

2003 LEGISLATIVE REVIEW

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REVIEW EDITOR'S NOTE

The sixth annual edition of *Animal Law's* Legislative Review addresses the passage, defeat, and pending status of a broad spectrum of state and federal animal legislative action in 2003. It is exciting to witness, as well as contribute to, the changing public ethic regarding animals. As seen over the last year, the law is gradually recognizing animals as sentient beings worthy of protection. Unfortunately, there are also strong legislative efforts to minimize their value. This edition covers the most noteworthy of these positive and negative actions.

Ms. Andrea Gyger reports on major pieces of federal legislation, including a bill that would end the use of the inhumane steel-jaw leghold trap in the United States; the Downed Animal Protection Act, which would require regulations providing for the humane treatment,

handling, and immediate euthanasia of downed livestock; the Truth in Tuna Labeling Act of 2003, which would further the protective intent of the dolphin-safe label on canned tuna; and a discussion on the Whaling Resolution, which expresses the United States' opposition to commercial whaling and its international leadership in the effort to conserve whale populations.

Mr. Joshua Hodes reports on state legislation in 2003, including states' efforts to pass a constitutional right to hunt and other efforts to increase hunting opportunities; an update on felony and anti-cruelty legislation, including the passage of landmark legislation in Maine and Connecticut; legislation in New Jersey and Massachusetts that would protect students from academic penalty if they choose to not participate in class projects requiring the dissection of animals; and the development of a program in California adding vegetarian lunches to school menus.

In 2003, we saw states tackling cruelty issues for the first time. For example, Connecticut is the first state to address the confining or tethering of dogs, and Maine is the first to pass legislation protecting elephants used for entertainment. Unfortunately, both laws passed in a diluted form from their original intent, but it remains a positive step toward obtaining increased protections for all animals. It is my desire that other states will soon follow their courageous lead.

We hope this section is useful in monitoring important changes in animal law. *Animal Law Review* welcomes suggestions for the publication of future legislative reviews.

Emilie Clermont
Legislative Review Editor

I. FEDERAL LEGISLATION

A. *Steel-Jaw Leghold Traps*

Nearly every year since 1975, legislation essentially banning the use of steel-jaw leghold traps in the United States has been introduced in Congress.¹ Internationally, the European Union banned the use of the traps in all 15 member nations in 1995.² Currently, 89 countries prohibit their use.³ In December of 1997, the United States Trade Representative entered an agreement with the European Union (EU) that anticipated the United States would phase out the use of the traps by

¹ M. Lynne Corn, National Council for Science and the Environment, CRS Report for Congress, *The Steel-Jaw Leghold Trap: Issues and Concerns*, <http://www.nceonline.org/nle/crsreports/biodiversity/biodv-37.cfm?&CFID=12392719&CFTOKEN=76151660> (Mar. 29, 1993).

² Animal Protection Institute, *Steel-Jaw Leghold Traps*, <http://www.api4animals.org/75.htm> (accessed Mar. 10, 2004).

³ Animal Protection Institute, *Countries that Have Banned or Restricted Trapping*, <http://www.bancrueltraps.com/Need/CountriesBanTraps.htm> (updated Sept. 9, 2002).

2004.⁴ Because states typically have jurisdiction over fish and gaming laws, federal efforts to ban or regulate trapping practices face strong opposition. Despite reports that 78% of Americans favor banning leghold traps,⁵ only eight states have implemented leghold trap bans or restrictions.⁶ On April 11, 2003, Representative Nita Lowey (D-NY) introduced H.R. 1800 to the House. The bill would effectively end the use of conventional steel-jaw leghold traps on animals in the United States.⁷

An estimated 20 million animals are killed for their fur in the United States each year and the majority are caught by the conventional steel-jaw leghold trap.⁸ Animal and environmental advocates firmly oppose the traps and lobby for a blanket ban on trapping. Proponents of the leghold traps include commercial trappers, many state wildlife agencies, the United States Fish and Wildlife Service, and non-trapping citizens and organizations arguing a basic right to trap.⁹

Current steel-jaw leghold trap designs have changed very little since their invention in 1823.¹⁰ The bill defines a conventional steel-jaw leghold trap as “any spring-powered pan or sear-activated device with two opposing steel jaws, whether the jaws are smooth, toothed, padded, or offset, which is designed to capture an animal by snapping closed upon the animal’s limb or part thereof.”¹¹ The main opposition to the use of these archaic traps is that they are inhumane because they subject animals to extreme pain and torment. A further concern is the indiscriminate nature of the leg-hold trap. For every target animal trapped, at least two non-target animals fall prey to the devices, including companion animals, threatened and endangered species, and humans.¹²

The trapping mechanism is simple, yet destructive. The trap is triggered by pressure an animal exerts on a spring-powered pan-tension or sear-activated device located between the two jaws of the trap.

⁴ Society for Animal Protective Legislation, *Legislation to End the Use of Steel-Jawed Leghold Traps on Animals in the United States*, <http://www.saplonline.org/Legislation/endsteeljaw.htm> (accessed Apr. 4, 2004).

⁵ *Id.*

⁶ The Humane Society of the United States, *Fur and Trapping*, <http://www.hsus.org/ace/12031> (accessed Mar. 10, 2004) (states that have banned the use of traps: Washington, California, Massachusetts, Colorado, Arizona, New Jersey, Florida, and Rhode Island).

⁷ Thomas, *Bill Summary and Status for the 108th Congress*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR01800:@@L&summ2=M&> (accessed Apr. 4, 2004).

⁸ Corn, *supra* n. 1.

⁹ *Id.*

¹⁰ American Humane, *Send the Message that Steel-Jaw Leghold Traps are Inhumane*, <https://secure2.convio.net/aha/site/Advocacy?id=183&JServSessionIdr008=m7fdmftby2.app5a> (accessed Apr. 4, 2004).

¹¹ H.R. 1800, 108th Cong. § 5(2) (Apr. 11, 2003).

¹² API, *supra* n. 2.

The jaws snap shut with crushing force, gripping the animal's extremity. Animals typically experience distress and physical injuries including, but not limited to, torn flesh, ripped tendons, bone fractures, edema, blood loss, dislocated joints, crushed pelvises, amputations, swelling, tooth and mouth damage, and dehydration and starvation as they are left to suffer in the traps for days at a time.¹³ Frequently, animals "wring-off,"¹⁴ or self-mutilate, by chewing or twisting off the restrained limb in an effort to free themselves from the traps. Traps set for aquatic animals, such as beavers, typically function by drowning the animals in a process that can take up to 20 minutes.¹⁵

Trapping proponents argue that variations, such as a padded jaw design, are humane, despite reports indicating the occurrence of serious injury to the contrary. Furthermore, veterinary associations, including the World Veterinary Association, the American Animal Hospital Association, and the American Veterinary Medical Association (AVMA), expressly oppose such trap variations and consider their use inhumane.¹⁶ Traps that result in drowning are also condemned, as the AVMA has declared death by drowning to be inhumane and not to be considered a form of euthanasia.¹⁷

By adopting H.R. 1800, the United States would discontinue the use of the inhumane conventional steel leghold trap. The bill prohibits the import, export, or transport in interstate commerce of conventional steel-leghold traps; articles of fur derived from an animal that was trapped by such means; and the sale or acquisition of such traps transported in violation of this provision.¹⁸ Penalties are prescribed for violations. A first violation results in imprisonment for not more than five days and/or a fine under title 18 of the United States Code (U.S.C.).¹⁹ Subsequent violations result in imprisonment for not more than two years and/or a fine under title 18 U.S.C.²⁰

Additionally, the bill provides rewards to persons, excluding government officers or employees performing official duties, who provide information leading to a conviction of a violation of any provision of the bill.²¹ Furthermore, the bill empowers enforcement officials to detain, search, and seize suspected containers or merchandise and any accompanying documents; to make arrests without warrants but with probable cause; and to execute warrants, as well as subject seized merchandise to forfeiture.²²

¹³ HSUS, *supra* n. 6; API, *supra* n. 2.

¹⁴ Corn, *supra* n. 1.

¹⁵ Animal Protection Institute, *Exposing the Myths: The Truth About Trapping*, <http://www.api4animals.org/1123.htm> (accessed Mar. 10, 2004).

¹⁶ API, *supra* n. 2.

¹⁷ *Id.*

¹⁸ H.R. 1800, 108th Cong. at § 2(a).

¹⁹ *Id.* at § 2(b)(1).

²⁰ *Id.* at § 2(b)(2).

²¹ *Id.* at § 3. The Secretary shall pay a reward equal to one-half of the fine paid pursuant to the conviction.

²² Thomas, *supra* n. 7.

H.R. 1800 has been referred to the House Committees on Energy and Commerce, Ways and Means, International Relations, and the Judiciary. Additionally, the bill is considered in the Subcommittee on Trade as well as the Subcommittee on Crime, Terrorism, and Homeland Security. Currently, 69 representatives co-sponsor this bill.²³

B. *Downed Animal Protection Act*

On December 30, 2003, Agriculture Secretary Ann M. Veneman, announced that the United States Department of Agriculture (USDA) would enhance the nation's protection system against Bovine Spongiform Encephalopathy (BSE), commonly termed "mad cow disease,"²⁴ to ensure the protection of public health.²⁵ Among the protective measures implemented is an immediate ban on the slaughter of all downer²⁶ cattle for human consumption.

Veneman's announcement was prompted by intense media coverage and public concern regarding a confirmed case of BSE in Washington State. On December 22, 2003, a Washington bovine tested positive for BSE 13 days after it had been sent to slaughter.²⁷ Reports indicate that the animal was a downed dairy cow,²⁸ "that would not have entered the human food chain if the Downed Animal Act were law."²⁹

The Downed Animal Protection Act (S. 1298 and H.R. 2519 respectively), was introduced in Congress on June 19, 2003, by Senator Daniel Akaka (D-HI) and Representative Gary Ackerman (D-NY).³⁰ The Act amends section 10815 of the Farm Security and Rural Investment Act of 2002 (7 U.S.C. § 1967). The Act requires the Secretary of Agriculture to promulgate regulations to provide humane treatment,

²³ *Id.*

²⁴ More than 150 people died in the United Kingdom from the human form of mad cow disease. Common Dreams Progressive Newswire, *CU Supports Legislation on "Downed" Animals*, <http://www.commondreams.org/news2004/0121-08.htm> (Jan. 21, 2004).

²⁵ United States Department of Agriculture, *Veneman Announces Additional Protection Measures to Guard Against BSE*, <http://www.usda.gov/news/releases/2003/12/0449.htm> (Dec. 30, 2003).

²⁶ The Act specifically defines nonambulatory livestock as "any cattle, sheep, swine, goats, or horses, mules, or other equines, that are unable to stand and walk unassisted." Sen. 1298, 108th Cong. § 2(a)(a)(4) (June 19, 2003).

²⁷ The Humane Society of the United States, *USDA Bans Slaughter of Downers After Mad Cow Finding*, <http://www.hsus.org/ace/20207> (accessed Feb. 28, 2004).

²⁸ Because they live longer, and are often pushed beyond their physical and genetic limits, 23% of dairy cattle, as compared to 3%–4% of beef cattle, are downers. Elizabeth Weise, *Ban on 'downers' could change way cattle are raised*, USA Today, http://www.usatoday.com/money/industries/food/2004-01-02-madcow-usat_x.htm (Jan. 1, 2004).

²⁹ U.S. Senator Patrick Leahy, *Leahy: Mad Cow Case Spotlights Need to Remove Sick Animals from Human Food Chain . . . Calls on Bush Administration to End Its Opposition to Downed Animal Bill*, <http://leahy.senate.gov/press/200312/123003.html> (accessed Feb. 28, 2004).

