REACHING FOR JUSTICE: AN ANALYSIS OF SELF-HELP PROSECUTION FOR ANIMAL CRIMES

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Although prosecutorial discretion is a firmly entrenched legal doctrine in the United States, such unbridled discretion impedes the vigorous and consistent prosecution of animal crimes. With an overwhelming incidence of animal cruelty and neglect crimes perpetrated in the United States every year, documented cases should not be passed over for prosecution due to a lack of empathy on the part of the prosecutor, a misplaced understanding of the seriousness of animal cruelty crimes, or a dearth of resources. To ensure that animal crimes are more vigorously and consistently prosecuted, citizens should take advantage of existing mechanisms that allow for public participation in the prosecutorial process, and strive to enact new legislative schemes to further facilitate the prosecution of animal crimes.

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I. INTRODUCTION

In Snohomish County, Washington, two boys brutally attacked a four-month-old kitten named Angel.[1] The boys swung her around by her tail and penetrated her anus with a stick, resulting in an amputated tail, severe internal injuries, and permanent incontinence.[2] Snohomish County prosecutors did not prosecute the two boys for the crime, citing conflicting veterinary opinions regarding the nature of Angel's injuries and unreliable testimony concerning the attack.[3] Though some may approve of the prosecutors' decision in this case given the above-cited reasons, it is only one of many instances of animal cruelty, critics charge, that Snohomish County prosecutors failed to prosecute.[4] In fact, this case and others of its kind prompted a Snohomish County Council public hearing to address concerns regarding the County's lack of investigation and prosecution of animal cruelty cases.[5]

A prosecutor's power to decide whether or not to charge an individual with the commission of a crime is virtually unchecked, making it one of the broadest discretionary powers in criminal justice administration.[6] Prosecutorial discretion is a lynchpin of our legal system, and the U.S. Supreme Court has declared that the Government retains "broad discretion" regarding whom and whether or not to prosecute.[7] However, in practical application, critics argue that this discretion is not functioning properly to punish animal abusers. In addition to anecdotal evidence, studies show that the overwhelming majority of reported animal cruelty and neglect cases are not prosecuted.[8] In the

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[1] Humane Society of the United States, *In the News: Kitten Penetrated with Stick—County Declines to Prosecute* <http://www.hsus.org/firststrike/news/WAAngelKitten.htm> (accessed Jan. 29, 2002) (site no longer available).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *See* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. Crim. L. & Criminology 717, 741 (1996). The prosecutor's office has become the most powerful office in the criminal justice system, particularly in the areas of charging, plea bargaining, and sentencing.

[7] *See U.S. v. Goodwin*, 457 U.S. 368, 380 n. 11 (1982). *See also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his [her] discretion."). Note, however, that the Supreme Court has also held that prosecution is not an *exclusively* executive function. *See Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the Ethics in Government Act, which allows for appointment of special prosecutors by the Special Division of the D.C. Circuit).

[8] *See infra* Section II.

face of such ineffectiveness regarding animal cruelty and neglect crimes, self-help prosecution provides a glimmer of hope.

Self-help prosecution occurs when a citizen, or group of citizens, circumvents the district attorney in order to bring charges against an individual or individuals for commission of a crime.[9] It also includes mechanisms whereby a citizen, or group of citizens, compels a prosecuting attorney to commence prosecution of a specific crime.[10] One expert surmised that "[t]he affirmative power to prosecute is enormous, but the negative power to withhold prosecution may be even greater, because it is less protected against abuse."[11] As such, we must increase the accountability of public prosecutors and, using case law and statutory schemes, devise ways to ensure that justice is served in cases of animal abuse and neglect.

This article does not advocate the abolition of prosecutorial discretion, for prosecutors arguably must be entrusted with some degree of discretion for the criminal justice system to function efficiently. The goal is to propose effective solutions to cut back *unnecessary* discretionary power and to control *necessary* discretionary power, specifically in the context of animal crimes. Part II of this article argues that self-help prosecution is necessary in the animal cruelty context because, although animal crimes warrant serious attention in their own right with attendant implications for human welfare, animal crimes are not vigorously prosecuted. Part III provides an overview of the prosecutorial process as it relates to charging an individual with a crime, to provide background for subsequent ideas presented. Part IV discusses various checks on prosecutorial discretion—including writs of mandamus, attorney general involvement, judicial review of decisions to not prosecute, grand jury procedures, and various animal-specific statutes providing for differing levels of self-help. Part V examines potential downsides to self-help prosecution, but ultimately argues for its adoption in the face of widespread prosecutorial inaction regarding animal cruelty. Part VI presents a model self-help statute, and Part VII concludes that animal advocates should take advantage of existing self-help mechanisms and work to enact additional self-help legislation.

II. THE NEED FOR SELF-HELP PROSECUTION IN THE ANIMAL CRUELTY CONTEXT

A. Animal Crimes Are Not Vigorously Prosecuted

Unfortunately, much of the information regarding the lack of prosecution for animal crimes in relation to the actual incidence of reported

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[9] *See infra* Section IV. Please note that the terms "district attorney," "prosecuting attorney," "state prosecutor," and "public prosecutor" will be used interchangeably throughout this paper.

[10] *See infra* Section IV.

[11] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* 188 (La. St. U. Press 1969).

animal abuse is largely anecdotal; however, limited statistics do exist. In a study undertaken on behalf of the Animal Legal Defense Fund's Anti-Cruelty Division, attorney Sarah Kern found that humane organizations, animal control agencies, and district attorney offices all have different recording systems to track animal abuse cases and any subsequent prosecution.[12] Furthermore, some agencies have no systems in place at all.[13] Although such inconsistency often makes it difficult to determine the exact disproportionality between animal abuse and its prosecution, Ms. Kern's study described a specific example of stark disproportionality in one Portland, Oregon county.[14] Her data showed that Multnomah County prosecuted only 260 cases of animal-related crimes over a ten-year period, while the number of calls of animal cruelty and neglect to one animal agency in the area, the Oregon Humane Society, totaled more than 9,500—a prosecution rate of less than three percent.[15] Ms. Kern cites both investigators and prosecutors as responsible for this dearth of prosecution.[16]

A 1997 study conducted by the Massachusetts Society for the Prevention of Cruelty to Animals (MSPCA) and Northeastern University showed that of the 80,000 complaints investigated by MSPCA officers between 1975 and 1996, only 268 of the complaints resulted in prosecution efforts.[17] Furthermore, less than half of these 268 cases resulted in guilty findings, and the sentences handed down were paltry.[18] In 1996, Ohio State University undertook a survey of Ohio Animal Care and Control agencies that highlighted a lack of prosecution of animal cruelty crimes.[19] One hundred three agencies reported 25,564 animal cruelty complaints for 1996, but prosecutors filed criminal charges in only two percent of those cases.[20] In 2000, the State of New Jersey Commission of Investigation found numerous problems with that state's enforcement of animal cruelty laws,[21] and stated

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[12] *See* Sarah Kern, *Bridging the Gap Between Animal Cruelty Investigation and Prosecution* 3 (2001) (unpublished manuscript, on file with author).

[13] *Id. E.g.*, Multnomah County Animal Control did not possess data regarding animal cruelty reports.

[14] *Id.* at 24–25.

[15] *Id.*

[16] *Id.* at 25. *See infra* Section III for more information regarding the role of investigators in the prosecutorial process.

[17] Arnold Arluke & Carter Lake, *Physical Cruelty Toward Animals in Massachusetts, 1975-1976,* 5 (3) Society & Animals J. of Human-Animal Stud. (1997) (available at <http://www.psyeta.org/sa/sa5.3/Arluke1.html>) (accessed Apr. 5, 2003).

