

They Have the Right to Remain Silent – the Intersection between Animal Law and Criminal Law

I History

- 1) Historically, animals treated as property. Prior to the 18th and 19th century, very little protection for animals, and subjected to horrific cruelty.
 - A) In 1821, Maine passed the first animal cruelty law in the US.
 - B) England passed Martin's Law in 1822, the first animal cruelty law in England. Made cruelty to cattle, horses, sheep, mules and asses criminal. Later revised to include other domestic animals and to prohibit bull baiting and animal fighting.
 - C) Several American states followed suit. Generally the laws concerned only horses, cattle, sheep, and swine (not dogs and cats) and did not punish neglect, but only affirmative acts.
- 2) ASPCA formed in 1866.
- 3) Cruelty laws continued to broaden and become more common. Just like today, one of the most contentious animal treatment issues at that time was animal experimentation, including vivisection. Mark Twain even spoke out against this practice in *A Dog's Tale*. The US did not pass comprehensive federal legislation on this subject until the 1960s, when the Laboratory Animal Welfare Act of 1966 was passed.
- 4) Animal fighting was banned in almost all states in the early 1900s.
- 5) Animal law v. Animal Rights – The movement to recognize legal rights for animals.

II Federal animal related statutes providing for criminal penalties

- 1) Federal – Generally, the federal government can only regulate crimes against animals if the crimes relate to the government's limited powers under the Constitution. Hence, the federal government cannot criminalize the violent treatment of animals. They have, however, passed various animal welfare provisions that touch upon interstate or foreign commerce.
- 2) Animal Welfare Act (AWA) 7 USC 2131-2159
 - A) What does it do? Authorizes Secretary of Agriculture to establish standards for the humane handling, care, treatment and transportation of animals by dealers, research facilities and exhibitors.
 - (i) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
 - (ii) to assure the humane treatment of animals during transportation in commerce; and
 - (iii) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.
 - (iv) Provides for licensing and record keeping
 - (v) Standards and regulations are 9 C.F.R. Chapter 1, Subchapter A.

- B) Who does it affect?
 - (i) Dealers, carriers and persons or organizations engaged in using animals for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.
 - C) What animals are protected?
 - (i) Applicable to warmblooded animals, but excludes horses not used for research purposes and other farm animals. Also excludes birds, rats and mice bred for use in research.
 - D) How is it enforced?
 - (i) Secretary of Agriculture has power to make such investigations and inspections as he deems necessary to determine if violations exist. Required to inspect once at least once a year. §2146(a).
 - (ii) Provides for civil and criminal penalties for knowing violation. § 2149(d).
 - E) Is it enforced? In 2010, the USDA's Office of the Inspector General (OIG) released a report (<http://www.usda.gov/oig/webdocs/33002-4-SF.pdf>) criticizing APHIS for ignoring repeated AWA violations committed by large-scale dog breeders and brokers known as "puppy mills. In addition, concerns have been expressed regarding lack of enforcement against repeat offenders among research facilities and zoos.
 - (i) 110 veterinary medical officers and animal care inspectors were responsible for inspecting 4,843 Class A breeders (bred on site and sold wholesale), 1,209 Class B dealers, 2,573 exhibitors (a zoo or circus, for example), 1,113 research facilities, 278 intermediate handlers (who transport animals), 180 carriers (like an airline): more than 10,000 licensees and registrants.
 - (ii) Mostly civil penalties, but in 2006, based on an undercover investigation, Martin Creek Kennel, a Class B dealer who sold to research facilities, was fined \$262,700 and had license revoked. As part of a related criminal trial, in plea bargain surrendered 700 acres of land worth \$1.1 million, forfeited \$200,000 in cash, and reimbursed animal rescue groups who cared for the dogs taken.
- 3) Part of the AWA also restricts "animal fighting ventures" 7 USC § 2156-2159.
- A) Makes it unlawful to sponsor, exhibit or knowingly attend an "animal fighting venture". Also makes it unlawful to sell, buy, possess, train, transport, deliver or receive any animal for the purpose of having the animal participate in an animal fighting venture.
 - B) "Animal Fighting Venture" is defined as an event in or affecting interstate or foreign commerce that involves a fight conducted or to be conducted between at least 2 animals for purposes of sport, wagering, or entertainment, except that the term "animal fighting venture" shall not be deemed to include any activity the primary purpose of which involves the use of one or more animals in hunting another animal. §2156(g). Excludes bird fighting in states where legal.
 - C) Provides for criminal penalties. 18 USC § 49.
 - D) Michael Vick was prosecuted under this.
- 4) Migratory Bird Treaty Act. 16 U.S.C. 703-711.
- A) What does it do? Makes it unlawful, except was permitted by regulation, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for

- sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof. 16 U.S.C. § 703(a).
- B) What animals are protected? Birds that are native to the United States and its territories and are included in certain treaties between the United States and Great Britain, Mexico, Japan, and the USSR.
- (i) Native means occurring naturally or, if introduced, the bird was native to the US and its territories prior to 1918.
- C) How is it enforced? Any employee of the Department of the Interior authorized by the Secretary of the Interior to enforce the provisions of this subchapter shall have power, without warrant, to arrest any person committing a violation of this subchapter in his presence or view and to take such person immediately for examination or trial before an officer or court of competent jurisdiction; shall have power to execute any warrant or other process issued by an officer or court of competent jurisdiction for the enforcement of the provisions of this subchapter; and shall have authority, with a search warrant, to search any place. 16 U.S.C. § 706. Misdemeanor penalties and forfeitures. A “knowing” violation is a felony.
- D) Is it enforced? Obviously, many ordinary activities kill birds, so the case law has surrounded what constitutes a knowing “take”.
- (i) *United State of America v. Duke Energy Renewables, Inc.*, District Court for the District of Wyoming, CR 13-268 R. This 2013 case was the first ever criminal enforcement of the MBTA for unpermitted avian takings at wind projects. Duke Energy pleaded guilty, and paid fines, restitution and community service totaling \$1 million, and was placed on probation for five years. The charges stemmed from the discovery of 14 golden eagles and 149 other protected birds, including hawks, blackbirds, larks, wrens and sparrows by the company at its “Campbell Hill” and “Top of the World” wind projects in Converse County between 2009 and 2013. The two wind projects are comprised of 176 large wind turbines sited on private agricultural land. According to the charges and other information presented in court, Duke Energy Renewables Inc. failed to make all reasonable efforts to build the projects in a way that would avoid the risk of avian deaths by collision with turbine blades, despite prior warnings about this issue from the U.S. Fish and Wildlife Service (USFWS).
- (ii) Operation “High Roller”. In 2006, in California and Oregon two federal wildlife agents infiltrated roller pigeon clubs and realized how wide spread the killing of raptors in connection with these clubs was. In 2007, several members of roller pigeon clubs in California, Texas, Washington and Oregon were arrested in connection with a fourteen month long nationwide undercover investigation into the killing of protected birds, namely thousands of hawks and peregrine falcons in retaliation for preying upon the

roller pigeons. They were tried and convicted but received no jail time or fines approaching the maximum level. For example, in one case involving a Kelso, Washington man, he was sentenced only to community service, since the judge found that any “significant fine would be overkill”.

5) Endangered Species Act

A) What does it do? Prohibits the “take” of species of animals listed as endangered or threatened. Destruction of designated critical habitat can also constitute a “take”. See also 16 U.S.C. § 1538.

(i) “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C. § 1532(19).

B) What animals are protected?

(i) Species that the Secretary of the Interior or the Secretary of the Commerce (in the case of anadromous fish and certain marine mammals) find are in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man (endangered) OR any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (threatened). 16 U.S.C. § 1532(6) and (20).

