‘Namgis, would Corky merely remain property under another settler legal regime? Or is there a path for Corky’s reintegration into kinship with her L-Pod and the Coast Salish to be formally enshrined in Canadian law in a way that reverberates beyond her case?

Because Canada does not have a legislative equivalent to NAGPRA, a successful NAGPRA suit to liberate Corky could usher in an unprecedented moment of multispecies Reconciliation. Rather than allow Corky to remain formally classified as property, either as tribal cultural patrimony under U.S. law or as an animal owned as property by the OrcaLab sanctuary, the Canadian government could further elevate Corky’s status by recognizing her Indigenous animal personhood through explicit legislation in accordance with its policy of Reconciliation with First Nations.

In concrete terms, this could take the form of an amendment to Canada’s Ending the Captivity of Whales and Dolphins Act (“CWDA”). In 2019, the CWDA passed, prohibiting the public display and breeding of captive cetaceans.<sup>86</sup> However, the CWDA did not liberate the marine mammals that were already held in captivity such that the Vancouver Aquarium and Marineland still keep marine mammals including dolphins, beluga whales, and an orca in

---

and European immigrants. In the same way, he said, it’s time to bring about reconciliation with our fellow animals and the natural world. Dr. Marino took up the theme of reconciliation, discussing how a sanctuary can give back to captive whales as much as possible of the life they’ve lost by being taken from their homes and families in the wild.”).

<sup>85</sup> Lynda V. Mapes, *Orcas in Peril*, SEATTLE TIMES (NOV. 11, 2018), <https://projects.seattletimes.com/2018/orcas-in-peril/>.

<sup>86</sup> S-203, the Ending the Captivity of Whales and Dolphins Act.

captivity. Marineland currently imprisons Kiska, the last captive orca in Canada who has been in isolation since 2011.<sup>87</sup>

A Reconciliation amendment to the CWDA could mainstream the Indigenous animal personhood and kinship Coast Salish attribute to resident orcas, giving it the legal force it currently lacks. The material effect of the amendment could bestow First Nation peoples with a kind of guardianship over resident orcas, giving them the standing and sovereignty to defend their shared ecological and conservationist interests in the face of industrializing threats.

This would be a logical and just amendment. In passing the CWDA, the Canadian government acknowledged the ethical violation inherent in capturing marine mammals for captivity. However, it failed to acknowledge its own complicity in the severe harm caused to resident orca pods and their Indigenous Coast Salish kin in allowing the taking of Corky and other orcas during the 20th century. Thus, a successful NAGPRA campaign to free Corky could not only mean her retirement to seaside sanctuary, but also empower the Coast Salish to safeguard the wellbeing of her family members for generations to come.

### **III. “Repatriation and Reconciliation” Amendment to California Orca Protection Act**

Corky’s retirement to her seaside sanctuary in Double Bay could also be realized through an amendment to the California Orca Protection Act (“COPA”).<sup>88</sup> Like the proposed amendment to the CWDA, this amendment would be grounded in a decolonial legal framework of

---

<sup>87</sup> Kiska was captured from Ingólfshöfði, Iceland in October 1979. *Kiska*, KILLER WHALE WIKI (last visited April 21, 2022), <https://killerwhales.fandom.com/wiki/Kiska>.

<sup>88</sup> See California Orca Protection Act, West’s Ann.Cal.Fish&G.Code § 4502.5. The COPA makes it unlawful to “hold in captivity an orca, whether wild-caught or captive-bred, for any purpose, including, but not limited to, display, performance, or entertainment purposes.” While the COPA was a major victory against SeaWorld, it unfortunately did not liberate Corky. The Act grandfathered whatever orcas already existed in captivity on January 1, 2017, meaning that Corky and the other orcas at SeaWorld San Diego will live out the rest of their lives at the park unless SeaWorld decides to retire them to a marine sanctuary. The Act allows captive orcas, including Corky, to be used in “educational performances,” defined as a “live, scheduled orca display in the presence of spectators that includes natural behaviors, enrichment, exercise activities, and a live narration and video content that provides science-based education to the public about orcas.” *Orca Encounter*, SEA WORLD, <https://seaworld.com/san-diego/shows/orca-encounter/>.

“Repatriation and Reconciliation.” It would mandate the repatriation of all wild-caught orca held in captivity in California to sanctuaries in their ancestral waters. This repatriation would occur as an explicit gesture of Reconciliation, acknowledging the harm done to the resident orca and their Coast Salish kin in profiting from the orca captures of the 1960s and 70s. As Corky is the last wild-caught orca in California, the law would be implicitly directed at compelling SeaWorld to release her to the joint care of OrcaLab and the ‘Namgis (or another Coast Salish tribe).

This amendment to COPA would likely be highly successful as a ballot initiative, harnessing the California electorate’s strong sentiment against marine mammal captivity, particularly in a post-*Blackfish* culture. The logistics of implementing the amendment would involve SeaWorld focusing its educational efforts into a collaboration with OrcaLab, the Whale Sanctuary Project, and whichever Coast Salish tribes takes on a guardianship role over Corky’s interests. The amendment could stipulate that wild-caught captive orcas (Corky) must be repatriated within two years of the law’s passage. Repatriation would occur pending the completion of a whale sanctuary that meets standards agreed upon by scientifically qualified entities like WSP and OrcaLab, as well as Corky’s Coast Salish guardian tribe, and, for the sake of true collaboration and reconciliation, SeaWorld, particularly the caregivers and veterinarians who currently know Corky best.

Further, the amendment could provide a path to seaside sanctuary for Corky’s fellow captive orcas at SeaWorld San Diego who are captive-born. Based on the ecotype makeup of the orca, SeaWorld must focus its efforts in relocating those orcas to appropriate seaside sanctuaries within five years of the law’s passage. This could open up the possibility of Corky’s adopted daughter Orkid, with whom she has had a close bond since Orkid’s birth in the late 1980s. Orkid is half Icelandic ecotype, half northern resident; her father Orky was captured from Pender

Harbour in 1968, a year before Corky.<sup>89</sup> Thus, based on her maternal bond with Corky, a northern resident, and her half northern resident genetic make-up, she would likely fare well alongside Corky at OrcaLab’s Double Bay sanctuary more than in any other sanctuary. Of course, the best-case scenario would be for SeaWorld to voluntarily repatriate Orkid with Corky, as it would be in their best interest to not be separated from one another, even temporarily.

#### **IV. SeaWorld “Repatriation and Reconciliation” Shareholder Resolution**

Another viable option for securing Corky’s release to a seaside sanctuary could be proposing the same “Repatriation and Reconciliation” plan as a shareholder resolution at SeaWorld’s annual shareholder meeting. Importantly, even when a resolution does not gain a majority vote or never comes to a vote, it can still catalyze meaningful corporate change for animals by pushing the company to change its practices.