[18] *Id.* at 6. Notably, 26.1% of the cases were dismissed, and in 4.1% of the cases, the complaint was denied by the court. Typical sentences included fines (averaging $132), restitution (averaging $99), less than six months jail time or probation, or community service.

[19] Linda K. Lord & Thomas E. Wittum, *1996 Survey of Ohio Animal Care & Control Agencies* 25 (Ohio St. U. Dept. of Vet. Prev. Med. 1996) <http://www.doglicense.com/presentationf.pdf> (accessed Feb. 9, 2003).

[20] *Id.*

[21] *See generally* State of New Jersey Commission of Investigation, *Societies for the Prevention of Cruelty to Animals* 1–2 <www.state.nj.us/sci/spca.pdf> [hereinafter NJ

that, "[a]ll too frequently, acts of animal cruelty in New Jersey are not prosecuted."[22] Furthermore, the Commission reported that "New Jersey remains mired in an archaic legislative scheme that places the enforcement of animal cruelty laws in the hands of unsupervised, volunteer groups of private citizens."[23] Since volunteers with the New Jersey Society for the Prevention of Cruelty to Animals (SPCA) receive no "formal law enforcement training, [and are not subject to] any standards or guidelines governing their activities and any monitoring by a government entity to ensure the uniform and proper application of the laws, SPCA officers and agents exercise unbridled discretion in investigating complaints of animal cruelty and issuing civil and criminal summonses."[24] Finally, the Commission stated that the New Jersey SPCA rarely exercised its powers of arrest, incredibly making no arrests in 1998 or 1999, despite documentation of reported animal abuse during those two years.[25]

B. Animal Crimes Warrant Serious Prosecutorial Attention

The decision of whether or not to charge an individual with a crime is often based in part on "the relative gravity of the offense."[26] Generally, "a victim has more influence in getting the prosecutor to charge when the crime is [a] major [one]."[27] Aside from the fact that animal abuse and neglect warrant prosecution in their own right—on behalf of the animal—there is also a documented and widely discussed link between the incidence of animal cruelty and human violence.[28]

Commission] (Dec. 2000). For example, state and county animal protection societies are unsupervised in their enforcement of anti-cruelty laws, the societies are not accountable to government authorities, employees are not required to undergo any formal law enforcement training, the majority of the societies are understaffed, and there is a reluctance on the part of the societies to seize animals even if appropriate to do so because the societies often lack the necessary resources to care for the seized animals. *Id.* at 1–2.

[22] *Id.* at 152.

[23] *Id.* at 1.

[24] *Id.* at 2.

[25] *Id.* at 8.

[26] *Pugach v. Klein*, 193 F. Supp. 630, 635 (S.D.N.Y. 1961).

[27] Douglas E. Beloof, *Victims in Criminal Procedure* 238 (Carolina Academic Press 1999). Not only must society acknowledge that animal crimes are indeed serious, society must also appreciate the precarious position of animals in our society—they are merely property under the law. *See generally* Gary L. Francione, *Animals, Property, and the Law* (Temple U. Press 1995). This, in turn, gives animals even less power than humans in the prosecutorial process when considered victims of crimes.

[28] *See e.g.* Randall Lockwood, *Animal Cruelty and Violence Against Humans: Making the Connection*, 5 Animal L. 81, 83 (1999) ("[A]cts of animal cruelty provide the first warning signs of a potential for violence."); MSPCA Study, *supra* n. 17, at 7–9 (study found that 70% of animal abusers committed at least one other criminal offense, and nearly 40% committed violent crimes against humans); Alan R. Felthous, *Aggression Against Cats, Dogs, and People*, in *Cruelty to Animals and Interpersonal Violence* 159 (Randall Lockwood & Frank R. Ascione eds., Purdue U. Press 1997); Stephen R. Kellert & Alan R. Felthous, *Childhood Cruelty Toward Animals Among Criminals and Noncriminals*, in *Cruelty to Animals and Interpersonal Violence* at 194 (study showed that 25% of aggressive criminals admitted five or more acts of childhood cruelty toward ani-

William S. Cohen, former U.S. Secretary of Defense, made the following statement in testimony delivered as a Republican Senator from Maine:

> As a society, we must realize that violent behavior rarely exists in a vacuum. We must recognize at-risk youths who lack empathy and compassion for animals and other human beings. It is our responsibility to do all that we can to teach these personality attributes to our youth so that today's animal abusers don't continue these despicable actions and become tomorrow's dangerous felons, thereby perpetuating the cycle of violence that has taken such a devastating toll on our society.[29]

As such, it is critical to provide intervention and appropriate treatment and punishment for children and adolescents prone to animal cruelty.[30] Furthermore, adult infliction of animal cruelty must be similarly addressed, as it "may signal a pattern of violence directed against humans."[31] The bottom line is that "documentation of animal cruelty is essential in building an individual's history of violence,"[32] and prosecution is an effective mechanism for documenting these patterns.

III. OVERVIEW OF THE PROSECUTORIAL PROCESS AS IT RELATES TO CHARGING[33]

A. Preliminary Investigation and Arrest

After a crime is reported[34] or is otherwise brought to the attention of law enforcement, the police may conduct a pre-arrest investigation if sufficient probable cause to arrest does not yet exist.[35] After arrest, assuming that the prosecutor has not yet made the decision to charge, the police book the individual and conduct any necessary post-arrest

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mals); Humane Society of the United States, *First Strike Campaign: Statistics on Violence* <http://www.hsus2.org/ firststrike/factsheets/firststrike_stats.html> (accessed Apr. 5, 2002) (New Jersey study showed that in 88% of families reported for child abuse, at least one person had abused animals); David Tingle et al., *Childhood and Adolescent Characteristics of Pedophiles and Rapists*, 9 Intl. J.L. & Psychiatry 114, 116 (1986) (study showed that 48% of convicted rapists and 30% of convicted pedophiles reported perpetrating acts of animal cruelty in childhood or adolescence).

29 142 Cong. Rec. S4631 (daily ed. May 3, 1996) (statement of Sen. Cohen).

30 NJ Commission, *supra* n. 21, at 162.

31 *Id. See also supra* n. 28.

32 NJ Commission, *supra* n. 21, at 162.

33 For an interesting comparison between U.S. and European charging models, *see* Matti Joutsen, *Listening to the Victim: The Victim's Role in European Criminal Systems*, 34 Wayne L. Rev. 95 (1995). For example, in Ireland, England, Wales, and Cypress, "any person may prosecute a crime." *Id.* at 110.

34 Although not the focus of this paper, studies indicate that less than half of all crimes are even brought to the attention of law enforcement. *See* U.S. Dept. of Justice, Bureau of Justice Statistics, *Criminal Victimization in the United States* (2000) (available at <http://www.ojp.usdoj.gov/bjs/abstract/cvusst.htm>).