³⁰ The Humane Society of the United States, *Downed Animal Protection Act*, <http://www.hsus.org/ace/12578> (accessed Jan. 19, 2004).

handling, and disposition of downed livestock, including a requirement that such animals be immediately and humanely euthanized.³¹ Pursuant to the Act's definitions, "humanely euthanized" means, "to kill an animal by mechanical, chemical, or other means that immediately renders the animal unconscious, with this state remaining until the death of the animal."³² Furthermore, the Act prohibits the movement of conscious downed livestock.³³ The Act also prohibits establishments covered by the Federal Meat Inspection Act to pass downed livestock through inspection, thereby banning downed meat for human consumption.³⁴

According to the USDA, 130,000 to 190,000 downer animals are annually presented at slaughterhouses.³⁵ These animals account for only a fraction of the estimated 35 million slaughtered each year. Nevertheless, it is estimated that three-quarters of downed animals are slaughtered for human consumption, posing serious health risks to the public.³⁶ Secretary Veneman reported that 20,000 downers were tested for BSE in 2003. However, these animals only comprised approximately 10% to 15% of the total that reached processing plants.³⁷

In addition to BSE, downer animals present further health risks to humans. More than 70,000 Americans are exposed and become ill from *E. coli* each year.³⁸ Downed animals play a significant role in this statistic, as is evident from USDA reports stating that "downer cows have three times more of the deadly bacterium *E. coli* 015H7 than other cows."³⁹ Furthermore, the USDA has "approved meat from downed animals with numerous conditions, including gangrene, hepatitis, malignant lymphoma, and pneumonia."⁴⁰

For nearly a decade, organizations such as the Humane Society of the United States and the Farm Sanctuary have pursued a ban on the inhumane treatment and slaughter of downed animals. In addition to citing risks to human health, these organizations also report on the inhumane treatment and suffering experienced by downed animals.

Downed animals are routinely pushed with tractors or forklifts, kicked, dragged with chains, prodded with electric shocks in efforts to

³¹ Sen. 1298, 108th Cong. at § 2; H.R. 2519, 108th Cong. § 2 (June 19, 2003).

³² Sen. 1298, 108th Cong. at § (2)(a)(a)(3).

³³ *Id.* at 2(d)(1).

³⁴ Thomas, *Bill Summary and Status for the 108th Congress*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR02519:@@L6summ2=M6> (accessed Apr. 4, 2004).

³⁵ The Humane Society of the United States, *The HSUS Demands Ban on Processing Downed Animals for Human Consumption*, <http://www.hsus.org/ace/20208> (accessed Feb. 28, 2004).

³⁶ *Id.*

³⁷ The Humane Society of the United States, *supra* n. 27.

³⁸ Common Dreams Progressive Newswire, *supra* n. 24.

³⁹ Weise, *supra* n. 28.

⁴⁰ Farm Sanctuary, *Frequently Asked Questions*, <http://www.nodowners.org/faqs.htm> (accessed Feb. 1, 2004).

move them at auction and slaughterhouse facilities.⁴¹ These animals sustain “injuries ranging from bruises and abrasions to broken bones and torn ligaments” due to such abusive practices.⁴²

Additionally, sick or injured downer animals are left to suffer for hours or days without proper food, water, or veterinary care.⁴³ Because they do not own the animals, stockyards neglect downed animals to minimize costs.⁴⁴ Antibiotic treatment may also be withheld to ensure compliance with slaughter restrictions regarding drug withdrawal time periods.⁴⁵

If adopted, the Downed Animal Protection Act would remove economic incentives to put downed animals into the human food chain, and would mandate and motivate more humane practices within the livestock industry.⁴⁶ Temple Grandin, professor of animal sciences at Colorado State University, estimates that 90% of downer cases are actually preventable.⁴⁷ Despite industry attempts to self-regulate, these statistics continue to persist. These percentages would likely decrease with the implementation of federal legislation prescribing a national standard of livestock practices.

Adam Goldberg, a policy analyst with Consumers Union (CU), has announced CU’s support of the Downed Animal Protection Act, stating, “we could substantially reduce the risk consumers face from these diseases by simply taking these downed animals out of the food supply.”⁴⁸

A “no downer” policy has received support from the livestock industry as well.⁴⁹ Industry representatives, including the National Cattlemen’s Association, have acknowledged that downed animals should never be marketed and that the most humane and economical option is euthanasia.⁵⁰

While the USDA ban is encouraging, it is discriminating and temporary. The Downed Animal Protection Act would protect all animal species, unlike the USDA ban which only addresses cattle. States, including California, Illinois, and Maryland, have already passed laws

⁴¹ Farm Sanctuary, *Support the Downed Animal Protection Act (H.R. 2519 and S. 1298)*, http://www.nodowners.org/dapa_points.htm (accessed Feb. 1, 2004).

⁴² Farm Sanctuary, *Legislative Work: Presented Before the U.S. House Agricultural Subcommittee on Livestock—Sept. 28, 1994*, <http://www.nodowners.org/hearing.htm> (accessed Feb. 29, 2004).

⁴³ Farm Sanctuary, *supra* n. 41.

⁴⁴ Farm Sanctuary, *supra* n. 42.

⁴⁵ *Id.*

⁴⁶ Leahy, *supra* n. 29.

⁴⁷ Weise, *supra* n. 28.

⁴⁸ Common, *supra* n. 24. Consumers Union is the independent, non-profit publisher of Consumer Reports magazine.

⁴⁹ Farm Sanctuary, *Livestock Industry Voices Supporting “No Downer” Policy*, <http://www.nodowners.org/industryquotes.htm> (accessed Feb. 29, 2004).

⁵⁰ *Id.*

prohibiting the acceptance of downed animals at stockyards.⁵¹ However, federal legislation would establish uniform standards, which would allow ease of enforcement as well as incite more humane husbandry practices for the entire nation.

The Downed Animal Protection Act has faced strong political opposition in the past. Notably, Congressmen Charles Stenholm (D-TX) and Bob Goodlatte (R-VA) have opposed its passage, arguing that sending downed animals to slaughterhouses actually helps prevent disease, despite reports that the majority of downed animals are not tested for BSE.⁵² The Senate passed the Downed Animal Act in both 2002 and 2003; however, pressure from the White House killed the bill in House-Senate conferences. Senator Patrick Leahy stated, “[t]he Senate keeps passing our bill, and the White House keeps taking it out in back room deals with special interests The President needs to work with us to put this sensible consumer protection into law.”⁵³

Both S. 1298 and H.R. 2519 were introduced on June 19, 2003.⁵⁴ S. 1298 was referred to the Senate Committee on Agriculture, Nutrition, and Forestry, while H.R. 2519 was referred to the House Committee on Agriculture the same day.⁵⁵ On June 24, 2003, H.R. 2519 was referred to the Subcommittee on Livestock and Horticulture.

The Downed Animal Act was then attached, and later approved, as an amendment to the Senate Agriculture Appropriations Bill (H.R. 2673) on November 5, 2003. The Amendment would prohibit the USDA from funding the slaughter of downed animals for human consumption. However, the Act was stripped out of the Agriculture Appropriations Bill by the House-Senate conference committee on December 9, 2003.⁵⁶ A similar measure presented to the House was ultimately defeated on July 14, 2003, in a 202-199 decision.⁵⁷

Due to growing concerns regarding disease and inhumane practices, the Downed Animal Protection Act is still pending and will be reconsidered by Congress in early 2004.⁵⁸ As of January 30, 2004, S. 1298 has 32 co-sponsors, while H.R. 2519 has 128 co-sponsors.⁵⁹

⁵¹ Farm Sanctuary, *supra* n. 42. Illinois and Maryland Departments of Agriculture lead this action, and livestock industry and humane groups supported the Illinois legislation.

⁵² Farm Sanctuary, *Downed Animal Slaughter Ban Narrowly Defeated*, http://www.nodowners.org/dapa_update.htm (accessed Mar. 22, 2004).

⁵³ Leahy, *supra* n. 29.

⁵⁴ S. 1298, 108th Cong. § 2 (June 19, 2003) (as introduced); H.R. 2519, 108th Cong. § 2 (June 19, 2003) (as introduced).

⁵⁵ *Id.*

⁵⁶ Farm Sanctuary, *Downed Animal Provision Stripped in Conference Committee; but Issue Remains Alive in Congress*, http://www.nodowners.org/dapa_akaka.htm (accessed Mar. 22, 2004).

⁵⁷ The Humane Society of the United States, *Senate Passes Downed Animal Act, Sets Up Showdown with House*, <http://www.hsus.org/ace/20085> (accessed Mar. 22, 2004).

⁵⁸ Humane Society of the United States, *Humanelines Update: Downed Animal Protection Amendment Stripped in Conference* (Dec. 17, 2003).

⁵⁹ Thomas, *supra* n. 34.

C. *The Truth in Tuna Labeling Act of 2003*

In the 1950s, fishermen discovered that large yellowfin tuna aggregate and swim beneath schools of dolphin stocks.⁶⁰ Because large and mature tuna fish are more desirable, purse seine technology rapidly replaced the pole and line fishing method of harvesting tuna in the Eastern Tropical Pacific Ocean (ETP) as fishers began using dolphins as a harvesting tool.⁶¹ Consequently, hundreds of thousands of dolphins were killed during the early years of this type of fishing. Despite historic efforts to reduce dolphin mortality, these practices continue, threatening the stability of dolphin populations.

Purse seine nets may span one mile in length and hang deep beneath floats on the ocean surface.⁶² Fishers watch for dolphin groups, and once sighted, speedboats proceed to chase and herd the dolphins into a tight group, allowing them to be easily encircled by the purse seine nets.⁶³ Then the bottom of the net is pulled, or “pursed,” together preventing the tuna from escaping under the net.⁶⁴ During this process, which may last 20 to 60 minutes, dolphins may asphyxiate and die if they become entangled or are unable, or unwilling, to leave the net.⁶⁵

Scientific evidence prepared by the National Oceanic and Atmospheric Administration (NOAA) indicates that dolphin stocks⁶⁶ in the ETP are severely depleted.⁶⁷ Furthermore, NOAA reported that dolphin stocks are not recovering at a rate consistent with these levels of depletion and the low reported kills.⁶⁸ The very low population

⁶⁰ National Marine Fisheries Service, *Background on the Tuna/Dolphin Issue*, <http://www.nmfs.noaa.gov/pr/readingrm/tunadolphin/background.htm> (accessed Mar. 22, 2004).

⁶¹ National Marine Fisheries Service, *Fact Sheet: Historical Events in Reducing Dolphin Mortality in the ETP Tuna Purse Seine Fishery*, http://www.nmfs.noaa.gov/pr/readingrm/tunadolphin/historical_events.htm (accessed Apr. 4, 2004).

⁶² Whale and Dolphin Conservation Society, *Introduction to the Tuna/Dolphin Issue*, <http://www.wdcs.org/dan/publishing.nsf/allweb/ADED9F368A73DC3280256E1B003F367C> (accessed Apr. 4, 2004).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Dolphin populations that occur in the ETP, including the Northeastern offshore spotted dolphins, eastern spinner dolphins, and coastal spotted dolphins, have significantly reduced as a result of mortality associated with tuna fishing involving chase and encirclement practices. Marine Mammal Commission, *Letter to Secretary Evans*, http://www.nmfs.noaa.gov/pr/PR2/Tuna_Dolphin/mmc_comments.htm (Oct. 25, 2002).

⁶⁷ *Earth Island Inst. v. Evans*, 256 F. Supp. 2d 1064, 1072 (N.D. Cal. 2003).