For example, in 2013, PETA acquired the minimum number of shares in SeaWorld necessary to submit resolutions at annual meetings.<sup>90</sup> In March 2016, though its stock was down over 50% since its initial public offering, SeaWorld agreed to stop breeding animals in captivity, a proposal PETA had previously submitted and subsequently withdrew.<sup>91</sup> Further, in 2020, in response to SeaWorld’s practice of having trainers ride dolphins, PETA submitted a complaint letter urging the USDA to investigate violations of the Animal Welfare Act and filed a shareholder resolution requesting that SeaWorld cease the attraction.<sup>92</sup> Two months later, PETA withdrew the proposal after SeaWorld announced it would end the attraction of its own accord.<sup>93</sup>

---

<sup>89</sup>*Orkid*, KILLER WHALES WIKI (last visited Apr. 22, 2022) <https://killerwhales.fandom.com/wiki/Orkid>.

<sup>90</sup> Lillian Hernández Caraballo, *PETA, which owns stock in SeaWorld, takes credit for ending controversial dolphin show*, CL TAMPA (Feb. 7, 2020), <https://www.cltampa.com/arts-entertainment/travel-leisure/article/21114774/peta-which-owns-stock-in-seaworld-takes-credit-for-ending-controversial-dolphin-show>.

<sup>91</sup>*Id.*

<sup>92</sup>*Id.*

<sup>93</sup>*Id.*

Thus, by appealing to SeaWorld’s interest in improving its ailing reputation, a shareholder resolution to repatriate Corky could put pressure on the company to pivot its future role as a collaborator with whale sanctuaries such as OrcaLab and the Whale Sanctuary Project. ‘Namgis, Lummi, or other Coast Salish tribes invested in Corky’s repatriation could collaborate with PETA or a similarly situated shareholder organization to compose a resolution that captures the spirit of “Repatriation and Reconciliation,” distilling the central arguments of the NAGPRA suit alongside the substance of the COPA amendment. This mode of shareholder activism could also be an excellent opportunity to shift shareholder consciousness by educating SeaWorld investors on an anti-captivity perspective that they may have never considered. This may give them yet another reason to push SeaWorld to take the next step in dismantling its financial reliance on captive whales like Corky by taking on an active role in the advent of whale sanctuary retirement.<sup>94</sup>

## V. CONCLUSION

Taken together, these three strategies of litigation, legislative reform, and shareholder resolution activism stand as my client-centered plan to achieve justice for Corky as her animal lawyer. Were these strategies to be set into motion in conjunction, they could put pressure from SeaWorld on all sides and reanimate public sentiment that has grown complacent vis-à-vis orcas like Corky who still face years, if not decades, of captivity.

Ultimately, the decolonial lens of my representation of Corky strives to venture just beyond the margins of the North American settler colonial legal regime as it concerns (and subjugates) animals, in an attempt to bypass the dead ends that animal lawyers are so often

---

<sup>94</sup>See Keith Griffith, *Why PETA Buys Stock in Companies it Protests*, THE STREET (Aug. 4, 2016, 8:23 AM), <https://www.thestreet.com/investing/why-peta-buys-stock-in-companies-it-protests-13641714> (noting that a study found that “merely submitting a proposal on social issues tends to spur management action, even though such proposals almost never get majority support.” The study also found that “social-issues proposals on material topics—which ask a company to make some fundamental change to its business model, process, or products—are associated with a subsequent increase in relative firm value.”).

confronted with in seeking legal recognition of the dignity of animals through the status quo. It is a lens that seriously considers animal-friendly Indigenous legalities capable of being alchemized into non-frivolous legal claims out of existing, enforceable laws like NAGPRA that straddle both Indigenous and mainstream Western law. The NAGPRA actions to free Sk'aliCh'elh-tenaut and Corky rely in particular on the faith that animal law requires as a cutting-edge field of law—taking laws that were not remotely created with uplifting or liberating animals in mind—and using them to this very end. In seeking justice for Corky and her orca and human family, we are relying on the power of vigorous and creative argumentation, an appeal to legal progress that could bring about that judicial leap of faith that finally returns Corky to her family and ushers in broader horizons in animal law.

**THE BIG CAT PUBLIC SAFETY ACT:  
WHY THE LEGACY CLAUSE NEEDS TO BE AMENDED**

Vanessa Beane  
Vermont Law School  
Class of 2022

THE BIG CAT PUBLIC SAFETY ACT: WHY THE LEGACY CLAUSE NEEDS TO BE  
AMENDED

I. INTRODUCTION.....3  
    A. BACKGROUND.....3  
    B. LEGACY CLAUSE.....4  
II. HUMAN PUBLIC SAFETY.....5  
    A. LACK OF RESOURCES TO SAFELY RETURN AN ESCAPED ANIMAL.....6  
    B. ANIMAL ATTACKS.....8  
III. LARGE ANIMAL KEEPING REQUIREMENTS.....10  
    A. ENCLOSURES.....10  
    B. ENRICHMENT.....12  
    C. VETERINARY CARE.....14  
IV. DOMESTICATED V. INTELLIGENT.....16  
V. PLACEMENT OPTIONS.....18  
VI. CONCLUSION.....21

## I. INTRODUCTION

The public should not be allowed to house, keep, or privately own big cats. Big cats for purposes of the Big Cat Public Safety Act include, “lion (*Panthera leo*), tiger (*Panthera tigris*), leopard (*Panthera pardus*), snow leopard (*Uncia uncia*), jaguar (*Panthera onca*), cougar (*Puma concolor*), or any hybrid thereof.”<sup>1</sup> The Big Cat Public Safety Act (BCPSA), which would make it “unlawful for any person to import, export, transport, sell, receive, acquire, or purchase . . . or to breed or possess, any prohibited wildlife species,” recently passed the United States House Committee on Natural Resources.<sup>2</sup> The BCPSA contains a “grandfather clause” stating that it, “does not apply to—an entity or individual that is in possession of any prohibited wildlife species that was born before the date of the enactment of the Big Cat Public Safety Act.”<sup>3</sup> However, this paper details why the general public should not be allowed to house, keep, or privately own big cats despite their possession prior to the enactment of the BCPSA, and why this clause needs to be amended as to require previous (to the enactment) owners to relinquish their big cats. This analysis analyzes the reasons why the “grandfather clause” needs to be amended by detailing issues of human public safety, animal living requirements, domestication versus intelligence, and placement options for rehoming captive wildlife, specifically big cats.

### A. BACKGROUND

The BCPSA was reintroduced in early 2021 with its goal to prohibit the sale, acquisition, and possession of prohibited wildlife species, specifically six species of big cats and any hybrids of those six.<sup>4</sup> This legislation is needed because it is the only legislation in federal circulation

---

<sup>1</sup>Big Cat Public Safety Act, H.R. 263, 117<sup>th</sup> Cong. § 3(e)(2) (2021).