35 *See* Wayne R. LaFave et al., *Criminal Procedure* vol. 1, 78, 92 (2d ed., West 1999). Note that arrests can be made with or without warrants.

investigation.[36] At this point, the arresting officer already has decided whether to charge the individual with a specific crime. Moreover, in the case of minor crimes, such as traffic violations, police typically make the *sole* decision of whether to charge an individual with a crime, by issuing traffic tickets.[37] However, for more serious crimes, a prosecuting attorney determines whether or not to issue formal charges against an individual, and also determines the level of each charge.[38]

B. The Charging Decision

In deciding whether to prosecute a suspect, a prosecutor typically weighs several factors: 1) the sufficiency of the evidence; 2) the suspect's background; 3) any perceived costs and benefits stemming from a conviction; 4) witness difficulties; and 5) community attitudes regarding the suspect and the nature of the offense.[39] Furthermore, the charging decision involves a determination of what, if any, alternatives to prosecution a prosecutor may wish to elect, such as pretrial diversion, or conditional release.[40]

For a wide spectrum of offenses, the level of investigation undertaken by law enforcement officers—including police officers, animal cruelty officers, and animal control investigators—and the amount of evidence collected by such individuals directly determines whether a charge will be brought, because a prosecutor uses sufficiency of evidence as a basis for deciding whether to proceed with a prosecution.[41] Ms. Kern, in speaking with prosecutors, stated the following regarding the role of investigation in the animal cruelty context, as it relates to the decision of whether or not a prosecutor decides to bring formal charges:

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[36] *Id.* at 96.

[37] *Id.* at 5, 100. Note that while prosecutors have statutory and common law discretion regarding charging decisions, police officers often have no such discretion built into the laws they must enforce. Wayne R. LaFave et al., *Criminal Procedure* vol. 4, 15 (2d ed. West 1999).

[38] LaFave, *supra* n. 35, at 103.

[39] Frank R. Miller et al., *Prosecution and Adjudication* 661–62 (5th ed., Foundation Press 2000). *See also* Frank R. Miller, *Prosecution: The Decision to Charge a Suspect with a Crime* (Little & Brown 1959). Note also that, "[j]ust as the prosecutor enjoys broad discretion in deciding whether to charge at all, he [or she] exercises broad discretion in choosing the specific charges to bring against a defendant." Miller, *Prosecution and Adjudication* at 662.

[40] Wayne R. LaFave et al., *Criminal Procedure* vol. 4, 5 (2d ed., West 1999). Pretrial diversion programs give an arrestee "the opportunity to avoid conviction if he or she is willing to perform prescribed 'rehabilitative steps' (e.g., making restitution to the victim, undertaking a treatment program)." *Supra* n. 35, at 102. For a discussion of pretrial diversion, *see* LaFave, *Criminal Procedure* vol. 4, at 8–9.

[41] LaFave, *supra* n. 35, at 5. Consider that a law enforcement officer plays a very significant role in bringing a crime to a prosecutor's attention. Thus, any efforts to see that animal cruelty is more vigorously prosecuted must not overlook the large role that investigators and other types of law enforcement officers play in this process.

> The investigators (whether intentionally or unintentionally) screen what is recorded about a call that they investigate. They also decide how much detail will be recorded about each stop. The investigator is also responsible for using her discretion to decide whether or not a case merits further investigation and preparation for prosecution. . . . The investigator is the most critical person in any prosecution. The evidence presented to the prosecutor by the investigator is the only evidence that a prosecutor relies on in preparing a case. Therefore, the investigator's job of drafting reports and gathering data is crucial to the prosecution of animal crimes.[42]

Furthermore, Reno City Attorney's Office Chief Prosecutor, William Gardner, blames a lack of documentation of animal crimes as the main obstacle to trying cases of animal abuse and neglect.[43] The chances of prosecution of an animal crime—or any crime perceived as less important by prosecutors—are greater if a prosecutor possesses well-documented evidence of that crime. Thus, investigators should try to keep accurate and detailed accounts of the cases they investigate, in the hopes that prosecutors will file charges in a greater number of cases. Although there is still the issue of prosecutorial discretion regarding the charging decision, once the underlying evidentiary matters are deemed sufficient, some jurisdictions offer ways to better ensure that crimes, both animal-specific and general, have a greater chance of being prosecuted.[44]

The following list includes some common explanations used by prosecuting attorneys for their decisions not to prosecute: 1) the fact that legislative "overcriminalization" makes certain actions criminal, in contrast to modern societal tolerances;[45] 2) the belief that discretion is necessary to best utilize limited public resources; 3) the perceived need to individualize justice for particular perpetrators; 4) the fact that a victim has expressed a desire that the perpetrator not be prosecuted; 5) the desire to not unduly harm an individual or her reputation for various inconsequential crimes; 6) the fact that an offender could help with the prosecution of another crime; and 7) the fact that the harm resulting from the crime can be corrected by the offender without resorting to prosecution.[46]

In addition to these reasons often cited for not prosecuting specific offenders, Joshua Marquis, former President of the Oregon District Attorney's Association and Vice-President of the National District Attorney's Association, believes that animal crimes *in particular* are not prosecuted vigorously enough due to the perception by many individuals that an animal crime involves "just an animal" and is thus not wor-

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[42] Kern, *supra* n. 12, at 26 (internal citations omitted).

[43] Gail Connors, *"Three Strikes and You're Out" in Nevada for Animal Cruelty and Abuse*, Nev. Law. 32, 33 (Mar. 8, 2000).

[44] *See infra* Section IV.

[45] *E.g.* the crime of adultery.

[46] LaFave, *supra* n. 40, at 13–14. For example, if a person writes a bad check but pays restitution to the victim, the need for prosecution lessens greatly, because the victim has theoretically been made "whole."

thy of time or resources, the "macho" environment of the law enforcement field, and the perception by many prosecutors that animal cases are somewhat "sissy."[47]

C. *The Complaint, Preliminary Hearing, and Grand Jury Phases*

Assuming that the prosecuting attorney initiated criminal proceedings, she must then file an initial charging instrument with the magistrate court.[48] Next, the court may hold a preliminary hearing.[49] This hearing generally occurs only with felony cases, and in the absence of a grand jury indictment at this stage in the process.[50]

Nearly every jurisdiction authorizes grand jury screening in cases where the prosecutor brought felony charges, and such screening is required when felony prosecutions are contingent upon the filing of an indictment.[51] In the majority of states that use grand juries, the prosecution generally proceeds either by information—thus, not requiring a grand jury screening—or by grand jury indictment.[52] A grand jury consists of a group of private citizens who review cases to determine whether requisite probable cause exists for the prosecutor to charge a specific defendant.[53] If the grand jury—typically twelve citizens—determines that the evidence sufficiently warrants prosecution, it issues the indictment sought by the prosecutor.[54] Conversely, if the jury determines that sufficient evidence is lacking, the prosecutor does not charge the individual.[55]

Clearly, the decision whether to prosecute an individual for a crime is a multi-step process, with many actors deciding whether to go forward with a particular prosecution. A concerned citizen can play a role in the charging process by compelling certain actions on the part of the prosecutor, by eliciting Attorney General (AG) involvement, by seeking judicial review of charging decisions, by directly approaching grand juries or judges, and by urging animal care organizations to utilize available animal-specific statutes. The following section will analyze each of these options.

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47 Telephone interview with Joshua Marquis (Mar. 13, 2002). Mr. Marquis is outspoken on the issues of animal cruelty and the need for increased prosecution of animal crimes. *See e.g.*, Joshua Marquis, *The* Kittles *Case and Its Aftermath*, 2 Animal L. 197 (1996). Incidentally, Mr. Marquis is not an advocate of self-help prosecution in the animal context. Rather, he believes the better tactic is to raise public (and prosecutorial) awareness regarding the need to detect and punish perpetrators of animal crimes.

48 LaFave, *supra* n. 35, at 109. This charging instrument is typically called a complaint, information, or accusation. *Id.*

49 *Id* at 118–19.

50 *Id* at 119.

51 *Id.* at 121.

