

**COMMUNITY CATS:
CHANGING THE LEGAL PARADIGM FOR THE
MANAGEMENT OF SO-CALLED “PESTS”**

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INTRODUCTION

The domestic cat (*Felis catus*) is an extremely popular companion animal in the United States. Thirty percent of American households combined own over seventy-four million cats, outnumbering the almost seventy million dogs owned in the United States.¹ The vast majority of Americans consider their pets a member of the family.² At the same time, unowned, free-roaming cats sometimes are viewed as “pests” or “nuisance animals” by animal control,³ and/or “invasive species” by

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1. *U.S. Pet Ownership Statistics*, AM. VETERINARY MED. FOUND., <https://www.avma.org/KB/Resources/Statistics/Pages/Market-research-statistics-US-pet-ownership.aspx> (last visited Sept. 26, 2016).

2. The Associated Press, *Poll: Americans Consider Pets Part of the Family*, NBC NEWS.COM (June 23, 2009, 10:50 AM), http://www.nbcnews.com/id/31505216/ns/health-pet_health/t/poll-americans-consider-pets-part-family/#.V3qy9LgrKhc.

3. *See, e.g.*, PRINCE GEORGE’S COUNTY, MD., CODE OF ORDINANCES § 3-101(a)(66)(A) (2016) (“The term ‘public nuisance animal’ shall mean . . . any animal which . . . [i]s

conservationists,⁴ and targeted for eradication citing “scientific” proof that such cats are a threat to native wildlife, the ecosystem, and public health.⁵ However, these free-roaming cats are members of our shared community and therefore often referred to as “community cats.”⁶

The federal government and most states classify cats as domesticated animals, not invasive species, and thus they typically fall under the jurisdiction of animal control agencies.⁷ Cats are quite prolific;

repeatedly found at large.”).

4. See, e.g., DAMIEN OSSI ET AL., D.C. DEP’T OF ENERGY & ENV’T, DISTRICT OF COLUMBIA WILDLIFE ACTION PLAN 2015: A CONSERVATION STRATEGY FOR WASHINGTON, D.C. 109 (2015) [hereinafter DDOE WILDLIFE ACTION PLAN], http://doec.dc.gov/sites/default/files/dc/sites/ddoe/service_content/attachments/05%202015%20WildlifeActionPlan%20Ch4%20Threats.pdf; *Cats and Other Invasives*, AM. BIRD CONSERVANCY, <https://abcbirds.org/threat/cats-and-other-invasives/> (last visited Sept. 26, 2016).

5. See, e.g., DDOE WILDLIFE ACTION PLAN, *supra* note 4, at 137–38; Travis Longcore et al., *Critical Assessment of Claims Regarding Management of Feral Cats by Trap-Neuter-Return*, 23 CONSERVATION BIOLOGY 887, 888 (2009); A.D. Roebing et al., *Rabies Prevention and Management of Cats in the Context of Trap-Neuter-Vaccinate-Release Programmes*, ZOOSES & PUB. HEALTH, Jan. 3, 2013, at 1, 4, <http://abcbirds.org/wpcontent/uploads/2015/05/Roebing-et-al.-2013-Rabies-prevention-and-management-of-cats-in-TNVR-programs.pdf>. The vilification of, and attack on, cats is escalating in the United States. The book *Cat Wars: The Devastating Consequences of a Cuddly Killer* released in September 2016 is perhaps most vicious attack on free-roaming cats concluding that they are “unrelenting killers and cauldrons of disease” who are “slowly unraveling the tapestry of our ecological well-being and threatening the health of people around the world.” PETER P. MARRA & CHRIS SANTELLA, *CAT WARS: THE DEVASTATING CONSEQUENCES OF A CUDDLY KILLER* 177, 178 (2016). One month later, in October 2016, the Smithsonian Magazine published an excerpt from Abigail Tucker’s, *The Lion in the Living Room*, vilifying “house cats” as “a tsunami of violence and death” and “a savage beast” causing the extinction of scores of endangered wildlife, including the Key Largo woodrat. Abigail Tucker, *To Save the Woodrat, Conservationists Have to Deal with an Invasive Species First: House Cats*, SMITHSONIAN.COM (quoting Australian Environmental Minister Greg Hunt), <http://www.smithsonianmag.com/science-nature/save-woodrat-conservationists-deal-invasive-species-first-house-cats-180960445/?no-ist> (last visited Sept. 26, 2016). Notably the excerpt exaggerates some statistics, stating the “United States alone has nearly 100 million pet cats” when the estimate is seventy-four million, a difference of twenty-six million cats, and relies on flawed statistics that cats “kill some 1.4 billion to 3.7 billion birds per year.” *Id.*; see *infra* text accompanying notes 91–97. And perhaps more notably, the author notes that the Key Largo “woodrat’s woes likely started in the 1800s, when Key Largo farmers razed hardwood hammocks to plant pineapple crops, and worsened in the 20th century when large-scale construction projects transformed their formal coral reef” such that the woodrat “is now found only in a handful of public reserves.” Tucker, *supra*. Free-roaming unowned cats are targeted for eradication in other countries as well. See Mitsuhiro A. Takahashi, *Cats v. Birds in Japan: How to Reconcile Wildlife Conservation and Animal Protection*, 17 GEO. INT’L ENVTL. L. REV. 135, 136 (2004).

6. *Community Cats*, ANIMAL HUMANE SOC’Y, <https://www.animalhumanesociety.org/services/community-cats> (last visited Sept. 26, 2016).

7. Shawn Gorman & Julie Levy, *A Public Policy Toward the Management of Feral Cats*, 2 PIERCE L. REV. 157, 159, 174 (2004) (first citing 50 C.F.R. § 14.4 (2003); then citing 16 U.S.C. § 3371(a) (2000); and then citing 50 C.F.R. § 16.11 (2003)) (discussing federal

they have an average life span of about fifteen years and are able to give birth while still kittens themselves.⁸ With a gestation period of about nine weeks, they have on average four kittens per litter and one and a half litters per year (although the mortality rate for kittens is seventy-five percent).⁹ As such, cats, in general, raise unique concerns for animal shelters.

According to the American Society for the Prevention of Cruelty to Animals (ASPCA),¹⁰ of the approximately 3.4 million cats who enter shelters annually, twice as many are designated “stray” as compared to owner-surrenders—often because they are not allowed in the residence or family members are allergic—and the redemption rate for stray cats reunited with their owners from the shelter is less than five percent.¹¹ The average adoption rate for cats is only thirty-seven percent, with 1.4 million cats killed by shelters annually.¹² As a result, many cats who enter a shelter do not leave alive. Some reasons that contribute to this are that many cats brought to the shelter are either not socialized to humans or are so frightened that they appear unsocial and thus unadoptable.¹³ Moreover, the stress and crowded environment of the shelter often results in the spread of disease among the population resulting in euthanasia.¹⁴

The traditional method of managing community cats is to “trap and

law); *id.* at 160, 174 (discussing state law).

8. Sam Bourne, *The Average Lifespan of a Cat Breed by Breed Chart*, PETCARERX (Mar. 4, 2014), <https://www.petcarerx.com/article/the-average-lifespan-of-a-cat-breed-by-breed-chart/1698> (showing ranges of life expectancy by breed); *How Early Can My Cat or Dog Get Pregnant?*, SPAYFIRST!, <http://www.spayfirst.org/faq/how-early-can-my-cat-or-dog-get-pregnant/> (last visited Sept. 26, 2016) (stating that cats may become pregnant as young as four months of age).

9. Julie Levy & P. Cynthia Crawford, *Humane Strategies for Controlling Feral Cat Populations*, 225 J. AM. VETERINARY MED. ASS’N 1354, 1355 tbl.1 (2004); *see also* Felicia B. Nutter et al., *Reproductive Capacity of Free-Roaming Domestic Cats and Kitten Survival Rate*, 225 J. AM. VETERINARY MED. ASS’N 1399, 1400 (2004).

10. *About Us*, AM. SOC’Y FOR PREVENTION CRUELTY TO ANIMALS, <http://www.aspca.org/about-us> (last visited Sept. 26, 2016).

11. *Pet Statistics*, AM. SOC’Y FOR PREVENTION CRUELTY TO ANIMALS, <http://www.aspca.org/animal-homelessness/shelter-intake-and-surrender/pet-statistics> (last visited Sept. 26, 2016).

12. *Id.*

13. *See* Margaret R. Slater et al., *A Survey of the Methods Used in Shelter and Rescue Programs to Identify Feral and Frightened Pet Cats*, 12 J. FELINE MED. & SURGERY 592, 593, 599 (2010).

14. *See* P.A. Pesavento & B.G. Murphy, *Common and Emerging Infectious Diseases in the Animal Shelter*, 51 VETERINARY PATHOLOGY 478, 480, 488 (2013); Patricia Turner et al., *Animal Shelters and Animal Welfare: Raising the Bar*, 53 CAN. VETERINARY J. 893, 894 (2012).

remove” (where “remove” virtually always means kill) or perhaps hunt and/or poison them.¹⁵ Yet, the number of free-roaming cats in the United States today is estimated at approximately seventy million.¹⁶ Moreover, the unnecessary killing of healthy felines is unacceptable to most Americans.¹⁷ A non-lethal, humane method of control, Trap-Neuter-Vaccinate-Return (TNVR),¹⁸ originating in England in the 1950s and introduced in the United States in the 1990s, has become the focus of

15. See, e.g., AARON HILDRETH ET AL., UNIV. OF NEB.-LINCOLN, INST. OF AGRIC. & NAT. RES., EC1781, FERAL CATS AND THEIR MANAGEMENT 3–5 (2010), <http://extensionpublications.unl.edu/assets/pdf/ec1781.pdf> (discussing examples of trap and remove programs); see also *Taking a Broader View of Cats in the Community: NACA Feral Cat Policy Moves Toward Management*, ANIMAL SHELTERING, Sept./Oct. 2008 at 8, 8 [hereinafter *Taking a Broader View*], http://www.aplnj.org/assets/pdf/NACA_Interview.pdf (summarizing interview with Mark Kumpf, National Animal Control Association (NACA) President who referred to the old policy of feral cat “removal” as “capture-and-euthanize”).

16. Maryann Mott, *U.S. Faces Growing Feral Cat Problem*, NAT’L GEOGRAPHIC NEWS (Sept. 7, 2004), http://news.nationalgeographic.com/news/2004/09/0907_040907_feralcats.html; see also William R. Folger et al., *Free-Roaming, Abandoned and Feral Cats*, 14 J. FELINE MED. & SURGERY 822, 822 (2012), <http://www.catvets.com/public/PDFs/PositionStatements/FreeRoaming.pdf> (70–100 million).

17. See KARYEN CHU & WENDY M. ANDERSON, ALLEY CAT ALLIES, U.S. PUBLIC OPINION ON HUMAN TREATMENT OF STRAY CATS 1 (2007), <http://www.alleycat.org/resources/public-opinion-on-humane-treatment-of-cats/> (follow “PDF” hyperlink) (finding that approximately eighty percent of respondents to a survey believe free-roaming cats should not be killed); Peter J. Wolf, *New Study Reveals Widespread Support for Trap-Neuter-Return*, FAUNALYTICS, <https://faunalytics.org/new-survey-reveals-widespread-support-for-trap-neuter-return/> (last visited Sept. 26, 2016).

18. *A Brief History of TNR*, BEST FRIENDS ANIMAL SOC’Y, <http://bestfriends.org/resources/brief-history-tnr> (last visited Sept. 26, 2016); *What is TNvR?*, SPAYING CAP. REGION UNOWNED FERAL FELINES, <http://scruffcats.org/what-is-tnvr/> (last visited Sept. 26, 2016). TNR was the original and traditional term used to describe the program. *Trap, Neuter, Return*, HUMANE SOC’Y PINELLAS, <http://www.humanesocietyofpinellas.org/trap-neuter-return/> (last visited Sept. 26, 2016). Recently, advocates have been expressly including the vaccination component of the program in the name. See *id.* The term TNVR is used here in order to make specific reference to the vaccination aspect of the program to counter some of the public health concerns raised by detractors of TNVR programs. Moreover, some use the term “Release” instead of “Return.” Most TNVR programs are designed to return the cats to their original location and are always preferred. *What is TNvR?*, *supra*. However, in the event that it is impossible to return the cats to their original location, perhaps because of construction or other external threats to the lives of the cats, many advocates will opt for “releasing” them to another available location, taking the health of the cats and new environment into account, rather than killing them because they are not able to be “returned.” See *id.* Opponents of TNVR claim that the cats are merely “released into the environment” which is not accurate. *Basic Information About TNR*, TNR REALITY CHECK, <http://www.tnrrealitycheck.com/basicInfo.asp> (last visited Sept. 26, 2016). Thus, because “return” is by far the most common and preferred approach, it is more accurate to use the term “Return.” See *Cats Indoors: Trap-Neuter-Release*, AM. BIRD CONSERVANCY, <https://abcbirds.org/program/cats-indoors/trap-neuter-release/> (last visited Sept. 26, 2016).

animalists¹⁹ nationwide²⁰ and adopted by numerous localities worldwide²¹ as the most humane, effective, and efficient method for

19. Animalist is a term created by Professor David Favre to refer to lawyers and advocates who work to promote the interests of animals. See Randall S. Abate et al., *Animal Law and Environmental Law: Exploring the Connections and Synergies*, 46 ENVTL. L. REP. NEWS & ANALYSIS 10177, 10187–89 (2016). It is designed to be inclusive and not distinguish between animal welfare and animal rights advocates. *Id.* It is the animal-advocate equivalent to environmentalist, depicting lawyers and advocates who work to promote the environment. *Id.* The terms, of course, are not mutually exclusive. *Id.*

20. TNVR is endorsed by major animal advocacy organizations nationwide. See AM. HUMANE ASS'N, AMERICAN HUMANE ASSOCIATION ANIMAL WELFARE POLICY AND POSITION STATEMENTS 9 (2012), <http://www.americanhumane.org/app/uploads/2016/08/animal-position.pdf>; ASS'N OF SHELTER VETERINARIANS, TRAP-NEUTER-RETURN OF FREE-ROAMING & COMMUNITY CATS (2015), <http://www.sheltervet.org/assets/docs/position-statements/trap-neuterreturn.pdf>; George W. Harding, *Extended Animal Care & Control Concerns—Community Cat Management*, in NACA GUIDELINES 28 (2016), http://c.y.mcdn.com/sites/www.nacanet.org/resource/resmgr/Docs/NACA_Guidelines.pdf (recognizing that TNVR programs may be effective); *Position Statement on Feral Cat Management*, AM. SOC'Y FOR PREVENTION CRUELTY TO ANIMALS, <http://www.aspc.org/about-us/aspc-policy-and-position-statements/position-statement-on-feral-cat-management> (last visited Sept. 26, 2016); *Frequently Asked Questions About TNR*, BEST FRIENDS ANIMAL SOC'Y, <http://bestfriends.org/resources/faqs-about-trap-neuter-return-tnr> (last visited Sept. 26, 2016); *Feral Cats*, DEFENSE ANIMALS, <http://www.idausa.org/campaigns/dogs-cats/feral-cats/> (last visited Sept. 26, 2016); *Friends of Animals Position Statement on Feral Cats and Trap-Neuter-Return*, FRIENDS ANIMALS, <https://www.friendsofanimals.org/programs/domesticated-and-feral-animals/cats-and-dogs/friends-animals-position-statement-feral-cats> (last updated June 2007); *The HSUS's Position on Cats*, HUMANE SOC'Y U.S., http://www.humanesociety.org/animals/cats/facts/cat_statement.html?credit=web_id83574224#unowned_cats (last visited Sept. 26, 2016); Genevieve Rajewski, *Feline Fixers*, TUFTS NOW (June 1, 2011), <http://now.tufts.edu/articles/feline-fixers>; *Help Save Companion Animals*, WORLD ANIMAL FOUND., http://www.worldanimalfoundation.net/companion_animals.html#TOC-Trap-Neuter-Return:-Saving-Feral-Ca. (last visited Sept. 26, 2016).