<sup>2</sup>Big Cat Public Safety Act, H.R. 263, 117<sup>th</sup> Cong. § 3(e)(1) (2021); Animal Wellness Action, *Big Cat Public Safety Act Clears Key House Committee Setting Up Floor Vote and Expected Landslide Passage of Measure*, NEWSWIRE (June 15, 2022), [https://www.einnews.com/pr\\_news/576955220/big-cat-public-safety-act-clears-key-house-committee-setting-up-floor-vote-and-expected-landslide-passage-of-measure](https://www.einnews.com/pr_news/576955220/big-cat-public-safety-act-clears-key-house-committee-setting-up-floor-vote-and-expected-landslide-passage-of-measure).

<sup>3</sup>Big Cat Public Safety Act, *supra* note 1 at 3(e)(2)(E).

<sup>4</sup>Big Cat Public Safety Act, *supra* note 1.

whose goal is to specifically protect big cats by limiting public contact with the animals and thus eliminating a whole market for privately owned big cats. Passing the BCPSA is an acknowledgement of the detrimental circumstances many big cats in the United States (U.S) are in.

The International Fund for Animal Welfare (IFAW) estimates that there are 10,000 captive big cats in the U.S.<sup>5</sup> This figure includes but is not limited to private ownership, roadside zoos, and many unaccredited exhibitors—some of which showcase the poor treatment and living conditions of big cats in this country. Caring for big cats involves an exhaustive list of procedures, precautions, and costs. In passing the BCPSA, future big cats can be guaranteed protection from poor treatment and lack of procedural care that current big cats in captivity are experiencing.

## B. LEGACY CLAUSE

Unfortunately, the BCPSA includes a legacy clause (otherwise known as a grandfather clause). A legacy clause exempts specified people or entities from adherence to newly enacted legislation.<sup>6</sup> There are normally stipulations that come with being included in this type of clause, but the main purpose is that the people or entities do not have to comply with aspects of the legislation.<sup>7</sup> Originally known as the “grandfather clause,” this type of exemption originated in the late 1860s.<sup>8</sup> After the Civil War, new requirements were created in the South for voter eligibility, including literacy tests and poll tax payments that were to be completed before a voter

---

<sup>5</sup>*There Are More Tigers in Captivity in the United States Than There Are in the Wild*, INT’L FUND ANIMAL WELFARE, <https://www.ifaw.org/projects/big-cats-in-captivity-rescue-and-advocacy-united-states> (last visited Oct. 28, 2021).

<sup>6</sup> Alan Greenblatt, *The Racial History of the ‘Grandfather Clause,’* NAT’L PUBLIC RADIO (Oct. 22, 2013), <https://www.npr.org/sections/codeswitch/2013/10/21/239081586/the-racial-history-of-the-grandfather-clause>.

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

could participate in an election.<sup>9</sup> During the onset of these new requirements, the “grandfather clause” was implemented exempting white male voters whose grandfathers had voted before the end of the Civil War.<sup>10</sup> This prohibited most African Americans from voting, as well as poor white citizens.<sup>11</sup> A case was brought concerning this issue and the Supreme Court ruled in *Guinn v. United States*, 238 U.S. 347 (1915), that the “grandfather clause” was unconstitutional because it violates the Fifteenth Amendment.<sup>12</sup> The Fifteenth Amendment declares that a citizen’s right to vote “shall not be denied” because “of race, color, or previous condition of servitude.”<sup>13</sup> Although the “grandfather clause” did not explicitly disqualify citizens based on race or color, it included enough stipulations that the intent was obvious. The justices at the time stated that it had been “a clear attempt by the states to nullify the federal Constitution.”<sup>14</sup> Despite this ruling in 1915, the clause was not phased out completely until 1939 regarding voter discrimination.<sup>15</sup> Currently, the clause is included in most legislation although in different contexts.

To restate the legacy clause in the BCPSA, it “does not apply to— . . . an entity or individual that is in possession of any prohibited wildlife species that was born before the date of the enactment of the Big Cat Public Safety Act.”<sup>16</sup> This means that anyone currently in possession of a big cat, until the BCPSA is enacted, is permitted to keep their cat. This then excludes the estimated 10,000 big cats currently in captivity from widespread relief.<sup>17</sup>

## II. HUMAN PUBLIC SAFETY

---

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*Guinn v. United States*, 238 U.S. 347 (1915).

<sup>13</sup> U.S. Const. amend XV, § 1.

<sup>14</sup> Alan Greenblatt, *supra* note 6.

<sup>15</sup>*Id.*

<sup>16</sup> Big Cat Public Safety Act, *supra* note 3.

<sup>17</sup> INT’L FUND ANIMAL WELFARE, *supra* note 5.

There are many ways that privately owned big cats pose a risk to the humans around them. Two of the main issues are lack of resources and animal attacks. It is an unfortunate reality for these big cats that if they can escape from their poorly built cages, they subsequently pay the price should they defend themselves.

#### A. LACK OF RESOURCES TO SAFELY RETURN AN ESCAPED ANIMAL

One of the biggest threats that private ownership of big cats' poses is lack of resources to bring an animal back to an enclosure safely in the case of an escape. This lack of resources puts the public in danger. Pamela Sellner, owner of Cricket Hollow Zoo in Iowa, housed approximately 300 animals and was one of only two full-time workers.<sup>18</sup> In *Kuehl v. Sellner*, 887 F.3d 845 (2018), Sellner presented her plan for an escaped animal.<sup>19</sup> In her short six-page note documenting emergency procedures, only one paragraph is dedicated to large, escaped animals. She gives three options as follows:

If a large carnivore is inside perimeter fence, we will attempt to get it back inside its enclosure. If a large carnivore is outside the perimeter, it will be destroyed as a safety measure. If any animal escapes and is found outside the zoo, it will be necessary to call the sheriff's office and report it missing if not located on our property. It may be darted or destroyed depending on the animal.<sup>20</sup>

Sellner's first option seems to be the safest for the animal and those around, although she does not give any further instruction on how they would achieve getting the animal back in the enclosure. The last two options present a fatal ending for the escaped animal, unless darted. However, it could be assumed by the second option that a large carnivore would be "destroyed"

---

<sup>18</sup>*Kuehl v. Sellner*, 887 F.3d 845, 848 (8<sup>th</sup> Cir. 2018).

<sup>19</sup>Jessica L. Blome, Attny., Greenfire Law, PC, Presentation on *Kuehl v. Sellner*, 887 F.3d 845 (2018) (Oct. 14, 2021).

<sup>20</sup>*Id.*

as a first measure.<sup>21</sup> The procedures not only show a lack of concern for the animal's wellbeing, but also a lackadaisical approach to emergencies that can prove harmful to the public.

In areas heavily concentrated with privately owned big cats, the responsibility of one escaping generally falls on the local law enforcement's department. In such cases, these departments are ill-equipped to handle animals of this size and nature. A detective in Idaho commented on the escape of nineteen African lions in 1995 saying that the event was "unimaginable."<sup>22</sup> Another sheriff from the same department went on to explain that because the tranquilizers they had were only meant for cougars, SWAT was called and had to gun down the lions.<sup>23</sup> School was canceled and the surrounding town was told to stay inside until all of the escaped lions could be accounted for.<sup>24</sup> One high school student praised the sheriff's department saying, "he found it amazing that 19 lions had been killed without loss of human life."<sup>25</sup> An absurd amount of extra precautions had to be quickly taken by the whole town to protect the safety of its occupants. The high school student's comment is warranted in his astonishment that the people of the community made it out of this emergency unscathed. With the added dangers of SWAT and police making their best attempts to neutralize the escaped cats, there was a high possibility of someone finding themselves caught in the middle. This is a real danger plaguing communities that are home to privately owned big cats.