52 *Id.* at 121–22. An information is a charging instrument issued by a prosecutor, whereas an indictment is a charging instrument issued by a grand jury. *Id.*

53 *Id.* at 122.

54 *Id.*

55 *Id.* at 123.

IV. CHECKS ON PROSECUTORIAL DISCRETION

> Although the American criminal justice system has reasonably effective controls to ensure that the prosecutor does not abuse his power by prosecuting upon less than sufficient evidence, there are—as a practical matter—no comparable checks upon his discretionary judgment of whether or not to prosecute one against whom sufficient evidence exists.[56]

A. Writs of Mandamus

A writ of mandamus is used to either: 1) compel an official to act when she has a legal duty to act but has failed to do so; or 2) prohibit an official from acting when she is legally prohibited from doing so.[57] Generally, a writ of mandamus is only available when there is no other "plain, speedy, and adequate remedy in the ordinary course of the law."[58] The leading federal case regarding an attempt to use a writ of mandamus to compel prosecution is *Inmates of Attica Correctional Facility v. Rockefeller*.[59] In that case, the inmates of the prison and other persons sought to require federal and state officials to investigate and prosecute individuals whose treatment of prisoners allegedly violated federal and state law.[60] The Second Circuit held that the district court was proper in dismissing the complaint because the decision to prosecute was discretionary, and "federal courts have traditionally and . . . uniformly refrained from overturning, at the insistence of a private person, discretionary decisions of federal prosecuting authorities not to prosecute persons regarding whom a complaint of criminal conduct is made."[61] The majority of states also take the view that mandamus cannot compel a duty that is discretionary in nature, and will thus dismiss a mandamus action against a state prosecuting attorney.[62] However, several states do allow mandamus in the prosecutorial context to some extent.[63]

In most states, mandamus can only be used in the prosecution context when the prosecutor has abused her discretion in choosing not

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56 LaFave, *supra* n. 40, at 27.

57 Beloof, *supra* n. 27, at 260.

58 *See e.g.* Or. Rev. Stat. § 34.110 (1999).

59 477 F.2d 375 (2d Cir. 1973).

60 *Id.* at 376.

61 *Id.* at 379. *See e.g. Smith v. U.S.*, 375 F.2d 243 (5th Cir. 1967); *Powell v. Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965).

62 *See e.g. St. ex rel. Travis v. Bd. of Parole*, 154 Or. App. 718, 721 (1998):

> When the law requires a public officer to do a specified act in a specified way . . . without regard to his own judgment as to the propriety of the act, and with no power to exercise discretion, the duty is ministerial in character, and performance may be compelled by mandamus, if there is no other remedy.

Shephard v. Atty. Gen., 567 N.E.2d 187 (Mass. 1991); *Prof. Check Serv., Inc. v. Dutton*, 560 S.2d 755 (Ala. 1990); *Taliaferro v. Locke*, 182 Cal. App. 2d 752 (1960). *See also* Or. Rev. Stat. § 34.110 (1999) (a writ of mandamus "shall not control judicial discretion").

63 *E.g. infra* n. 64.

to charge an individual for a crime.[64] Because this abuse of discretion standard is difficult to meet, mandamus is usually not an efficient or available mechanism with which to compel prosecution of animal crimes. West Virginia is unique because mandamus is widely available to compel prosecution of a crime, providing for the most permissive and expansive use of the writ. West Virginia law states that every prosecutor has a duty "when he has information of the violation of any penal law committed within such county" to "institute and prosecute all necessary and proper proceedings against the offender," which "makes it a prosecutor's non-discretionary duty to institute proceedings against persons when he has information giving him probable cause to believe that any penal law has been violated," even if the prosecutor has insufficient manpower.[65] In other words, assuming there is probable cause to prosecute an individual for a crime, the prosecutor possesses no discretion whatsoever in determining whether to charge that individual.[66] Thus, a citizen in West Virginia may use mandamus to compel a prosecutor to perform this mandatory duty. Unfortunately, West Virginia is the only state where citizens can use mandamus to compel more vigorous animal crime prosecution.

B. State Attorneys General

While a state Attorney General (AG) may have the power to initiate a prosecution, she rarely exercises that power, and then only in the most egregious cases.[67] However, some states explicitly give Attorneys General supervisory powers. Perhaps most significantly, New Hampshire grants its AG extremely broad powers of supervision over county attorneys.[68] The New Hampshire AG has ultimate responsibility for criminal law enforcement, and she has "the power to control, direct,

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[64] *See e.g. Ackerman v. Houston*, 43 P.2d 194 (Ariz. 1935); *Brack v. Wells*, 40 A.2d 319 (Md. 1944); *Cmmw. v. Eisemann*, 419 A.2d 591 (Pa. 1980); *Pengov v. White*, 766 N.E.2d 228, 231 (Ohio 2001); *St. ex rel. Master v. Cleveland*, 661 N.E.2d 180, 184 (Ohio 1996) ("A prosecuting attorney will not be compelled to prosecute a complaint except when the failure to prosecute constitutes an abuse of discretion." Mandamus is available when "the failure to prosecute constitutes an abuse of discretion," which "connotes a decision that is unreasonable, arbitrary, or unconscionable."). *But see Ascherman v. Bales*, 273 C.A.2d 707, 708 (Cal. 1969) ("Except where a statute clearly makes prosecution mandatory, a district attorney is vested with discretionary power in the investigation and prosecution of charges and a court cannot control this discretionary power by mandamus.").

[65] *See St. ex rel. Ginsberg v. Naum*, 318 S.E.2d 454, 455–56 (W. Va. 1984) (court grants mandamus, on petition of Department of Human Services Commission, for prosecution of welfare fraud cases, as per West Virginia code section 7-4-1); *St. v. Orth*, 359 S.E.2d 136 (W. Va. 1987) ("A prosecutor may . . . exercise discretion in . . . refraining from prosecuting a case when, in good faith, he doubts the guilt of the accused or feels the case is not capable of adequate proof," but otherwise "the prosecutor's duty is mandatory and nondiscretionary").

[66] *St. ex rel. Hamstead v. Dostert*, 313 S.E.2d 409, 414–15 (W. Va. 1984).

[67] Beloof, *supra* n. 27, at 257. (In practice, "initiation of prosecution by Attorneys General only rarely occurs"). *See also* LaFave, *supra* n. 40, at 40.

[68] *See Wyman v. Danais*, 147 A.2d 116, 118 (N.H. 1958).

and supervise criminal law enforcement by the county attorneys in cases where [s]he deems it in the public interest."[69]

Furthermore, in Vermont, the office of the State's Attorney and the office of the AG possess equal authority to initiate criminal prosecutions.[70] Where a State's Attorney brought an action to enjoin the AG from bringing a prosecution when the State's Attorney had already exercised his discretion to forgo prosecution, the Supreme Court of Vermont stated that the decision by the State's Attorney not to prosecute was not a bar to a prosecution by the AG.[71] Vermont statute sets out that the AG may represent the State in both criminal and civil matters, and she has "the same authority throughout the state as a state's attorney."[72] Furthermore, the AG may summon a grand jury where a State's Attorney has declined to act.[73] Therefore, the AG has significant power and authority to initiate prosecutions in Vermont.

Pennsylvania also provides that its AG may supersede the district attorneys of the state if the AG shows that supersession of the district attorney is "reasonably necessary to enforce the laws of the Commonwealth."[74] The AG may only supersede a district attorney with "court authorization under an abuse of discretion standard (or at the district attorney's own invitation)."[75] Thus, Pennsylvania grants AGs only a narrowly circumscribed power to initiate a criminal prosecution over the objection of the district attorney.