C) How is it enforced? 16 U.S.C. § 1540 provides the enforcement mechanism. 16 U.S.C. § 1540(b) provides for criminal penalties for “knowing” violations of any provision of the chapter, of any permit or certificate issued thereunder, or any regulation issued to implement certain sections of the ESA.

(i) It is a defense to prosecution if the defendant had a “good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual, from bodily harm from any endangered or threatened species.” 16 U.S.C. § 1540(b)(3).

(ii) Provides for fines of up to \$50,000 and imprisonment of up to one year.

D) Is it enforced? In 2013, two environmental groups filed suit for Declaratory and Injunctive relief in the District of Arizona because of the failure of the Department of Justice to criminally enforce the ESA.

(i) “McKittrick Policy” *United States v. McKittrick*, 142 F.3d 1170 (9th Cir. 1998). Since this case, the DOJ has taken the position that it must prove that the defendant specifically intended to kill an endangered species. As a result, the DOJ rarely prosecutes an individual if they claim the take was a result of mistaken identity.

6) Animal Enterprise Terrorism Act (“AETA”) – Passed as amendment to AEPA in 2006.

A) What does it do?

(i) Crime under a previous act, the Animal Enterprise Protection Act to “intentional cause physical disruption . . . of an animal enterprise by intentionally stealing, damaging, or causing the loss of, any property . . . used by the animal enterprise with resulting economic damages of at least ten thousand dollars.

- (ii) Amendments were proposed to broaden act because only the animal enterprise itself was covered by the law, and activists were targeting persons and organization with ties to animal enterprises instead of the enterprise itself. AETA broadens the definition to encompass offenses against any person or entity with an association to an animal enterprise. 18 USC § 43(a)(2). Also adds placing a person in fear of injury or death, regardless of economic damage. to the list of activities constituting an offense.
 - (iii) Makes it a crime to travel in interstate or foreign commerce use the mail or any other facility of interstate or foreign commerce to damage or interfere with the operations of an animal enterprise, including damaging property of an animal enterprise or a person or entity having a connection with an animal enterprise. Also a crime to place a person in reasonable fear of death or serious bodily injury.
 - (iv) Amendments were challenged as unconstitutional, but the pre-enforcement challenge was dismissed for lack of standing. *Blum v. Holder*, 744 F.3d 790(1st, 2014). A writ of certiorari was filed on August 5, 2014. The government has until August 6, 2014 to file a response.
- B) Who does it affect? Animal Enterprises are defined as:
- (A) a commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing;
 - (B) a zoo, aquarium, animal shelter, pet store, breeder, furrier, circus, or rodeo, or other lawful competitive animal event; or
 - (C) any fair or similar event intended to advance agricultural arts and sciences; 18 U.S.C. § 43(d)(1).
- C) How is it enforced? Imposes penalties up to life in prison depending on the seriousness of the offense as well as monetary fines and restitution for the reasonable cost of repeating any experimentation that was interrupted or invalidates or for the loss of any food production or farm income reasonably attributable to the offense.
- (i) Economic damages does not include lawful economic disruption that results from lawful public, governmental or business reaction to the disclosure of information about an animal enterprise.
- D) Is it enforced? *U.S. v. Fullmer*, 584 F.3d 132 (3rd Cir. 2009) This case concerns acts that took place prior to the amendments and led to the passage of the AETA. The defendants engaged in a series of attacks against Huntington Life Sciences and their affiliates, including a Seattle insurance company.
- (i) The defendants argued that their protest activity against companies associated with Huntington were not animal enterprises and therefore should not have been considered as evidence of a conspiracy to violate the AETA. The actions occurred prior to the amendments in 2006. The court disagreed.
 - (ii) This July, two animal activists, Tyler Lang and Kevin Olliff, were indicted in the Northern District of Illinois for violations of the AETA. They released thousands of minks and foxes from fur farms in 2013. They both plead guilty

to state charges and were sentenced. If convicted on the Federal charges, they face a maximum of ten years in prison.