A similar situation happened in 2011 near Zanesville, Ohio in what has come to be known as the Zanesville Massacre. On October 19, 2011, Terry Thompson released his

---

<sup>21</sup>*Id.*

<sup>22</sup>*Big Cat Incidents*, HUMANE SOC'Y U.S., v. 2012-09-11, <https://www.humanesociety.org/sites/default/files/docs/captive-big-cat-incidents.pdf> (last visited Oct. 28, 2021).

<sup>23</sup>Cydney McFarland, *Lava Hot Springs Residents Remember Escaped Big Cats 20 Years Later*, IDAHO ST.J. (Sep. 23, 2015), [https://www.idahostatejournal.com/members/lava-hot-springs-residents-remember-escaped-big-cats-20-years-later/article\\_30945950-b51f-508e-a01f-9a86ced34f15.html](https://www.idahostatejournal.com/members/lava-hot-springs-residents-remember-escaped-big-cats-20-years-later/article_30945950-b51f-508e-a01f-9a86ced34f15.html).

<sup>24</sup>*Id.*

<sup>25</sup>DesiraiRushforthSchild& Jennifer Gallagher, *Fears Renewed with Lion Killing*, IDAHOST. J. (Sep. 29, 1995), at A1, <http://yesteryear.idahostatejournal.com/?p=401616>.

menagerie of exotic animals and then died by suicide.<sup>26</sup> Thompson had lived on a seventy-three-acre property where he kept a variety of animals, including tigers, bears, lions, and macaques.<sup>27</sup> Once the sheriff department realized the severity of the situation, big cats were making their way off the property and heading toward the highway.<sup>28</sup> By the end of the night, “49 animals were slaughtered, including 18Bengal [*sic*]<sup>29</sup> tigers, 17 lions, six black bears, a pair of grizzlies, three mountain lions, two wolves and a baboon.”<sup>30</sup> County Sheriff Matt Lutz expressed his sadness, not only for the animals, but for his department stating, “These killings were senseless. For our guys to have to do this, it was nonsense, it was crazy.”<sup>31</sup> It is worth noting that Sheriff Lutz recounted this story in front of the House Committee on May 12, 2022, expressing his feelings on what a tragedy Zanesville was, and how scary of a situation his department and community were forced into.<sup>32</sup>

## B. ANIMAL ATTACKS

The second greatest threat, and possibly the most feared, is a wild animal attack. Because of the lack of federal regulation and accountability for private owners, there is no official count of big cats living with private owners in the U.S.<sup>33</sup> People for the Ethical Treatment of Animals

---

<sup>26</sup>Christina Caron, *Zanesville Animal Massacre Included 18 Rare Bengal Tigers*, ABC NEWS (Oct. 19, 2011), <https://abcnews.go.com/US/zanesville-animal-massacre-included-18-rare-bengal-tigers/story?id=14767017>.

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

<sup>28</sup>*Id.*

<sup>29</sup>[*sic*] As a point of accuracy, I want to acknowledge the use of the word “Bengal” in this quote. Though there is a slight possibility these were Bengal tigers, it is likely that they were “generic” tigers. The United States Fish and Wildlife Service has acknowledged that due to tiger’s readiness to breed in captivity, the U.S. is now flooded with “generic tigers—tigers of unknown genetic background or crosses between two different subspecies of tigers.” *U.S. Fish and Wildlife Service Strengthens Protections for Captive Tigers under the Endangered Species Act*, USFWS (Apr. 5, 2016), <https://www.fws.gov/press-release/2016-04/us-fish-and-wildlife-service-strengthens-protections-captive-tigers-under>.

<sup>30</sup>Christina Caron, *supra* note 26.

<sup>31</sup>*Id.*

<sup>32</sup>*Hearing Held on Big Cat Public Safety Act*, ANIMAL WELFARE INST., <https://awionline.org/awi-quarterly/summer-2022/hearing-held-big-cat-public-safety-act> (last visited July 14, 2022).

<sup>33</sup>*Big Cat Attacks*, BIG CAT RESCUE, <https://bigcatrescue.org/big-cat-attacks/> (last visited Oct. 28, 2021).

(PETA) released a report containing over one hundred incidents involving captive big cats.<sup>34</sup> The report contains quotes from children, adults, and local authorities, among others who have been affected by a big cat living in their communities. Some of the accounts are sightings of a tiger jumping a fence into the neighbor’s yard, whereas others detail an attack either because the animal escaped, or someone was in too close contact with the big cat.<sup>35</sup> It is alarming to read the countless stories of attacks in yards or neighborhoods because someone’s “pet” big cat escaped. For example, a four-year-old was mauled because his aunt kept a mountain lion.<sup>36</sup> Where another example tells of a “pet” tiger that escaped from his cage and attacked the family dog, which led to the tiger’s demise when the sheriff arrived and shot him.<sup>37</sup>

Animals attack, or show aggression, for a handful of reasons. Studies show that various “environmental manipulations” can cause aggression.<sup>38</sup> Some manipulations analyzed in these experiments were social isolation, provocation, and experience.<sup>39</sup> These listed manipulations can all relate to big cats in captivity. Many instances of big cats isolated in poor conditions are seen being provoked by tourists or aggressive owners; this provocation results in heightened aggression.<sup>40</sup> For example, “frustrative non-reward” provocation leads to heightened aggression in animals.<sup>41</sup> For example, in cub petting operations where tiger cubs are thrown around and beaten for the pleasure of the paying customer.<sup>42</sup> The tiger is not getting a reward for this activity

---

<sup>34</sup>*Big-Cat Incidents in the U.S. Factsheet*, PETA, <https://www.peta.org/wp-content/uploads/2021/06/BigCatIncidentList.pdf> (last visited Dec. 13, 2021).

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>*Id.*

<sup>38</sup>Deepa Natarajan & Doretta Caramaschi, *Animal Violence Demystified*, 4 FRONT. BEHAV. NEUROSCI. 1, 5 (Apr. 5, 2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2854525/>.

<sup>39</sup>*Id.*

<sup>40</sup>*Id.*

<sup>41</sup>*Id.*

<sup>42</sup>Jennifer Jacquet, *America, Stop Visiting Roadside Zoos - They Make Money From the Inhumane Treatment of Animals*, GUARDIAN (Nov. 27, 2016), <https://www.theguardian.com/sustainable-business/2016/nov/27/roadside-zoos-america-animal-cruelty-welfare>.

and is being hurt throughout the process. The “behavioral, husbandry, and welfare manager for Omaha’s Henry Doorly Zoo and Aquarium in Omaha, Nebraska,” Jay Pratte, speaks on this issue as well.<sup>43</sup> Pratte contends that cubs in these operations who are continually beaten “develop atypical behavioral patterns—such as an increase in aggression—because they are forced to adjust to this unnatural environment.”<sup>44</sup> This is not only physical but psychological injury for small, young cubs to experience daily with no opportunity for relief.

