COMMENTS

ASSET FORFEITURE AND ANIMAL CRUELTY: MAKING ONE OF THE MOST POWERFUL TOOLS IN THE LAW WORK FOR THE MOST POWERLESS MEMBERS OF SOCIETY

BY
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Animals have historically been one of the most vulnerable segments of society to crime due both to their status as property and their inability to advocate for themselves. While this has long worked to their disadvantage, developments in an area of jurisprudence where criminal and property law merge now offer an unprecedented possibility. Forfeiture laws have become one of the most powerful and effective tools in the war against crime. The principles and precedents that have emerged from asset forfeiture are aptly suited to application in the animal cruelty context as well. This article discusses asset forfeiture and animal cruelty, offering suggestions on how to combine these two areas of law in an effort to better protect animals from abuse.

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I. INTRODUCTION

"[L]aws, and the enforcement or observance of laws for the protection of dumb brutes from cruelty, are, in my judgment, among the best evidences of the justice and benevolence of men."[1]

The United States legal system currently faces a rare opportunity to make a great stride forward in justice at little financial cost. Animals have historically been the most vulnerable segment of society to crime. This is due to both their status as property and the fact that, unlike other groups which the law used to consider property (namely slaves, married women, and children), animals are truly and completely unable to advocate for themselves. This combination has long worked to their individual disadvantage, as well as to the disgrace of society as a whole. Now, developments in another area of jurisprudence where criminal and property law merge offer an unprecedented possibility. Over the last several decades, asset forfeiture has become one of the most powerful and effective tools in the war on crime. It was initially envisioned as a means of taking the current profit and future incentive out of illegal activities such as racketeering or drug trafficking.[2] However, the principles and precedents that have emerged from asset forfeiture are aptly suited to application in the animal cruelty context as well.

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[1] Stephens v. State, 3 So. 458, 459 (Miss. 1887).

[2] S. REP. No. 98-225, at 371 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374. The legislative history of the Comprehensive Crime Control Act of 1984 describes how Congress enhanced the forfeiture provisions "as a law enforcement tool in combatting [sic] two of the most serious crime problems facing this country: racketeering and drug trafficking. Profit is the motivation for this criminal activity. . ." and the "forfeiture authority [is] designed to strip these offenders and organizations of their economic power." *Id.*

While cruelty comes in many forms, this Comment focuses on some of the more common examples for the sake of simplicity.[3] Section II discusses the history of forfeiture laws and what makes them so powerful. Section III examines the major federal statutes containing forfeiture provisions. Section IV explores the history of cruelty laws and why they are so ineffective. Finally, the Comment concludes by offering some suggestions on how to combine the areas of asset forfeiture and animal cruelty, to try to reach both animals that are the object of crime as well as those (mis)used as an instrumentality to commit another crime. Suggestions range from ideas that could be implemented today to those that would ultimately require a shift in the nation's gestalt.

As most modern commentary on the treatment of animals observes, there are at least two predominant ways of viewing animals: as property or as children. While this Comment concludes with some thoughts on how to better protect animals from abuse or neglect through laws patterned after those that protect children in similar situations, it primarily focuses on the first paradigm. As a practical matter, this is the world we live in, so it is important to be able to argue within that framework. It is worth noting that forcing the law to treat animal property the way it treats inanimate property (the latter, unfortunately, often better) has advantages. Unless society recognizes that animals are more than property, forfeiture laws that currently govern inanimate property will better protect animals against cruelty than most current anti-cruelty statutes. If society does someday recognize that depriving someone of an animal is more serious than other deprivations of property, then the law will recognize animals as more than property and all the benefits which flow from that will follow.

II. THE POWER OF FORFEITURE LAWS

A. *Brief History of Forfeiture*

The concept of forfeiture dates back at least to biblical times. It was written "[i]f an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten."[4] Similarly, the notion that property which causes the death of a human being should be forfeited was one of three forms of forfeiture that existed in the common law of England.[5] This was called a *deodand*, from the Latin *Deo dandum*, meaning "to be given to God."[6] The "guilty" prop-

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[3] The discussion of types of property subject to forfeiture is limited to personal property in order to maintain a manageable size for this Comment. Additionally, discussion will focus on the more common forms of forfeiture. civil and criminal, rather than administrative forfeiture. The seizure of animals may implicate the Takings Clause in some contexts as well. *See* U.S. CONST. amend. V, cl. 5.

[4] *Exodus* 21:28 (King James).

[5] Austin v. United States, 509 U.S. 602, 611-12 (1993) [relying on Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-83 (1974)].