21. ELIZABETH HOLTZ, TRAP-NEUTER-RETURN ORDINANCES AND POLICIES IN THE UNITED STATES: THE FUTURE OF ANIMAL CONTROL 3 (2013), [http://www.accord3.com/docs/WhitePaper%20TNROrdinances%20PolicyBrief\(1\).pdf](http://www.accord3.com/docs/WhitePaper%20TNROrdinances%20PolicyBrief(1).pdf) (“[A]t least 331 local governments [in the United States] incorporate TNR.”); see also Eugenia Natoli et al., *Management of Feral Domestic Cats in the Urban Environment of Rome (Italy)*, 77 PREVENTATIVE VETERINARY MED. 180, 181 (2006); *Trap-Neuter-Return in Seoul*, ANIMAL RESCUE KOREA (Mar. 11, 2013), <http://www.animalrescuekorea.org/articles/trap-neuter-return-in-seoul>; *Feral Cats*, DEFENSE ANIMALS, <http://www.idausa.org/campaigns/dogs-cats/feral-cats/> (last visited Sept. 26, 2016); Piper Hoffman, *Israel Will Trap, Neuter and Return 45,000 Street Cats*, CARE2 (Nov. 2, 2013), <http://www.care2.com/causes/israel-will-trap-neuter-and-return-45000street-cats.html>; *Do You Know About Our TNR Program?*, SOC'Y FOR PREVENTION CRUELTY TO ANIMALS (June 5, 2013), <http://www.sPCA.com/?p=6065&lang=en>; *History of TNR in Hong Kong*, SOC'Y FOR PREVENTION CRUELTY TO ANIMALS, <http://www.sPCA.org.hk/en/animal-birth-control/tnr-trap-neuter-return/history-tnr-hong-kong> (last visited Sept. 26, 2016); *The Trap, Neuter, Return Program and the Feral Cat Coalition*, TORONTO, <http://www1.toronto.ca/wps/portal/contentonly?vgnextoid=6626f1f960745410VgnVCM10000071d60f89RCRD&vgnextchannel=a5bb39220b2c1410VgnVCM10000071d60f89RCRD> (last visited Sept. 26, 2016).

controlling the community cat population.²² TNVR involves (T) trapping the cats, (NV) having them evaluated by a veterinarian and, after determining they are healthy, sterilizing, vaccinating and ear-tipping (the universal sign of a sterilized community cat) them. After monitoring their recovery, the cats are then (R) returned to their original location to live out their lives.²³ Kittens and socialized adults are removed and placed for adoption when possible.²⁴ In some situations, the returned cats are under the care of a volunteer who feeds, waters, and monitors the cats for illness or injury and for any new arrivals so that they may be TNVRed.²⁵

Public education regarding community cats and TNVR, and emphasizing the responsibility of cat owners to care for their owned cats so they do not add to the community cat population, are the final steps that make TNVR successful.²⁶ Opponents of TNVR have argued that the presence of a TNVR program that includes ongoing caregiving may encourage owners to abandon their cats knowing they will be cared for; thus TNVR may increase the number of community cats.²⁷ However, it is difficult to imagine a responsible owner abandoning their cat because their neighbor is feeding community cats. Arguably, if an irresponsible owner wants to abandon their cat, they will do so with or without knowledge that the cat might be cared for by a caregiver. Thus, the

22. See, e.g., Natoli et al., *supra* note 21, at 185; *Do You Know About Our TNRM Program?*, *supra* note 21.

23. See HOLTZ, *supra* note 21, at 4; TORONTO, *supra* note 21.

24. See Julie K. Levy et al., *Evaluation of the Effect of a Long-Term Trap-Neuter-Return and Adoption Program on a Free-Roaming Cat Population*, 222 J. AM. VETERINARY MED. ASS'N 42, 44 (2003) (noting 47% of the 155 cats involved in the TNVR study were adopted over the course of the study).

25. *Id.* at 43, 45. TNVR typically involves multiple volunteers including a trapper, veterinarian, returner, and possibly a caregiver, although in some cases the same person may trap, return, and care for the cats. Traditionally the debate over TNVR focuses on the entire program without distinguishing among the different components. This article will do the same unless there is a specific need to distinguish. *Id.* at 43.

26. *What is TNVR?*, FERAL CAT FOCUS WNY, <http://feralcatfocus.org/tnvr/> (last visited Sept. 26, 2016).

27. Nico Dauphine & Robert J. Cooper, *Impacts of Free-Ranging Domestic Cats (Felis catus) on Birds in The United States: A Review of Recent Research with Conservation and Management Recommendations*, in PROCEEDINGS OF THE FOURTH INTERNATIONAL PARTNERS IN FLIGHT CONFERENCE: TUNDRA TO TROPICS 205, 211–12 (2009), http://www.pwrc.usgs.gov/pif/pubs/McAllenProc/articles/PIF09_Anthropogenic%20Impacts/Dauphine_1_PIF09.pdf. Of note, the author of the piece, Dr. Nico Dauphine, was convicted of attempting to poison cats in her neighborhood and resigned from her position at the Smithsonian Migratory Bird Center in 2011. Michael Price, *Wildlife Biologist Found Guilty of Attempting to Poison Feral Cats*, AAAS: SCIENCE (Nov. 1, 2011, 5:35 PM), <http://www.sciencemag.org/news/2011/11/wildlife-biologist-found-guilty-attempting-poison-feral-cats>.

presence of a TNVR caregiver likely has negligible effect on the abandonment of owned cats. However, for those cats who are abandoned, the presence of a caregiver will help efforts to control the population, as the caregiver will identify the newly introduced cats (who may find their way to the easiest food source if abandoned close by) and will TNVR the new cats, which will avoid unwanted litters by the newly abandoned, intact cats. In fact, one TNVR case study revealed a twenty-two percent decrease overall in the number of free-roaming cats despite a twenty-one percent rate of cat immigration.²⁸

“Many veterinary and animal rights and welfare professionals also object to TNVR as inhumane, because it . . . exposes domestic animals to neglect, abuse, and death by trauma.”²⁹ However, the health of community cats, in general, is quite good and cats are quite capable of thriving on their own.³⁰ They were domesticated some 8,000–10,000 years ago around nomadic human agricultural settlements.³¹ The agriculture attracted rodent populations which in turn attracted wildcats who lived close by and who gradually became socialized to humans.³² “They migrated with humans across the globe,” and “unlike species domesticated for agriculture (e.g., cows) or transport (e.g., horses) cats co-occurred with modern humans.”³³ Thus, although today a domesticated species, they still may flourish outdoors.³⁴ One study of community cats “examined in spay/neuter clinics in six states [found that] less than one percent of those cats [were] euthanized due to debilitating

28. Natoli et al., *supra* note 21, at 184.

29. Dauphine & Cooper, *supra* note 27, at 212; MARRA & SANTELLA, *supra* note 5, at 126 (“[Cats] suffer and die horrible deaths because they must fend for themselves outdoors.” (quoting *What is PETA’s Stance on Programs that Advocate Trapping, Spaying and Neutering, and Releasing Feral Cats?*, PEOPLE FOR ETHICAL TREATMENT ANIMALS, <http://www.peta.org/about-peta/faq/what-is-petas-stance-on-programs-that-advocate-trapping-spaying-and-neutering-and-releasing-feral-cats/> (last visited Sept. 26, 2016))). *But see* Karen L. Johnson & Jon Cicirelli, *Study of the Effect on Shelter Cat Intakes and Euthanasia From a Shelter Neuter Return Project of 10,080 Cats from March 2010 to June 2014*, PEERJ, Oct. 30, 2014, at 9 (noting a TNVR study that found dead cat pick up off the streets declined 20%).

30. *The Wild Life of Feral Cats*, NO KILL ADVOCATE (No Kill Advocacy Center, Oakland, Cal.), 2008, at 1, 2, http://www.friends4life.org/pdf/Feral_Fact_sheet.pdf.

31. CHU & ANDERSON, *supra* note 17, at 3–4 (quoting Stephen J. O’Brien & Warren E. Johnson, *The Evolution of Cats*, SCI. AM., July 2007, at 68, 74, <http://www.bionica.info/biblioteca/O'brien2007EvolutionCats.pdf>).

32. *Id.* at 4.

33. *Id.*

34. *Id.*

conditions, trauma, or infectious diseases.”³⁵ Further, another study has shown that TNVRed community cats “had similar or lower prevalence rates of infections than those published for pet cats in the United States.”³⁶

As TNVR’s popularity has grown, some in the conservation community, those primarily (or solely) concerned with the sustainability of species and the ecosystem, have attacked its use citing a lack of scientific proof that it works and insisting that lethal methods be used to protect wildlife and public health.³⁷ To be clear, TNVR, like lethal methods of management, is designed to *reduce* the community cat population, but animalists, those who are not only concerned about species and the ecosystem, but also about individual animal welfare, argue that TNVR is the more effective, efficient, humane, and popular method.³⁸ First, although lethal methods have been utilized for many decades, there is still a robust population of free-roaming cats; clearly, it has not worked.³⁹ One reason is that the sudden removal of several cats from an area may allow the remaining (often less conspicuous) cats to breed up to the area’s carrying capacity, and attract new cats to the area once populated by those trapped thereby allowing the cycle to continue.⁴⁰ With TNVR, the cats are neutered and released back to their home so

35. *Id.* at 3; see Jennifer L. Wallace & Julie K. Levy, *Population Characteristics of Feral Cats Admitted to Seven Trap-Neuter-Return Programs in the United States*, 8 J. FELINE MED. & SURGERY 279, 282 (2006).

36. CHU & ANDERSON, *supra* note 17, at 3.

37. See Paul L. Barrows, *Professional, Ethical, and Legal Dilemmas of Trap-Neuter-Release*, 225 J. AM. VETERINARY MED. ASS’N 1365, 1365, 1368 (2004), https://www.avma.org/News/Journals/Collections/Documents/javma_225_9_1365.pdf. Marra and Santella state that TNVR fails primarily because insufficient numbers of cats are trapped and neutered and “colonies are constantly receiving new animals.” MARRA & SANTELLA, *supra* note 5, 137. Arguably a TNVR program is only as effective as the resources devoted to it so that sufficient cats may be trapped and neutered. Thus failing to trap and neuter sufficient cats is not a problem with TNVR generally. Moreover, the same critique can be made of lethal methods; they must kill many cats to be successful. Furthermore, colonies will receive new cats under lethal methods. However, unlike trap and kill programs where the new arrivals will multiply, in many TNVR programs caregivers are present to care for and monitor the colonies and trap and neuter new arrivals.

38. Barrows, *supra* note 37, at 1365.

39. See *Taking a Broader View*, *supra* note 15, at 8 (quoting Mark Kumpf referring to the old policy of “removal” of feral cats as “bailing the ocean with a thimble”); Fact Sheet, Alley Cat Allies, *The Vacuum Effect: Why Catch and Kill Doesn’t Work 1* (2011) [hereinafter Fact Sheet, *The Vacuum Effect*], <http://www.alleycat.org/VacuumEffectScience> (follow “PDF” hyperlink).

40. Fact Sheet, *The Vacuum Effect*, *supra* note 39, at 1; see also GRANT SIZEMORE, AM. BIRD CONSERVANCY, REPORT TO POMPANO BEACH CITY COMMISSIONERS: THE SCIENCE OF FERAL CATS 2 (2013), http://abcbirds.org/wp-content/uploads/2015/05/Report_The_Science_of_Feral_Cats.pdf.

there is no sudden loss in the population that draws new cats to the area and, of course, no breeding occurs because the cats have been sterilized.⁴¹ Moreover, neutering the cats reduces nuisance behaviors, including yowling and fighting, allowing the cats to co-exist in greater harmony with their human neighbors.⁴² Over time, the cats die naturally.⁴³

Second, lethal methods must be accomplished at government expense and the cost to handle and dispose of the cats is more expensive than to sterilize and vaccinate the cats.⁴⁴ For example, Hillsborough County Animal Services in Tampa Florida spent approximately \$168 to catch, hold, and dispose (i.e., kill) of a cat while the cost to sterilize and vaccinate a cat was approximately sixty-five dollars.⁴⁵ Moreover, TNVR often is conducted by nonprofits and individual volunteers costing the government little or nothing. For example, in 2007 Cook County, Illinois enacted a Community Cat Ordinance.⁴⁶ By 2013, the county had saved more than \$1.5 million in their efforts to control feral cats.⁴⁷ Instead of killing 500–600 cats per year at \$135 per cat, nearly 18,000 cats had been sterilized, vaccinated, and ear-tipped through collaboration, communication, education, and prevention programs conducted by nonprofit humane groups.⁴⁸

Third, TNVR only returns cats who are healthy and the vaccination helps ensure they remain healthy and do not create a public health hazard.⁴⁹ Finally, although some argue that a life outdoors for cats is

41. Fact Sheet, Alley Cat Allies, *Why Trap-Neuter-Return Feral Cats? The Case for TNR* 2, 4 (2012) [hereinafter Fact Sheet, *Why TNR?*], <http://www.alleycat.org/resources/why-trap-neuter-return-feral-cats-the-case-for-tnr/> (follow “PDF” hyperlink).

42. See Finkler et al., *The Impact of Anthropogenic Factors on the Behavior, Reproduction, Management, and Welfare of Urban, Free-Roaming Cat Populations*, 24 ANTHROZOÖS 31, 45 (2011).

43. Fact Sheet, *Why TNR?*, *supra* note 41, at 2.

44. *Id.* at 3. See also *Taking a Broader View*, *supra* note 15, at 8, 9, where Mark Kumpf explains, “[T]here’s no department that I’m aware of that has enough money in their budget to simply practice the old capture-and-euthanize policy; nature just keeps having more kittens The cost for picking up and simply euthanizing and disposing animals is horrendous”

45. Francis E. Hamilton, *Leading and Organizing Social Change for Companion Animals*, 23 ANTHROZOÖS 277, 280 (2010); see also Johnson & Cicirelli, *supra* note 29, at 1, 2 (“[Twenty-five dollars per cat to sterilize and] vaccin[ate] against rabies and other common cat disease, flea treatment, ear treatment, microchip, and ear-tipping.”).