Although many states grant the AG certain powers to supervise, supersede, and initiate prosecutions, AGs rarely exercise these powers. Furthermore, it is easy to imagine that lack of local animal crime prosecution is considered a low priority to a State AG. Thus, reliance on the office of the AG is misguided in the quest to ensure that animal crimes are vigorously and consistently prosecuted.

C. Judicial Review of Prosecutorial Discretion

Commentators claim that "more than nine-tenths of local prosecutors' decisions are supervised or reviewed by no one."[76] It is estimated that approximately ninety percent of prosecutorial abuse occurs in the context of a failure to prosecute.[77] Unfortunately, however, citizens do not have a wide variety of mechanisms at their disposal to challenge

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69 *Id. See also* N.H. Stat. Ann. 7:11 (2001) (officers charged with enforcing the criminal law "shall be subject to the control of the attorney general whenever in the discretion of the latter he shall see fit to exercise the same").

70 *Off. of St.'s Atty. v. Off. of Atty. Gen.*, 409 A.2d 599, 601 (Vt. 1979).

71 *Id.* at 602.

72 Vt. Stat. Ann. tit. 3, § 152 (2002).

73 V.R.Cr.P. 6(a) (2002).

74 *Cmmw. v. Schab*, 383 A.2d 819, 824 (Penn. 1978).

75 *Carter v. City of Phila.*, 181 F.3d 339, 353 (3d Cir. 1999). *See also Schab*, 383 A.2d at 823–24.

76 Davis, *supra* n. 11, at 208.

77 Beloof, *supra* n. 27, at 247 n. 2.

such decisions. The U.S. Supreme Court made the following statement regarding judicial review of prosecutorial charging decisions:

> [T]he decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systematic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.[78]

On the federal level, the only safeguards that protect against a prosecutor's immense power of charging discretion, other than that which can be accomplished legislatively, are the Equal Protection clause of the U.S. Constitution[79] and various civil rights statutes.[80] In the state context, these safeguards are also available,[81] as well as other mechanisms that vary from jurisdiction to jurisdiction.

One commentator made the following statement regarding prosecutorial charging decisions:

> While it is thus fair to say that discretionary enforcement in the charging process is a significant problem in current criminal justice administration, clearly the answer does not lie in depriving the prosecutor of any discretion whatsoever. Full enforcement is neither possible nor tolerable; discretion is necessary in criminal administration because of the immense variety of factual situations faced at each stage of the system and the complex interrelationship of the goals sought. The issue is not discretion versus no discretion, but rather how discretion should be confined, structured, and checked.[82]

Indeed, there is a danger inherent in unchecked prosecutorial discretion because the screening process regarding charging decisions is informal, invisible, and lacking in set policy or guidelines. Thus, it is questionable whether prosecutorial discretion can realistically operate with any measurable degree of fairness as to all individuals facing or

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78 *Wayte v. U.S.*, 470 U.S. 598, 607–08 (1985).

79 U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

80 *See e.g. Inmates of Attica Correctional Facility*, 477 F.2d 375 (plaintiff unsuccessfully sought mandamus to compel investigation, arrest, and prosecution of individuals charged with violating prisoners' civil rights during and after Attica prison uprising).

81 *See e.g. St. v. Tracy*, 720 P.2d 841 (Wash. App. 1986) (assessing equal protection claim in the failure to charge context); *St. v. Cotton*, 769 S.2d 345, 351 (Fla. 2000) (absent compelling equal protection argument, exercise of prosecutorial discretion generally not subject to judicial review).

82 LaFave, *supra* n. 40, at 22–23.

not facing prosecution.[83] Citizens must therefore possess reasonable means to ensure that they can review prosecutorial discretion for abuse.

For example, Pennsylvania Rule of Criminal Procedure 506 (a)–(b) states that when a prosecutor declines to prosecute a case and a private party then files a private criminal complaint, the prosecutor must either approve the complaint and file charges or else disapprove the complaint with a statement of reasons.[84] If disapproved, the affiant may then file a private criminal complaint with a judge of the Court of Common Pleas.[85] If the prosecutor refused the complaint on evidence sufficiency grounds, the court review is *de novo*. However, if the prosecutor disapproved on policy grounds, the question on review is whether the prosecutor abused his discretion.[86] Although this appears to be a reasonable way to check prosecutorial discretion, prosecutors could conceivably evade strict court review simply by making charging decisions based on policy reasons.[87]

Furthermore, Colorado statute section 16-5-209 states in part:

> The judge of a court having jurisdiction of the alleged offense, upon affidavit filed with the judge alleging the commission of a crime and the unjustified refusal of the prosecuting attorney to prosecute any person for the crime, may require the prosecuting attorney to appear before the judge and explain the refusal. If after that proceeding, . . . the judge finds that the refusal of the prosecuting attorney to prosecute was arbitrary or capricious and without reasonable excuse, the judge may order the prosecuting attorney to file an information and prosecute the case or may appoint a special prosecutor to do so.[88]

There is a presumption that the prosecutor acted appropriately, so the party or individual challenging the district attorney's charging decision has the burden of proving by clear and convincing evidence that the prosecutor's decision was "arbitrary or capricious and without reasonable excuse."[89] The Supreme Court of Colorado referred to the

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[83] Miller, *supra* n. 39, at 8.

[84] Pa. R. Crim. P. 506 (a)–(b) (2002). *See Commonwealth v. Benz*, 565 A.2d 764 (Pa. 1989) (after a citizen requested review of the prosecutor's decision not to prosecute due to a claim of insufficient evidence, the Superior Court ordered that the district attorney's office prosecute because there was a *prima facie* case). *See also Commonwealth v. Brown*, 708 A.2d 81 (Pa. 1998) (Pennsylvania Supreme Court holding attorney general acted in bad faith in disapproving private criminal complaint).

[85] Pa. R. Crim. P. 506(b). *But see Cleveland v. State*, 417 S.2d 653 (Fla. 1982) (state attorney decisions that are prosecutorial in nature are not subject to judicial review).

[86] *Commonwealth v. Brown*, 708 A.2d 81 (Pa. 1998).

[87] *See* Beth A. Brown, *The Constitutional Validity of Pennsylvania Rule of Criminal Procedure 113(b)(2) and the Traditional Role of the Pennsylvania Courts in the Prosecution Function*, 52 U. Pitt. L. Rev. 269 (1990).

[88] Colo. Rev. Stat. § 16-5-209 (2002).

[89] *Sandoval v. Farish*, 675 P.2d 300, 302–03 (Colo. 1984) (writ of mandamus dismissed because statutory remedy provided an adequate remedy to petitioner; prosecutor's decision not to prosecute was not arbitrary and capricious and without reasonable excuse and he could thus not be compelled to prosecute). *See also Landis v. Farish*, 674 P.2d 957 (Colo. 1984) (victims of alleged theft by deception failed to prove that district

American Bar Association (ABA) Standard for Criminal Justice 3-3.9(b)[90] when it determined whether the prosecutor in *Sandoval v. Farish* acted lawfully.[91] ABA Standard 3-3.9(b) sets out the following:

> The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:
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> (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
> (ii) the extent of the harm caused by the offense;
> (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
> (iv) possible improper motives of a complainant;
> (v) reluctance of the victim to testify;
> (vi) cooperation of the accused in the apprehension or conviction of others; and
> (vii) availability and likelihood of prosecution by other jurisdiction.[92]

In light of the fact that the burden is on the party challenging the prosecutor's decision not to prosecute, and the fact that such party must overcome a high standard of proof, this state statute may not actually provide for any meaningful review of prosecutors' decisions not to prosecute.