⁶⁸ *Id.*

growth rates suggest that “some process is acting to suppress population growth,”⁶⁹ and that there is “a conservation concern given the depleted state of the populations.”⁷⁰

On January 9, 2003, Senator Barbara Boxer (D-CA) introduced Senate Bill 130, commonly referred to as the Truth in Tuna Labeling Act of 2003. The Act amends the Dolphin Protection Consumer Information Act (16 U.S.C. 1385) by requiring that tuna products labeled “dolphin safe” are accompanied by certification stating that no dolphins were intentionally chased or harassed during the voyage on which the tuna were caught using purse seine nets.⁷¹ Furthermore, the Act specifies that any “producer, importer, exporter, distributor, or seller of any tuna product that is exported from or offered for sale in the United States,” who does not meet labeling requirements, violates section five of the Federal Trade Commission Act (15 U.S.C. 45).⁷²

The original dolphin-safe label was introduced in the late 1980s as a response to pressure from consumers who boycotted canned tuna due to reports indicating that as many as half a million dolphins were dying each year as a result of fisheries setting nets on dolphins to catch tuna. The label assures and informs consumers that tuna in marked cans was caught without intentionally chasing, harassing, capturing, or killing dolphins.⁷³ Furthermore, under the U.S. Marine Mammal Protection Act (MMPA) of 1972, importation of tuna caught by countries that did not comply with the dolphin-safe label provisions was banned.⁷⁴

Consequently, in the mid-1990s, Mexico threatened action against the United States, alleging that the U.S. dolphin protection laws violated the free trade requirements of the World Trade Organization.⁷⁵ International legislation was enacted to alleviate this tension. In October of 1995, 12 nations,⁷⁶ including the United States, signed the Declaration of Panama and pledged to continue long-term dolphin

⁶⁹ Possible factors impeding dolphin recovery include: changes in the ETP environmental/ecosystem resulting in a lowered environmental carrying capacity for dolphins, fishery effects beyond reported incidental mortality, and other fishery effects. Fishery effects beyond reported incidental mortality regards: unobserved mortality that may occur during the chase phase of the fishing operation, mortality resulting from the separation of mothers and their calves, mortality due to predation that may be facilitated by the chase and capture, and reproductive failure caused by the stress resulting from these practices. Marine Mammal Commission, *supra* n. 66.

⁷⁰ *Earth Island Inst.*, 256 F. Supp. 2d at 1072.

⁷¹ Thomas, *Bill Summary and Status of the 108th Congress*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN00130:@@L&summ2=M&> (accessed Feb. 29, 2004).

⁷² Sen. 130, 108th Cong. § 3 (Jan. 9, 2003) (as introduced) (citing the Fed. Trade Comm. Act, 15 U.S.C. § 45(d) (2004)).

⁷³ The Humane Society of the United States, *The Dolphin Safe Label*, <http://www.hsus.org/ace/11578> (accessed Mar. 22, 2004).

⁷⁴ *Id.*

⁷⁵ The Humane Society of the United States, *An Unhappy Year for Dolphins*, <http://www.hsus.org/ace/15993> (accessed Mar. 22, 2003).

⁷⁶ The Declaration of Panama was signed by Belize, Colombia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, Vanuatu, Venezuela, and the United

protection efforts. As part of the Declaration, the United States agreed to lift embargoes on tuna and revise the term dolphin safe to include tuna caught by setting purse seine nets on dolphins, as long as observers certify that no dolphin mortality occurred during the set.⁷⁷ The Declaration of Panama was enacted by the International Dolphin Conservation Program Act (IDCPA) of 1997, thereby lifting the ban on imports of tuna from countries and redefining the term dolphin safe to include tuna caught by purse seine nets as long as a qualified observer and the captain of the vessel certify that “no dolphins were killed or seriously injured during the sets in which the tuna were caught.”⁷⁸

The IDCPA mandated that Congress review a completed scientific study to determine whether the intentional setting of purse seine nets on dolphins is having a significant adverse impact on dolphins in the ETP between July of 2001, and December of 2002.⁷⁹ Accordingly, on behalf of the Secretary of Commerce, the National Marine Fisheries Service announced on December 31, 2002, its “finding that the tuna purse seine industry practice of encircling dolphins to catch tuna has no significant adverse impact on dolphin populations in the Eastern Tropical Pacific Ocean.”⁸⁰ Consequently, the dolphin-safe definition was modified, prescribing that dolphins can be encircled or chased, but none can be killed or seriously injured in the set in which the tuna was harvested.⁸¹

In response, Earth Island Institute, et al,⁸² filed a complaint in the United States District Court for the Northern District of California, challenging the finding and seeking to legally prohibit any change to the original dolphin-safe labeling standard for tuna harvested with purse seine nets.⁸³ On April 10, 2003, United States District Judge

States. Kristen Stewart, *Dolphin-Safe Tuna: the Tide is Changing*, 4 Animal L. 111, 128 (1998).

⁷⁷ *Id.* at 128-2a.

⁷⁸ *Id.* at 130.

⁷⁹ *Id.*

⁸⁰ National Oceanic and Atmospheric Administration (NOAA), *Commerce Department Determines No Significant Adverse Impact of Fishing on Dolphin Populations*, <http://www.publicaffairs.noaa.gov/releases2002/dec02/noaa02168.html> (Dec. 31, 2002).

⁸¹ National Marine Fisheries Service, *Dolphin-Safe Determination*, http://www.nmfs.noaa.gov/prot_res/PR2/Tuna_Dolphin/finalfinding.html (accessed Feb. 29, 2004).

⁸² Plaintiffs include: Earth Island Institute, biologist Samuel LaBudde, Humane Society of the United States, American Society for the Prevention of Cruelty to Animals (ASPCA), Defenders of Wildlife, International Wildlife Coalition, Animal Welfare Institute, Society for Animal Protective Legislation, Animal Fund, and Oceanic Society. Earth Island Institute, *Court Blocks Bush ‘Dolphin Safe’ Label*, http://www.earthisland.org/news/new_news.cfm?newsID=390 (Apr. 10, 2003).

⁸³ National Marine Fisheries Service, *Litigation Related to the Tuna/Dolphin Program*, http://www.nmfs.noaa.gov/prot_res/PR2/Tuna_Dolphin/litigation.html (accessed Feb. 29, 2004). See *Earth Island Inst. v. Evans*, 256 F. Supp. 2d 1064, 1069 (N.D. Cal. 2003).

Thelton E. Henderson determined that Earth Island Institute demonstrated a likelihood of success of their claims. The Court found it probable that Commerce Secretary Donald Evans considered improper factors, specifically international trade policy considerations, in making the finding.⁸⁴ The preliminary injunction was granted, which currently prohibits the Secretary from taking “any action under the Dolphin Protection Consumer Information Act, as amended by the IDCPA, to allow any tuna product to be labeled as ‘dolphin safe’ that was harvested using purse seine nets intentionally set on dolphins in the ETP.”⁸⁵ Pending a final determination of the action or further order of the Court, the original dolphin-safe definition has been reinstated. In the meantime, countries with AIDCP membership may not export their tuna to the U.S.⁸⁶

While Judge Henderson’s decision looks promising, the threats to dolphins and consumer confidence persist. Mexican, Venezuelan, Colombian, and other international fisheries continue to practice chasing and encircling techniques that kill thousands of dolphins per year.⁸⁷ Dolphin populations are less than half of what they were in the 1950s, when tuna fisheries began using purse seine nets.⁸⁸ Additionally, U.S. government scientists admit that two dolphin populations in the eastern Pacific Ocean have been seriously depleted and may not recover for 200 years.⁸⁹

Since the passage of the dolphin-safe label requirements in 1990, dolphin mortality has decreased from more than 100,000 dolphin kills each year to fewer than 2,000 kills each year.⁹⁰ However, if the Secretary’s finding is sustained to allow the definition of dolphin-safe to be weakened, an estimated 20,000 to 40,000 dolphin deaths will occur each year.⁹¹

Enactment of the Truth in Tuna Labeling Act would preserve the original dolphin-safe definition and further the intent of the dolphin-safe label on canned tuna, preventing such a detrimental result. Despite the strong history of consumer pressure and reports of threats to dolphins, the fate of this Act is questionable. As of early 2004, there are only five co-sponsors.⁹² This Act has been read twice and referred

⁸⁴ *Earth Island Inst.*, 256 F. Supp. 2d at 1073-75.

⁸⁵ *Id.* at 1080.

⁸⁶ The Humane Society of the United States, *Agreement on the International Dolphin Conservation Program*, <http://www.hsus.org/ace/11562> (accessed July 30, 2003).

⁸⁷ The Humane Society of the United States, *U.S. Government Report Shows Tuna Fisheries are Still a Threat to Dolphins*, <http://www.hsus.org/ace/15942> (accessed Feb. 29, 2004).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Sen. 130, 108th Cong. § 2(3) (Jan. 9, 2003) (citing the Annual Report of the Marine Mammal Commission and the Inter-American Tropical Tuna Commission).

⁹¹ *Id.* at § 2(4).

⁹² Thomas, *supra* n. 71. Co-sponsors: Sen. Biden (DE), Sen. Cantwell (WA), Sen. Hollings (SC), Sen. Kerry (MA), and Sen. Wyden (OR).

to the Senate Committee on Commerce, Science, and Transportation for further consideration.⁹³

D. Whaling Resolution

Senator Olympia Snowe (R-ME) introduced Sen. Con. Res. 55 to the Senate Committee on June 12, 2003.⁹⁴ Concurrently, an identical bill, H.R. Con. Res. 216, was introduced by Representative William Delahunt (D-MA) to the House Committee.⁹⁵ These bills, proposing a Whaling Resolution, “[express] the sense of the Congress regarding the policy of the United States at the 55th Annual Meeting of the International Whaling Commission.”⁹⁶

According to the Resolution, at the 55th Annual Meeting of the International Whaling Commission, the United States should remain firmly opposed to commercial whaling, oppose the lethal taking of whales for scientific purposes unless authorized by the Scientific Committee of the Commission as necessary for scientific purposes, seek the Commission’s support to end the trade in whale meat, support establishment of sanctuaries for permanent protection of whale populations, and support expansion of whale conservation efforts.⁹⁷ Additionally, at the 13th Conference of the Parties to the Convention on International Trade in Endangered Species, the United States should oppose all efforts to reopen international trade in whale meat or to downlist any whale population.⁹⁸ Furthermore, the United States should make full use of all appropriate diplomatic mechanisms and relevant international laws and agreements to implement the goals stated in the Resolution.⁹⁹

This Resolution follows historical efforts to conserve whale populations, monitor and regulate commercial whaling, and prevent a reoccurrence of unsustainable practices that nearly eradicated whale species prior to the mid-1940s. A notable step in this movement was the creation of the International Whaling Commission (IWC) in 1949 under the International Convention for the Regulation of Whaling (ICRW), which itself was founded three years earlier in 1946.¹⁰⁰ The

⁹³ *Id.*

⁹⁴ Thomas, *Bill Summary and Status for the 108th Congress: Sen. Con. Res. 55*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SC00055:@@L&summ2=M&> (accessed Feb. 29, 2004).

⁹⁵ Thomas, *Bill Summary and Status for the 108th Congress: H.R. Con. Res. 216*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HC00216:@@L&summ2=M&> (accessed Apr. 4, 2004).

⁹⁶ Thomas, *supra* n. 94.

⁹⁷ Sen. Con. Res. 55, 108th Cong. § 1 (June 12, 2003); H.R. Con. Res. 216, 108th Cong. § 1 (June 12, 2003).

⁹⁸ Sen. Con. Res. 55, 108th Cong. § 2; H.R. Con. Res. 216, 108th Cong. § 2.

⁹⁹ Sen. Con. Res. 55, 108th Cong. § 3; H.R. Con. Res. 216, 108th Cong. § 3.

¹⁰⁰ The Humane Society of the United States, *International Whaling Commission*, <http://www.hsus.org/ace/11599> (accessed Jan. 19, 2004).

IWC was formed in “recognition of the fact that whales are highly migratory and that they do not belong to any one Nation.”¹⁰¹

The IWC was established to provide for the proper conservation of whale stocks;¹⁰² however, these goals were not being met. Consequently, 33 years later, in 1982, the IWC passed a moratorium on commercial whaling that would take effect in 1985.¹⁰³ However, whales are still in peril. The moratorium contains exemptions, including whaling for scientific research, which Japan has taken advantage of to continue its whaling practices. Norway expressed reservations against the ban and continues commercial whaling. The moratorium is also indefinite and may be lifted if the IWC decides by a three-quarters majority vote.¹⁰⁴

Despite the implementation of the whaling moratorium, whale populations continue to be threatened. “Some 21,000 whales have been slaughtered . . . and every year a growing number of whales are killed.”¹⁰⁵ This is the result of nations such as Japan, Norway, and Iceland challenging and often defying the IWC.