46. Julie Mazzola, *Protecting Feral Cats*, PAWS CHICAGO (May 1, 2013), <http://www.pawschicago.org/news-resources/news-features/paws-chicago-news/paws-chicago-news-item/showarticle/protecting-feral-cats/> (summarizing 2013 sponsor progress report).

47. See *id.*

48. *Id.*

49. Fact Sheet, *Why TNR?*, *supra* note 41, at 2.

worse than death, a large percentage of Americans, some seventy to eighty percent disagree.⁵⁰ They would rather provide the cats an opportunity at life on the street than certain death in the shelter.⁵¹

Free-roaming cats are not the only animals targeted in the United States as pests; native white-tailed deer, Canada geese, and coyotes are just a few of the other species often targeted as pests in the United States. As native white-tailed deer populations have grown, often in urban settings such as Rock Creek Park within our nation's capital, federal and local officials plan deer "culls" to reduce their population.⁵² Proponents cite nuisance behaviors, such as eating shrubbery or defecating on lawns, public health and safety concerns (as deer are often thought to be either a source of Lyme disease⁵³ or involved in car accidents), and environmental concerns claiming the deer, through browsing, are destroying native plants and the habitat of other wildlife.⁵⁴ Canada geese also are quite abundant in many United States urban areas.⁵⁵ Similar concerns are raised against geese with claims that they pose threats to humans due to their droppings contaminating water or littering the neighborhood, occasionally aggressive behavior, and collisions with aircraft.⁵⁶ And, coyotes, historically found primarily in the North American Great Plains, have extended their range throughout the United States and adapted to urban areas.⁵⁷ Coyotes are viewed as pests with

50. CHU & ANDERSON, *supra* note 17, at 2; Wolf, *supra* note 17.

51. CHU & ANDERSON, *supra* note 17, at 2; Wolf, *supra* note 17.

52. See DDOE WILDLIFE ACTION PLAN, *supra* note 4, at 124; *White Tailed Deer Management*, NAT'L PARK SERV., <https://www.nps.gov/rocr/learn/management/white-tailed-deer-management.htm> (last visited Sept. 26, 2016); see also Chuck Stermer, *Big Buck Down or the Lack Thereof: Hunting for a Solution to the Urban White-Tailed Deer Problem*, 16 TEX. TECH. ADMIN. L.J. 219, 224–25 (2014).

53. According to the Centers for Disease Control, Lyme disease is spread only through the bite of infected black-legged ticks, sometimes referred to as "deer ticks," because of their propensity to feed on white-tailed deer; although they may feed on a number of other mammals, including humans. See *Lyme Disease Home: Transmission*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/lyme/transmission/index.html>; Rachel Johnson, *Killing Deer Not the Answer to Reducing Lyme Disease, Says HSPH Scientist*, HARV. T.H. CHAN SCH. PUB. HEALTH (Nov. 23, 2010), <https://www.hsph.harvard.edu/news/features/killing-deer-not-answer-reducing-lyme-disease-html/> (explaining that ticks do not get Lyme disease from deer, the ticks are the carrier of the disease, and if hunters kill deer, there will be more ticks per deer, not a decline in ticks).

54. Peter Fitzgerald, *Good Badger, Bad Badger: The Impact of Perspective on Wildlife Law and Policy*, 10 J. ANIMAL & NAT. RESOURCE L. 41, 59 (2014).

55. DDOE WILDLIFE ACTION PLAN, *supra* note 4, at 95, 124–25.

56. Fitzgerald, *supra* note 54, at 59.

57. Jeffrey S. Green et al., *Coyotes*, INTERNET CTR. FOR WILDLIFE DAMAGE MGMT., <http://icwdm.org/handbook/carnivor/coyotes.asp> (last visited Sept. 26, 2016).

claims that they cause damage to “livestock, poultry, and crops,” prey on companion animals, and threaten public health and safety either as “carriers of rabies” or when found on airport runways and in urban areas.⁵⁸ Ironically, the U.S. Fish and Wildlife Service, a program of the U.S. Department of Agriculture, Animal and Plant Health Inspection Service,⁵⁹ the agency responsible for enforcing the Animal Welfare Act, uses inhumane lethal control to kill so-called “pests” annually.⁶⁰ Between 2004 and 2013 they killed “nearly 34 million bears, bobcats, coyotes, mountain lions, wolves and many other wild animals in the name of protecting crops, farm animals, private property and even other species such as rare birds and prey species favored by hunters. Unintended targets—even endangered species and pets—are also killed”⁶¹ costing taxpayers more than one billion dollars.⁶² While management of these and other species may be required, non-lethal methods exist that are humane and effective, both to control population and redirect the animals away from areas that create public hazards, including contraception, fencing, frightening devices, and repellents.⁶³

Other countries target free-roaming cats and other so-called “pests” as well.⁶⁴ Although the specific conservation concerns raised in other countries may differ from those in the United States, the same strategy is used to vilify these animals and kill them.⁶⁵ For example, in the United

58. *Id.*

59. *Wildlife Services*, U.S. DEP’T AGRIC. ANIMAL & PLANT HEALTH INSPECTION SERV., https://www.aphis.usda.gov/aphis/ourfocus/wildlifedamage/SA_Program_Overview (last modified Aug. 19, 2015).

60. *Wildlife Disservice: The USDA Wildlife Services’ Inefficient and Inhumane Wildlife Damage Management Program*, HUMANE SOC’Y U.S., http://www.humanesociety.org/issues/lethal_wildlife_management/facts/usda-wildlife-services-inefficient-and-inhumane.html (last visited Sept. 26, 2016).

61. *Id.*

62. *Id.*

63. See Fact Sheet, Brooke Maslo & Chloe Lewis, Rutgers, N.J. Agric. Experiment Station, FS1217, Strategies for Resident Canada Goose Control and Management in New Jersey (2013), <https://njaes.rutgers.edu/pubs/fs1217/> (follow “Download PDF” hyperlink); Uma Ramakrishnan, Non-Lethal Methods of Controlling Deer Population Growth, Presentation at the Connecticut Agricultural Experiment Station: Plant Science Day 2002 (Aug. 7, 2002), <http://www.ct.gov/caes/cwp/view.asp?a=2824&q=378098>; Green et al., *supra* note 57; *Deer Damage Management Techniques: Non-Lethal*, MD. DEP’T NAT. RESOURCES, http://dnr2.maryland.gov/wildlife/Pages/hunt_trap/ddmtnonlethal.aspx (last visited Sept. 26, 2016).

64. See Fitzgerald, *supra* note 54, at 92; Olivia Khoo, *A New Call to Arms or a New Coat of Arms? The Animal Rights and Environmentalism Debate in Australia*, 5 J. ANIMAL L. 49, 50 (2009).

65. See Fitzgerald, *supra* note 54, at 46.

Kingdom, badgers have “enjoy[ed] a prominent and privileged position,” yet when the animal was linked to bovine tuberculosis, although the science is vigorously debated, they became viewed as diseased vermin to be eradicated.⁶⁶ The kangaroo is the national icon of Australia, depicted on the Australian Coat of Arms. Yet as their numbers have grown, they have become “viewed as one of the country’s most persistent pests”⁶⁷ and thousands are culled annually.⁶⁸ In Australia, the *Model Code of Practice for the Humane Control of Feral Cats* defines a pest animal very broadly as a “native or introduced, wild or feral, non-human species of animal that is currently troublesome locally, or over a wide area, to one or more persons, either by being a hazard, a general nuisance, or by destroying food, fiber, or natural resources.”⁶⁹ Thus, kangaroos are not alone in being targeted; also viewed as “pests” in Australia are native birds, possums, and flying foxes, and nonnative feral camels, goats, horses, donkeys, pigs, rabbits, foxes, dogs, and cats.⁷⁰ Most recently, in an unprecedented and cruel move, a local Queensland government plans to eradicate feral goats on Pelorus Island by releasing dingoes to kill them.⁷¹ The dingoes will, in turn, be killed in two years by an embedded poison capsule.⁷²

Common themes are apparent in all cases of “pest” management. First, proponents characterize the animals as “pests” who are causing serious damage to the ecosystem and human interests based on science that is often inaccurate, conflicting, and/or highly debated.⁷³ Second, the primary, if not sole, method of management is lethal, with officials describing non-lethal methods of management as impracticable.⁷⁴ Third, and most importantly, the lethal methods prove to be ineffective as a long-term strategy given the continually increasing number and annual

66. *Id.* at 44, 46–48.

67. Khoo, *supra* note 64, at 50.

68. See, e.g., Jordan Hayne, *Government Announces 2,000 Kangaroos To Be Culled in Canberra*, ABC NEWS (May 13, 2016, 12:44 AM), <http://www.abc.net.au/news/2016-05-13/kangaroos-to-be-culled-in-canberra-over-coming-months/7412680>.

69. MODEL CODE OF PRACTICE FOR THE HUMANE CONTROL OF FERAL CATS (INVASIVE ANIMALS COOP. RESEARCH CTR. 2012), <http://www.pestsmart.org.au/wp-content/uploads/2012/09/catCOP2012.pdf>.

70. Sophie Riley, *Model Codes for Humane Treatment of Animals: Australian Law and Policy on Lethal Control of Pests*, 18 J. INT’L WILDLIFE L. & POL’Y 276, 279, 280 (2015).

71. Nicole Mortillaro, *Self-Destructing Dingoes Let Loose on Australian Island Goats*, GLOBAL NEWS, <http://globalnews.ca/news/2853945/self-destructing-dingoes-let-loose-on-australian-island-goats/> (last updated July 28, 2016, 4:51 PM).

72. *Id.*

73. See Fitzgerald, *supra* note 54, at 92; Khoo, *supra* note 64, at 50.

74. See Riley, *supra* note 70, at 280.

culls of the animals.⁷⁵ For animalists who value the lives of the animals and seek a more humane and effective approach to their management, this cycle must end. Instead of killing these animals, non-lethal methods of management that respect and value the lives of the individual animals are the solutions that not only are more ethically responsible and humane, but more effective and efficient.

Recognizing that the science, policy, and law involving the different animal “pests” are unique, the approach to changing the traditional paradigm is largely the same. Although the debate continues surrounding free-roaming cats, the approach of cat advocates to turn the tide away from deeply entrenched lethal methods of animal control provides an interesting and useful case study on how to alter the political, scientific, and legal paradigm in favor of respecting animal life for all animals deemed “pests.” The strategy involves (1) reconceiving the animals as members of our community and reframing the debate over their management, (2) challenging the science used to vilify the animals and promote the killing of them as a means of management while critically studying and documenting the efficacy of non-lethal methods and emphasizing areas of potential agreement, and (3) implementing legal reform to allow for the implementation of non-lethal methods as the primary (if not sole) means for managing the animals. Our relationship with, devotion to, and love for our companion felines sets the stage for the domestic cat as a prime candidate to serve as a “gateway species” for a paradigm shift regarding our approach to managing all animals viewed as “pests.”

I. RECONCEPTUALIZE FREE-ROAMING CATS

The first step to changing the traditional paradigm is to reconceive the animals as members of our community and reframe the debate over their management. For years the dialogue referred to free-roaming cats as “feral,” and “pests,” and, more recently, as “invasive species.”⁷⁶ A “feral” animal is defined as a “wild beast,” connoting images of a vicious and predatory animal that preys on native birds and small mammals and spreads disease.⁷⁷ A “pest” is defined as an “animal detrimental to

75. *Id.*

76. *See, e.g.,* PRINCE GEORGE’S COUNTY., MD., CODE OF ORDINANCES § 101(a)(66)(A) (2016); DDOE WILDLIFE ACTION PLAN, *supra* note 4, at 109; *Cats and Other Invasives*, *supra* note 4.

77. *Feral*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/feral> (last visited Sept. 26, 2016).

humans”;⁷⁸ while an “invasive species” is defined as “non-native (or alien) to the ecosystem” and “likely to cause economic or environmental harm or harm to human health.”⁷⁹ By using such terms that characterize the cats as wild beasts, foreign to the location, and detrimental to humans, it is relatively easy to promote lethal methods for their eradication.⁸⁰ In fact, free-roaming cats may be “feral” in the sense that they are not socialized to humans, or they may be “stray” in the sense that they are socialized to humans but abandoned by their owners and now living on the streets.⁸¹ Further, “cats have followed mankind for centuries and [perhaps should] no longer be considered non-indigenous because native species have since acclimated to their presence.”⁸² Moreover, all free-roaming cats are members of the domestic species we share our lives and homes with, those we call our family members, and on whom we spend tens of billions of dollars annually.⁸³ As such, unowned free-roaming cats are members of our shared community; in other words, they are “community cats.”⁸⁴ Use of the term “community cats” both allows for the inclusion of all free-roaming cats, independent of their socialization, and characterizes them as individuals who share our streets and community rather than as vicious invasive pests detrimental to human interests.⁸⁵

In addition, reframing the debate surrounding the management of so-called “pests” is critical. First, clarify the terminology. TNVR opponents often use vague terms to describe lethal methods of

78. *Pest*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/pest> (last visited Sept. 26, 2016).

79. *What is an Invasive Species?*, NAT’L INVASIVE SPECIES INFO. CTR., <https://www.invasivespeciesinfo.gov/whatis.shtml> (last modified May 24, 2016).

80. See, e.g., Mark J. Farnworth et al., *What’s in a Name? Perceptions of Stray and Feral Cat Welfare and Control in Aotearoa, New Zealand*, 14 J. APPLIED ANIMAL WELFARE SCI. 59, 68–70 (2011) (finding that the use of the terms “stray” and “feral” may have a significant impact on the public’s view of welfare and conservation issues as they relate to community cats).

81. Fact Sheet, Alley Cat Allies, *Feral and Stray Cats—An Important Difference* 1–2 (2011), <http://www.alleycat.org/resources/feral-and-stray-cats-an-important-difference/#> (follow “PDF” hyperlink).

82. Gorman & Levy, *supra* note 7, at 158.

83. Michelle Castillo, *Americans Will Spend More than \$60 Billion on Their Pets This Year*, NBC NEWS (July 12, 2015, 4:53 PM), <http://www.nbcnews.com/business/consumer/americans-will-spend-more-60-billion-their-pets-year-n390181>.

84. See *Feral and Community Cats*, AM. SOC’Y FOR PREVENTION CRUELTY TO ANIMALS PROF., <http://aspcapro.org/feral> (last visited Sept. 26, 2016) (explaining that the ASPCA uses the term “community cats” to encompass any unowned cat).