[6] BLACK'S LAW DICTIONARY 436 (6th ed. 1990).

erty was forfeited to the Crown, or more technically, its assessed value was forfeited,[7] in the belief that the Crown would distribute it for pious uses. For example, the money would be used for church services for the good of the dead person's soul.[8] Eventually, the religious rationale was dropped and the *deodand* simply became a source of revenue for the Crown.[9] It was justified as punishment for the negligence of the owner in allowing his property to injure another.[10]

The second type of English common law forfeiture, called forfeiture of estate, required convicted felons and traitors to forfeit all property.[11] Those convicted of treason or a felony not only had to forfeit property connected with their crime but all of their real and personal property.[12] Forfeiture of estate was intended to be a punishment.[13] The English justified forfeiture of estate on the ground that the right to own property was given by society and could be taken away by society for violating its laws.[14]

English law provided a third type of forfeiture based on violations of customs and revenue laws.[15] Known as statutory forfeiture, it became the only type of forfeiture that took hold in the United States,[16] doing so decades before the Constitution even had been drafted.[17] The Navigation Acts of the seventeenth century, enforced by colonial vice-admiralty courts, included forfeiture provisions.[18] The actions of a crew member were considered imputable to the ship's owner,[19] therefore a violation of the Acts required not only forfeiture of the cargo, but of the vessel itself.[20] These proceedings were *in rem*.[21] However, statutory forfeitures were likely a "merger of the deodand tradition and the belief that the right to own property could be denied to the wrongdoer,"[22] and "[s]ince each of these traditions had a punitive aspect, it is

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[7] See Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodand, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 185 (1973).

[8] *Austin*, 509 U.S. at 611. *See also* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 300.

[9] *Calero-Toledo*, 416 U.S. at 680-81.

[10] *Id. See also* BLACKSTONE, *supra* note 8, at 301. For a history of early English forfeiture law, see generally OLIVER W. HOLMES, THE COMMON LAW 1-38 (3d ed. 1923); Finkelstein, *supra* note 7.

[11] *Austin*, 509 U.S. at 611.

[12] *Id.* at 611-12.

[13] *Id.*

[14] *Id. See also* BLACKSTONE, *supra* note 8, at 299.

[15] *Austin*, 509 U.S. at 612.

[16] *Id.* at 613.

[17] Matthew P. Harrington, *Rethinking in Rem: The Supreme Court's New (and Misguided) Approach to Civil Forfeiture*, 12 YALE L. & POL'Y REV. 281, 291 (1994).

[18] *Id.*

[19] *Austin*, 509 U.S. at 612.

[20] *Id.*

[21] Harrington, *supra* note 17, at 291. *See also* BLACK'S, *supra* note 6, at 793 (defining *in rem* as "proceedings or actions instituted *against the thing* in contradistinction to personal actions, which are said to be *in personam*.").

[22] *Calero-Toledo*, 416 U.S. at 682.

not surprising that forfeiture under the Navigation Acts was justified as a penalty for negligence."[23] Once the colonies broke away from Britain, the states established their own admiralty courts and *in rem* proceedings.[24]

The federal legislative branch has always authorized parallel *in rem* forfeiture actions and criminal prosecutions based on the same underlying conduct or events,[25] despite the fact that the legislature viewed forfeiture as punishment.[26] The United States Supreme Court also has recognized that *in rem* forfeiture imposed punishment, although it was civil in nature.[27] One of the earliest cases to draw this sharp distinction was *The Palmyra*,[28] involving a ship seized at sea for violating a piracy statute. A lower court ruled that the ship should not be forfeited *in rem* because no one was convicted *in personam* for the offense.[29] The Supreme Court disagreed:

> [A]t the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach in rem; but it was part, or at least, a consequence of the judgment of conviction . . . But this doctrine never was applied to seizures and forfeitures, created by statute . . . . The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum* or *malum in se*.[30]

Accordingly, in a long history of *in rem* forfeiture cases, the guilt or innocence of the owner was irrelevant.[31] The notion that the property itself was guilty simply evolved into the belief that the forfeiture is justified "on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence."[32] Modern scholars offer a somewhat more practical, if not mundane, explanation: the purpose of an *in rem* forfeiture is to ask the court to recognize a change in the ownership of the property.[33] Moreover, by bringing the action directly against the property the government can quiet title, not only against the defendant, but against the whole world in one proceeding.[34] It does not matter if the defendant even appears in court.[35]

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23 *Austin*, 509 U.S. at 612.

24 Harrington, *supra* note 17, at 292.

25 United States v. Ursery, 518 U.S. 267, 274 (1996).

26 *Austin*, 509 U.S. at 613.

27 *Id.* at 614.

28 25 U.S. (12 Wheat.) 1 (1827). *See also* James E. Beaver et al., *Civil Forfeiture and the Eighth Amendment after Austin*, 19 SEATTLE U. L. REV. 1 (1995).

29 *The Palmyra*, 25 U.S. at 5.

30 *Id.* at 14.

31 *See, e.g.*, Dobbin's Distillery v. United States, 96 U.S. 395 (1878); J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505 (1921); *Calero-Toledo*, 416 U.S. at 663.