### III. LARGE ANIMAL KEEPING REQUIREMENTS

Large animals, big cats for these purposes, have different keeping requirements than the typical house animal. There are a handful of variables that are to be considered when attempting to house a big cat. The variables discussed in this section are enclosures, enrichment, and veterinary care. Though there is more that goes into the care of a big cat, these three are analyzed here.

#### A. ENCLOSURES

Privately owned big cats across the country have been documented in horrible conditions. Their living quarters are cramped, dirty, and sometimes literally unlivable. Such was the case for the 1995 escaped lions in Idaho. When sheriffs went through the compound, Ligertown, they found multiple cages containing skulls and bones of deceased lions.<sup>45</sup> This shows that not only were the animals dying here, but the enclosures also remained unchecked because bones were left in the cages with the remaining living lions. Another example can be seen in the Endangered Species Act (ESA) case against Pamela Sellner, the owner of Cricket Hollow Zoo.<sup>46</sup> Here it was found that Sellner’s inadequacy of the tigers’ enclosures and care resulting in injury and death

---

<sup>43</sup>*PETA v. Wildlife in Need and Wildlife in Deed*, 476 F.Supp.3d 765, 772 (S.D.Ind. 2020).

<sup>44</sup>*Id.* at 784.

<sup>45</sup>Chuck Oxley & Juanita Rodriguez, *Filth Stench Upon Touring Lava Complex*, IDAHOST. J. (Sep. 26, 1995), <http://yesteryear.idahostatejournal.com/?p=401616>.

<sup>46</sup>*Kuehl v. Sellner*, 161 F.Supp.3d 678 (2016).

was “harassment” under the ESA.<sup>47</sup> The enclosures were small, piled high with feces, and were never sanitized.<sup>48</sup> Ultimately, five tigers died in two years at Cricket Hollow Zoo.<sup>49</sup> Horrible living conditions are one of the sad realities for big cats living in private captivity.

Large animals, when living in captivity, require ample space to live a fulfilled life. Though there is dispute over what “ample space” means exactly, the Association of Zoos and Aquariums (AZA) has compiled what they think to be ideal living requirements for animals in captivity. The AZA is an accrediting body comprised of “experienced and trained experts in operations, animal welfare and husbandry, and veterinary medicine.”<sup>50</sup> They have been working since 1971 to ensure that captive animals can enjoy life while living in zoos.<sup>51</sup> They do so by having a rigorous accrediting process that exhibitors apply to by adhering to the provided manuals.<sup>52</sup> There are currently thirty-four completed animal care manuals, with twenty-five in progress.<sup>53</sup> These contain the standards for proper care of animals in zoos. For example, in the Tiger Care Manual, “[t]he typical exhibit size in AZA tiger-holding institutions (as of 2012) is average 5,500 sq.ft.”<sup>54</sup> They provide their minimum suggestion, what their average is, and how each enclosure should be added upon when more than one animal lives in the same enclosure.<sup>55</sup> Because these standards are compiled by experts in the field, it can be assumed that some private owners of big cats do not have the same level of knowledge and thus cannot provide adequate

---

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>*Id.*

<sup>50</sup>*About AZA Accreditation*, ASS’N ZOOS& AQUARIUMS, <https://www.aza.org/what-is-accreditation> (last visited Oct. 29, 2021).

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>*Animal Care Manuals*, ASS’N ZOOS& AQUARIUMS, <https://www.aza.org/animal-care-manuals> (last visited June30, 2022).

<sup>54</sup>AZA Tiger Species Survival Plan, *Tiger (Panthera tigris) Care Manual*, ASS’N ZOOS& AQUARIUMS (2016), [https://assets.speakcdn.com/assets/2332/tiger\\_care\\_manual\\_2016.pdf](https://assets.speakcdn.com/assets/2332/tiger_care_manual_2016.pdf).

<sup>55</sup>*Id.*

space for their cat(s). This is at a detriment to the animals because they may be forced to live in cramped spaces that are not always held to proper health standards.

Another accrediting body that is working to enforce above adequate keeping requirements of wild animals is the Global Federation of Animal Sanctuaries (GFAS). Like the AZA, the GFAS provides eligibility criteria for sanctuaries and rescues.<sup>56</sup> One of the key principles for the GFAS accredited true sanctuaries is “providing excellent and humane care for their animals in a non-exploitative environment and having ethical policies in place, regarding: tours, commercial trade, exhibition, acquisition and disposition, breeding and more.”<sup>57</sup> It is important for these accrediting bodies to continue to push for standards regarding keeping requirements so long as humans are going to keep animals in captivity. As seen in the *Kuehl v. Sellner* cases and the account of the escaped lions in Idaho, big cats require a great deal of care and healthy living spaces for them to survive.<sup>58</sup> The AZA and the GFAS understand these factors and are working to provide the best captive requirements they can.

## B. ENRICHMENT

Enrichment is “the enhancement of captive animals’ well-being by stimulating active behaviors.”<sup>59</sup> Because of the decline of tigers in the wild and increase of tigers in the hands of people and institutions, studies are being conducted to analyze their behaviors.<sup>60</sup> One study found that tigers presented less unnatural behaviors in an enclosure that more accurately represents the

---

<sup>56</sup>*Accreditation*, GLOBAL FED’N ANIMAL SANCTUARIES, <https://www.sanctuaryfederation.org/accreditation/> (last visited Dec. 13, 2021).

<sup>57</sup>*What is a Sanctuary*, GLOBAL FED’N ANIMAL SANCTUARIES, <https://www.sanctuaryfederation.org/accreditation/> (last visited Dec. 13, 2021).

<sup>58</sup>*Kuehl v. Sellner*, *supra* notes 18, 46; Chuck Oxley & Juanita Rodriguez, *supra* note 45.

<sup>59</sup>Amy L. Skibieli et al., *Comparison of Several Types of Enrichment for Captive Felids*, 26 ZOO BIOLOGY 371, 371 (July 24, 2007), <https://onlinelibrary.wiley.com/doi/abs/10.1002/zoo.20147>.

<sup>60</sup>Leigh Elizabeth Pitsko, *Wild Tigers in Captivity: A Study of the Effects of the Captive Environment on Tiger Behavior*, VA. TECH. 1 (Apr. 25, 2003), <https://vtechworks.lib.vt.edu/handle/10919/32620>.

stimulation they would get in the wild.<sup>61</sup> This includes structures that allow for “swimming, climbing, stalking, and predation.”<sup>62</sup> Another study acknowledges that proper enrichment has been achieved through “novel food items, altered feeding routings and food displays, and novel toys/objects.”<sup>63</sup> These are only a couple of the studies showing that when tigers are provided proper enrichment their stress behaviors subsequently subside.