85. *Id.*

management that do not readily identify the method as lethal. For example, they state they will “trap and remove” the cats.⁸⁶ However, “remove” is a euphemism for “kill” since community cats generally are unadoptable.⁸⁷ Thus, TNVR advocates must make clear the true outcome for the cats under lethal methods. Second, emphasize the shared common interest of those in favor and against TNVR to reduce the population of community cats and protect wildlife. This common goal, when emphasized, will help to narrow the gap among the groups debating TNVR.⁸⁸ Third, introduce additional goals often ignored by TNVR opponents, but important to localities and the public.⁸⁹ These goals include the cost to local animal control agencies of impounding community cats, concern for individual animal welfare, and respect for cats’ lives.⁹⁰ In sum, reframing the debate helps make clear that TNVR is the most effective, efficient, and humane means of managing community cats and allows for TNVR advocates to more easily influence human hearts and minds to protect the cats’ lives by using non-lethal methods of management.

II. THE SCIENCE

The second step to changing the traditional paradigm is to challenge the science used both to (1) vilify community cats and TNVR and (2) promote lethal methods of management, while (3) critically studying and documenting the efficacy of TNVR.

First, challenge the science used to vilify community cats and TNVR. Opponents of TNVR vilify community cats for killing native birds, some of whom are threatened or endangered, citing predation

86. See generally *Outdoor Cats: Frequently Asked Questions*, HUMANE SOC’Y U.S., http://www.humanesociety.org/issues/feral_cats/qa/feral_cat_FAQs.html (last visited Sept. 26, 2016) (describing the process by which local animal control utilizes “trap and remove” when TNR methods are unavailable).

87. *Id.*

88. See Dara Wald et al., *Outdoor Cats: Identifying Differences Between Stakeholder Beliefs, Perceived Impacts, Risk and Management*, 167 *BIOLOGICAL CONSERVATION* 414, 422 (2013); *Hayden Island Cat Project*, AUDUBON SOC’Y PORTLAND, <http://Audubonportland.org/issues/hazards/cats/hayden> (last visited Sept. 26, 2016) (discussing partnership between Audubon Society of Portland and Feral Cat Coalition of Oregon to humanely reduce cat population on island).

89. See, e.g., SIZEMORE, *supra* note 40, at 3 (discounting success of TNR based on reduced intake of cats to shelters, and arguing that the only accurate representation of TNR’s success would be a reduction in the total population of free-roaming cats).

90. Wald et al., *supra* note 88, at 422.

estimates and economic impacts that are derived from flawed science.⁹¹ *The Impact of Free-Ranging Domestic Cats on Wildlife of the United States*,⁹² cited in the District of Columbia's *Wildlife Action Plan* to support the claim that "an estimated 1.3–4.0 billion birds and 6.3–22.3 billion small mammals are lost to cats in the United States annually," is one such paper.⁹³ In fact, this one paper has received much attention within the mainstream media and scientific community despite serious flaws in methodology.⁹⁴ Given that the total number of landbirds in the United States is estimated at 3.2 billion, the authors' high-end estimate of birds killed by cats in the 48 contiguous states annually exceeds the total number of birds estimated to populate the entire country.⁹⁵ If true, one would expect the United States landbird population to have long ago disappeared.

The estimates are grossly exaggerated because the model from which the estimates are generated is seriously flawed.⁹⁶ For example, identifying just a few of the problems, the model (1) inflates the estimate of unowned cats in the United States by using the frequently cited values which are not grounded in empirical data, (2) inflates the predation rate of unowned cats by relying on decades-old studies that did not use random-sampling of free-roaming cats but instead focused on hunting cats, (3) uses unproven methods for converting stomach contents of cats to annual predation rates, and (4) assumes that 80%–100% of unowned cats successfully hunt birds, again inflated because of a heavy reliance on

91. Fact Sheet, Vox Felina, No. 2, Predation (Aug. 2012) [hereinafter Fact Sheet, Predation], http://voxfelina.com/voxfelina/Vox_Felina_Fact_Sheet_Predation_v_1.1.pdf.

92. Scott R. Loss et al., *The Impact of Free-Ranging Domestic Cats on Wildlife of the United States*, NATURE COMM., Jan. 29, 2013, at 1, 2. Peter Marra is a co-author of *The Impact of Free-Ranging Domestic Cats on Wildlife of the United States* and of the recent book *Cat Wars: The Devastating Consequences of a Cuddly Killer*. See MARRA & SANTELLA, *supra* note 5.

93. DDOE WILDLIFE ACTION PLAN, *supra* note 4, at 109–10.

94. *Article Metrics for: The Impact of Free-Ranging Domestic Cats on Wildlife of the United States*, NATURE COMM., <http://www.nature.com/articles/ncomms2380/metrics> (last updated Oct. 14, 2016, 11:39 PM).

95. *Partners in Flight: Population Estimates Database*, ROCKY MOUNTAIN BIRD OBSERVATORY, <http://rmbo.org/pifpopestimates/Database.aspx> (last visited Sept. 26, 2016).

96. See *The Draft 2015 District of Columbia Wildlife Action Plan: Hearing Before the Comm. on Transp. & the Env't*, Council Period 21 (D.C. 2015) (written testimony of Peter J. Wolf, Cat Initiatives Analyst, Best Friends Animal Soc'y) [hereinafter *Hearing*] (on file with author); see also GREGORY MATTHEWS, A REVIEW OF THE STATISTICAL METHODS EMPLOYED IN THE ARTICLE "THE IMPACT OF FREE-RANGING DOMESTIC CATS ON WILDLIFE OF THE UNITED STATES" (2013), <http://www.alleycat.org/alley-cat-allies-delivers-55000-signatures-to-smithsonian-to-protest-flawed-study-on-cats-and-birds/> (follow "analysis by an independent researcher that found major flaws in Smithsonian study" hyperlink).

studies of rural cats, when in fact most unowned cats live in urban areas where they are less reliant on prey.⁹⁷

Similarly, ecologists at Cornell University published several papers allegedly quantifying “the environmental impact of non-native species in the United States,” including “an economic cost assigned to the domestic cat based on the notion of environmental damage as the result of wild bird depredation”⁹⁸ at seventeen billion dollars.⁹⁹ However, the results are “meaningless estimates based on inaccurate assumptions and poor data.”¹⁰⁰ The flaws in this study are typical of other predation estimates and include the following: (1) “cats prey only on native birds” when in fact “cats [prey] primarily on non-native species of rodents and birds” which may have a positive effect on native wildlife; (2) “all birds eaten by cats were alive, hunted, and killed by the cat” when in fact, analysis of stomach contents cannot determine “whether the bird was injured, dead, or alive when the cat encountered it”; (3) all cats have the same hunting profiles, when in fact not all cats hunt and those cats who do have scavenging profiles that differ across habitats; and (4) “all [cat] hunting is additive” when in fact cat predation may be largely compensatory in that cats primarily prey on “weak, sick, or injured birds that would not have survived to breed.”¹⁰¹ In fact, the Royal Society for the Protection of Birds states, “It is likely that most of the birds killed by cats would have died anyway from other causes before the next breeding season, so cats are unlikely to have a major impact on populations.”¹⁰²

Moreover, in addition to the unreliable and often inflated estimates of free-roaming cats in the United States, the predation habits of free-roaming owned cats differs from that of unowned cats, yet owned cats are the subject of most predation studies.¹⁰³ Unowned cats who rely primarily on prey to survive optimize their hunting strategy given prey availability and thus kill many more rodents than birds when both prey

97. *Hearing, supra* note 96, at 8 (written testimony of Peter J. Wolf, Cat Initiatives Analyst, Best Friends Animal Soc’y).

98. Laurie D. Goldstein, *All Dollars and No Sense: Critique of Dr. Pimentel’s Estimated Economic Impact of Domestic Cat Predation*, 2 MID-ATLANTIC J. ON L. & PUB. POL’Y 153, 154 (2013).

99. Fact Sheet, Predation, *supra* note 91.

100. Goldstein, *supra* note 98, at 158.

101. *Id.* at 158–65.

102. *Are Cats Causing Bird Declines?*, ROYAL SOC’Y FOR PROTECTION BIRDS, <http://www.rspb.org.uk/makeahomeforwildlife/advice/gardening/unwantedvisitors/cats/birddeclines.aspx> (last visited Sept. 26, 2016).

103. Goldstein, *supra* note 98, at 169.

are available.¹⁰⁴ Further, in scaling up the predation rate across the population of free-roaming cats, the studies use the mean rate rather than the median rate which can inflate the estimates since only “a small percentage of cats [are] exceptional predators.”¹⁰⁵

TNVR opponents also vilify free-roaming cats as public health hazards given the potential for cats to transmit rabies, toxoplasmosis, and other diseases.¹⁰⁶ However, the claims often are exaggerated.¹⁰⁷ Regarding rabies, “[s]ince 1960, only two cases of human rabies have been attributed to cats.”¹⁰⁸ In 2014, 272 cases of rabid cats were reported to the Centers for Disease Control, representing 4.51% of all reported cases, with the number of rabid cats remaining largely unchanged over the past twenty-five years despite the increasing popularity of TNVR.¹⁰⁹ In fact, TNVR programs evaluate cats and return only healthy cats after vaccinating them for rabies, thereby reducing, for years, the risk of rabies in the returned cats.¹¹⁰ Finally, community cats, many unsocialized to humans, rarely have contact with humans, thus making disease transmission highly unlikely.¹¹¹

While toxoplasmosis is a legitimate public health concern,

104. *Id.* at 169–70 (citing Olof Liberg, *Food Habits and Prey Impact by Feral and House-Based Domestic Cats in a Rural Area in Southern Sweden*, 65 J. MAMMALOGY 424, 430 (1984)) (discussing a lack of bird hunting by feral cats whose primary prey were rabbits).

105. *Id.* at 171–72 (discussing a 1998 study in which 70% of the 138 cats caught less than ten prey animals annually, but 6% caught more than 50 prey animals resulting in a sample median approximately half that of the sample mean predation rate).

106. *See, e.g.*, MARRA & SANTELLA, *supra* note 5, ch. 5 (The Zombie Maker: Cats as Agents of Disease); Roebing et al., *supra* note 5, at 3. Cats also have been linked to certain intestinal parasites and flea-borne typhus, yet studies have shown they do not create any serious risk of transmission to humans. *See* Fact Sheet, Alley Cat Allies, Feral Cats and the Public—A Healthy Relationship 1–2 (2011) [hereinafter Fact Sheet, Feral Cats and the Public], <http://www.alleycat.org/resources/feral-cats-and-the-public-a-healthy-relationship/> (follow “PDF” hyperlink) (citing various scientific studies on the cat-associated diseases and their transmission to humans).

107. Fact Sheet, Vox Felina, No. 3, Rabies (Aug. 2012) [hereinafter Fact Sheet, Rabies], http://voxfelina.com/voxfelina/Vox_Felina_Fact_Sheet_Rabies_v_1.1.pdf.

108. *Id.* (citing *Recovery of a Patient from Clinical Rabies—California, 2011*, 61 CENTERS FOR DISEASE CONTROL & PREVENTION: MORBIDITY AND MORTALITY WEEKLY REPORT 61, 64 (2012)).

109. Benjamin P. Monroe et al., *Rabies Surveillance in the United States During 2014*, 248 J. AM. VETERINARY MED. ASS’N 777, 779 tbl.1, 784 (2016).

110. Fact Sheet, Rabies, *supra* note 107 (quoting *What You Need to Know About Rabies*, SHADOW CATS, <http://www.shadowcats.net/resources/what%20you%20need%20to%20know%20about%20rabies.php> (last visited Sept. 26, 2016)).

111. Fact Sheet, Feral Cats and the Public, *supra* note 106, at 1 (quoting Jeffrey D. Kravetz & Daniel G. Federman, *Cat-Associated Zoonoses*, 162 ARCHIVES INTERNAL MED. 1945, 1951 (2002)).

“epidemiological studies often disagree on important risk factors for infection and disease, making health recommendations difficult to uniformly advocate.”¹¹² Moreover, data from the large-scale National Health and Nutrition Examination Survey reveal a significant decrease between 1988 and 2010 in age-adjusted seroprevalence of *Toxoplasma gondii* among people 12–49 years of age born in the United States, decreasing from 14.1% in 1988–1994 to 6.6% in 2009–2010.¹¹³ Over this same period, the popularity of TNVR increased dramatically, raising doubts about any suggestion that community cats pose a serious threat of infecting humans with the *T. gondii* parasite.¹¹⁴ In 2013, researchers reported that unmanaged “feral” cats are 4.8 times more likely to be exposed to the *T. gondii* parasite than managed colony cats, and 11.8 times more likely to shed infectious spore-like oocysts in their feces.¹¹⁵ Thus, feeding community cats would appear to be an effective measure at reducing the likelihood of *T. gondii* exposure in both cats and, by extension, humans.¹¹⁶

Second, challenge the efficacy of killing cats as a means of management. Although TNVR opponents claim that lethal methods are necessary to manage their population, they lack proof that lethal methods are effective.¹¹⁷ In fact, recent research from Australia found that lethal methods increased the population of free-roaming cats.¹¹⁸ The only instances where lethal methods successfully eradicated the population of free-roaming cats are those on “small oceanic islands” using cruel and hazardous methods.¹¹⁹ Perhaps the most “celebrated” case is Marion Island, 115 square miles, where it “took 19 years to exterminate approximately 2,200 cats—using feline distemper, poisoning, hunting

112. Natalie J. Miller, *Toxoplasma gondii* Diversity: From Seroprevalence in Multiple Host Species to Genotypic Analysis of Field Isolates 16 (Jan. 1, 2013) (unpublished Ph.D. dissertation, University of Pennsylvania), <http://repository.upenn.edu/dissertations/AAI3565168/> (follow “View More” hyperlink).

113. Whitney S. Krueger et al., *Drinking Water Source and Human Toxoplasma gondii Infection in the United States: A Cross-Sectional Analysis of NHANES Data*, 14 BMC PUB. HEALTH, July 10, 2014, at 4–6, 9.

114. See HOLTZ, *supra* note 21, at 4, 11.

115. Elizabeth VanWormer et al., *Toxoplasma gondii, Source to Sea: Higher Contribution of Domestic Felids to Terrestrial Parasite Loading Despite Lower Infection Prevalence*, 10 ECOHEALTH 277, 282–83 tbls.1 & 2 (2013).

116. *Id.* at 285.

117. *Prank Culls*, VOX FELINA (Apr. 6, 2015), <http://www.voxfelina.com/2015/04/prank-culls/>.

118. *Id.*

119. Fact Sheet, Vox Felina, No. 1, Trap-Neuter-Return (Aug. 2012), http://voxfelina.com/voxfelina/Vox_Felina_Fact_Sheet_TNR_v_1.1.pdf.

and trapping, and dogs. . . . On Ascension Island, roughly one-third the size of Marion Island, it cost approximately \$1,732 per cat to eradicate an estimated 635 cats over 27 months.”¹²⁰

Finally, cats were introduced centuries ago to many habitats and “may now serve a beneficial role in some . . . ecosystems.”¹²¹ Studies have shown that cats may control the presence of nonindigenous species that if not controlled would do more harm than the cats do to the indigenous and endangered species.¹²² For example, a study from New Zealand in Orongorongo Valley “concluded that by suppressing the introduced rat population, cats allowed a denser population of native birds to exist.”¹²³ In fact, the irony of the so-called “successful” eradication of cats from Marion Island resulted in a burgeoning and uncontrolled mouse population that is harming albatross chicks.¹²⁴ Thus, suddenly removing cats, rather than allowing them to die naturally over time through TNVR, in certain habitats may cause more harm than good to native birds and wildlife.