Masayuki Komatsu, an agent of Japan’s Fisheries Agency, stated in March of 2002, that “[w]haling and whale meat are an integral part of the culture of a number of locations in Japan.”¹⁰⁶ Komatsu’s remarks stemmed from the results of a survey, conducted by the Cabinet of Japanese Prime Minister Junichiro Koizumi, which polled 3,453 people, age 20 years or older, from 350 locations in Japan.¹⁰⁷ The survey indicated that over 75% of those polled support commercial whaling if the catch is managed in a scientific and sustainable manner, and approximately 88% said they had eaten whale meat.¹⁰⁸

Further reports indicate that Japan has attempted to gain support for commercial whaling and encourages developing countries to join the IWC by providing them with financial assistance.¹⁰⁹ Japan has provided substantial foreign aid and investment to several Caribbean

¹⁰¹ United States Embassy: Tokyo, Japan, *Resolution Calls for Firm Opposition to Commercial Whaling*, <http://usembassy.state.gov/tokyo/wwwhecc0592.html> (May 14, 2002) (quoting Senator Kerry’s remarks).

¹⁰² Sen. Con. Res. 55, 108th Cong. (June 12, 2003); H.R. Con. Res. 216, 108th Cong. (June 12, 2003).

¹⁰³ United States Embassy, *supra* n. 101 (Senator Kerry’s remarks).

¹⁰⁴ Campaign Whale, *A Nasty Business – Why Commercial Whaling Must End*, <http://www.campaign-whale.org/reports/nastybusiness.html> (accessed Feb. 29, 2004).

¹⁰⁵ Campaign Whale, *A Nasty Business: Commercial Whaling Set to Return*, <http://www.labouranimalwelfaresociety.org/articles/A%20Nasty%20Business.htm> (accessed Feb. 29, 2004).

¹⁰⁶ Whale Watch, *Most Japanese Support Commercial Whaling According to Survey*, <http://www.whalewatch.co.nz/disc3/00000287.htm> (accessed Jan. 30, 2004).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Animal People, *Whalers’ Covert Strategy Confirmed*, <http://www.animalpeoplenews.org/99/6/whale.html> (accessed Jan. 30, 2004).

nations whose delegations have often voted with Japan on IWC resolutions, and has recently also significantly assisted the Irish fishing industry, which itself has made attempts to lift the ban on commercial whaling.¹¹⁰

While profits seem to drive efforts to reinstate commercial whaling, other non-deadly options are economically lucrative. Whale meat is neither a nutritional nor economic necessity in countries seeking to lift the ban on commercial whaling and whale products have been replaced or are manufactured synthetically.¹¹¹ Additionally, whales are increasingly contaminated by persistent organic compounds, such as pesticides and PCBs, which pose serious health risks not only to the whales, but to humans who consume whale meat.¹¹² Despite these facts, whale meat “remains an expensive gourmet food in Japan that can fetch the equivalent of £200 per pound.”¹¹³ Conserving whales would be equally, if not more, lucrative than commercial whaling “as a \$1 billion dollar worldwide whale-watching industry clearly demonstrates.”¹¹⁴

Financial concerns aside, more than 7,500 whales have been killed in lethal scientific whaling programs since the adoption of the moratorium.¹¹⁵ Additionally, the quantity and species available for these lethal takings under the guise of scientific research is increasing.¹¹⁶ Also, IWC member countries “stated their intentions to engage in international trade of whale products, “despite a ban on such trade under the Convention on International Trade in Endangered Species.”¹¹⁷ Provided this information, the Whaling Resolution bills are likely to pass both the Senate and the House, reasserting the United States’ opposition to commercial whaling and the lethal taking of whales under the guise of research. Furthermore, adoption of the Whaling Resolution will indicate the United States’ continued leadership in the effort to conserve whale populations. As of early 2004, the Resolution has nineteen co-sponsors in the Senate¹¹⁸ and seven co-sponsors in the House.¹¹⁹ Sen. Con. Res. 55 has been referred to the Senate Committee on Foreign Relations,¹²⁰ while H.R. Con. Res. 216 has been referred to the House Committee on International Relations.¹²¹

¹¹⁰ *Id.*

¹¹¹ Campaign Whale, *supra* n. 105.

¹¹² *Id.*

¹¹³ *Id.*; Currency conversion on Feb. 29, 2004: 1USD is equal to .538358 GBP. Currency Calculator, <http://www.x-rates.com/calculator.html> (accessed Feb. 29, 2004).

¹¹⁴ Campaign Whale, *supra* n. 105.

¹¹⁵ United States Embassy: Tokyo, Japan, *supra* n. 101.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Thomas, *supra* n. 94.

¹¹⁹ Thomas, *supra* n. 95.

¹²⁰ Thomas, *supra* n. 94.

¹²¹ Thomas, *supra* n. 95.

II. STATE LEGISLATION

A. *Hunting*

Hunting issues permeated the 2003 legislative session with a trend to increase hunting opportunities. Ten states attempted to strengthen citizens' right to hunt, mostly in the form of amendments to state constitutions. While some proposed amendments failed or stalled in committee, others made it onto the 2004 ballot and will be left up to voters.

California passed CA A.B. 396, creating the Shared Habitat Alliance for Recreational Enhancement (SHARE).¹²² The program encourages private landowners to make their land available for a variety of wildlife activities, including hunting.¹²³ Georgia launched its first-ever alligator hunting season, making it the fifth state to have a hunting season for alligators.¹²⁴ Unfortunately, two bills that would have banned dove hunting in both California and Rhode Island failed to make it out of committee.¹²⁵ Finally, legislation in Montana serves as an example of the increase in hunting opportunities.

1. *The Constitutional Right to Hunt*¹²⁶

Arkansas, Illinois, Indiana, Louisiana, Missouri, Montana, Nebraska, Pennsylvania, Oklahoma, and Wisconsin attempted to join the seven other states that already have constitutional protections for hunters.¹²⁷ Most amendments would add simple language to state constitutions enshrining the right to hunt, subject to the laws of the

¹²² Humane Society of the United States, *CA A.B. 396 Hunting*, <http://hsus.org/ace/19132> (accessed Apr. 3, 2004).

¹²³ Cal. Assembly 396, 92, 2003-2004 Reg. Sess. 1 (Oct. 11, 2003) (available at http://www.leginfo.ca.gov/pub/bill/asm/ab_0351-0400/ab_396_bill_20031011_chaptered.pdf).

¹²⁴ Associated Press, *Georgia Launches First-Ever Alligator Hunting Season*, <http://www.foxnews.com/story/0,2933,97394,00.html> (Sept. 15, 2003).

¹²⁵ Animal Protection Institute, *Rhode Island -Legislation 2003*, <http://www.api4animals.org/1468.htm> (accessed Apr. 3, 2004); see also United States Sportsmen, *Anti-Dove Hunting Bills Appear on Both Coasts*, <http://www.ussportsmen.org/interactive/features/Read.cfm?ID=1019> (accessed Apr. 3, 2004) (H.B. 5300 would have banned all mourning dove hunting in Rhode Island, and A.B. 1190 would have banned hunting for western mourning doves and white-winged doves in California).

¹²⁶ Many of the bills also include the constitutional right to fish and harvest game.

¹²⁷ The seven states are Alabama, California, Minnesota, North Dakota, Rhode Island, Vermont, and Virginia. Wisconsin Legislative Council Information Memorandum on Hunting, Fishing, and Trapping, *Laws on Hunting, Fishing and Trapping*, http://www.legis.state.wi.us/lc/jlc00/im00_7.pdf (accessed Apr. 3, 2004). In 1999, New Mexico SJR 1 failed to make New Mexico the eighth state. Forest Guardians, Issue 509, *Hunting and Fishing will not be a Constitutional Right in New Mexico any time soon*, <http://www.fguardians.org/frontline/ofront50.htm> (Feb. 19, 1999). Following suit in 2001, Texas H.J.R. 14 failed to create a constitutional right to hunt. Wildlife Management Interactive, *"Right to Hunt" Bill in Question: December 16, 2001 Texas*, <http://www.wminteractive.org/Articles/01tx12-16.htm> (accessed Apr. 3, 2004).

state.¹²⁸ At the close of 2003, only Wisconsin added the right to hunt to its constitution. In early 2004, Georgia's lawmakers sponsored a resolution to add the right to hunt to the state constitution.

a. Pending and Failed Amendments

Pending in Illinois, S.B. 1527 would create the Illinois Heritage Protection Act and expand hunting rights. Sponsored by State Senator John Jones (R), it passed the Senate and was re-referred to the House Rules Committee in June of 2003.¹²⁹ Similarly, Louisiana S.B. 47, a state constitutional amendment preserving the right to hunt, fish, and trap, and sponsored by State Senator William McPherson (D), is also pending after it passed the Senate and was sent to the House.¹³⁰ Indiana H.J.R. 1, which would amend the state constitution to add the right to hunt, stalled in the House early in January, 2003.¹³¹ Missouri H.J.R. 7, which would "preserve the right of every person to hunt, fish, and harvest game," is no longer on the calendar in the House.¹³²

Pennsylvania H.B. 1512 was laid on the table on December 22, 2003. H.B. 1512 provides a constitutional right to hunt, but also explicitly allows the state to revoke or suspend the right to a hunting or fishing license.¹³³ Nebraska L.R. 4CA will carry over into the second session in January 2004 after entering the general file. If passed, it will be placed on the November 2004 ballot.¹³⁴ Arkansas S.J.R. 1,

¹²⁸ For example, Wisconsin's amendment provides, "people have the right to fish, hunt, trap, and take game subject only to reasonable restrictions as prescribed by law." Wis. Const. Art. I, § 26.

¹²⁹ Illinois General Assembly, *Bill Status of SB1527*, <http://www.legis.state.il.us/legislation/billstatus.asp?DocNum=1527&GAID=3&DocTypeID=SB&LegID=4576&SessionID=3> (accessed Apr. 3, 2004).

¹³⁰ Louisiana Legislature, *SB 47*, http://www.legis.state.la.us/leg_docs/03RS/CVT2/OUT/H0007612.PDF (last updated Apr. 30, 2003).

¹³¹ Access Indiana, *Bill Info Action List: Joint Resolution 0001*, <http://www.in.gov/apps/lisa/session/billwatch/billinfo?year=2003&request=getActions&doctype=HJR&docno=0001> (accessed Apr. 3, 2004).

¹³² Missouri House of Representatives, *HJR 7*, <http://www.house.state.mo.us/bills03/bills/hjr7.htm> (accessed Apr. 3, 2004); Missouri House of Representatives, *House Joint Resolution No. 7*, <http://www.house.state.mo.us/bills03/biltxt/intro/HJR0007I.htm> (accessed Apr. 4, 2004).

¹³³ The Pennsylvania General Assembly, *HB 1512*, <http://www.legis.state.pa.us/WU01/LI/BI/BH/2003/0/HB1512.HTM> (accessed Jan. 8, 2004) (when a bill is laid on the table, it is temporarily postponed, but not dead. It may be taken off of the table for further consideration. H.B. 1512 provides in full, "[t]he right of the people to hunt and fish shall not be prohibited, subject to reasonable restrictions relating to seasons, licensure, limits, methods and locations, as prescribed by the Commonwealth. However, this right shall not be construed to confer a right to a license to hunt or fish issued by the Commonwealth when the privilege to hold such a license has been revoked or suspended pursuant to an act of the General Assembly").