Many roadside zoos and private homes cannot and/or do not provide any enrichment for their big cats. This results in stress for the animal, which can present itself physically. A report presented by Big Cat Rescue documents a cougar in Texas that was picked up from an exotic animal exhibitor.<sup>64</sup> When an official from Texas Parks and Wildlife went to retrieve the cougar, they found the approximately seven-and-a-half-month-old cat in a “three-by-five-foot cage with no water and only a small amount of dog food. She was missing patches of fur, had red, irritated skin, and was covered in fleas.”<sup>65</sup> Another example can be seen at the Waccatee Zoological Farm in Myrtle Beach, South Carolina. Lila, the tiger, lived and died at Waccatee Zoo, where she dramatically lost weight and went entirely bald due to stress, health problems, and horrible living conditions.<sup>66</sup> Michelle Sinnott, the Associate Director for the Captive Animal Law Enforcement division of PETA, wrote to Waccatee Zoo asking for the release of Lila’s veterinary records and the release of their other big cats.<sup>67</sup> Over a year of visits to Lila, it was documented that she lived in a barren enclosure with no way to exercise her natural behaviors.<sup>68</sup> The extreme stress from

---

<sup>61</sup>*Id.* at 14.

<sup>62</sup>*Id.* at Abstract.

<sup>63</sup>Monika S. Szokalski et al., *Enrichment for Captive Tigers (Panthera tigris): Current Knowledge and Future Directions*, 139 APPLIED ANIMAL BEHAV. SCI. 1, Abstract (June 2012), <https://www.sciencedirect.com/science/article/abs/pii/S0168159112000718>.

<sup>64</sup>BIG CAT RESCUE, *supra* note 33.

<sup>65</sup>*Id.*

<sup>66</sup>David Perle, *Where’s Lila? PETA Seeks Missing Tiger From Waccatee Zoo*, PETA (Mar. 1, 2021), <https://www.peta.org/media/news-releases/wheres-lila-peta-seeks-missing-tiger-from-waccatee-zoo/>.

<sup>67</sup>*Id.*

<sup>68</sup>*Id.*

her living conditions caused the weight and hair loss, and eventual death.<sup>69</sup> People who privately own big cats often do not anticipate or prepare for the cost, amount of care, or space required to keep them. These owners are attempting to cage and keep wild animals, some of which result in the harming and killing of the big cats themselves. If big cats are to live in captivity, they deserve to live in enclosures that are prepared by experts and have the big cats' best interests in mind. This gives the cats a better chance at a healthy life where they can exhibit their species-specific behaviors.

### C. VETERINARY CARE

Lastly, veterinary care for large, exotic animals is not easily accessible, especially in local neighborhoods or cities. Local veterinarians have a vast knowledge of multiple species of animals that they must care for everyday. Those species normally include dogs, cats, birds, rodents, and reptiles. Depending on the veterinarian, they may only care for a few of those listed or will be more specialized for one or two types of animals. For example, there may be a veterinarian that specializes in caring for horses. This is the same for large, exotic animals. Typically, a zoo veterinarian receives advanced training to care for “non-domestic animals held in captivity.”<sup>70</sup> This level of veterinary care is not available to the general public. For example, in *Kuehl v. Sellner*, Pamela Sellner enlisted the help of a veterinarian for her big cats. However, this veterinarian specialized in agricultural veterinary practices and attempted those on the big cats.<sup>71</sup> This resulted in many deaths at Cricket Hollow Zoo because the animals were not receiving correct medical care.<sup>72</sup> Similarly, veterinarians employed by the Tri-State Zoological Park of

---

<sup>69</sup>Danny Prater, *PETA Confirms Bald Tiger Trapped at Waccatee Zoo Has Died*, PETA (March 1, 2021), <https://www.peta.org/blog/where-is-lila-peta-fears-bald-tiger-trapped-at-waccatee-zoo-has-died/>.

<sup>70</sup>Mary Hope Kramer, *What Does a Zoo Veterinarian Do?*, BALANCE CAREERS (July 18, 2019), <https://www.thebalancecareers.com/zoo-veterinarian-125943>.

<sup>71</sup>Jessica L. Blome, *supra* note 19.

<sup>72</sup>*Id.*

Western Maryland were both inexperienced in caring for exotic animals.<sup>73</sup> Dr. Fox, the veterinarian from 2009 to 2018, said, “I’m just a regular old veterinarian, I’m not a specialty in any of those zoo animals.”<sup>74</sup> Dr. Duncan, who replaced Fox in 2018, said, “I did not have any past experience beyond what we are taught in vet school.”<sup>75</sup> Tragically Cayenne, one of Tri-State’s tigers, died because of Duncan’s lack of exotic animal experience and resources needed to provide the necessary care.<sup>76</sup> Cayenne was anesthetized for an x-ray and blood draw procedure.<sup>77</sup> While under anesthesia, Cayenne went into respiratory arrest and Duncan administered epinephrine and chest compressions to resuscitate her.<sup>78</sup> However, because of his lack of equipment (he only had a thermometer and a stethoscope) Cayenne was not hooked up to any fluids or breathing assistance following her resuscitation.<sup>79</sup> Duncan proceeded to leave her unattended for ten minutes where she then had a heart attack and died.<sup>80</sup> This is the type of subpar care big cats are receiving around the country because of their owners lack of care, experience, and resources.

Due to small, inadequate enclosures and substandard veterinary care, privately owned big cats are also susceptible to zoonotic disease. A zoonotic disease is a type of “illness caused by harmful germs like viruses, bacteria, parasites, and fungi that spread between animals and people.”<sup>81</sup> Animals kept in filthy conditions, with inadequate food and water, and improper or no veterinary care are the most at risk. As seen in the aforementioned examples documenting lack of animal care, it can be deduced that once animals become sick, no measures are taken to bring the

---

<sup>73</sup>*PETA v. Tri-State Zoological Park of W. Md.*, 397 F.Supp.3d 768, 773 (2019).

<sup>74</sup>*Id.*

<sup>75</sup>*Id.*

<sup>76</sup>*Id.* at 774.

<sup>77</sup>*Id.* at 773.

<sup>78</sup>*Id.* at 774.

<sup>79</sup>*Id.*

<sup>80</sup>*Id.*

<sup>81</sup>*Zoonotic Diseases*, CTRS. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/onehealth/basics/zoonotic-diseases.html> (last visited Oct. 29, 2021).

animal back to health. It is also known that big cats can contract Covid-19 and have subsequently tested positive.<sup>82</sup> This is just one example of a disease-risk posed between big cats and humans, should people continue to keep and be in contact with these animals.