- 7) “Crush Video” Legislation – In December 1999, Federal legislation passed making it a crime to knowingly create, sell, or possess “a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain.” 18 USC § 48. The primary motivation was to restrict the sale of crush videos, which feature women crushing small animals to death with high-heeled shoes or barefeet. This legislation was struck down by the U.S. Supreme Court as a violation of the First Amendment right to freedom of speech. *U.S. v Stevens*, 130 S. Ct. 1577 (2010). This case did not involve crush videos, but dog-fighting videos filmed in countries where that practice is legal. The court decided that § 48 was overly broad, but noted that it was not deciding whether a statute strictly limited to crush videos would pass constitutional scrutiny.

After the law was struck down, the market for crush videos reemerged. Congress then passed the Animal Crush Video Prohibition Act of 2010. This law is codified in 18 USC § 48.

- A) What it does. A crush video is defined as an image that “depicts actual conduct in which one or more living non-human mammals, birds, reptiles, or amphibians is intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury” Congress determined that crush videos were obscene because they “appeal to the prurient interest in sex; are patently offensive; and lack serious literary, artistic, political or scientific value.” H.R. 5566, 111th Cong. §2(6)(A)-(C). New law makes it illegal to create or “knowingly sell, market, advertise, exchange, or distribute an animal crush video in, or using a means or facility of, interstate or foreign commerce.” Exempts videos of hunting, trapping, or fishing, the slaughter of animals for food, or customary and normal veterinary or agricultural husbandry practices.
- B) Who does it affect? Those who create or distribute crush videos in or using a means or facility of interstate commerce.
- C) How is it enforced? Fines and imprisonment of not more than 7 years.
- D) Is it enforced? In *U.S. v. Richards*, 755 F.3d 269 (5th Cir. 2014) two defendants were charged with 4 counts of creating and one count of distributing crush videos. They filed a motion to dismiss on the basis that § 48 is facially invalid under the First Amendment. The district court dismissed the charges, concluding that § 48 is facially invalid because it proscribes speech that is not within an unprotected category — specifically the speech is neither obscene nor incidental to criminal conduct — and is not narrowly tailored to serve a compelling government interest. The government timely appealed, arguing that on its face § 48 proscribes only unprotected speech and is not overbroad. The Appellate court reversed and remanded.

- 8) Horse Protection Act 15 U.S.C. §§ 1821-1831.

- A) What does it do? Makes it a crime to exhibit, or transport for the purpose of exhibition, any “sored” horse, which is a horse whose feet have been injured in order to alter the horse’s gait. Included in the U.S.C. under Commerce and Trade because Congress made a finding that:

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce

15 U.S.C. § 1822.

- B) Who does it affect? Managers of horse shows and auctions; shippers and exhibitors of “sored” horses.
- C) What animals does it protect? Mainly Tennessee Walking Horses.
- D) Although criminal penalties are provided for, most enforcement is civil.

III State animal related statutes with criminal penalties

- 1) RCW 9.08.090-Acts against animal facilities – Washington’s version of the Animal Enterprise Protection Act.
 - A) A person is guilty of a class C felony: If he or she, without authorization, knowingly takes, releases, destroys, contaminates, or damages any animal or animals kept in a research or educational facility where the animal or animals are used or to be used for medical research purposes or other research purposes or for educational purposes; or if he or she, without authorization, knowingly destroys or damages any records, equipment, research product, or other thing pertaining to such animal or animals – Unlike the AETA, does not extend to related entities or people.
 - B) Senate Bill 6566 was introduced in 2010, but has not been passed. Ag-gag bill. Several states have passed laws making it illegal to film inside animal facilities.
 - C) Also civil penalties for interference with research or agricultural facility. RCW 4.24.570-580.
- 2) Cruelty statute RCW Chapter 16.52
 - A) Amended in 2005 to add dog and cock fighting.
 - B) Amended in 2007 to add abandonment as cruelty.
 - C) Amended in 2009 to prevent defendant convicted of cruelty from owning animals.
 - D) Amended in 2011 to clarify that failing to provide food and water is cruelty and to strengthen penalty of prohibiting ownership of animals.
- 3) Protection orders 26.50.060, 26.50.110 (2009)
 - A) RCW 26.50.060(l) Order possession and use of essential personal effects. The court shall list the essential personal effects with sufficient specificity to make it clear which property is included. Personal effects may include pets. The court may order that a petitioner be granted the exclusive custody or control of any pet owned, possessed, leased, kept, or held by the petitioner, respondent, or minor child residing with either the petitioner or respondent and may prohibit the respondent from interfering with the petitioner's efforts to remove the pet. The