Third, critically study and document the efficacy of TNVR. There are several studies that have shown TNVR to decrease cat colony size over time.¹²⁵ For example, one study tracked a TNVR program on a college campus over eleven years and found the population had decreased by eighty-five percent.¹²⁶ Another study documented a thirty-six percent decline in six cat colonies in rural North Carolina after two years (while unsterilized colonies experienced an average forty-seven percent increase) with continued decline or eradication over the next five years.¹²⁷ A third study of 132 colonies containing 920 cats in Florida showed a decline of twenty-six percent in the first year of TNVR.¹²⁸ And, in Rome,

120. *Id.*

121. Gorman & Levy, *supra* note 7, at 170.

122. *Id.*

123. *Id.* (citing B.M. Fitzgerald & B.J. Karl, *Foods of Feral House Cats (Felis catus L.) in Forest of the Orongorongo Valley, Wellington*, 6 N.Z. J. ZOOLOGY 107, 124 (1979)).

124. John Yeld, *Marion Island’s Plague of Mice*, IOL (Aug. 17, 2013, 9:00 AM), <http://www.iol.co.za/scitech/science/environment/marion-islands-plague-of-mice-1563686>.

125. Sheilah A. Robertson, *A Review of Feral Cat Control*, 10 J. FELINE MED. & SURGERY 366, 371–72 (2008).

126. Julie K. Levy et al., *Effect of High-Impact Targeted Trap-Neuter-Return and Adoption of Community Cats on Cat Intake to a Shelter*, 201 VETERINARY J. 269, 269 (2014) [hereinafter *Effect on Cat Intake*] (citing Julie K. Levy et al., *supra* note 24, at 42–44 (2003)).

127. See Michael K. Stoskopf & Felicia B. Nutter, *Analyzing Approaches to Feral Cat Management—One Size Does Not Fit All*, 225 J. AM. VETERINARY MED. ASS’N 1361, 1363 (2004).

128. See *Effect on Cat Intake*, *supra* note 126, at 269 (citing Lisa A. Centonze & Julie K. Levy, *Characteristics of Free-Roaming Cats and Their Caretakers*, 220 J. AM. VETERINARY

Italy, a survey of cat caregivers for 103 cat colonies revealed a twenty-two percent decrease overall in cat population over several years.¹²⁹ Further, researchers, through sophisticated population modeling, have shown that successful population management can be accomplished by sterilizing thirty percent of a given population every six months.¹³⁰

Moreover, while the reduction in community cats is beneficial for wildlife and conservation advocates, TNVR provides significant relief to animal control and shelters as well. A recent study of the effect of a targeted TNVR program in Alachua County, Florida—to capture and neuter at least 50% of the projected population (2366 cats) over two years—resulted in a 66% decrease in cat impoundment.¹³¹ A second study of San Jose Animal Care and Services four years after implementing TNVR reported “impounds decreased 29.1%; euthanasia decreased from over 70% of intakes in 2009, to 23% in 2014. Euthanasia in the shelter for Upper Respiratory Disease decreased 99%; [and] dead cat pick up off the streets declined 20%.”¹³² Additionally, because TNVR reduces certain nuisance behaviors by cats, such as roaming for mates, fighting, and urine-spraying, TNVR case studies have documented a significant reduction in nuisance complaint calls to animal control.¹³³ Thus, TNVR is more efficient, effective, and humane than lethal methods of control.

MED. ASS’N 1627, 1631, 1633 (2002)).

129. Natoli et al., *supra* note 21, at 183–84 (discussing that although some colonies initially experienced an increase in population, numbers began to decrease significantly after three years of TNVR).

130. Philip S. Miller et al., *Simulating Free-Roaming Cat Population Management Options in Open Demographic Environments*, PLOS ONE, Nov. 26, 2014, at 1, 8–11, <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0113553> (follow “Download PDF” hyperlink) (discussing that while the same simulation shows that successful population management can be accomplished by removing (i.e., killing) 20% of the given population every six months, the costs of trap and kill as compared to TNVR, including economic, social, and ethical costs, outweigh the slight “benefit”).

131. *Effect on Cat Intake*, *supra* note 126, at 271–73.

132. Karen L. Johnson & Jon Cicirelli, Abstract, *Study of the Effect on Shelter Cat Intakes and Euthanasia From a Shelter Neuter Return Project of 10,080 Cats from March 2010 to June 2014*, PEERJ, Oct. 30, 2014; *see also* Mazzola, *supra* note 46 (explaining that in Cook County, Illinois, several years after enactment of the Community Cat Ordinance, the cats now reside in over 1,000 registered colonies with a 41% reduction in the total number of free-roaming cats and a 30–40% decrease in stray cats being relinquished to shelters in Cook County).

133. *See How TNR Reduces Nuisance Complaints: What the Research Tells Us*, BEST FRIENDS ANIMAL SOC’Y, <http://bestfriends.org/resources/how-tnr-reduces-nuisance-complaints-what-research-tells-us> (last visited Sept. 26, 2016) [hereinafter *How TNR Reduces Nuisance Complaints*].

III. THE LAW

The final step to change the traditional paradigm is to implement legal reform to allow for the implementation of non-lethal methods as the primary (if not sole) means for managing so-called “pest” animals. Community cats and TNVR face serious legal challenges that arguably are more complex than addressing wildlife “pests” because cats are considered domesticated animals and thus governed primarily under traditional state and local animal control laws.¹³⁴ Additionally, they also may be affected by state and federal wildlife laws focused on the protection of threatened and endangered species, especially the Endangered Species Act.¹³⁵ The following will discuss the legal challenges and the progress made to save community cats’ lives and legalize TNVR.

A. Traditional State and Local Animal Control Laws

Traditional animal control law creates serious problems for community cats as free-roaming cats often are viewed by animal control as “pests” that create a nuisance and thus are subject to eradication to protect the health and safety of humans.¹³⁶ Local animal control ordinances vary across jurisdictions; however, there are many commonalities. Community cats, as free-roaming, often are defined as “stray” or “at-large” and subject to impoundment.¹³⁷ Once impounded, the cats generally must be held for a specific period of time, referred to as the “stray-hold period,” typically five days.¹³⁸ If not claimed within the stray-hold period, they become the property of the locality and may be killed, adopted, or released to a humane society or shelter.¹³⁹ Since community cats often are not considered “owned” by anyone, they will

134. Gorman & Levy, *supra* note 7, at 160, 174.

135. *Id.* at 158.

136. See Verne R. Smith, *The Law and Feral Cats*, 3 J. ANIMAL L. & ETHICS 7, 16 (2009) (discussing historical treatment); see also Jeremy Masten, Note, *Don’t Feed the Animals: Queso’s Law and How the Texas Legislature Abandoned Stray Animals, A Comment on H.B.2328 and the New Tex. Penal Code § 42.092*, 60 BAYLOR L. REV. 964, 967 (2008).

137. See, e.g., PRINCE GEORGE’S COUNTY, MD., CODE OF ORDINANCES § 3-135 (2016).

138. See VA. CODE ANN. § 3.2-6546(C) (Repl. vol. 2016).

139. See, e.g., *id.* § 3.2-6546(D). Note that the code uses the term “euthanized,” however, it is not an accurate use of the term. *Id.* Euthanasia is the killing of a very sick or injured individual to prevent additional suffering. *Euthanasia*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/euthanasia> (last visited Sept. 26, 2016). Under the code, any animal, even those that are perfectly healthy, are subject to death by the jurisdiction. VA. CODE ANN. § 3.2-6546(D). The killing of a healthy animal is just that, killing, not euthanasia. Cf. *Euthanasia, supra*.

not be reclaimed, and because many are unsocialized to humans, they are only rarely candidates for adoption.¹⁴⁰ Thus they are killed. In fact, in some jurisdictions they will be killed immediately upon impoundment if they are deemed to pose a risk of physical injury to shelter workers.¹⁴¹

Stray-hold periods are designed to allow owners to reunite with their loved felines, however, the national average reunification rate for cats is less than 5%.¹⁴² Thus, stray-hold periods for most cats, but certainly for unowned, unsocialized community cats, generally do more harm than good. They require that shelters house the community cats in a crowded shelter environment, subjecting them to stress and disease, with no opportunity to be reclaimed and eventually killed because they are unadoptable, while utilizing cage space that could otherwise house surrendered, socialized, and adoptable cats.¹⁴³

Traditional animal control law also creates serious concerns for advocates working to protect community cats through TNVR, as they may find themselves in violation of local and/or state law.¹⁴⁴ Local animal control laws create duties for persons who own animals.¹⁴⁵ If the TNVR volunteer, typically the caregiver, is deemed the owner of the community cat, they could be subject to such duties, which may include licensing, pet limits, and at-large or leash laws, making it virtually impossible to perform TNVR caregiving activities.¹⁴⁶ Even if not deemed an owner, feeding bans, nuisance laws, and laws prohibiting abandonment, may subject them to civil and/or criminal prosecution.¹⁴⁷ Finally, they may be liable to third parties harmed by the community cat.¹⁴⁸

The first question for TNVR volunteers is whether they are deemed “owners” under the law. A typical definition of owner is “any person having the right of property in an animal, who *keeps or harbors* an

140. See Slater, *supra* note 13.

141. See VA. CODE ANN. § 3.2-6546(G).

142. *Pet Statistics*, *supra* note 11.

143. ‘No-Kill’ Label Slowly Killing Animals, PEOPLE FOR ETHICAL TREATMENT ANIMALS, <http://www.peta.org/issues/companion-animal-issues/animal-shelters/kill-label-slowly-killing-animals/> (last visited Sept. 26, 2016).

144. See David Fry, *Detailed Discussion of Feral Cat Legal Issues*, ANIMAL LEGAL & HIST. CTR. (2010), <https://www.animallaw.info/article/detailed-discussion-feral-cat-legal-issues>.

145. See *infra* notes 149–58 and accompanying text.

146. See *infra* notes 149–58 and accompanying text.

147. See *infra* notes 149–58 and accompanying text.

148. See, e.g., PRINCE GEORGE’S COUNTY, MD., CODE OF ORDINANCES § 3-135(c) (2016) (“The owner of any animal running at large shall be held strictly liable for a violation of this statute . . . and for any damages caused by said animal.”).

animal, who has it in their care, acts as its custodian or who *knowingly permits an animal to remain on or about any premises occupied by them.*¹⁴⁹ Jurisdictions typically define “keeps or harbors” to mean “the act of, or the permitting or sufferance by, an owner or occupant of real property either of feeding or sheltering any domesticated animal on the premises of the occupant or owner thereof.”¹⁵⁰ Under this definition the caregiver could be deemed the “owner” of the community cats if the cats are fed and/or found on or about the caregiver’s premises.¹⁵¹

If deemed an owner, the caregiver may be subject to the following collection of duties.¹⁵² First, they may need to license each cat.¹⁵³ If the caregiver is providing for several community cats, this may be burdensome. Second, many jurisdictions have limits on the number of pets one may own.¹⁵⁴ Others require a permit if the owner exceeds a certain limit.¹⁵⁵ Since community cats often live in colonies that may include several cats, a caregiver may provide for multiple colonies and could be in violation of the limit.¹⁵⁶ Third, although most jurisdictions prohibit dogs from being at-large,¹⁵⁷ some jurisdictions include cats as well,¹⁵⁸ sometimes defining such behavior as a “public nuisance.”¹⁵⁹ A TNVR caregiver could be liable under such a law as the cats are free-roaming and thus at-large.

There is, however, one benefit to the TNVR caregiver being deemed an owner as it allows them to regain custody of the cat if impounded by

149. COOK COUNTY., ILL., CODE OF ORDINANCES § 10-2 (2016) (emphasis added); *see also* PRINCE GEORGE’S COUNTY, MD., CODE OF ORDINANCES § 3-101(57).

150. PRINCE GEORGE’S COUNTY., MD., CODE OF ORDINANCES § 3-101(50).

151. *Id.*

152. *See* Smith, *supra* note 136, at 18–23 (explaining the obligations of individuals who are owners of cats).

153. *See, e.g.*, PRINCE GEORGE’S COUNTY, MD., CODE OF ORDINANCES § 3-145 (“A . . . cat which is four months of age shall be licensed by the owner.”).

154. Rebecca F. Wisch, *Overview of Pet Number Restrictions in Municipal Ordinances*, ANIMAL LEGAL & HIST. CTR. (2004), <https://www.animallaw.info/article/overview-pet-number-restrictions-municipal-ordinances>.

155. *See, e.g.*, PRINCE GEORGE’S COUNTY, MD., CODE OF ORDINANCES § 3-148.01(a) (“No person may keep or harbor five (5) or more animals larger than a guinea pig or over the age of four months, without first obtaining an animal hobby permit.”).

156. *See id.*

157. Rebecca F. Wisch, *Detailed Discussion of State Dog Impound Laws*, ANIMAL LEGAL & HIST. CTR. (2003), <https://www.animallaw.info/article/detailed-discussion-state-dog-impound-laws>.

158. *See, e.g.*, PRINCE GEORGE’S COUNTY, MD., CODE OF ORDINANCES § 3-135(c) (“It shall be unlawful for the owner . . . of any animal . . . to permit the animal to run at large.”).

159. *Id.* § 3-131(c); *see also* WYO. STAT. ANN. § 11-31-301(a) (2015).

animal control. As a practical matter, however, this is little consolation. First, it is unlikely the caregiver would observe that a cat in the colony was “missing” until the stray-hold period was over and, secondly, an impounded community cat would likely be deemed feral and immediately killed.

Even if the caregiver is not deemed an owner, TNVR nevertheless may be prohibited under the law. First, feeding bans are the death knell for community cat caregivers as they out rightly prohibit people from feeding stray or feral cats. The feeding bans may apply to public and/or private property within the locality. For example, in 2014, the Township of West Orange, New Jersey, amended its feeding ban ordinance to include private as well as public property: “No person shall feed any wildlife, excluding confined wildlife, anywhere within the Township.”¹⁶⁰ In support of the amendment, the township stated that “the existence of stray, feral and otherwise unconfined wildlife” posed a threat to the health of residents and their pets.¹⁶¹ Noting the hundreds of stray cat complaints received from 2010 to 2013, the township stated that existing law limiting the ban on feeding to public property had proven insufficient to address the health concerns.¹⁶² Another jurisdiction defines a “nuisance cat” as any stray, feral, or abandoned cat and prohibits anyone from keeping, harboring, or feeding such cat.¹⁶³

Feeding bans that include community cats generally are ineffective and inhumane.¹⁶⁴ First, other food sources are available, and since cats are scavengers, efforts to eradicate the cats through starvation fails.¹⁶⁵ They do, however, “encourage [the] cats to roam further to find food,” which, in turn, increases their visibility and related public complaints.¹⁶⁶

160. West Orange, N.J., An Ordinance Amending Chapter 4, Section 35.2 of the Revised General Ordinances of the Township of West Orange (Sept. 9, 2014). Interestingly, this township refers to stray cats as wildlife. See WEST ORANGE, N.J., REVISED GENERAL ORDINANCES § 4-35.1 (2015).