32 *Austin*, 509 U.S. at 615. For a good discussion of the evolution from the notion that the property is guilty to the notion that the owner is negligent, *See id.* at 615-18.

33 Harrington, *supra* note 17, at 286.

34 *Id.* at 289-91.

35 *Id.*

B. *Modern Trends in Forfeiture*

The sharp distinction between *in rem* civil forfeiture and *in personam* criminal forfeiture became blurred a little more than a decade ago in *United States v. Halper*.[36] Halper was convicted of sixty-five counts of Medicare fraud.[37] A lower court sentenced him to two years in prison and imposed a $5000 fine.[38] The government then brought civil proceedings in which it sought more than $130,000 in penalties.[39] The district court rejected the penalty as excessive, and the government took a direct appeal to the Supreme Court.[40] The Supreme Court, however, agreed with the district court.[41] In the waning days of the recent liberal court era, Justice Blackmun wrote that the label civil or criminal was less important than whether the sanction imposed was actually punitive.[42] Thus, in comparing the $130,000 civil penalty to the $585 which Halper had actually defrauded the government, the Court stated that the penalty bore "no rational relation" to its stated remedial goal of making the government whole from its loss.[43] *Halper* held that a civil sanction which could not be characterized as remedial, but rather deterrent or retributive, qualified as punishment.[44] The Justices found Halper's sanction to be a second punishment, and as such it violated the Double Jeopardy Clause of the Fifth Amendment.[45] The Court announced that its holding in *Halper* was intended only for "the rare case."[46] Yet, what defense lawyer worth his salt does not believe his client represents the rare case? Within the next few years, double jeopardy challenges were on the rise. The United States Supreme Court used several of those challenges to further expand double jeopardy protection.

In *Austin v. United States*,[47] the government initiated civil forfeiture proceedings against Austin's mobile home and body shop after convicting him on a drug charge.[48] The Supreme Court held that the Eighth Amendment's Excessive Fines clause also applies to civil *in rem* forfeitures.[49] In *Department of Revenue of Montana v. Kurth Ranch*,[50] a farming family challenged the constitutionality of a state

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36 490 U.S. 435 (1989).

37 *Id.* at 437. Halper's scam consisted of submitting 65 reimbursement forms for $12 per claim when he was only entitled to $3 per claim, for a total overpayment of $585.

38 *Id.*

39 *Id.* at 438.

40 *Id.* at 439-40.

41 *Id.* at 452.

42 *Id.* at 447-48.

43 *Id.* at 449.

44 *Id.* at 448.

45 *Id.* at 448-49.

46 *Id.* at 449.

47 509 U.S. at 602.

48 *Id.* at 604.

49 *Id.* at 622.

50 511 U.S. 767 (1994).

tax on their illegal marijuana crop.[51] The Supreme Court ultimately held that a drug tax can count as punishment for double jeopardy purposes.[52] By the mid-1990s, the expanding doctrine included protection from many types of sanctions that never had been historically regarded as punishment. This was good news for defendants who wanted to safeguard their property against government seizure. However, it directly contravened the wishes of Congress,[53] which had begun to wage a legislative war on crime in the 1970s. Asset forfeiture had become one of Congress's most powerful weapons in that war.[54] The *Halper-Austin-Kurth* holdings seemed to weaken that weapon.

Asset forfeiture regained strength in *United States v. Ursery*,[55] which abruptly reversed the expansion in double jeopardy jurisprudence.[56] Michigan police found marijuana growing next to Ursery's property as well as marijuana plant parts and a growlight in his house.[57] The federal government first went after Ursery's house in a civil proceeding.[58] Ursery was later convicted of manufacturing marijuana and sentenced to sixty-three months in prison.[59] He appealed on the grounds that his conviction violated the Double Jeopardy clause,[60] but the Supreme Court disagreed.[61] The Court held that "*in rem* civil forfeitures are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause."[62]

In reaching that decision, Chief Justice Rehnquist's opinion traced the history of civil forfeiture in the United States.[63] His analysis began with one of the first cases considering the relationship between the Double Jeopardy Clause and civil forfeiture, *Various Items of Personal Property v. United States*.[64] Here, a corporation first convicted of operating an illegal distillery was then ordered to forfeit its facilities.[65] The Court upheld the order, reaffirming that the action is against the property, not the defendant, and therefore "double jeopardy does not ap-

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51 *Id.* at 773-75.

52 *Id.* at 783-84.

53 Douglas Kim, *Asset Forfeiture: Giving Up Your Constitutional Rights*, 19 CAMPBELL L. REV. 527, 528 (1997).

54 *Id.*

55 518 U.S. 267 (1996). This was actually a consolidation of two cases. Ursery's claim arose in the Sixth Circuit. Charles Arlt and James Wren brought a similar claim in the Ninth circuit, where the government first instituted civil forfeiture proceedings against them and then proceeded to bring numerous criminal drug and money laundering charges.