court may also prohibit the respondent from knowingly coming within, or knowingly remaining within, a specified distance of specified locations where the pet is regularly found.

B) RCW 26.50.110 penalties.

4) Dangerous Dogs 16.08.100

(2) If a dangerous dog of an owner with a prior conviction under this chapter attacks or bites a person or another domestic animal, the dog's owner is guilty of a class C felony, punishable in accordance with RCW [9A.20.021](#). It is an affirmative defense that the defendant must prove by a preponderance of the evidence that he or she was in compliance with the requirements for ownership of a dangerous dog pursuant to this chapter and the person or domestic animal attacked or bitten by the defendant's dog trespassed on the defendant's real or personal property or provoked the defendant's dog without justification or excuse. In addition, the dangerous dog shall be immediately confiscated by an animal control authority, placed in quarantine for the proper length of time, and thereafter destroyed in an expeditious and humane manner.

(3) The owner of any dog that aggressively attacks and causes severe injury or death of any human, whether or not the dog has previously been declared potentially dangerous or dangerous, shall, upon conviction, be guilty of a class C felony punishable in accordance with RCW [9A.20.021](#). It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the human severely injured or killed by the defendant's dog: (a) Trespassed on the defendant's real or personal property which was enclosed by fencing suitable to prevent the entry of young children and designed to prevent the dog from escaping and marked with clearly visible signs warning people, including children, not to trespass and to beware of dog; or (b) provoked the defendant's dog without justification or excuse on the defendant's real or personal property which was enclosed by fencing suitable to prevent the entry of young children and designed to prevent the dog from escaping and marked with clearly visible signs warning people, including children, not to trespass and to beware of dog. In such a prosecution, the state has the burden of showing that the owner of the dog either knew or should have known that the dog was potentially dangerous as defined in this chapter. The state may not meet its burden of proof that the owner should have known the dog was potentially dangerous solely by showing the dog to be a particular breed or breeds. In addition, the dog shall be immediately confiscated by an animal control authority, quarantined, and upon conviction of the owner destroyed in an expeditious and humane manner.

(4) Any person entering a dog in a dog fight is guilty of a class C felony punishable in accordance with RCW [9A.20.021](#).

5) RCW 9A.76.200

(1) A person is guilty of harming a police dog, accelerant detection dog, or police horse, if he or she maliciously injures, disables, shoots, or kills by any means any dog or horse that the person knows or has reason to know to be a police dog or accelerant detection dog, as defined in RCW [4.24.410](#), or police horse, as defined in

subsection (2) of this section, whether or not the dog or horse is actually engaged in police or accelerant detection work at the time of the injury.

(2) "Police horse" means any horse used or kept for use by a law enforcement officer in discharging any legal duty or power of his or her office.

(3) Harming a police dog, accelerant detection dog, or police horse is a class C felony.

(4)(a) In addition to the criminal penalty provided in this section for harming a police dog:

(i) The court may impose a civil penalty of up to five thousand dollars for harming a police dog.

(ii) The court shall impose a civil penalty of at least five thousand dollars and may increase the penalty up to a maximum of ten thousand dollars for killing a police dog.

(b) Moneys collected must be distributed to the jurisdiction that owns the police dog.