161. West Orange, N.J., An Ordinance Amending Chapter 4, Section 35.2 of the Revised General Ordinances of the Township of West Orange.

162. *Id.*

163. City of Cordova, Ala., Ordinance 005-2016 (Aug. 26, 2016).

164. Nate Gartrell, *Antioch Feral Cat Feeding Ban Proves Futile*, THE MERCURY NEWS (Dec. 24, 2014, 10:58 AM), http://www.mercurynews.com/my-town/ci_27204488/antioch-feral-cat-feeding-ban-proves-futile.

165. See *Feeding Ban Position Statement*, ALLEY CAT ALLIES (citing *Advancing Sustainable Materials Management: Facts and Figures*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/smm/advancing-sustainable-materials-management-facts-and-figures> (last visited Sept. 26, 2016)), <http://www.alleycat.org/resources/feeding-ban-position-statement/> (last visited Sept. 26, 2016).

166. *Id.*

Moreover, such laws are very difficult to enforce.¹⁶⁷ Arguably, encouraging TNVR efforts that are designed to humanely reduce the community cat population is more effective than punitive measures directed at individuals who care about community cats.¹⁶⁸

Second, one may be held criminally liable for creating a public nuisance, which is defined generally as “activities deemed to violate public peace, comfort, and morals.”¹⁶⁹ Nuisance behaviors typically associated with cats include noise from cat fighting and mating, and odor from feces and the spraying of urine to mark their territory.¹⁷⁰ As cats roam, often to find mates, these behaviors affect more individuals and may constitute a “public nuisance.”¹⁷¹

Arguably, activities associated with TNVR and ongoing caregiving should not create a public nuisance but, in fact, should help reduce such nuisance behaviors by community cats. Researchers with the Alliance for Contraception in Cats & Dogs have noted that “[c]redible studies indicate that neutering reduces urine spraying and roaming in search of mates by male cats, and spaying eliminates estrous-associated behaviors in female cats, including aggression [and] vocalization.”¹⁷² Moreover, TNVR case studies have shown a significant reduction in nuisance complaint calls to animal control in communities with TNVR.¹⁷³

Finally, some jurisdictions extend their anticruelty abandonment law to include “every person who willfully abandons any animal.”¹⁷⁴ Prohibiting abandonment of owned animals is important to protect the animals and to deter owners from contributing to the community cat population. The problem for TNVR volunteers arises when a jurisdiction views the “Return” in TNVR as “abandonment.” A typical definition of “abandon” is “to desert, forsake, or absolutely give up an animal without having secured another owner or custodian for the animal or by failing to provide the elements of basic care.”¹⁷⁵

167. *See id.*

168. *Id.*

169. Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 950 (2007).

170. *How TNR Reduces Nuisance Complaints*, *supra* note 133.

171. *Cf. Montana v. Zimmerman*, 228 P.3d 1109, 1115 (Mont. 2010) (discussing defendant who fed outdoor cats and was convicted for maintaining a public nuisance based on witnesses’ objections to the cats’ urine and feces, destruction of flowerbeds, and fighting).

172. KATHERINE MOLDAVE & LINDA RHODES, ALL. FOR CONTRACEPTION IN CATS & DOGS, CONTRACEPTION AND FERTILITY CONTROL IN DOGS AND CATS 100 (2013).

173. *How TNR Reduces Nuisance Complaints*, *supra* note 133.

174. CAL. PENAL CODE § 597s (West 2010).

175. VA. CODE ANN. § 3.2-6500 (Repl. Vol. 2016); *see also* FLA. STAT. § 705.19(3) (2013)

Does returning a community cat to their original location constitute abandonment? First, in TNVR programs where a caregiver is present to provide food and water and monitor the cats for future illness or injury, the cats arguably are not deserted or forsaken; thus there is no abandonment.¹⁷⁶ However, for TNVR programs where there is no officially identified caregiver, the interpretation becomes less clear.¹⁷⁷ The anticruelty laws proscribe conduct, including abandonment “under circumstances reasonably likely to result in the infliction of unjustifiable pain, or suffering, or cruelty upon [the animal].”¹⁷⁸ However, TNVR is designed to improve and save the lives of community cats. First, only healthy cats are returned to their homes and since the cats were healthy when trapped there is no reason to believe that returning them to the original location would subject them to pain, suffering, or cruelty.¹⁷⁹ Second, the cats’ health and well-being is enhanced after neutering and vaccination.¹⁸⁰ And finally, the alternative for the cat is almost certainly death in the shelter. Thus, arguably, although they remain outdoors, they are not “abandoned.” Nevertheless, the legislative history surrounding the amendment to one state’s abandonment statute suggests that the law may have intended to protect not only the abandoned animal, but also the environment from damage caused by abandoned animals who may become feral, suggesting that “return” could be considered abandonment by some jurisdictions.¹⁸¹

Finally, TNVR participants may be liable to third parties who are

(“[A]bandoned’ shall mean to forsake entirely, or to neglect or refuse to provide or perform the legal obligations for care and support of an animal by its owner, or its owner’s agent.”); KAN. STAT. ANN. § 47-835(c) (2000).

176. VA. CODE ANN. § 3.2-6500.

177. The Virginia Attorney General issued an opinion arguing that returning a cat to their original location may be considered dumping and/or abandonment under Virginia law. Letter from Kenneth T. Cuccinelli II, Attorney Gen., Commonwealth of Va. Office of the Attorney Gen., to Douglas W. Napier, Town Attorney, Town of Front Royal (July 12, 2013), http://ag.virginia.gov/files/Opinions/2013/12-100_Napier.pdf (official advisory opinion 12-100). *But see* Letter from G. Timothy Oksman, Ops. Counsel, Commonwealth of Va. Office of the Attorney Gen., to Rob Blizard, Exec. Dir., Norfolk Soc’y for the Prevention of Cruelty to Animals (May 4, 2015), <http://www.alleycat.org/virginia-office-of-the-attorney-general-clarifies-yes-tnr-is-legal/> (follow “letter written by G. Timothy Oksman” hyperlink) (stating that the prior AG opinion was applicable only to the release of cats by the locality although there did not appear to be any difference in the analysis regarding abandonment and dumping).

178. *People v. Untiedt*, 116 Cal. Rptr. 899, 901 (Cal. Ct. App. 1974).

179. *See* Fact Sheet, *Why TNR?*, *supra* note 41, at 2.

180. *See* Fact Sheet, *Alley Cat Allies, Key Scientific Studies on Trap-Neuter-Return 1* (2012), <http://www.alleycat.org/TNRStudies> (follow “PDF” hyperlink).

181. *See* STATE OF CAL. S. COMM. ON PUB. SAFETY, A.B. 1540 B. ANALYSIS, 1999–00 Reg. Sess., at 1 (1999).

“harmed” by community cats. First, some jurisdictions override common law via statute and hold the owner of any at-large animal strictly liable for any damage caused by the animal.¹⁸² Thus, if a third party can prove that a community cat caused any damage to their person or property, the caregiver could be held responsible for such damage if deemed an owner.

Under the common law, owners have no legal duty to keep their cats confined because cats are regarded as domestic animals unlikely to do harm if left to themselves and incapable of constant control.¹⁸³ As a result, owners generally are not liable for damage to property caused by cats roaming onto another’s property unless it is a situation where allowing them to roam would be deemed negligent (e.g., the owner has an animal known to be dangerous and/or likely to cause harm or damage to another).¹⁸⁴ In contrast, a case from California held that if a person (whether an owner or not) did something that caused the cats to be attracted to an area owned by another and the cats did damage to and/or caused a private nuisance that affected the landowner’s enjoyment of their property, that person may be liable for damages.¹⁸⁵

B. “Legalizing” TNVR to Embrace Community Cats

In light of the potential legal obstacles to TNVR, advocates have lobbied, successfully in hundreds of jurisdictions, to embrace community cats by expressly providing for TNVR as the means for managing community cats.¹⁸⁶ The most productive legal approach is to remove the barriers to TNVR and promote or support its use without overregulating.¹⁸⁷ TNVR most often is conducted by nonprofit groups

182. See, e.g., PRINCE GEORGE’S COUNTY, MD., CODE OF ORDINANCES § 3-135(c) (2016) (“The owner of any animal running at large shall be held strictly liable for a violation of this statute . . . and for any damages caused by said animal.”).

183. *McElroy v. Carter*, No. M2005-00414-COA-R3-CV, 2006 Tenn. App. LEXIS 635, at *13 (Tenn. Ct. App. Sept. 29, 2006) (quoting RESTATEMENT (SECOND) OF TORTS § 518 cmt. j (AM. LAW INST. 1977)) (explaining that there is no common law legal duty to confine cats because they are generally regarded as domestic animals unlikely to do harm if left to themselves and incapable of constant control).

184. *Id.* at 13.

185. *Kyles v. Great Oaks Interests*, 2007 Cal. App. Unpub. LEXIS 1303, at *38–39 (Cal. Ct. App. Feb. 16, 2007) (explaining that apartment manager may be liable to landowner for overflowing garbage bins that attracted cats).

186. See sources cited *supra* note 21.

187. See, e.g., COOK COUNTY, ILL., CODE OF ORDINANCES § 10-95 (2016). Although this ordinance has been successful in Cook County, Illinois, it provides detailed regulations and enforcement mechanisms for the management of community cats and may dissuade some volunteers from participating. See *id.*

and individual volunteers.¹⁸⁸ If the law imposes unnecessarily burdensome requirements on volunteers, they are unlikely to participate or fail to follow them exactly, which may result in penalty or liability for their good-intentioned efforts.

The elements of a successful Community Cat Ordinance are as follows:

First, the ordinance must define key terms.

Community Cat: “[A]ny free-roaming cat or kitten, whether abandoned, stray, lost or feral, that may be cared for by one or more known or unknown residents . . . and that may live on its own or in a colony of other such felines.”¹⁸⁹

Note that this definition does not require that the cat be unsocialized,¹⁹⁰ in fact, even owned cats who are “abandoned” or “lost” are included in this definition. This broad definition is best given the purpose of TNVR is to manage the population of all free-roaming cats, and it is very difficult, if not often impossible, to distinguish among owned or unowned cats, unless of course the cat is collared or microchipped and their owner can be identified.¹⁹¹

Community Cat Caregiver: “[Any] person who, in accordance with [a good faith effort to trap, neuter, vaccinate, and return a community cat] provides care, including food, water, shelter or veterinary care to a Community Cat. A Community Cat Caregiver shall not be considered the owner of a Community Cat and shall not be subject to the definition of ‘kennel.’”¹⁹²

Note that this definition does not require that the caregiver be associated with a formally recognized TNVR program. Although some ordinances require such affiliation, it can impose a substantial burden and dissuade many individuals from participating.¹⁹³ This definition does not prohibit the creation of a formal program but it also does not mandate that

188. See Mazzola, *supra* note 46.

189. LAKE COUNTY, FLA., ORDINANCE § 4-3 (BD. OF CTY. COMM’RS OF LAKE CTY., FLA., Proposed Official Draft No. 4-22-15, 2015).

190. *Contra* COOK COUNTY, ILL., CODE OF ORDINANCES § 10-95 (“[A] cat that: (1) Is born in the wild or is the offspring of an owned or feral cat and is not socialized; (2) Is a formerly owned cat that has been abandoned and is no longer socialized; or (3) Lives on a farm.”); City of Detroit, Or., Ordinance 233 § 2 (July 12, 2014) (“[A] cat that is not socialized to humans and is not an owned cat.”).

191. See, for example, City of Detroit, Or., Ordinance 233 § 2, which defines “owned cat” as “a cat that is a companion to a person, is regularly fed and sheltered in that same person’s habitation, and carries visible indicia of ownership, including a collar or tag.”

192. LAKE COUNTY, FLA., CODE OF ORDINANCES § 4-3 (2016).

193. See, e.g., COOK COUNTY, ILL., CODE OF ORDINANCES § 10-95.

every caregiver formally join such a program.

Ear-Tipping: “[T]he removal of the ¼ inch tip of a Community Cat’s left ear, performed while the cat is under anesthesia, to identify the Community Cat as being sterilized and lawfully vaccinated for rabies.”¹⁹⁴

Trap-Neuter-Vaccinate-Return (TNVR): “[T]he process of humanely trapping, sterilizing, vaccinating for rabies, Eartipping, and returning Community Cats to their original location.”¹⁹⁵

Second, the ordinance should exempt community cats from existing provisions that hamper TNVR efforts and place strains on shelters or the community cats. For example, stray-hold periods, cat at-large laws, licensing requirements, and feeding bans should expressly exempt ear-tipped community cats.

Third, the ordinance should exempt community cat caregivers from existing provisions that hamper TNVR efforts. Community Cat Caregivers should be exempt from the definition of owner and their efforts in performing TNVR should not be considered abandonment.

Fourth, the ordinance should establish minimal provisions empowering TNVR and providing immunity from suit for all participants as follows:

- This community recognizes that TNVR “is the only effective and humane method to manage, and over time, reduce the population of community cats. [TNVR] shall be permitted, and community cat caregivers, organizations, city staff, and animal control officers are encouraged to carry out [TNVR].”¹⁹⁶
- An ear-tipped Community Cat shall not be impounded—if such cat is received by animal control the cat shall be returned to its original location or if such cat is trapped by animal control the cat shall be released on-site, unless veterinary care is necessary.¹⁹⁷ In the exceptional case that return to the original site would create a serious threat to the well-being of the cat and/or endangered or threatened wildlife, the cat shall be relocated to an appropriate location.
- “[Community Cat Caregivers] are empowered to reclaim impounded community cats without proof of ownership.”¹⁹⁸
- “[Community Cat Caregivers] are empowered to provide or

194. LAKE COUNTY, FLA., CODE OF ORDINANCES § 4-3.

195. *Id.*

196. City of Detroit, Or., Ordinance 233 § 3(1).

197. *Id.* § 3(2).

198. *Id.* § 3(3).

arrange for the provision of adequate food,” water, shelter, and veterinary care for community cats and to make reasonable efforts to remove and find foster and/or adoptive homes for kittens born to a community cat.¹⁹⁹

- All municipalities, community cat caregivers, organizations, city staff and animal control officers are immune from criminal liability and are not civilly liable, except for willful and wanton misconduct, for damage caused while conducting TNVR.²⁰⁰

C. Legal Challenges to Community Cat Ordinances

Even if advocates are successful at persuading a local jurisdiction to embrace TNVR, the ordinance may be challenged by localities that do not wish to support non-lethal control efforts and/or by conservationists who argue such efforts violate laws protecting endangered species.