¹³⁴ Animal Protection Institute, *Nebraska—Legislation 2003: LR 4CA Constitutional Right to Hunt and Fish*, <http://www.api4animals.org/1460.htm#LR4CA> (accessed Apr. 3, 2004).

known as the Sportsperson's Bill of Rights, died in committee.¹³⁵ Oklahoma S.J.R. 9 died early this year. It would have provided for a constitutional right to hunt and fish as well as legalize dogfighting, cockfighting, and other forms of animal sport.¹³⁶

b. Montana and Wisconsin

Two bills, Montana H.B. 306 and Wisconsin A.J.R. 1, successfully passed both houses in 2003. Montana H.B. 306, which recognizes and preserves the right to fish and hunt made it onto the ballot for November 2004.¹³⁷ Wisconsin A.J.R. 1 was enacted after voters elected to change the state constitution in an April referendum.¹³⁸ The bill amended Section 26 of Article I of the Wisconsin Constitution. The constitution now provides, "the people have the right to fish, hunt, trap, and take game subject only to reasonable restrictions as prescribed by law."¹³⁹ For example, present restrictions include the types of animals that may be hunted, the hours hunting may occur, the types of weapons and ammunition that may be used for each type of animal, locations where the hunting may occur for each animal, how many animals may be taken, and whether baiting is available during the hunt.¹⁴⁰

Many commentators on the issue of the constitutional right to hunt are unsure of its legal consequences. Some writers on both sides of the issue contend that adding a constitutional right to hunt will have little practical effect.¹⁴¹ Hunters will not be free from animal rights groups' challenges. Anti-hunters can still challenge hunting regulations in court on the basis of the reasonableness of those regulations. However, the constitutional leverage given to hunters may protect them not only against lawsuits, but also give them the arsenal they need to invalidate legislation that they find encroaches too far.¹⁴²

¹³⁵ Animal Protection Institute, *Arkansas—Legislation 2003: SJR 1 Constitutional Right to Hunt*, <http://www.api4animals.org/1448.htm#SJR1> (accessed Apr. 3, 2004).

¹³⁶ Humane Society of the United States, *OK S.J.R. 9 Constitutional Right to Abuse Animals*, <http://hsus.org/ace/18430> (accessed Apr. 3, 2004).

¹³⁷ Montana Secretary of State Bob Brown, *2004 Ballot Measures C-41*, http://sos.state.mt.us/css/ELB/2004_Ballot_Measures.asp (accessed Apr. 3, 2004).

¹³⁸ Meg Jones, *Voters to cast opinion on sporting rights*, <http://www.jsonline.com/news/state/mar03/129879.asp> (last updated Mar. 30, 2003) (the Senate and the Assembly passed the bill over two consecutive sessions, which is necessary to amend the Wisconsin state constitution).

¹³⁹ Wis. Const. art. I, § 26.

¹⁴⁰ See Wisconsin Department of Natural Resources, *Wisconsin Hunting and Trapping Regulations*, <http://www.dnr.state.wi.us/org/land/wildlife/regs/> (accessed Apr. 3, 2004).

¹⁴¹ Brian Carnell, *Wisconsin Voters Will Decide Pro-Hunting Amendment*, <http://www.animalrights.net/articles/2003/000026.html> (Feb. 9, 2003).

¹⁴² For a discussion of the tension between the animal protection movement and its opponents in American democracy, see Joseph Lubinski, *The Cow Says Moo, the Duck Says Quack, and the Dog Says Vote! The Use of the Initiative to Promote Animal Protection*, 74 U. Colo. L. Rev. 1109 (2003). Lubinski writes, "[t]he essence of these (constitutional right to hunt) measures is to draw a line. Animal activists can attempt to help

Pro-hunters contend that their favorite pastime will be forever protected against needless litigation from animal rights groups.¹⁴³ Wisconsin State Representative Scott Gunderson (R), co-author of the amendment, pointed to the future fight between sportsmen and women and animal rights groups as the inspiration for this legislation. He pointed to California's ban on hunting cougars and Colorado's ban on certain types of trapping as illustrations of the erosion of hunters' rights. The amendment was supported by Sporting Heritage, Inc. because of the alleged positive impact on conservation.¹⁴⁴

Anti-hunting activists see this type of amendment as a move by a politically powerful sportspersons' lobby to increase its legal arsenal against any attack, reasonable or not. They contend that the constitutional right to hunt will create causes of action for hunters.¹⁴⁵ There may be increased litigation over what constitutes "reasonable regulations." For example, hunters may want longer season dates, additional species available for hunt, and increased bag limits. Moreover, the right to hunt may provide hunters greater legal weight when bringing harassment suits. The prevention of animal cruelty could suffer because outright bans on certain types of trapping may now be impossible.¹⁴⁶

animals by conferring upon them certain rights and protections, but they can only go so far. If they attempt to push past these limits and create absolute protections for animals, the state constitution stands squarely in the way." *Id.* at 1142.

¹⁴³ Jim Slinsky, *A Few Good Men Stand Tall for Our Rights*, <http://www.outdoortalknetwork.com/art167.html> (accessed Apr. 3, 2004). Slinsky writes, "[a] Constitutional Amendment would put the debate to bed. An amendment will formalize our rights and we will continue to gloriously exercise our rights into the future. The current strategy of the Biodiversity crowd to replace hunters with mountain lions and timber wolves will collapse." *Id.*

¹⁴⁴ Dennis Chaptman & Richard P. Jones, *Constitutional right to hunt and fish will be up to voters*, <http://www.jsonline.com/news/state/jan03/114184.asp> (updated Jan. 29, 2003); Meg Jones, *Voters to Cast Opinions on Sporting Rights*, <http://www.jsonline.com/news/state/mar03/129879.asp> (updated Mar. 30, 2003); an opponent of the Amendment suggested that the impetus for the bill was pro-hunting legislators who were angered by criticism from animal rights activists over the expansion of hunting in Wisconsin to include hunting doves. Joel McNally, Shepherd Express Metro, *Taking Liberties: Freedom, Justice and Fishing for All: Winning the Right to Shoot Anything that Moves*, http://www.shepherd-express.com/shepherd/21/31/columnists/taking_liberties.html (July 27, 2000).

¹⁴⁵ Wisconsin Safe Space, *Whose Rights Should be Primary, Hunters or Non Hunters?*, http://www.wisconsinsafespace.org/wildlife_refuges.html#whose_rights (accessed Apr. 4, 2004).

¹⁴⁶ Animal News Center & The Fund for Animals, *No Constitutional 'Right' to Hunt, Say Animal Advocates*, http://www.anc.org/wildlife/wildlife_article.cfm?identifier=2003_1124_hunt (Nov. 25, 2003) (bag limits are provided by regulation. The term refers to the number of each species that may be taken by each hunter during the hunting season).

Other detractors consider the addition of the recreational pursuit of hunting as a constitutional right to be a degradation of state constitutions.¹⁴⁷ They view this movement as a political maneuver. In an attempt to attract the votes of hunters, legislators have allowed this issue to rise to the level of constitutional amendments.¹⁴⁸

c. Georgia

Representative Greg Morris (D) and State Senator Eric Johnson (R) sponsored H.R. 985 and S.R. 563 in January of 2004. On January 26, 2004, S.R. 563 passed the Senate, while H.R. 986 was in the House Committee on Game, Fish, and Parks.¹⁴⁹ The proposal, which would also have to be approved by Georgia voters, mirrors those previously discussed: citizens have the constitutional right to fish and hunt subject to reasonable restrictions promulgated by the legislature.¹⁵⁰

The bill is aimed at protecting hunting interests from any future threats by animal rights groups. There are already 1.3 million hunting and fishing permits issued each year in Georgia.¹⁵¹ Pointing to urban growth encroaching upon rural values, Senator Johnson stated, “[a] future Legislature might step over its bounds.”¹⁵² There have been problems between hunters and private landowners over the last few years pertaining to the use of hunting dogs. After the success of private landowners in lobbying for stricter regulations, hunters felt threatened. If the constitutional amendment passed, then the law requiring hunting clubs that use dogs to lease over 1,000 acres would be subjected to a “reasonableness” test.¹⁵³ Whether a simplistic amendment to the constitution could help give the hunters the upper hand in a nuisance suit remains to be litigated.

¹⁴⁷ *Id.* Some go even further, asking whether next year there will be a constitutional right to bowl, golf, or drink beer. Milwaukee Journal Sentinel, *Is Securing Right to Bowl Next?*, <http://www.jsonline.com/news/state/apr03/130378.asp> (updated Apr. 1, 2003).

¹⁴⁸ Dennis Chaptman & Richard P. Jones, *supra* n. 144; see also Animal News Center & The Fund for Animals, *No Constitutional ‘Right’ to Hunt, Say Animal Advocates*, http://www.anc.org/wildlife/wildlife_article.cfm?identifier=2003_1124_hunt (Nov. 25, 2003) (Heidi Prescott, national director of the Fund for Animals, stated, “[t]he constitution is a sacred document which shouldn’t be used as a graffiti wall for political rhetoric Nearly a million people already hunt in Pennsylvania without having the ‘right’ enshrined in the constitution”).

¹⁴⁹ Humane Society of the United States, *GA H.R. 985 & S.R. 563 Constitutional Right to Hunt*, <http://www.hsus.org/ace/20227> (accessed Apr. 3, 2004).

¹⁵⁰ The Chattanooga, *Georgia Legislator’s Effort Guaranteed Hunting Rights*, http://www.chattanooga.com/articles/article_45578.asp (Jan. 15, 2004).

¹⁵¹ *Id.*

¹⁵² Stacy Shelton, The Atlanta Journal-Constitution, *Senate backs hunting rights: Proposed amendment passes easily*, <http://www.ajc.com/metro/content/metro/legislature/27leg hunt.html> (Jan. 27, 2004).

¹⁵³ *Id.*

2. California's SHARE Program

California AB 396, co-sponsored by the California Waterfowl Association, the California Cattlemen's Association, and the California Farm Bureau, was signed into law by Governor Gray Davis on October 10, 2003. This bill authorizes the creation of the Shared Habitat Alliance for Recreational Enhancement (SHARE). The program opens up private land to hunting and fishing throughout California where the majority of critical wildlife habitat, including wetlands, is made up of private property.¹⁵⁴

SHARE authorizes the California Department of Fish and Wildlife to enter into voluntary contracts with private landowners to provide access to their land.¹⁵⁵ It provides an incentive for private landowners to allow access to their land in two ways. First, it offers landowners a small payment for every acre enrolled in the program.¹⁵⁶ This compensation will not exceed \$30 per acre and will derive from user fees, federal funds, or other non-state sources.¹⁵⁷ For example, the Hunting Heritage Partnership Program has already pledged \$50,000 to the program.¹⁵⁸ Second, it will protect landowners who participate in the program from some forms of legal liability.¹⁵⁹

There has been a history of litigation, and California AB 396 is designed to alleviate the concerns of reluctant private landowners. California law provides that every individual who uses this private land must sign a waiver releasing both the government and the private landowner "from liability for any injury or damage that arises from, or is connected with that person's use of the land."¹⁶⁰ Without liability, the amount of land, and thus animals, made available to hunters will multiply.

¹⁵⁴ California Waterfowl Association, *Action Alert*, <http://www.calwaterfowl.org/Governmentaffairs01d.htm> (Oct. 6, 2003). See also California Waterfowl Association, *Governor Signs Private Lands Hunting Access Bill*, <http://www.calwaterfowl.org/Governmentaffairs14.htm> (accessed Apr. 3, 2004) (indicating that there are similar programs in approximately twelve other states, including Oregon, Montana, and Maine. The programs are credited with helping to increase hunter numbers).

¹⁵⁵ California Codes, *Fish and Game Code Section 1570-1574*, <http://www.leginfo.ca.gov/cgi-bin/waisgate?WAISdocID=02365526632+0+0+0&WAISaction=retrieve> (accessed Apr. 3, 2004) (citing to § 1573 (a)(1)).

¹⁵⁶ California Waterfowl Association, *supra* n. 154, at <http://www.calwaterfowl.org/Governmentaffairs01d.htm>.

¹⁵⁷ California Codes, *supra* n. 155.

¹⁵⁸ California Waterfowl Association, *Governor Signs Private Lands Hunting Access Bill*, <http://www.calwaterfowl.org/Governmentaffairs14.htm> (accessed Apr. 3, 2004).

¹⁵⁹ *Id.*

¹⁶⁰ California Codes, *supra* n. 155 (citing to § 1573 (2)(e)).