In California, if a district attorney has "willfully, corruptly, or inexcusably refuse[d] to perform his duty [to prosecute] in the premises, he could be proceeded against for malfeasance or nonfeasance in office."[93] Similarly, New Jersey allows its AG to charge a county prosecutor with criminal malfeasance (failure to act).[94] Although a New Jersey prosecutor has "wide discretion to charge or not to charge persons suspected of criminal offenses,"[95] she must exercise this discretion "in accordance with established principles of law, fairly, wisely, and with skill and reason."[96] Therefore, a prosecutor who fails to "examine the available evidence, the law and the facts, and the applicability of each to the other" is guilty of criminal malfeasance.[97]

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attorney's decision not to prosecute alleged perpetrator was arbitrary or capricious and without reasonable excuse).

90 ABA Standard for Criminal Justice, Standard 3-3.9(b) (3d ed. 1993) [hereinafter ABA Standard 3-3.9(b)].

91 *Sandoval*, 675 P.2d at 301. Interestingly, the ABA does not set forth any guidelines regarding prosecutorial *failure* to charge. Instead, the ABA focuses merely on the decision to *affirmatively* prosecute, and thus provides guidelines that must be followed only in the course of charging an individual with a crime. ABA Standard 3-3.4 (3d ed. 1993).

92 *Id.*

93 *Boyne v. Ryan*, 34 P. 707, 708 (Cal. 1893).

94 *State v. Winne*, 96 A.2d 63, 68 (N.J. 1953).

95 *State v. Di Frisco*, 571 A.2d 914, 920 (N.J. 1990).

96 *Winne*, 96 A.2d at 73.

97 *Id.*

Overall, the existing statutes that allow judicial review of prosecutorial charging decisions are largely ineffective because they provide high standards of proof and give immense deference to local prosecutors, especially when decisions not to charge are based on policy considerations.

D. Citizen Access to the Grand Jury

While some states do not allow citizen access to the grand jury at all,[98] West Virginia is unique because a citizen's right to approach a grand jury and present evidence of an offense is a constitutional right.[99] The Supreme Court of West Virginia stated the following in justifying this right:

> To fulfill its functions of protecting individual citizens and providing them with a forum for bringing complaints within the criminal justice system, the grand jury must be open to the public for the independent presentation of evidence before it. [Thus], . . . any person may go to the grand jury to present a complaint to it.[100]

On the other hand, *Brack v. Wells*[101] affirmed a citizen's right to approach the grand jury in Maryland, as a matter of common law, as long as her remedies have been exhausted before the magistrate and the state's attorney. The court, in stating that a grand jury may investigate a case that the state's attorney has refused to bring before that body, sang the praises of this allowance by commenting, "[u]pon the proper functioning of the grand jury the lives, security, and property of the people largely depend."[102] In addition, Louisiana,[103] Alabama,[104] and Texas[105] also allow, under the common law, private citizens to have access to grand juries to initiate criminal prosecutions.

Finally, Tennessee provides its citizens direct access to the grand jury via statute. Section 40-12-104(a) of the Tennessee Code sets out the following: "[a]ny person having knowledge or proof of the commission of a public offense triable or indictable in the county may testify before the grand jury."[106] Such statutes present a valuable opportunity for a citizen to initiate a criminal complaint without reliance on the local prosecutor.

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98 *See e.g.* Ohio Rev. Code Ann. § 2939.10 (Anderson 2000) (only prosecuting attorney or assistant prosecuting attorney may appear before the grand jury).

99 *State ex rel. Miller v. Smith*, 285 S.E. 2d 500 (W. Va. 1981); W. Va. Const. art. III, § 17 states "[t]he courts of this State shall be open, and every person, for an injury done to him, in his person, property, or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay."

100 *Id.* at 504–05.

101 40 A.2d 319 (Md. 1944).

102 *Id.*, at 322.

103 *State v. Stewart*, 14 So. 143 (La. 1893).

104 *King v. Second Natl. Bank & Trust Co.*, 173 So. 498 (Ala. 1937).

105 *Hott v. Yarborough*, 245 S.W. 676 (Tex. 1922).

106 Tenn. Code Ann. § 40-12-104 (1997).

E. Citizen Bypass of the Grand Jury

Even beyond citizen access to the grand jury, some jurisdictions allow a citizen to approach a judge and directly request that a charge be filed against an individual.[107] Wisconsin allows a "John Doe" criminal proceeding where a citizen can bypass the grand jury and present a criminal complaint to a judge. Wisconsin statute section 968.26 states the following:

> If a person complains to a judge that he or she has reason to believe that a crime has been committed within his or her jurisdiction, the judge shall examine the complainant under oath and any witnesses produced by him or her and may, and at the request of the district attorney shall, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed. The extent to which the judge may proceed in the examination is within the judges (sic) discretion.[108]

The John Doe proceeding serves both as an inquest into discovery of a crime and as a screen to prevent reckless prosecutions.[109] In 1989, the Supreme Court of Wisconsin held that the John Doe proceeding did not violate the constitutional doctrine of separation of powers concluding, "the statute does not impermissibly delegate exclusive powers of the executive branch to the judiciary."[110]

In order to initiate a John Doe criminal proceeding, a citizen must file a complaint with a magistrate judge.[111] The judge must remain neutral and detached throughout the proceeding, and her only goal is to determine whether probable cause exists to initiate a prosecution.[112] John Doe proceedings are subject to appellate court review, and a John Doe judge is subject to a writ of injunction if she abuses her discretion by extending the procedure or scope of the proceeding beyond that which is allowable or if she otherwise conducts the proceeding improperly.[113]

The individual initiating the John Doe proceeding need not name a particular person as one who allegedly committed a crime, but she must at the outset establish an objective reason to believe that a crime has been committed.[114] Thus, the complainant must do more than

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107 For example, this section will discuss citizen-initiated complaints in Wisconsin, New Jersey, Missouri, and Ohio.

108 Wis. Stat. § 968.26 (2001).

109 *State ex rel. Reimann v. Cir. Ct. for Dane County*, 571 N.W.2d 385 (Wis. 1997).

110 *Unnamed Def.*, 441 N.W.2d at 701. *See also State v. Washington*, 266 N.W.2d 597 (Wis. 1978).

111 *Wis. Fam. Counseling Servs., Inc. v. State*, 291 N.W.2d 631 (Wis. App. 1980).

112 *State v. Schrober*, 481 N.W.2d 689, 691 (Wis. App. 1992) (stating that a John Doe magistrate is not a "super-prosecutor with power to mandate continuing legal process to jury verdict"). *See also Washington*, 266 N.W.2d at 605 ("The John Doe judge should act with view toward issuing a complaint or determining that no crime has occurred. To the extent that the judge exceeds this limitation, there is an abuse of discretion.").