1. Locality Home Rule Authority to Outlaw TNVR

Cook County embraced community cats when it enacted its Community Cat Ordinance in 2007, authorizing the managed care of feral cats by sponsors and their caregivers.²⁰¹ In 2009, the Village of Bridgeview within Cook County adopted an ordinance forbidding residents from operating feral cat colonies within the village limits and imposed fines on anyone doing so.²⁰² Cook County filed suit, arguing the Bridgeview ordinance infringed on Cook County’s authority to control and prevent the spread of rabies and control feral cats within its jurisdiction.²⁰³ Cook County won with the court finding that Bridgeview

199. *See id.* § 3(4)–(6).

200. *See* 510 ILL. COMP. STAT. 5/35 (2014). Such immunity should include that to the owner of a free-roaming cat whose cat may be trapped and sterilized “by accident.” In conducting TNVR an “owned” free-roaming cat may be trapped “accidentally.” TNVR participants initially check for a microchip delineating the owner of the cat when brought to the clinic so as to sterilizing an “owned” cat without the owner’s permission. However, if the cat is not microchipped the cat will likely be vaccinated, sterilized and returned. In this instance TNVR participants should not be held liable to the owner for sterilizing the cat. Note that if the law does not expressly immunize participants from liability, the existence of a Community Cat Ordinance may be used as a “defense” against claims of nuisance or negligence for the damage to property caused by community cats by demonstrating that the activities of the cat caregiver are “approved” by the municipality and thus “exempt” from liability to third parties if in compliance with the ordinance. *See, e.g.*, Judgment at 4, Baker v. Kuchler, No. 29D05-0605-SC-1055 (Ind. Super. Ct., Mar. 2, 2007).

201. Cook County, Ill., Code of Ordinances § 10-99 (2016).

202. County of Cook v. Village of Bridgeview, 8 N.E.3d 1275, 1278 (Ill. App. Ct. 2014).

203. *Id.*

lacked home rule authority to enact its ordinance.²⁰⁴

Under the Illinois Constitution “a home rule unit may exercise any power and perform any function *pertaining to its government and affairs* including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare.”²⁰⁵ The scope of authority thus depends upon the definition of “*pertaining to its government and affairs.*”²⁰⁶ Illinois courts have held that “[a]n ordinance *pertains to the government and affairs of a home rule unit* where the ordinance relates to problems that are *local in nature* rather than State or national.”²⁰⁷ The court in *Bridgeview* determined that problems relating to animal control, overpopulation, and the spread of rabies are both local and statewide concerns and thus a weighing of several factors is necessary to determine which concern is most relevant.²⁰⁸

The factors to be weighed are “[1] the nature and extent of the problem, [2] the units of government which have the most vital interest in [resolving the problem], and [3] the role traditionally played by local and statewide authorities in dealing with [the problem].”²⁰⁹ The court held that the community cat problem is not a purely local concern since cats know no political or jurisdictional boundaries and allowing localities to hinder county efforts would have a detrimental effect on the county’s efforts to address feral cats.²¹⁰ Moreover, “[t]he General Assembly, through the Animal Control Act, has determined that the issues of animal control . . . and the control of rabies are more effectively addressed at the county level” because “[c]ounties have greater geographical reach and thus can more comprehensively and effectively address feral cat control than local municipalities,” thus the county has the most vital interest in

204. *Id.* at 1280–81. The Village also argued they had statutory authority under Illinois’s Animal Control Act to outlaw TNVR. *Id.* at 1280. The court disagreed, stating that a locality may enact more rigorous or definite regulations, but may not conflict with the statute. *Id.* at 1281. Thus, although *Bridgeview* has authority to “prohibit animals from running at large” and “to further control and regulate . . . cats” it may not outlaw the operation of feral cat colonies in direct conflict with Illinois or Cook County law. *See Village of Bridgeview*, 8 N.E.3d at 1280 (quoting 510 Ill. Comp. Stat. 5/24).

205. *Id.* (emphasis added) (quoting Ill. Const. art. VII, § 6(a)).

206. *Id.* (quoting *City of Chicago v. Village of Elk Grove*, 820 N.E.2d 1158, 1161 (Ill. App. Ct. 2004)).

207. *Id.* at 1278–79 (emphasis added) (quoting *Village of Bolingbrook v. Citizens Utils. Co.*, 632 N.E.2d 1000, 1002 (Ill. 1994)).

208. *Id.* at 1279.

209. *Village of Bridgeview*, 8 N.E.3d at 1279 (quoting *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 274 (Ill. 1984)).

210. *Id.* at 1280.

its solution and plays the primary role in dealing with these issues.²¹¹ In sum, Bridgeview lacked home rule authority to forbid feral cat colony caretaking when such a prohibition was in conflict with the Cook County ordinance.²¹²

2. TNVR as a Taking Under the Endangered Species Act

Academics have argued that TNVR may violate the Endangered Species Act (ESA)²¹³ and the U.S. Fish and Wildlife Service (FWS) has threatened local jurisdictions approving of TNVR with possible prosecution under the ESA.²¹⁴ However, no case had been filed to test this argument until March 31, 2016,²¹⁵ when the American Bird Conservancy (ABC) filed suit against the New York Commissioner of Parks, Recreation and Historic Preservation (“Parks”) to compel the Commissioner “to cease violating the Endangered Species Act by authorizing, facilitating, and maintaining feral cat colonies at Jones Beach State Park in close proximity to the nesting sites of Piping Plovers.”²¹⁶

Piping Plovers in New York are listed as threatened under the ESA.²¹⁷ Section 9 of the ESA prohibits any “person” from “tak[ing]” any member of an endangered species.²¹⁸ “The term take” includes any actions that “harass, harm, pursue, hunt, shoot, wound, trap, capture, or collect, or attempt to engage in any such conduct.”²¹⁹ The FWS defines “harass” to include “an intentional or negligent act or omission which

211. *Id.* at 1279–80.

212. *Id.* at 1281.

213. See Pamela Jo Hatley, *Feral Cat Colonies in Florida: The Fur and Feathers Are Flying*, 18 J. LAND USE & ENVTL. L. 441, 442 (2003); see also Gorman & Levy, *supra* note 7, at 174.

214. Letter from Acting Supervisor, U.S. Dep’t of the Interior, to David Chanda, Dir., N.J. Dep’t of Env’tl. Prot. 3 (Nov. 20, 2009), <http://abcbirds.org/wp-content/uploads/2015/05/2009.11.20-FWS-letter-in-support-of-NJ-ban-of-TNR.pdf> (stating that the Fish and Wildlife Service opposes free-roaming cats and failure to take action to reduce the likelihood of death or injury to threatened and endangered species from feral cats could result in the violation of the ESA with civil sanctions up to \$25,000 per take and criminal penalties up to \$50,000 per take and up to one year in prison).

215. Complaint for Declaratory & Injunctive Relief at 10, *Am. Bird Conservancy v. Harvey*, No. 2:16-cv-01582 (E.D.N.Y. Mar. 31, 2016).

216. Amended Complaint for Declaratory & Injunctive Relief at 1, *Am. Bird Conservancy v. Harvey*, No. 2:16-cv-01582 (E.D.N.Y. May 23, 2016).

217. *Id.* The Piping Plover is listed as an endangered species under New York law. 6 N.Y.C.R.R. § 182.5 (2010).

218. 16 U.S.C. § 1538(a)(1)(B) (2012).

219. *Id.* § 1532(19).

creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, including breeding, feeding, or sheltering.”²²⁰ Harm is defined as an act which “actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, which includes breeding, feeding, or sheltering.”²²¹

ABC’s factual argument to support a violation of the ESA is as follows: ABC alleges that “[o]utdoor cats kill approximately 2.4 billion birds every year in the United States, and individual unowned cats on average kill from 20.7 birds to 55.2 birds per year”²²² and that “[t]he mere presence of cats can cause behavioral changes in birds that reduce fecundity and may cause significant adverse effects on bird populations.”²²³ Further, FWS has concluded that “feral cats are likely to jeopardize the continued existence of the Atlantic Coast population . . . [of] Piping Plovers.”²²⁴ Regarding the feral cats on Jones Beach, the complaint alleges that “[a]t least two feral cat colonies exist at Jones Beach”²²⁵ approximately 0.25 miles and 0.65 miles from Piping Plover nests, making “it reasonably certain that the cats are traveling from the colony sites to the nest sites,”²²⁶ and citing one study showing “that the mean home range sizes for ten feral cats was nearly 3 miles for females and 5.47 miles for males.”²²⁷ The complaint further alleges that “feral cats have consistently been observed near important Piping Plover nesting areas” and “the number of Piping Plover chicks fledged on Long Island

220. 50 C.F.R. § 17.3 (2015).

221. *Id.*

222. Amended Complaint for Declaratory & Injunctive Relief, *supra* note 216, at 6.

223. *Id.*

224. *Id.*

225. *Id.* at 7.

226. *Id.* at 7–8.

227. Amended Complaint for Declaratory & Injunctive Relief, *supra* note 216, at 8. These ranges

imply a cat density of fewer than one cat per 100 acres, a figure that corresponds only to those found in studies of solitary *unfed* and *unsterilized* cats. By contrast, the most detailed study documenting the home range of managed colony cats (such as those at Jones Beach) reported a median home range of just 0.000458 square miles, or 0.3 acres.

Letter from Holly Sizemore, Dir. Nat’l Programs, Best Friends Animal Soc’y, to Eric Schneiderman, Attorney Gen., N.Y. State Office of the Attorney Gen. (Apr. 19, 2016) (citing Olof Liberg et al., *Density, Spatial Organisation and Reproductive Tactics in the Domestic Cat and Other Felids*, in *THE DOMESTIC CAT: THE BIOLOGY OF ITS BEHAVIOR* 119 (Dennis C. Turner & Patrick Bateson, eds., 2d ed. 2000)) (on file with author).

increased with the number of feral cats trapped.”²²⁸ Finally, ABC alleges that Parks has both recognized the threat to the Piping Plovers from the cats and stated that “where appropriate [they would] remove these feral cats in a humane way.”²²⁹

ABC’s legal argument in support of Parks’ violation of the ESA is as follows: ABC alleges that Parks “facilitates” and “maintain[s]” the feral cat colonies on Jones Beach by taking “no effective action to remove”²³⁰ them and effectively “authorizes” the construction of shelters for the feral cats and people to come onto the beach to feed the cats daily, in violation of applicable Park office “rules, regulations, and/or policy.”²³¹ Nonenforcement of Park office rules “is functionally equivalent to issuing permits”²³² for persons to build the structures and feed the cats which in turn “creates the likelihood of injury to’ the Piping Plovers and is reasonably certain to cause (if it has not already caused) the imminent ‘take’ of Piping Plovers.”²³³ ABC demands an injunction requiring Parks “to cease its authorization and facilitation of conduct that is reasonably certain to lead to the take of protected Piping Plovers at Jones Beach”²³⁴ and “to remove the feral cats and their housing from Jones Beach, and to prevent members of the public from acting to re-establish feral cat colonies.”²³⁵

On July 21, 2016, Parks moved to dismiss the amended complaint for failure to state a claim.²³⁶ The motion focuses primarily on the lack of specific facts alleged by ABC to state a plausible claim that the cats on Jones Beach are harming the Piping Plovers there and/or that the defendant has a duty to act.²³⁷ First, the only “take” alleged by ABC is “directly caused by [the] cats.”²³⁸ However, pursuant to section 9 of the

228. Amended Complaint for Declaratory & Injunctive Relief, *supra* note 216, at 7.

229. *Id.* at 8.

230. *Id.* at 9.

231. *Id.*

232. *Id.* at 10.

233. Amended Complaint for Declaratory & Injunctive Relief, *supra* note 216, at 10.

234. *Id.* at 11.

235. *Id.*

236. Notice of Defendant’s Motion to Dismiss at 1, *Am. Bird Conservancy v. Harvey*, No. 2:16-cv-01582 (E.D.N.Y. July 21, 2016). The defendant also argued lack of jurisdiction because ABC and individual plaintiffs lacked standing to file the suit, but that issue is not discussed here. *Id.* at 1.

237. Memorandum in Support of Defendant’s Motion to Dismiss at 12, *Am. Bird Conservancy v. Harvey*, No. 2:16-cv-01582 (E.D.N.Y. July 21, 2016) [hereinafter Motion to Dismiss].

238. *Id.* at 14.

ESA, only a “person” may “take” an animal, not another animal.²³⁹ As such, the violation by Parks must be a form of habitat modification that results in “population-level mortality for the Piping Plover species.”²⁴⁰ ABC has alleged no actual harm to one Piping Plover from the Jones Beach cats, much less sufficient harm to affect the entire population.²⁴¹

ABC in opposition asserts that no population-level mortality is required arguing that it “makes no legal or logical sense.”²⁴² Curiously, ABC states that Parks

cannot seriously suggest that if it were to affirmatively issue a permit for someone to dump a box of stray cats in the midst of a Plover nesting site, knowing that individual Plovers would inevitably be killed, injured, and harassed, that it would not violate section 9 unless population-level effects were shown. Plaintiffs allege that [Parks’] conduct is tantamount to the very same thing.²⁴³

This statement both misunderstands the legal theory and “misconstrue[s] Plaintiffs’ allegations in this case.”²⁴⁴ First, the legal requirement for population-level effect for a “taking” is required under a habitat modification theory when the “take” is by another animal.²⁴⁵ ABC relies on cases where the alleged “take” was by a “person” and thus are distinguished from this case.²⁴⁶ Second, neither Parks nor the individuals involved in TNVR efforts on Jones Beach abandoned the cats on the Beach, in fact, their efforts are designed to reduce the population of cats on Jones Beach, conduct consistent with protecting the Piping Plovers.

Second, although the circuits are split on whether a showing of reasonable certainty of harm is sufficient under the ESA, or whether past

239. *See* *Coal. for Sustainable Delta v. McCamman*, 725 F. Supp. 2d 1162, 1168 (E.D. Cal. 2010) (citing 16 U.S.C. § 1538(a)(1)(B) (2006)).

240. Motion to Dismiss, *supra* note 237, at 15.

241. *Id.* at 15–16.

242. Plaintiffs’ Brief in Opposition to Defendant’s Motion to Dismiss at 22, *Am. Bird Conservancy v. Harvey*, No. 2:16-cv-01582 (E.D.N.Y. Aug. 30, 2016) [hereinafter Plaintiffs’ Opposition].

243. *Id.* at 22.

244. Defendant Rose Harvey’s Reply in Further Support of Motion to Dismiss at 9, *Am. Bird Conservancy v. Harvey*, No. 2:16-cv-01582 (E.D.N.Y. Sept. 19, 2016) [hereinafter Defendant’s Reply].