Environmentalists and over 25 animal rights groups opposed the bill for a variety of reasons.¹⁶¹ One concern involves California conservation laws that do not set bag limits for certain types of animals, including coyotes, foxes, raccoons, and skunks.¹⁶² Some species may also be at risk from poaching on private land.¹⁶³ For example, the Animal Protection Institute believes that black bears are poached in Northern California, and that the number of illegally taken bears will rise as more private land is opened for hunting.¹⁶⁴ Animals are at greater risk because there may be less oversight on private land. Moreover, SHARE is seen as a program designed to benefit the minority of politically powerful hunters.¹⁶⁵ There may also be a detrimental effect on certain sensitive species due to increased human activity on private lands, including noise pollution from gunfire, recreational vehicles, and hunting dogs.¹⁶⁶ Three species that are at the greatest risk are the fisher, the wolverine and the marten because they are especially sensitive to the use of hounds. Other species at risk include the San Joaquin Kit Fox and the Sierra Nevada Red Fox.¹⁶⁷

Proponents of the law counter that California AB 396 was carefully crafted to avoid these problems. The law does not solely apply to hunting. It will increase the opportunities for fishing, bird watching, conservation education, picnicking, and hiking. Trusting that most hunters are law abiding citizens, the only wildlife to be hunted are game species, which are managed by the California Department of Fish and Game to assure long-standing healthy populations.¹⁶⁸ However, it remains to be seen the impact that SHARE will have on California's animal population.

¹⁶¹ California Waterfowl Association, *supra* n. 158.

¹⁶² Joe Miele, *Stop California's SHARE Program*, <http://www.all-creatures.org/cash/let-cashare-27jun03.html> (June 27, 2003).

¹⁶³ Animal Protection Institute, *Animal Protection Institute Says Bill Targets Wildlife*, <http://www.api4animals.org/1586.htm> (Sept. 4, 2003).

¹⁶⁴ E-mail from Camilla H. Fox, API, to Joshua Hodes, Lewis and Clark L. Sch., *California S.H.A.R.E. Program* (Jan. 26, 2004, 1:51 p.m. PST) (copy on file with Animal Law Review).

¹⁶⁵ Joe Miele, *supra* n. 162 (according to U.S. Fish and Wildlife Service statistics from 2001, 278,000 Californians hunt. This number represents less than 1% of California's population. On the other hand, 5.7 million Californians participated in other forms of wildlife watching activities); *see also* California Waterfowl Association, *supra* n. 158 (Virginia Handley of the Fund for Animals wrote to Governor Davis, "the result of AB 396 will be hunting clubs, with Fish & Game serving as a dating service between hunters and landowners").

¹⁶⁶ Animal Protection Institute, *supra* n. 163.

¹⁶⁷ E-mail from Camilla H. Fox, *supra* n. 164.

¹⁶⁸ California Waterfowl Association, *supra* n. 158 (although, a possible issue is whether bird watchers, picnickers, and hikers will pay the fee to access these private lands, especially while hunting activities may also be occurring); Bill Gaines, Director of the California Waterfowl Association, stated, "[t]hese animal rights groups ignore the long history of successful game management in North America in their zeal to deny Californians the ability to choose the traditional lifestyle of our forefathers." *Id.*

3. Alligator Hunting

a. Georgia

On July 1, 2003, Georgia joined Louisiana, Texas, South Carolina, and Florida to become the fifth state with an alligator hunting season.¹⁶⁹ Notably, Florida and Louisiana allow commercial alligator hunting.¹⁷⁰ It is now legal to hunt alligators at night with the use of a light during Georgia's two-week alligator season. One hundred eighty people were picked through a lottery system in 2003 to hunt the alligators in 13 counties. Each hunter must pay \$50 for a license and each alligator must be over four feet in length.¹⁷¹

The Georgia Wildlife Resources Department has promulgated extensive regulations for hunting alligators. Most notably, it is unlawful to harvest an alligator before it is restrained. Georgia H.B. 815 lists the weapons acceptable to hunt alligators, including gigs or arrows with restraining lines, hand-held ropes or snares, and any caliber handgun. Also, the alligator must be restrained with a line using the allowable methods. These include hand-held snares, gigs, arrows, harpoons, or snatch hooks. The hunter is given discretion as to which type he or she will use to restrain the alligator. After capture, the hunter can "dispatch" the alligator with a "bangstick" or a handgun of any caliber while the animal's head is under water.¹⁷²

The 1969 Endangered Species Act made alligator hunting illegal in the United States, but alligators lost their protection due to increased numbers resulting from major conservation efforts.¹⁷³ In 1987,

¹⁶⁹ Outdoor Central, *Governor Perdue Signs Law Regarding Hunting and Fishing*, <http://www.outdoorcentral.com/mc/pr/03/06/24a8.asp> (June 24, 2003); see Florida Museum of Natural History, *Distribution of Alligator Mississippiensis*, http://www.flmnh.ufl.edu/natsci/herpetology/brittoncrocs/cst_amis_dh_map.htm (accessed Apr. 3, 2004) (Alabama, Arkansas, North Carolina, Mississippi, Oklahoma, and South Carolina also have indigenous alligator populations).

¹⁷⁰ Associated Press, *Guide Urges Alligator Hunting*, http://www.charleston.net/stories/081803/sta_18hunt.shtml (last updated Aug. 18, 2003).

¹⁷¹ Associated Press, *Georgia Launches First-Ever Alligator Hunting Season*, <http://www.foxnews.com/story/0,2933,97394,00.html> (Sept. 15, 2003) (each hunter is allowed one alligator).

¹⁷² Georgia Department of Natural Resources, Wildlife Resources Division, Game Management Section, *Guide to Alligator Hunting in Georgia*, 6-10, <http://georgiawildlife.dnr.state.ga.us/assets/documents/Gator%20Hunt%20Guide.pdf> (July 2003) (if used properly, "[b]angsticks are a safe and effective tool for humanely killing alligators that are attached to a restraining line Bangsticks or power heads . . . discharge a fire-arm cartridge upon contact. For a humane kill, the shot should be centered immediately behind the skull cap and angled toward the brain." The regulations do not specify how many times a hunter may use the bangstick nor how many shots may be used. However, it is explicitly stated that no hunter should assume the alligator is dead. Thus, before the alligator may be placed fully in the boat, the hunter is told to sever the spine. Moreover, after using the weapon, the alligator's jaws should be taped or roped to prevent attack by an "apparently" dead alligator); Outdoor Central, *Governor Perdue Signs Law Regarding Hunting and Fishing*, <http://www.outdoorcentral.com/mc/pr/03/06/24a8.asp> (June 24, 2003).

¹⁷³ Associated Press, *supra* n. 170.

alligators were removed from “total protection” status.¹⁷⁴ Since 1980, there have been no fatalities in Georgia due to alligator attacks. However, residents complained that the alligators were nuisances. The Georgia Wildlife Resources Department “believes that the alligator hunting season will reduce potential nuisance problems while ensuring the conservation of the American alligator in Georgia and allow hunters to benefit from this sustainable and renewable natural resource.”¹⁷⁵ In the 1960s, the alligator was almost non-existent in Georgia. An estimated 200,000 alligators now exist in the state. Wildlife officials receive an estimated 450 complaints per year from Georgians who find alligators hiding in various places, including swimming pools, carpools, golf courses, and under homes.¹⁷⁶ Georgia officials were disappointed after only 64 alligators were taken in the 2003 hunt.¹⁷⁷ To note, licensed trappers already harvest over 400 nuisance alligators each year.¹⁷⁸

b. South Carolina

The South Carolina Department of Natural Resources (DNR) is following Georgia’s lead in the hunting of alligators. South Carolina has approximately 100,000 resident alligators. Alligator hunting is restricted, and poachers face up to \$5,000 in fines and one year in prison. However, over a month long private season, select landowners are able to indiscriminately hunt alligators. Furthermore, any alligator over six-feet long may be killed by a contracted DNR agent if it is creating a nuisance. This does not mean that the alligator is threatening human life. Like Georgia, there have been no human fatalities in South Carolina.¹⁷⁹

c. Louisiana

The effect of the Georgia hunt may have had a minimal impact on the nuisance problem in that state, but Louisiana officials claim that controlled alligator hunts are also an effective tool for conservation. The Louisiana hunts are coupled with the “Marsh to Market” program. In June and July, eggs are taken from the nesting sites of wild alligators throughout the state. The eggs are then sold to alligator farmers,

¹⁷⁴ Georgia Department of Natural Resources, *supra* n. 172, at 2.

¹⁷⁵ *Id.* at 1–3 (like South Carolina, Georgia already has a “nuisance alligator program,” where licensed trappers are allowed to capture and harvest alligators reaching a certain length. Georgia defines a “nuisance alligator” as one “that exhibits aggressive behavior toward humans or domestic animals, shows symptoms of some debilitating illness or injury or inhabits recreational waters intended primarily for swimming”).

¹⁷⁶ Associated Press, *supra* n. 171.

¹⁷⁷ Associated Press, *Low Yield From First Alligator Hunt Disappoints Georgia Officials*, http://www.charleston.net/stories/101803/wor_18gator.shtml (last updated Oct. 18, 2003).

¹⁷⁸ Georgia Department of Natural Resources, *supra* n. 172, at 3.

¹⁷⁹ Associated Press, *supra* n. 170.

who incubate and raise the alligators. When the alligators reach between three and four feet, they are sold.¹⁸⁰ The program is highly touted within the state, but appears to be contradictory since about 17%, or around 35,000, of the alligators that are hatched in captivity are eventually released back into the wild. At the same time, around 30,000 alligators are hunted in Louisiana each year. However, the program has virtually stopped the poaching of alligators, which was an extensive problem in Louisiana before 1972.¹⁸¹

4. *Hunting Legislation in Montana*¹⁸²

Bobcats, mountain lions,¹⁸³ gray wolves,¹⁸⁴ and large predators were the targets of Montana legislation in 2003. Montana H.B. 32, sponsored by Representative George Golie (D) and passed on March 26, 2003, allows the hunting of mountain lions and bobcats with the aid of dogs. During the winter open season, hunters may use dogs to hunt mountain lions, while during trapping season, hunters may use dogs in the pursuit of bobcats. In addition, H.B. 32 established a training season where both animals may be chased with dogs.¹⁸⁵

Animal rights groups, as well as many hunters, oppose legislation enabling hunters to use dogs because the practice undermines the supposed fairness of man versus animal. Animal rights groups argue that using dogs is an inhumane practice because it creates an increasingly frenzied atmosphere. The animals become panicked as radio-collared dogs chase them into trees, where they spend their last few minutes in

¹⁸⁰ Hillary Mayell, *Controlled Alligator Harvest an Effective Conservation Tool, Louisiana Says*, http://news.nationalgeographic.com/news/2001/10/1022_Ally_1.html (Oct. 22, 2001).

¹⁸¹ *Id.*

¹⁸² Animal Protection Institute, *Montana—Legislation 2003*, <http://www.api4animals.org/1459.htm> (accessed Apr. 3, 2004) (not all Montana legislation pertaining to animals aimed at increasing hunting opportunities was successful. Montana H.B. 379 would have repealed an initiative passed in 2000 that prohibited canned hunts. The state was also proactive in its protection of the trafficking in exotic animals. Montana S.B. 442, signed by Governor Judy Martz, provides the state with more authority to restrict or limit the importation of exotic animals).

¹⁸³ Mountain lions were classified as big game in South Dakota. South Dakota S.B. 27 also allows the use of dogs to hunt mountain lions. Animal Protection Institute, *South Dakota—Legislation 2003*, <http://www.api4animals.org/1469.htm> (accessed Apr. 3, 2004).

¹⁸⁴ Gray wolves were also delisted in Wyoming. Wyoming H.B. 229 reclassified gray wolves as trophy game animals. Animal Protection Institute, *Wyoming—Legislation 2003*, <http://www.api4animals.org/1476.htm#HB229> (accessed Apr. 4, 2004). Oregon H.B. 3125, which would have classified wolves as a predatory animal, died in committee. Animal Protection Institute, *Oregon—Legislation 2003*, <http://www.api4animals.org/1465.htm#HB3125> (accessed Apr. 4, 2004).