113 *Id.*

114 *Cir. Ct. for Dane County*, 571 N.W.2d at 392.

merely allege in conclusory terms that a crime has been committed.[115] Rather, she must support her allegation by objective, factual assertions before the trial court is required to conduct an examination of her complaint.[116] Once the John Doe complainant shows that she has objective reason to believe that a crime was committed, the trial court has *no discretion* to refuse to examine her complaint.[117]

The state of New Jersey also allows citizen-initiated complaints. New Jersey Municipal Court Rule 7:2-2(a)(1) states the following:

> An arrest warrant or summons on a complaint charging any offense made by a private citizen may be issued only by a judge, or . . . by a municipal court administrator or deputy court administrator. . . . The arrest warrant or summons may be issued only if it appears to the judicial officer from the complaint, affidavit, or testimony that there is probable cause to believe that an offense was committed and the defendant has committed it. The judicial officer's finding of probable cause shall be noted on the face of the summons or warrant. If, however, the municipal court administrator or deputy court administrator finds no probable cause exists to issue an arrest warrant or summons, that finding shall be reviewed by the judge. A judge finding no probable cause shall dismiss the complaint.[118]

Also, Ohio permits a citizen to either approach a judge, clerk of the court, or a prosecuting attorney to issue a complaint regarding the commission of a crime.[119] Section 2935.09 of the Ohio Rev. Code sets out the following:

> [I]n order to cause the arrest or prosecution of a person charged with committing an offense in this state, a peace officer, or a private citizen having knowledge of the facts, shall file with the judge or clerk of a court of record, or with a magistrate, an affidavit charging the offense committed, or shall file such affidavit with the prosecuting attorney or attorney charged by law with the prosecution of offenses in court or before such magistrate, for the purpose of having a complaint filed by such prosecuting or other authorized attorney.[120]

Thus, citizens of Wisconsin, New Jersey, and Ohio have the opportunity, to varying degrees, to approach members of the judiciary and prosecuting attorneys in order to make a criminal complaint.

F. Private Prosecution Specifically in the Animal Context

Several states allow limited private prosecution specifically for violations of animal abuse and neglect laws. For example, Wisconsin law

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115 *Id.* at 389.

116 *Id.*

117 *Id.* at 388.

118 N.J. Mun. Ct. R. 7:2-2(a)(1) (2000). Furthermore, New Jersey Municipal Court Rule 7:8-7(b) states that the court may "in its discretion and in the interest of justice . . . permit a private prosecutor to represent the government." *Id.* at 7:8-7(b). Such an action is subject to the court reviewing the attorney's certification, granting the certification, and granting the attorney's motion to act as private prosecutor. *Id.*

119 Ohio Rev. Code Ann. § 2935.09 (2002).

120 *Id.*

states that, "[a] humane officer may request law enforcement officers and district attorneys to enforce and prosecute violations of state law and may cooperate in those prosecutions."[121] Furthermore, Minnesota law states that:

> Any person who has reason to believe that a violation of this chapter has taken place or is taking place may apply to any court having jurisdiction over actions alleging violation of that section for a warrant and for investigation. . . . If the court is satisfied of the existence of the grounds of the application, or that there is probable cause to believe that a violation exists, it shall issue a signed search warrant and order for investigation to a peace officer in the county.[122]

In turn, Pennsylvania law states the following:

> An agent of any society or association for the prevention of cruelty to animals, incorporated under the laws of the Commonwealth, shall have the same powers to initiate criminal proceedings provided for police officers by the Pennsylvania Rules of Criminal Procedure. An agent of any society or association for the prevention of cruelty to animals, incorporated under the laws of this Commonwealth, shall have standing to request any court of competent jurisdiction to enjoin any violation of this section.[123]

Hawaii sets out the following in section 711-1110 of its revised statutes:

> The agent of any society which is formed or incorporated for the prevention of cruelty to animals, upon being appointed thereto by the president of such society in any district in the State, may within such district make arrests and bring before any district thereof offenders found violating the provisions of section 711-1109 to be dealt with according to law.[124]

In contrast to the above provisions, New Jersey allows private citizens to initiate civil suits on behalf of the New Jersey Society for the Prevention of Cruelty to Animals against individuals who violate state anti-cruelty statutes. Whoever violates New Jersey's anti-cruelty statute

> [s]hall forfeit and pay a sum not to exceed $250, except in the case of a violation of subsection (t) [abandonment of a domestic animal] a mandatory sum of $500, and $1,000 if the violation occurs on or near a roadway, and in the case of a violation of subsection (x) or (y) [knowing sale or barter of dog or cat flesh or fur for consumption or production] a sum not to exceed $1,000 for each domestic dog or cat fur or fur or hair product or domestic dog or cat carcass or meat product, to be sued for and recovered, with costs, in a civil action by any person in the name of the New Jersey Society for the Prevention of Cruelty to Animals.[125]

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121 Wis. Stat. § 173.07(4m) (2002).
122 Minn. Stat. § 343.22(1) (2000).
123 Pa. Stat. Ann. tit. 18 Consol. § 5511(i) (West 2000).
124 Haw. Rev. Stat. § 711-1110 (2001).
125 N.J. Ann. Stat. § 4:22–26 (2001).

Although this is a civil action with low penalties, it is nonetheless an important recognition by the state legislature that citizens of New Jersey have an interest in seeing that perpetrators of animal cruelty are singled out and fined.

While it may seem advantageous to enact statutory legislation allowing specifically for the prosecution of animal crimes, such statutes do not generally afford the typical citizen an opportunity to initiate criminal prosecutions in cases of animal abuse and neglect.[126] Moreover, animal care organizations with powers to arrest and initiate criminal proceedings may be overburdened by immense caseloads and lack of resources, or may otherwise be apathetic to enforcing animal anti-cruelty and neglect laws. For example, the New Jersey Commission of Investigation found that even though certain New Jersey animal protection organizations possess the power to arrest and issue criminal and civil summonses, "[i]n reality, the New Jersey SPCA rarely has exercised its powers of arrest. In fact, it made no arrests in 1998 or 1999."[127] Notwithstanding New Jersey's lack of enforcement and charging of animal crimes, animal care organizations are arguably in a good position to investigate, arrest, and initiate criminal proceedings against animal abusers because of their specific expertise in animal cruelty and neglect laws. The reality, however, is that even if such statutes were more widespread, animal care organizations should not bear the sole burden of enforcing state anti-cruelty laws and seeing that criminal prosecutions are initiated in such circumstances. Thus, jurisdictions would be wise to enact self-help statutes specific to animal abuse and cruelty as an adjunct to more general self-help provisions, such as those found in Wisconsin and West Virginia.[128]

V. THE DOWNSIDE TO SELF-HELP PROSECUTION

A. Criticism of Private Prosecution

Not surprisingly, there are many staunch advocates of prosecutorial discretion. Accordingly, it is said that private prosecution presents a "danger of the vindictive use of the criminal law process."[129] Critics of private prosecution argue that victims may abuse the availability of this method by bringing malicious and unfounded prosecutions.[130] However, as demonstrated by a Tennessee statute which

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126 Often only animal welfare societies and their agents may initiate prosecutions. *See e.g.* Wis. Stat. § 173.07(4m) (1999) (applies only to humane officers); Pa. Stat. Ann. tit. 18 § 5511(i) (West 2000) (applies only to "an agent of any society or association for the prevention of cruelty to animals"); Haw. Rev. Stat. § 711-1110 (2001) (applies only to "an agent of any society which is formed or incorporated for the prevention of cruelty to animals").

127 NJ Commission, *supra* n. 21, at 8.

128 *See supra* Section IV(D)-(E).

129 ABA Standard, Prosecution Function and Defense Function 20 (3d ed. 1993).

130 *See* Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 Pepp. L. Rev. 117, 155 (Symposium Issue, 1984).

allows a citizen to approach the grand jury, state legislatures can provide safeguards to protect the public interest. Tennessee law provides that any person submitting a knowingly false affidavit to the grand jury regarding a request to charge someone with a crime is guilty of perjury and will be punished accordingly.[131] Such a provision seems to be an effective safeguard against frivolous, fabricated charges against an individual.