245. *Id.*

246. *Id.*

or present harm is required,²⁴⁷ ABC fails under either standard.²⁴⁸ The only specific allegation that suggests the Jones Beach cats might cause harm to the Piping Plovers is that “the number of Piping Plover chicks fledged on Long Island increased with the number of feral cats trapped.”²⁴⁹ However, there is no alleged causal connection between the fledged chicks and the trapped cats.²⁵⁰ In fact, cats have been present on Jones Beach for at least fifteen years while the population of Piping Plovers has doubled during that period, suggesting that the cats are not a threat to the birds.²⁵¹ In reply, ABC argues they have alleged that cats are preying on Piping Plovers.²⁵² This statement, however, is seriously misleading. ABC, in fact, alleges that the two individually named plaintiffs are “deeply concerned that these cats are preying . . . on Piping Plovers.”²⁵³ However, alleging “concern” that cats are preying on the Plovers is not an allegation that cats are, in fact, preying on the Plovers, much less an allegation that the cats are actually killing or injuring the Plovers.²⁵⁴

Finally, even if sufficient harm were alleged, the ESA imposes no duty on Parks to remove the cats or “prevent third parties from committing possible violations under the ESA.”²⁵⁵ ABC does not allege that “Parks is regulating the feral cats, stocking Jones Beach with feral cats, or otherwise causing the feral cat population to stabilize or increase.”²⁵⁶ Furthermore, they have not “permitted, licensed, or otherwise ‘authorized’ any third party to inflict harm to the Piping Plovers at Jones Beach.”²⁵⁷ In sum, inaction by Parks when there is no duty to act is not actionable under the ESA.²⁵⁸ Since “[a]ny action Parks could take regarding the feral cats is discretionary,”²⁵⁹ Parks has no duty

247. Motion to Dismiss, *supra* note 237, at 13–14 (first citing *Defs. of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000); and then citing *Am. Bald Eagle v. Bhatti*, 9 F.3d 163, 165–66 (1st Cir. 1993)).

248. *Id.*

249. Amended Complaint for Declaratory & Injunctive Relief, *supra* note 216, at 7.

250. Motion to Dismiss, *supra* note 237, at 3, 15.

251. See Sizemore, *supra* note 227 (citing N.Y. DEP’T OF ENVTL. CONSERVATION, 2001–15 LONG ISLAND COLONIAL WATERBIRD AND PIPING PLOVER SURVEY RESULTS).

252. Plaintiffs’ Opposition, *supra* note 242, at 16.

253. Amended Complaint for Declaratory & Injunctive Relief, *supra* note 216, at 3–4.

254. Defendant’s Reply, *supra* note 244, at 6.

255. Motion to Dismiss, *supra* note 237, at 18.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* (citing *N.C. Fisheries Ass’n v. Pritzker*, 2015 U.S. Dist. LEXIS 95425, at *27

to act and thus their failure to act is not a violation of the ESA.²⁶⁰ ABC in opposition argues that since Parks “is the only entity empowered to remove the cats” they “are effectively ‘maintaining’ the cats, in violation of the ESA” by “permitting people to build shelters and feed the cats.”²⁶¹ However, ABC relies solely on cases where the “government body acted affirmatively to license, permit, or authorize activity in specifically the manner that courts found likely to result in a take.”²⁶² In contrast, Parks has neither affirmatively licensed, permitted, or authorized any entity nor is the conduct alleged by the public in this case likely to result in a violation of the ESA.²⁶³ Further, ABC alleges that Parks has refused to remove the cats and failed to enforce their own regulations barring persons from introducing animals into or abandoning property in State Parks.²⁶⁴ Again, this misconstrues both the alleged conduct in this case and Parks’ responsibility. First, the persons caring for the cats neither “introduced” nor “abandoned” the cats on Jones Beach. Second, “Parks has discretionary power to enforce its own regulations, which impose no duty upon Parks under the ESA to remove feral cats.”²⁶⁵

Parks has not expressly addressed whether TNVR itself constitutes a “take” under the ESA, and in fact implies that TNVR volunteers may be violating the ESA.²⁶⁶ Arguably TNVR volunteers, rather than violating the ESA, are working to promote the goals of the ESA to help protect endangered species.

“To prove a violation of the [ESA] . . . it must be shown that the alleged activity had some prohibited impact on an endangered species.”²⁶⁷ Thus, even if the cats are harming the birds one could reasonably argue that the TNVR activities do not *impact*, in other words *cause*, the harm to the Piping Plovers and thus is not a “take” under the

(E.D.N.C. July 22, 2015)). In *North Carolina Fisheries Ass’n*, the court found that the “defendants’ discretionary decisions to not impose regulations or seek penalties against fisherman [was not] implicit authorization for recreational fisherman to take sea turtles” and thus not actionable under the ESA. *N.C. Fisheries Ass’n*, 2015 U.S. Dist. LEXIS, at *27.

260. Motion to Dismiss, *supra* note 237, at 18.

261. Plaintiffs’ Opposition, *supra* note 242, at 20.

262. Defendant’s Reply, *supra* note 244, at 8.

263. *Id.*

264. Amended Complaint for Declaratory & Injunctive Relief, *supra* note 216, at 10.

265. Defendant’s Reply, *supra* note 244, at 9.

266. Motion to Dismiss, *supra* note 237, at 18 (“There is no any [sic] allegation, however, that Parks has a duty . . . to prevent third parties from committing possible violations under the ESA.”).

267. *Palila v. Haw. Dep’t of Land & Nat. Res.*, 639 F.2d 495, 497 (9th Cir. 1981) (citing *Barcelo v. Brown*, 478 F. Supp. 646 (D.P.R. 1979)).

ESA. This is because while the cats may be harming the birds, TNVR does not necessarily cause the cats to be present or remain on Jones Beach and, more importantly, TNVR is designed to *reduce* the cat population, which in turn protects, not harms, the Piping Plovers.

Perhaps the most relevant ESA precedent is *Palila v. Hawaii Department of Land & Natural Resources*.²⁶⁸ In *Palila*, feral goats and sheep were introduced to the Island of Hawaii in the late eighteenth century.²⁶⁹ Over the years these feral animals were found to destroy the mamane-naio forest and thus between 1921 and 1946, the government killed 45,000 animals, leaving only 500 remaining.²⁷⁰ However, in 1950 the “[s]tate’s policy . . . changed from one of eradication to one of management . . . because of [the] hunters’ desires for recreational game.”²⁷¹ The plaintiffs filed suit in the late 1970s when the feral goats numbered between 200 and 300 and feral sheep numbered about 600, an increase from some 500 to approximately 850 feral goats and sheep, claiming that since 1950, the defendants had “maintained populations of feral sheep . . . and feral goats . . . for sport-hunting” in an area that “include[d] most of the Palila’s critical habitat By consuming seedlings and shoots, the animals prevent[ed] regeneration of the forest, and thus [brought] about the relentless decline of the Palila’s habitat” in violation of the ESA.²⁷² The defendants argued that because the Palila population was “increasing and the . . . forest [was] regenerating despite the presence of the sheep, there [was] no ‘significant environmental modification of degradation’ which would constitute a taking.”²⁷³

The court found that the defendants’ maintenance of the animals and failure to remove the feral goats and sheep constituted a “take” under the ESA because the Palila required “all of its designated critical habitat in order to survive as a species and that the feral sheep and goats” maintained by the defendants were “the major cause of that habitat’s degradation.”²⁷⁴ Moreover, the defendants refused to adopt a removal program and instead argued that an “intensive management” program should be permitted to “protect the forest while providing for hunter

268. *Id.* at 495; *Palila v. Haw. Dep’t of Land & Nat. Res.*, 852 F.2d 1106 (9th Cir. 1988).

269. *Palila v. Haw. Dep’t of Land & Nat. Res.*, 471 F. Supp. 985, 989 (D. Haw. 1979), *aff’d*, 639 F.2d 495 (9th Cir. 1981).

270. *Id.* at 989 n.9.

271. *Id.*

272. *Id.* at 989–90.

273. *Id.* at 990 n.41 (quoting 50 C.F.R. § 17.3 (1978)).

274. *Palila*, 471 F. Supp. at 991.

interests.”²⁷⁵ The court determined that a management program would be ineffective to regenerate the forest

because of [1] inevitable hunter pressure to *increase* the feral sheep herd as long as any sheep remain in the forest, [2] [the] defendants’ demonstrated susceptibility to that pressure, and [3] the destructive effect on the forest of even a small number of sheep and goats due to their tendency to browse in flocks and denude an area totally.²⁷⁶

The court held that the defendants

may be ordered to adopt a program at state expense designed to eradicate the feral sheep and goats from the Palila’s critical habitat and may be enjoined from taking any action which has the effect of increasing or maintaining the existing population of feral sheep and goats in the Palila’s critical habitat.²⁷⁷

Let’s now turn to the Jones Beach case, and specifically whether directly engaging in TNVR violates the ESA. Traditionally cases involving a “take” under the ESA concern human conduct that clearly caused the alleged harm to endangered or threatened species—for example, constructing a school on endangered pygmy-owl critical habitat²⁷⁸ or authorizing the use of fixed fishing gear known to entangle North Atlantic right whales.²⁷⁹ In the case of TNVR, the harm is allegedly caused by free-roaming cats, not the human conduct of TNVR.²⁸⁰ Although the argument is that TNVR “encouraged and accommodated” the cats, TNVR is not the cause for the cats’ presence.²⁸¹ TNVR efforts begin only after free-roaming cats are found in an area. Experience suggests that once cats establish a colony in an area they remain there whether a designated feeder is present or not. Moreover, even if moved to another location, the cats will often return to the area they consider their home.²⁸² Thus, basic TNVR (with no ongoing caregiving) does not

275. *Id.* at 990.

276. *Id.* (emphasis added).

277. *Id.* at 999.

278. *See generally* Defs. of Wildlife v. Bernal, 204 F.3d 920, 920 (9th Cir. 2000) (discussing developing a ninety-acre parcel which included thirty acres of pigmy-owl habitat).

279. *See generally* Strahan v. Coxe, 127 F.3d 155, 165 (1st Cir. 1997) (discussing whether authorization to use fixed fishing gear which entangled North Atlantic right whales constituted a take under the ESA).

280. Amended Complaint for Declaratory & Injunctive Relief, *supra* note 216, at 6.

281. *Id.* at 8.

282. *See* Judgment, *supra* note 200, at 5 (“[E]xperience and science [suggest that] a cat is very territorial and bonds to that territory and will return there and remain there regardless of the conditions. If the cat is not given the basic necessities, it will not leave, but instead will remain.”).

cause the cats to be present or remain. Arguably, even the caregiving of building shelters and feeding does not cause the cats to be present or remain as other food sources are available there,²⁸³ which provided the sustenance before TNVR participants fed them.²⁸⁴

Moreover, even in cases where the human conduct is not the direct cause of the harm to the endangered species, the human conduct did cause an *increased* risk to the endangered species. For example, the defendants in *Palila*, via their management program, *increased* the numbers of feral sheep and goats and maintained sufficient numbers in a game management area for sport-hunting, which, in turn, caused the destruction of the Palila habitat.²⁸⁵ The causal dispute centered on the link between the population of the feral sheep and goats and survival of the Palila.²⁸⁶ There, the plaintiffs demonstrated that only complete removal of the feral sheep and goats would be adequate to save the Palila.²⁸⁷ Thus, the court determined that “the acts and omissions” of the defendants constituted a “take” and an order to remove the feral animals was warranted.²⁸⁸ Similarly, in *Coalition for a Sustainable Delta v. McCamman*, the plaintiffs challenged the defendants’ enactment of sport fishing regulations designed to protect striped bass, a predator of the endangered Chinook salmon, to *increase* their population and thus increasing the potential for predation of the salmon.²⁸⁹ The causal dispute focused on “evidence of a link between higher striped bass abundance and increased Listed Species mortality.”²⁹⁰ Neither case disputed that the human conduct, itself, caused an increased risk to the endangered species, only the extent of the harm caused by the animals affected by the human conduct—the feral sheep and goats and striped bass.

In contrast, here, TNVR is designed to *reduce* the numbers of cats present. Since the individuals involved in TNVR did not cause the cats to be present in the first place and their conduct is designed to reduce the free-roaming cat population, the act of TNVR is not harming or harassing

283. Cf. Amended Complaint for Declaratory & Injunctive Relief, *supra* note 216, at 7 (explaining that the cat colonies are located at the West Bathhouse and Field 10, locations near a source of trash (i.e., food) left by humans).

284. The only individuals responsible for the cats living on the beach are the original owners who abandoned them (if, in fact, the cats were previously owned).

285. *Palila v. Haw. Dep’t of Land & Nat. Res.*, 471 F. Supp. 985, 989–90 (D. Haw. 1979).

286. *Id.* at 990.

287. *Id.* at 990–91.

288. *Id.* at 995.

289. See 725 F. Supp. 2d 1162, 1164 (E.D. Cal. 2010).

290. *Id.* at 1193.

the Piping Plovers (even if there is proof that the free-roaming cats are harming the Piping Plovers), but rather is helping to protect the Piping Plovers. Such conduct, that which helps to protect the endangered species, is conduct antithetical to a “take” under the ESA.²⁹¹ Thus, arguably, TNVR activities would never trigger a violation of the ESA because TNVR is helping to *protect not harm* endangered or threatened species arguably harmed by free-roaming cats.

The fate of the Jones Beach cats remains in question as of fall 2016 as the parties await a decision on Parks’ motion to dismiss.

CONCLUSION

The traditional method for managing so-called animal “pests” is to kill them, with no concern for their lives, the unintended effect eradication may have on the habitat involved, or public opinion. Moreover, traditional lethal methods have typically failed. As such, the use of lethal methods to manage animals is becoming less and less acceptable as effective, humane, non-lethal methods of animal management have become available. Animalists, animal control advocates, and conservationists agree that a certain level of management of certain animals is necessary for public health, public safety, and the protection of birds and other wildlife. The difference is that animalists respect the lives of individual animals—all animals—including those in need of management and thus argue for the use of the more effective, humane alternatives to management in order to properly balance all goals and interests, including those of the managed animal. The approach of free-roaming cat advocates to turn the tide away from deeply entrenched lethal methods of animal control, provides an interesting and useful case study on how to alter the political, scientific, and legal paradigm in favor of respecting animal life for all animals deemed “pests.” Free-roaming cat advocates (1) reconceive the cats as members of our community and reframe the debate over their management, (2) challenge the science used to vilify the animals and TNVR and to promote the killing of them as a means of management while critically studying and documenting the efficacy of non-lethal methods and emphasizing areas of potential agreement, and (3) implement legal reform to allow for the implementation of non-lethal methods as the primary (if not sole) means for managing the animals. Our relationship with, devotion to, and love

291. Moreover, to the extent the causal argument is disputed, the plaintiffs shoulder the burden of proof of causation (e.g., that TNVR and/or the ongoing caregiving activities, in fact increases the risk of harm to the Piping Plovers).

for our companion felines sets the stage for the domestic cat as a prime candidate to serve as a “gateway species” for a paradigm shift regarding our approach to managing all animals viewed as “pests.”