¹⁸⁵ Animal Protection Institute, *supra* n. 61; Humane Society of the United States, *MT H.B. 32 Hunting Cougars and Mountain Lions with Dogs*, <http://www.hsus.org/ace/15889> (accessed Apr. 3, 2004).

a frightened state. At that point, the hunter shoots the scared animal as it desperately clings to the tree.¹⁸⁶

Montana H.B. 262, sponsored by Representative Daniel Fuchs (R) and signed into law on April 3, 2003, established the management of large predators in order to preserve huntable species. Accordingly, gray wolves were almost removed from Montana's endangered species list under the first version of Montana H.B. 283 for the protection of livestock and humans, as well as other huntable game species that are prey for the gray wolf.¹⁸⁷ However, as enacted, the final version of the bill mandates that the Montana attorney general, with help from Montana Fish, Wildlife, and Parks, create a legal opinion about the options for delisting the gray wolf.¹⁸⁸

Opposition to these actions focuses in part on the political power of both the hunting and livestock industry. When the legislature acts to delist wolves, there may not be an adequate process necessary to ensure that the animals are properly protected. As wolves become unprotected, they may once again find themselves the targets of unnecessary hunts and total destruction.¹⁸⁹

B. *Animal Protection and Anti-Cruelty Legislation*

Kentucky, Nebraska,¹⁹⁰ West Virginia and Wyoming became the thirty-eighth, thirty-ninth, fortieth, and forty-first states to have felony anti-cruelty legislation on the books. Similar legislation failed in Arkansas, Hawaii, and Kansas.¹⁹¹ Animal cruelty statutes were strengthened in Montana,¹⁹² while similar bills in Massachusetts, New Jersey, and Vermont are still pending.¹⁹³ Illinois updated its

¹⁸⁶ Animal Protection Institute, *supra* n. 182.

¹⁸⁷ *Id.* For the text of the bill, see Montana Legislature, *House Bill No. 283*, <http://data.opi.state.mt.us/bills/2003/billhtml/HB0283.htm> (accessed Apr. 3, 2004).

¹⁸⁸ Gary Marbut, *Montana Legislation*, http://www.propertyrightsresearch.org/articles/montana_legislation.htm (Apr. 1, 2003).

¹⁸⁹ *Id.*

¹⁹⁰ Nebraska L.B. 273 provides for a first-offense felony penalty. Until 2003, a felony was only possible for a second offense. Humane Society of the United States, *NE L.B. 273 Animal Cruelty*, <http://www.hsus.org/ace/18890> (accessed Apr. 3, 2004); Humane Society of the United States, *State Animal Anti-Cruelty Law Provisions*, http://files.hsus.org/web-files/PDF/State_Cruelty_Laws_Oct_2003.pdf (accessed Apr. 3, 2004).

¹⁹¹ Alaska, Georgia, Idaho, Maine, North Dakota, and Utah also do not have felony provisions. Pete Letheby, *Finally, Animal Cruelty a Felony in Nebraska*, http://www.theindependent.com/stories/040403/opi_letheby04.shtml (Apr. 4, 2003).

¹⁹² Animal Protection Institute, *supra* n. 182 (Montana H.B. 553 doubles the fine and imprisonment penalties for animal cruelty and created the offense of "aggravated animal cruelty").

¹⁹³ Humane Society of the United States, *MA H. 108 & S. 198 Animal Cruelty*, <http://www.hsus.org/ace/18888> (accessed Apr. 3, 2004). Massachusetts S. 198 would increase penalties for animal abuse from one year or \$1,000, or both, up to five years for a felony, and/or a \$2,500 fine. See Massachusetts Society for the Prevention of Cruelty to Animals, *Current Session*, http://www.mspca.org/advocacy/legislation/advo_currentsession.htm (updated Apr. 2, 2004); New Jersey A.B. 2720 would increase certain acts to the felony level. After passing the Assembly, it is now in the Senate. Animal Protection

Animal Control Act, creating a comprehensive law pertaining to vicious animals. Maine, while not a hub for circuses, passed “An Act to Prevent Abuse of Elephants.” Finally, Rhode Island, Indiana, and Connecticut considered legislation addressing the tethering and sheltering of dogs, but only Connecticut enacted H.B. 6038.

1. *Felony Animal Cruelty Legislation*

a. *West Virginia*

West Virginia S.B. 205, known as “Groucho’s Act,” was signed into law by Governor Bob Wise (D) on March 11, 2003.¹⁹⁴ Tracy Carbasho, a dog owner, spearheaded the lobbying effort in West Virginia, and Stephen Otto, Animal Legal Defense Fund’s Anti-Cruelty Division director of legislative affairs, authored the law.¹⁹⁵

The change in the necessary criminal intent for a charge of animal cruelty to lie is the most significant legal effect of West Virginia S.B. 205. The bill adds the language “knowingly” or “recklessly,” adds an exception to animal cruelty where the animal is killed while attacking livestock, a companion animal, or a person, and removes a bar to recovering more than the assessed value for the animal in civil suits. The penalty for negligent animal cruelty remains a misdemeanor, but intentional killing or torturing is now a felony.¹⁹⁶ Individuals convicted for felony animal cruelty are subject to three years in prison and a \$5,000 fine. Moreover, felony violators are banned from residing with or owning a pet for up to 15 years.¹⁹⁷ Those convicted of misdemeanor offenses are prohibited from owning an animal for five years. Finally, Groucho’s Act requires courts to evaluate the mental health of offenders before granting probation.¹⁹⁸

Institute, *New Jersey—Legislation 2003*, <http://www.api4animals.org/1461.htm#AB3159> (accessed Apr. 3, 2004); Vermont S. 100 is still in committee and would make aggravated animal cruelty a felony even if the animal does not die due to injuries. Originally, the bill included mandatory psychological evaluation and mandatory treatment for convicted juveniles. It also defined “adequate food and water” and “proper shelter.” However, these provisions were taken out of the bill by the House. Humane Society of the United States, *VT S. 100 Animal Cruelty*, <http://www.hsus.org/ace/18574> (accessed Apr. 3, 2004); see also New England Federation of Humane Societies, *New England News*, 2, http://www.newenglandfed.org/pdf/sept03_nefhsnews.pdf (accessed Apr. 3, 2004) (providing an overview of original legislation in the New England states).

¹⁹⁴ Humane Society of the United States, *WV S.B. 205 Felony Provision for Animal Cruelty*, <http://www.hsus.org/ace/15998> (accessed Apr. 3, 2004).

¹⁹⁵ Tara Godvin, *Woman’s Two Year Effort Leads to Tougher Animal Cruelty Law*, *The Herald-Dispatch* (Mar. 13, 2003) (available at <http://www.herald-dispatch.com/2003/March/13/Legislature01.htm>) (the law is named after Carbasho’s dog Groucho. Groucho was killed in a hit and run accident in June 2001. Carbasho was upset after the perpetrator was prosecuted only for reckless driving and other minor infractions. He was never punished for Groucho’s death); Animal Legal Defense Fund, *More States Join Anti-Cruelty Fight*, <http://www.aldf.org/article.asp?cid=118> (accessed Apr. 3, 2004).

¹⁹⁶ Federation of Humane Organizations West Virginia, *FOHO Facts*, <http://www.iolinc.net/animals/fohofactsa.htm> (accessed Apr. 3, 2004).

¹⁹⁷ Godvin, *supra* n. 195.

¹⁹⁸ Animal Legal Defense Fund, *supra* n. 195.

One legislator objected to the use of the word “companion animal” rather than “pet.” Delegate Don Perdue was concerned that it may lead to increased civil litigation over the differences between the two. Nevertheless, the bill passed the West Virginia Senate unanimously, and passed the House by a vote of 79 to 18.¹⁹⁹

b. Wyoming

Known as “Dexter’s Law,” Wyoming Sen. File 125 was signed into law by Governor Dave Freudenthal (D) on March 6, 2003.²⁰⁰ The bill was named for Dexter, a basset hound who was mutilated and killed in 2001.²⁰¹ Wyoming Sen. File 125 makes it a felony if an individual “knowingly and with intent to cause death, injury or undue suffering, cruelly beats, tortures, torments, injures, or mutilates an animal resulting in the death or required euthanasia of the animal.”²⁰² The felony is punishable by up to two years imprisonment and/or a fine of up to \$5,000.²⁰³

c. Nebraska

Nebraska L.B. 273 states that “intentional torture, repeating beating or mutilation” is a Class IV felony.²⁰⁴ The bill made it through committee without any formal opposition, and Governor Mike Johann (R) signed it into law on March 20, 2003.²⁰⁵ L.B. 273 also makes involvement in cockfighting and dogfighting punishable as a felony.²⁰⁶ Spectators at these events are included within the scope of the bill.²⁰⁷

d. Kentucky

Kentucky became the fourth state in the month of March to make perpetrators of animal cruelty subject to felony conviction. On March 31, 2003, Governor Ernie Fletcher (R) signed Kentucky S.B. 24.²⁰⁸ Unfortunately, it is a second offense felony provision and the only animals

¹⁹⁹ Godvin, *supra* n. 195.

²⁰⁰ Humane Society of the United States, *WY S.F. 125 Animal Cruelty*, <http://www.hsus.org/ace/16295> (accessed Apr. 3, 2004); *see also* Wyo. Stat. Ann. § 6-3-203 (2003) (available at <http://legisweb.state.wy.us/statutes/titles/title06.htm>).

²⁰¹ The Scoop, Convicted Dog-Killer gets 49 years, <http://www.dogsinthenews.com/issues/0108/articles/010831b.htm> (Aug. 31, 2001).

²⁰² Wyo. Stat. Ann. § 6-3-203 (2003), *supra* n. 200.

²⁰³ *Id.*

²⁰⁴ Letheby, *supra* n. 191 (prior to enactment, mistreatment of animals was a misdemeanor as a first offense. This bill provides that an individual may be charged with a felony after a first offense); *see* Humane Society of the United States, *supra* n. 69 (detailing specifics of Nebraska’s law).

²⁰⁵ Humane Society of the United States, *supra* n. 190.

²⁰⁶ Letheby, *supra* n. 191.

²⁰⁷ Legislature of Nebraska, *Legislative Bill 273*, http://www.unicam.state.ne.us/pdf/FINAL_LB273_1.pdf (accessed Apr. 3, 2004).

²⁰⁸ Humane Society of the United States, *KY S.B. 24 Make Torture a Felony*, <http://www.hsus.org/ace/16006> (accessed Apr. 3, 2004).

covered are cats and dogs, and then only for intentional torture.²⁰⁹ Kentucky Revised Statute § 525.125 already makes it a felony offense for an individual to own a four-legged animal used for fighting. Participants at the fights and owners of the property where the fighting occurs are also subject to felony penalties.²¹⁰

2. Illinois

The Illinois legislature passed a comprehensive bill that updates the Illinois Animal Control Act. Governor Rod R. Blagojevich (D) signed Illinois H.B. 184 on August 29, 2003, and it became effective on the same date.²¹¹ The law, already in committee, was reinvigorated and passed as a result of a lethal attack on a human in a Chicago park by two dogs.²¹²

Illinois H.B. 184 allows counties to mandate microchipping for all of its resident cats and dogs, while strengthening penalties for owners of dangerous dogs.²¹³ The bill requires that any dog deemed “vicious” or “dangerous” receive an implanted microchip.²¹⁴ Vicious dogs must be contained in an enclosure, which now includes a locked room in a residence, and may only leave the premises on a leash or other acknowledged method. Animal control must first approve of the enclosure. Owners of dogs that are labeled “vicious” or “dangerous” must first receive court approval before they sell or give away these pets.²¹⁵ Finally, the penalties for a violation were increased up to a Class 3 felony, which consists of two to five years in prison, with one year mandatory supervised release, and a possible fine of up to \$25,000.²¹⁶

The law embodies an aggressive stance toward dangerous dogs and their owners, although it does bar towns, cities, and municipalities from passing breed specific legislation.²¹⁷ The legislature worked with and had support from a variety of organizations, including the American Society for the Prevention of Cruelty to Animals (ASPCA), American Veterinary Identification Devices (a microchip manufacturer), the

²⁰⁹ University of Kentucky, *New State Laws*, <http://www.uky.edu/IS/AdminApps/SIS/Admin/LAW17Jun03.htm> (accessed Apr. 3, 2004).