Prosecutors frequently decide not to charge individuals with crimes in order to conserve scarce judicial resources and control crowded dockets—considerations "which neither promote the victim's interests nor serve the purposes of the criminal law and the goals of the criminal sanctioning process."[132] Private prosecution could function as a necessary and desirable check on prosecutorial charging discretion based upon those extraneous administrative considerations. Perhaps the use of private prosecutions could be confined to cases involving certain types of offenses that victims want to prosecute but which public prosecutors are reluctant to pursue, due to lack of perceived importance or quantity of resources. Animal abuse and neglect crimes conceivably fit within this paradigm.

B. Criticism of Judicial Review of Charging Decisions

Judicial review of decisions not to prosecute is a needlessly controversial issue, as judges are deemed to be neutral and detached, unlike the victim of a crime. Judicial review of agency determinations is a common and longstanding practice.[133] If judges are competent to review administrative agency decisions, they are no less competent to review prosecutorial inaction in the criminal law context. Critics of judicial review of prosecutorial charging decisions argue that judicial review under such circumstances will unduly hinder the judicial process.[134] Yet even assuming there is some merit to the fact that judicial review of charging decisions will impede judicial efficiency, "[p]rotection of the criminal defendant's right to be free from prosecutorial discrimination must rank above judicial expediency,"[135] as well should a victim's right—or the right of a *guardian ad litem*[136] for an animal victim—to seek justice for a crime committed against her. The current judicial system provides so much autonomy to prosecutors that judicial review of charging decisions is one of the only ways

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131 Tenn. Code. Ann. § 40-12-104(d) (2002).

132 Gittler, *supra* n. 130, at 158.

133 *See* Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion – Knowing There Will Be Consequences for Crossing the Line*, 60 La. L. Rev. 371, 400 (2000).

134 *Id.*

135 P.S. Kane, *Why Have You Singled Me Out? The Use of Prosecutorial Discretion for Selective Prosecution*, 67 Tul. L. Rev. 2293, 2309–10 (1993).

136 A *guardian ad litem* is an individual appointed to represent someone, generally a child or a mentally handicapped person, who cannot represent her own best interests and defend her own legal rights in judicial proceedings.

to effectively safeguard the prosecutorial charging process from abuse of this discretionary power. A system under which a complainant moves for prosecution in front of a magistrate when a prosecutor has refused to proceed—provided this right is limited to significant criminal conduct and that the prosecution is carried out by a public prosecutor—is a legitimate, controlled, and fair system that more jurisdictions should adopt.

VI. MODEL SELF-HELP STATUTE

Private citizens have a legitimate interest in the initiation of criminal proceedings, prosecutors have a legitimate interest in maintaining some degree of prosecutorial discretion, and defendants have a legitimate interest in not being unfairly treated with respect to frivolous or malicious prosecution. Thus, legislation that provides a mechanism whereby citizens can exercise their interests to initiate prosecution must guard against harassment and unfair treatment of potential defendants via procedural safeguards and a fairly limited scope of action. A well-written, balanced statute that takes into account the rights of the public and the divergent rights of a defendant will promote broader public confidence in the criminal justice system, especially in the context of animal cruelty and neglect prosecutions.

Before adoption of such a statute, legislatures must recognize the policy considerations that support the adoption of self-help mechanisms. Thus, advocates of such legislation should be prepared to argue that prosecutorial abuse is a serious problem in a given jurisdiction, and that there is a great deal of public dissatisfaction with prosecutorial inaction. Whether this will be more easily demonstrated in a specific criminal area—such as animal abuse and neglect—or in a broader sense will be determined on a case-specific basis, and will dictate whether individuals should pursue broad self-help statutes or those centered around only one given area of the law (e.g. animal crimes). As previously mentioned, the best course of action for animal advocates is to adopt legislation that allows for broad powers of self-help, as opposed to animal-specific self-help legislation. Thus, not only could animal care organizations and humane societies initiate criminal proceedings, but so could the average citizen.

The Model below sets out a proposed two-part self-help statute that encompasses mechanisms to initiate criminal proceedings against an individual and also to review prosecutorial decisions not to charge:

SECTION 1. Citizen Initiation of Criminal Proceedings

(a) Any private citizen may issue a complaint to a magistrate judge if such citizen has reason to believe that a crime has been committed within his or her jurisdiction.
(b) If the complainant supports her allegation that a crime has been committed with objective, fact-based assertions, the trial court has *no discretion* to refuse to examine her complaint.

(c) The judge shall examine the complainant under oath and any witnesses produced and may, or at the request of the district attorney shall, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed. The judge must inquire into the matter with care and accuracy, and she must examine the available evidence, the law, and the facts, and the applicability of each to the other.
(d) If the judge concludes that there is probable cause to believe that an offense was committed and the defendant is ascertainable, the judge shall issue an arrest warrant or summons for such defendant. If the judge concludes that no probable cause exists that an offense was committed by a specific individual, the judge shall dismiss the complaint.
(e) Upon a finding that a complainant brought forth a false complaint for reasons of vindictiveness or maliciousness, such complainant shall be subject to criminal and civil sanctions appropriate for that jurisdiction.

SECTION 2. Judicial Review of Charging Decisions

(a) If a prosecutor declines to prosecute a case, either misdemeanor or felony, and a private party files a private criminal complaint, the prosecutor must either approve the complaint and file charges or disapprove the complaint with a statement of reasons.
(b) Upon disapproval, the affiant may file a complaint with the judge of a court having competent jurisdiction over the alleged offense for approval or disapproval.
(c) The judge shall review the complaint *de novo* and both sides may testify.
(d) If, after a hearing, the judge concludes that the refusal of the prosecuting attorney to charge was without reasonable excuse, she may order the prosecuting attorney to file an information and prosecute the case or she may appoint a special prosecutor to do so.
(e) The following may constitute "reasonable excuse" for failure to prosecute an individual for a crime:
  (1) lack of sufficient evidence;
  (2) the prosecutor's reasonable doubt that the accused is in fact guilty;
  (3) possible improper motives of a complainant;
  (4) reluctance of the victim or key witnesses to testify;
  (5) cooperation of the accused in the apprehension or conviction of others; and
  (6) availability and likelihood of prosecution by another jurisdiction.

VII. CONCLUSION

Although prosecutorial discretion is a firmly entrenched doctrine in the U.S. legal system, the inherent nature of such discretion makes

it largely unsuitable for the consistent prosecution of animal cruelty crimes. Clearly, there is an overwhelming incidence of animal cruelty and neglect crimes perpetrated in the United States every year. Though not all incidents are detected or investigated, those cases that are investigated should not be fated to disappear simply because of a lack of empathy, a misplaced understanding of the seriousness of animal cruelty crimes, or a dearth of resources.

Legal scholar Gary Francione has often asserted that in our society, when human interests are balanced against animal interests, human interests inevitably prevail.[137] Perhaps we will one day witness criminal regulation that does not summarily dismiss animal cruelty crimes for being economically taxing and unimportant. In the interim, animal advocates should take advantage of existing mechanisms that allow for citizen participation in the prosecutorial process. Among the most beneficial are statutes that allow citizens to file a complaint directly with grand juries or judges, and statutes that provide for some judicial review of prosecutor's charging decisions.

Furthermore, citizens should strive to enact new legislative schemes to further facilitate the prosecutorial process. Chief among legislative proposals should be: (1) those that allow a citizen to approach a grand jury or a judge and request that charges be filed against an individual; and (2) those that allow for meaningful judicial review of prosecutorial charging decisions.

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[137] *See e.g.* Francione, *supra* n. 27.