#### IV. DOMESTICATED V. INTELLIGENT

This section provides the necessary distinction between domestication and intelligence. There is a common misconception that animals who have interacted with humans in any capacity are domesticated. However, this is not the case because the science behind domestication is more complex than that. It is important to understand this misconception, because claiming a big cat as “domesticated” is dangerous for people and the animals being kept in homes and backyards. To begin, the definition of domestication is “a process that involves artificial selection of plants or animals for traits desirable to humans.”<sup>83</sup> Keeping that definition in mind, another definition for domestication is “a phenomenon whereby a wild biological organism is habituated to survive in the company of human beings.”<sup>84</sup> Humans are normally the instigator of the domestication process. The easiest example to reference is the domestication of dogs. Although it is hard to affirmatively pin down why dogs were domesticated, however studies now show that the first domesticated dogs accompanied Pleistocene-era humans as they made their way to the Americas.<sup>85</sup> These genetic studies show the ancient split between wolf populations and what is generally accepted as the first dog population.<sup>86</sup> This leads to the next step of understanding—genetics is the core of domestication. Essentially, when a species is being domesticated they lose

---

<sup>82</sup>Sharon Pruitt-Young, *9 Lions and Tigers at the National Zoo are Being Treated for Covid*, NAT’L PUBLIC RADIO (Sept. 17, 2021), <https://www.npr.org/sections/coronavirus-live-updates/2021/09/17/1038295149/national-zoo-tigers-lions-covid-coronavirus>.

<sup>83</sup> Robert J. Brooker et al., *Biology G-9* (3d ed. 2014).

<sup>84</sup>*Domestication*, SCI. DAILY, <https://www.sciencedaily.com/terms/domestication.htm> (last visited Oct. 29, 2021).

<sup>85</sup>Angela R. Perri et al., *Dog Domestication and the Dual Dispersal of People and Dogs into the Americas*, PROCEEDINGS NAT’L ACADEMY SCI. U.S.A. 1,2 (Feb. 9, 2021), <https://www.pnas.org/content/118/6/e2010083118#sec-1>.

<sup>86</sup>*Id.* at 3.

aspects that were necessary to survive in the wild. Through multiple generations various morphological changes begin to take place as humans continue to interfere with a species, thus placing limiting factors on the species. Limiting factors can be directly from human choice or indirectly from living with humans.<sup>87</sup> One such morphological change that is directly attributed to human-choice domestication is overall smaller body size.<sup>88</sup> Studies have found that humans methodologically chose smaller animals from litters because “smaller individuals are said to be easier to control and more docile.”<sup>89</sup> This in turn began the change in morphology that smaller body size is the desired trait. Some indirect features are “deterioration in nutrition, increased disease frequency, [and] reduced activity patterns.”<sup>90</sup> These all can lead to smaller body size because an unhealthy animal cannot grow to their full, natural size.

Domestication is a process that must span several generations of one species to gain the desired traits necessary for the animals to be more docile and lack the majority of their wild instincts. Big cats do not fall under this category. For example, the Siberian tiger is the largest big cat in the world.<sup>91</sup> They weigh up to 660 pounds and can reach lengths longer than 10-feet.<sup>92</sup> It would take many generations of tigers and genetic selection to reach a tiger that would be considered domesticated. The general confusion of the public and their understanding of what domestication really means can be seen in *City of Rolling Meadows v. Kyle*, 494 N.E.2d 766 (1986).<sup>93</sup> In this case, the dispute was whether Audrey Kyle could keep her pet monkey under the City of Rolling Meadows’ ordinance, section 4-28 (1981), which states that a person is in

---

<sup>87</sup>Eitan Tchernov&LioraKolska Horwitz, *Body Size Diminution under Domestication: Unconscious Selection in Primeval Domesticates*, 10 J. ANTHROPOLOGICAL ARCHAEOLOGY 54, 57 (1991).

<sup>88</sup>*Id.* at 56.

<sup>89</sup>*Id.*

<sup>90</sup>*Id.*

<sup>91</sup>*Big Cats*, NAT’L GEOGRAPHIC, <https://www.nationalgeographic.com/animals/mammals/facts/big-cats-1> (last visited Oct. 29, 2021).

<sup>92</sup>*Id.*

<sup>93</sup>*City of Rolling Meadows v. Kyle*, 494 N.E.2d 766 (1986).

violation when “[k]eeping animals other than domesticated pets.”<sup>94</sup> The court found that the monkey was “domesticated” when they considered the defendant’s argument that the monkey had lived with them since infancy and had gone on vacations with them.<sup>95</sup> This, however, sets a poor precedent for the owners of wild animals because they can argue that they have had an animal for “x” number of years and that makes the animal domesticated. This furthers the misinformation of owning big cats, because domestication is not as simple as “years of ownership.” The misconception of domestication perpetuates the thought that it is safe to keep big cats.

Generally, people are mistaking domestication for intelligence. Humans tend to operate under “human exceptionalism,” where it is thought that humans are the smartest species and are thus the governing population.<sup>96</sup> However, many species display extremely high levels of intelligence and social skills. One of many examples is an orangutan that knows sign language.<sup>97</sup> These skills should not be mistaken for domestication. Although they show that animals deserve more credit for being intelligent creatures, it does not mean that they must be forced to live in captivity with humans. The opposite should be true—their intelligence and skills should be praised and left for them to use in their own societies. It is unfortunate to see human entitlement of wild animals and exploitation of their intelligence, rather than pure admiration for animals and the skills they possess.

## V. PLACEMENT OPTIONS

---

<sup>94</sup>*Id.*

<sup>95</sup>*Id.*

<sup>96</sup> Lori Gruen, *Ethics and Animals: An Introduction*, CAMBRIDGE UNIV. PRESS 1, 2(2011).

<sup>97</sup> Brigit Katz, *Chantek an Organutan Who Knew Sign Language Has Died at 39*, SMITHSONIAN MAG. (Aug. 8, 2017), <https://www.smithsonianmag.com/smart-news/chantek-orangutan-who-knew-sign-language-has-died-39-180964390/>.

Although there is a variety of solutions that could be analyzed and potentially utilized with proper enforcement and funding, this section focuses on placement options for rescued big cats. A lot goes into rehoming captive wild animals, including adequate space and funding for transport and care.

Studies show that captive-born carnivores have only a 32-percent chance of survival when being reintroduced into the wild.<sup>98</sup> One study found that behaviors resulting from human interaction were factors that negatively affected the “survival of captive-born released carnivores.”<sup>99</sup> These types of results significantly lower wild release as an option for rescued big cats who were born and bred in captivity. More studies need to be done regarding breeding success in these cats, however, because the lack of regulation for captive big cats inbreeding has become a big problem. Inbreeding reduces genetic diversity and can lead to a myriad of health complications.<sup>100</sup> Releasing animals that have been inbred and lack genetic diversity would only cause more problems in wild populations if death does not occur first. For example, the white tiger is not a separate endangered subspecies of tiger. In fact, the white coloring of their coat is due to an autosomal recessive gene.<sup>101</sup> For breeders to continue this line of white tigers, they must breed two of them together which more than likely means breeding related tigers.<sup>102</sup> As mentioned, inbreeding results in poor genetic integrity and health problems for big cats. White

---

<sup>98</sup>Kristen R. Jule et al., *The Effects of Captive Experience on Reintroduction Survival in Carnivores: A Review and Analysis*, Univ. of Exeter, Animal Behav. Research Group, 141 *BIO. CONSERVATION* 355, 359 (2008), [https://www.researchgate.net/publication/222557519\\_The\\_effects\\_of\\_captive\\_experience\\_on\\_reintroduction\\_survival\\_in\\_carnivores\\_A\\_review\\_and\\_analysis](https://www.researchgate.net/publication/222557519_The_effects_of_captive_experience_on_reintroduction_survival_in_carnivores_A_review_and_analysis).