²¹⁰ Ky. Rev. Stat. Ann. § 525.125 (Lexis 1999) (available at <http://www.animal-law.org/statutes/kentucky.htm>).

²¹¹ The American Society for the Prevention of Cruelty to Animals, *ASPCA Government Affairs & Public Policy: In Session 2003: Illinois*, http://www.asPCA.org/site/PageServer?pagename=lobby_Illinois_insession2003 (accessed Apr. 3, 2004) [hereinafter ASPCA].

²¹² The American Veterinarian Association, *Illinois May Lead the Nation with Microchip Law*, <http://www.avma.org/onlnews/javma/may03/030501e.asp> (accessed Apr. 3, 2004).

²¹³ *Id.*

²¹⁴ ASPCA, *supra* n. 211 (the bill sets forth the procedure for Animal Control to declare a dog “vicious” or “dangerous,” and it sets forth an appeal process. H.B. 184 also requires an implanted microchip in all reclaimed impounded dogs and cats).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

Humane Society of Central Illinois, the Animal Protective League, the Illinois Department of Agriculture, the Illinois State Veterinary Medical Association, the Illinois Association Chiefs of Police, the Cook County State's Attorneys' Office, and the Illinois PTA.²¹⁸ The updated Act will have its greatest impact on local communities because the law gives them the discretion to implement the new regulations.

3. *Maine Prevents Elephant Abuse*

Maine L.D. 327, "An Act to Prevent Abuse of Elephants," is landmark legislation, yet seems geographically misplaced. Maine has only one resident elephant (her name is Lydia and she lives at York's Wild Kingdom Zoo and Amusement Park in York Beach), and there are only about twelve elephants per year that come into the state in circuses and traveling exhibitions.²¹⁹ Maine hopes to inspire other states like New York and California, where zoos, circuses, and traveling exhibitions are commonplace, to follow its path toward the protection of elephants.²²⁰ The State House of Representatives passed the bill 91 to 46, while the State Senate voted unanimously; L.D. 327 was then signed into law by Governor John Baldacci on May 23, 2003.²²¹

Maine is the first state to pass legislation targeting the treatment of performing elephants, although the enacted version of the bill is a diluted form of the original.²²² The original bill would have completely banned all performing elephants in zoos, circuses, and exhibitions. The enacted version instead mirrors federal protections promulgated by Animal Plant Health Inspection Services by prohibiting elephants from being used in traveling exhibitions, as well as barring people from riding, feeding, or having physical contact not related to the care of the elephants. Violators may face up to 90 days in jail.²²³ Each elephant entering Maine must be registered with Maine Animal Welfare and comply with a set of standards. The Maine Agricultural Department is responsible for enforcing the new rules and regulations and state veterinarians are authorized to spot-check the organizations in possession of the elephants.²²⁴

²¹⁸ The American Veterinarian Association, *supra* n. 212; Animal Legal Defense Fund, *Animal Control Act Changed*, <http://www.aldf.org/news.asp?sect=news> (Sept. 4, 2003).

²¹⁹ Sharon Kiley Mack, *Maine is 1st State to Pass Legislation on Treatment of Performing Elephants*, <http://lists.envirolink.org/pipermail/ar-news/2003/000948.html> (last updated May 21, 2003); Michael Marston, *Elephant Bill Passes in Maine*, <http://www.seacoastonline.com/2003news/yorkweekly/05282003/news31111.htm> (May 28, 2003).

²²⁰ Mack, *supra* n. 219.

²²¹ Marston, *supra* n. 219; Humane Society of the United States, *ME L.D. 327 Elephant Abuse*, <http://www.hsus.org/ace/18456> (accessed Apr. 3, 2004).

²²² For the enacted law, see Maine Legislature, *LD 327*, <http://janus.state.me.us/legis/LawMakerWeb/externalsiteframe.asp?ID=280008312&LD=327&Type=1> (accessed Apr. 3, 2004).

²²³ Marston, *supra* n. 219.

²²⁴ Mack, *supra* n. 219.

4. *Tethering and Confining Animals*

While Indiana S.B. 285 and Rhode Island H.B. 5816 died in committee, Connecticut became the first state to tackle the issue of tethering dogs. Unable to pass H.B. 5203, which would have limited the amount of time that a dog may be chained or tethered to 22 hours out of a 24-hour period, the legislature passed Connecticut H.B. 6038.²²⁵ Effective October 1, 2003, the bill adds “confines or tethers a dog for an unreasonable period of time” to the animal cruelty statute. Violators can be imprisoned for up to one year and/or fined up to \$1,000.²²⁶ While a positive step against animal cruelty, the bill may be problematic as lawyers argue over what constitutes an “unreasonable period of time.”

C. *Animals in Schools*

Two very different animal issues facing American schools arose in 2003. First, New Jersey and Massachusetts tried to add themselves to a list of nine other states offering students a choice over the dissection of animals in their science classes.²²⁷ Second, California developed a program to add vegetarian lunches to school menus.

1. *Vivisection and Dissection Choice*²²⁸

At the close of 2003, New Jersey and Massachusetts had bills pending that would allow students in public schools to use alternative methods to animal dissection when studying subjects such as biology, zoology, and anatomy. Sponsored by Representative Louis Kafka (D), Massachusetts H. 1252 would help reduce the number of animals used for dissection. According to the Massachusetts ASPCA, an estimated six million vertebrate animals are used in classrooms each year. These animals include cats, frogs, fetal pigs and other species.²²⁹

If passed, Massachusetts H.B. 1252 will allow students, with parental consent, to decide whether to participate in classroom dissection. It will protect students from academic penalty if they opt to use

²²⁵ Connecticut General Assembly, *Proposed H.B. No. 5203*, <http://www.cga.state.ct.us/2003/tob/h/2003HB-05203-R00-HB.htm> (accessed Apr. 4, 2004).

²²⁶ Connecticut General Assembly, *Substitute Bill No. 6038*, <http://www.cga.state.ct.us/2003/tob/h/2003HB-06038-R02-HB.htm> (accessed Apr. 4, 2004).

²²⁷ See Humane Society of the United States, *NJ State Senate Unanimously Approves Student-Choice Bill*, <http://www.hsus.org/ace/15241> (accessed Apr. 3, 2004) (these include: California, Florida, Illinois, Louisiana, Maine, Maryland, New York, Pennsylvania, and Rhode Island); Teacher Magazine, *The Cutting Edge*, <http://www.teachermagazine.org/tmstory.cfm?slug=01tech.h15> (accessed Jan. 28, 2004).

²²⁸ For more information on the topic, see Ethical Science and Education Coalition, *Who We Are*, <http://www.neavs.org/esec/index.htm> (accessed Apr. 4, 2004).

²²⁹ Massachusetts Society for the Prevention of Cruelty to Animals, *Advocacy, Legislative Affairs, 2003-2004 Legislative Session, H. 1252 Dissection Choice*, http://www.mspca.org/advocacy/legislation/advo_currentsession.htm (accessed Apr 3, 2004) (other species include dogfish sharks, rabbits, mice, turtles, pigeons and rats. Invertebrates are also used in American classrooms).

alternatives, such as interactive computer simulation models.²³⁰ Other alternatives include three dimensional plastic models, instructional video tapes, and anatomical charts and books.²³¹ Proponents argue that not only would students receive the same caliber of education while having the opportunity to honor their ethical and religious beliefs, but also, alternatives are humanely, environmentally and fiscally sound.²³²

The bill faces an uphill battle as the Massachusetts' Teachers Association (MTA) has been successfully lobbying in opposition over the last few years.²³³ If proponents of the bill can effectively motivate the individual members of the MTA to oppose the organization's stance, then passage of the bill or a form of it will be more likely to succeed. A recent study done by Tufts University asserts that a majority of life science teachers in Massachusetts support student-choice legislation.²³⁴ New Jersey A.B. 3159 and S.B. 240 passed the State Senate and remain alive in the State Assembly.²³⁵ S.B. 240 was inspired by an honor student at a high school in Union, New Jersey. The student wrote a letter to former Senator Joseph Suglia (D) complaining that he wanted to learn animal biology but was morally opposed to dissection.²³⁶ The bill mirrors its Massachusetts counterpart. If a student chooses an alternative, with parental permission, his or her public school must provide an alternative education project. The choice shall not affect the student's grades. An amendment was also added to include a living invertebrate organism to the definition of animal.²³⁷

²³⁰ Humane Society of the United States, *Massachusetts: Give Students a Choice in Dissection*, <http://www.hsus.org/ace/14106> (accessed Apr. 3, 2004).

²³¹ The National Anti-Vivisection Society's free-loan program includes three-dimensional models of frogs, fetal pigs, cats, rats, sharks, perch, starfish, earthworms, and certain insects. The National Anti-Vivisection Society, *Animals in Education*, http://www.navs.org/education/dissection_loan_program.cfm?SectionID=education (accessed Apr. 4, 2004).

²³² AR-News, *Activists Protest Massachusetts Teachers Association for Dissection Choice*, <http://lists.envirolink.org/pipermail/ar-news/Week-of-Mon-20030908/006097.html> (accessed Apr. 4, 2004) ("All alternatives are reusable, many are available free from the Internet and loan libraries, and none require [sic] costly hazardous waste disposal, making alternatives not only educationally sounds [sic], but also environmentally and fiscally responsible – as well as humane").

²³³ *Id.*

²³⁴ Humane Society of the United States, *supra* n. 230.

²³⁵ Animal Protection Institute, *New Jersey—Legislation 2003*, <http://www.api4animals.org/1461.htm#AB3159> (accessed Apr. 3, 2004). The Senate passed the bill unanimously 37 to 0. Humane Society of the United States, *NJ State Senate Unanimously Approves Student-Choice Bill*, <http://www.hsus.org/ace/15241> (accessed Apr. 3, 2004).

²³⁶ Humane Society of the United States, *supra* n. 235.

²³⁷ For the text of the bill, see New Jersey Legislature, *Senate Education Committee Statement to Senate, No. 240*, http://www.njleg.state.nj.us/2002/Bills/S0500/240_S1.PDF (June 13, 2002).

2. *California Offers Vegetarian Alternatives*

California legislators, while not motivated by animal protection, passed ACR 16, also known as “The Healthy Lunch” resolution.²³⁸ ACR 16 addresses the health concerns over unhealthy lunches offered in California schools.²³⁹ The resolution mandates that state agencies develop nutritionally sound menus, providing daily vegetarian options.²⁴⁰ The Senate voted 23 to 8, while the Legislature voted 66 to 12. The California PTA, American Cancer Society, California Federation of Teachers, California Association of Student Councils, FARM Sanctuary, National Humane Education Society, USDA, and the American Heart Association were some organizations that supported the bill.²⁴¹ The agencies have the next four years to phase in these programs and must report to the California Legislature on optional vegetarian lunches by January 1, 2008.²⁴²

²³⁸ A resolution does not carry the same weight as a law. California Department of Education, *State/Federal Status*, <http://www.cde.ca.gov/nsd/legreg/status092603.pdf> (accessed Apr. 3, 2004).

²³⁹ Consumers for Healthy Options in Children’s Education, *California Proposal*, <http://www.choiceusa.net/California%20proposal.html> (updated Mar. 3, 2003) (also acknowledging the growing number of vegetarian and vegan students).

²⁴⁰ These include the Departments of Education and Health Services. California Department of Education, *supra* n. 238.

²⁴¹ Consumers for Healthy Options in Children’s Education, *Healthy School Lunch Endorsers*, <http://www.choiceusa.net/California%20endorsement%20letters.htm> (accessed Apr. 4, 2004).

²⁴² California Department of Education, *supra* n. 238.