<sup>99</sup>*Id.*

<sup>100</sup>Xiao Xu et al., *The Genetic Basis of White Tigers*, 23 *CURRENT BIO.* 1031, 1031 (June 3, 2013), <https://www.sciencedirect.com/science/article/pii/S0960982213004958>.

<sup>101</sup>*Id.*

<sup>102</sup>*Id.*

tigers also would not have a high survival rate in the wild due to their light coloring; and thus, lack of camouflage.<sup>103</sup>

The remaining options then are accredited zoos and sanctuaries. One unfortunate reality of rescuing big cats from captivity is the lack of resources needed to place them in a new, safe home. Because of the unknown number of big cats in private ownership in the U.S., it is difficult to anticipate how much funding is needing to move them. As mentioned previously, the AZA requires an enclosure to grow when the captive population grows.<sup>104</sup> This puts a financial constraint on existing establishments when they are considering taking in rescued cats. However, in places that have the space and resources to accept more big cats this should be the first option. Many sanctuaries across the U.S. are able to provide their big cats with the proper enclosures, enrichment, and veterinary care through donations and funding. One example is the Big Cat Rescue in Florida run by Carole Baskin. Big Cat Rescue is a 67-acre sanctuary for rescued big cats in Tampa, Florida and is accredited by GFAS.<sup>105</sup> They work to rescue big cats that were confiscated, on their way to slaughter for their fur, forced to perform in shows, and much more.<sup>106</sup>

However, transport and care of big cats is a large financial commitment. One idea for funding relocation of big cats if the BCPSA legacy clause were amended is through the United States Fish and Wildlife Service (USFWS). One of the USFWS's responsibilities is to "manage and distribute over a billion dollars each year to states, territories and tribes for fish and wildlife conservation."<sup>107</sup> Potentially some of this money could go toward relocating and rehoming big cats confiscated from private owners. Due to big cats being a large component in the exotic

---

<sup>103</sup>*Id.*

<sup>104</sup>AZA Tiger Species Survival Plan, *supra* note 54.

<sup>105</sup>Home, BIG CAT RESCUE (last visited July 7, 2022), <https://bigcatrescue.org>.

<sup>106</sup>About BCR, BIG CAT RESCUE (last visited July 7, 2022), <https://bigcatrescue.org/contact-bcr/>.

<sup>107</sup>About the U.S. Fish and Wildlife Service, USFWS (Feb. 12, 2021), [https://www.fws.gov/help/about\\_us.html](https://www.fws.gov/help/about_us.html).

animal trade, this can be acknowledged as harming big cat conservation. With respect to tigers, for example, all subspecies are endangered and fall under the ESA's protection.<sup>108</sup> Also, because of USFWS's job in enforcing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and their partnership with the Rhinoceros and Tiger Conservation Fund, there seems to be an adequate number of resources that could be used and would be within reason.

It is worth mentioning that in the past and current system, the legacy clause is put into a lot of legislation because of the difficulty and financial burden that accompanies relocating and rehoming captive wildlife. Unfortunately, it has been found that when an animal is being moved around a lot or is difficult to place the animal ends up euthanized.<sup>109</sup> In order to avoid euthanizing a large number of big cats, there must be some partnering between agencies and accredited sanctuaries or zoos.

## VI. CONCLUSION

The Big Cat Public Safety Act (BCPSA) is an act concerning six species of big cats that are subject to private ownership in the United States. The act contains a legacy clause, previously known as a grandfather clause, permitting private owners of big cats prior to the enactment of the BCPSA to keep their cats. However, this clause should be amended so the owners are required to relinquish their big cats. Privately owned big cats pose a threat to human public safety. In the event of an escaped animal, local law enforcement does not have the proper resources or tools to safely return the animal to its enclosure. This has led to shoot-outs and the killing of many big cats. This is a sad reality for the animals, but it is also dangerous for the surrounding community

---

<sup>108</sup>*Tigers*, "International Affairs," USFWS, <https://www.fws.gov/international/animals/tigers.html> (last visited Dec. 13, 2021).

<sup>109</sup>Corinne Henn, *What Happens When People Release Exotic Animals Into the Wild*, ONE GREEN PLANET (Feb. 2021), <https://www.onegreenplanet.org/animalsandnature/what-happens-when-people-release-exotic-animals-into-the-wild/>.

either by the law enforcement gunning down animals in public locations, or in the unfortunate event there is an attack between animal and person. Anything can happen when a big cat escapes, and that is scary for everyone involved.

Further, big cats require more extensive care than the average house pet. They need space to live and act out their natural behaviors including jumping, swimming, and climbing.<sup>110</sup> Along with needing large enclosures and plenty of enrichment, big cats require specialized veterinary care. Many big cats in private ownership are not getting this specialized care and it has resulted in their deaths. It has been argued in the past that it is permissible to keep wild and exotic animals because they are domesticated. However, this is inaccurate because domestication is an evolutionary process that spans many generations of a species and is not a process that is occurring in big cats. Domestication is being confused with intelligence. Big cats are extremely intelligent beings and learn quickly, however this does not mean that they are domesticated and thus subject to living with humans.

Lastly, removing big cats from private owners requires rehoming and different placement options. Although an expensive and difficult endeavor, there are ways of relocating and rehoming big cats if the legacy clause is amended. One idea presented was a partnership between the USFWS and accredited sanctuaries. The USFWS has funds allocated every year to disperse to states and territories to further conservation of wildlife.<sup>111</sup> Captive big cats are compromised when it comes to the idea of wild release because of their low survival rate from inbreeding and living in proximity with humans.<sup>112</sup> These factors can be seen as harmful to conservation because captive big cats are more harmful to wild populations than beneficial, which could lead to USFWS playing a role in their rescuing. Accredited sanctuaries and zoos would be the best fit

---

<sup>110</sup> Leigh Elizabeth Pitsko, *supra* note 60.

<sup>111</sup> *About the USFWS*, *supra* note 107.

<sup>112</sup> Kristen R. Jule et al., *supra* note 98.

for rehoming big cats because they are held to higher standards for animal keeping and, if they have the resources, could provide better lives for these big cats. The BCPSA should amend its legacy clause and save big cats from private owners once and for all.



Find us on the web  
at:  
[nysba.org/animals](http://www.nysba.org/animals/)