56 *Id.*

57 *Id.* at 271.

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.* at 292.

63 *Id.* at 274.

64 282 U.S. 577 (1931).

65 *Id.* at 579.

ply."[66] This rule was made even clearer in *One Lot Emerald Cut Stones v. United States*,[67] where a criminal acquittal for jewel smuggling was held not to be a bar to civil forfeiture proceedings for the jewels.[68] The Court noted that the civil forfeiture provision had been codified separately from the parallel criminal provision, and thus was clearly "a civil sanction."[69] *United States v. One Assortment of 89 Firearms*[70] reached a likewise holding. There, a criminal acquittal on charges of unlicensed firearms dealings did not stop the government from bringing a forfeiture action against the firearms, alleging that they were used or were intended to be used in violation of federal law.[71]

Ursery reestablished the two-prong test used in *89 Firearms* for determining whether a civil penalty was sufficiently punitive to count as punishment for double jeopardy purposes. First, *Ursery* looked to whether Congress intended the statute to be a remedial civil sanction.[72] The Court relied on three factors in making this determination: 1) whether the forfeiture proceeding was *in rem*; 2) whether the forfeiture provision at issue reached a broader range of items than its criminal analogue; and 3) whether the civil forfeiture provision furthered broad remedial and deterrent aims.[73] Second, *Ursery* looked to whether the purpose or effect of the sanction was so punitive as to negate congressional intent to establish a civil penalty.[74] A year later, the Court elaborated on this prong in *United States v. Hudson*,[75] looking to the factors announced in another earlier case, *Kennedy v. Mendoza-Martinez*,[76] for guidance. These factors were: "1) '[w]hether the sanction involves an affirmative disability or restraint'; 2) 'whether it has historically been regarded as a punishment'; 3) 'whether it comes into play only on a finding of scienter'; 4) 'whether its operation will promote the traditional aims of punishment-retribution and deterrence'; 5) 'whether the behavior to which it applies is already a crime'; 6) 'whether an alternative purpose to which it may rationally be connected is assignable for it'; and 7) 'whether it appears excessive in relation to the alternative purpose assigned.'"[77] The *Hudson* Court warned that no one factor is dispositive,[78] "and 'only the clearest proof' will suffice to override legislative intent" to transform what was labeled a civil penalty into a criminal one.[79]

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66 *Id.* at 581.
67 409 U.S. 232 (1972).
68 *Id.* at 235.
69 *Id.* at 236.
70 465 U.S. 354 (1984).
71 *Id.* at 356-57.
72 *Ursery*, 518 U.S. at 277 (relying on *89 Firearms*, 465 U.S. at 363).
73 *Id.*
74 *Id.* at 278 (relying on United States v. Ward, 448 U.S. 242, 248-49 (1980)).
75 118 S.Ct. 488 (1997).
76 372 U.S. 144 (1963).
77 *Hudson*, 118 S.Ct. at 493 (relying on *Kennedy*, 372 U.S. at 168-69).
78 *Id.* at 494.
79 *Id.* at 493 (relying on *Ward*, 448 U.S. at 249).

C. *Future Trends in Forfeiture?*

Chief Justice Rehnquist's reasoning in *Ursery* and *Hudson* fully supports both the constitutionality and the appropriateness of developing animal forfeiture statutes in the civil context. A civil provision that mirrored its criminal counterpart (as most civil forfeiture provisions do) would easily pass the two-prong test.

First, if a state legislature or Congress passed a civil sanction requiring the forfeiture of abused or mistreated animals it would be remedial for all the same reasons the firearms forfeiture in *Ursery* was remedial. To begin with, the animal forfeiture proceeding would be *in rem*, and historically *in rem* actions have been viewed as civil proceedings. Second, an animal forfeiture provision would preferably be structured like the *Ursery* provision, so it also would reach a broader range of issues than its criminal analogue. In fact, the required forfeiture of items used in committing an offense is aptly suited to the animal cruelty context. It would apply both to offenses where the animal itself was the object of the crime, such as cruelty, and where the animal was an instrumentality of the crime, such as a drug dealer's guard dog. The precedent requiring the forfeiture of items "intended to be used" in committing an offense provides a welcome extra measure of protection. Finally, an animal forfeiture provision would serve the broad remedial aim of stopping current socially harmful behavior and the deterrent aim of discouraging future harmful behavior.

Second, an analysis of the seven *Kennedy-Mendoza* factors would not establish the purpose or effect of a civil animal forfeiture sanction to be so punitive as to negate congressional intent to the contrary. For example, forfeiture of an abused or mistreated animal does not involve an "affirmative restraint," which *Hudson* narrowly defined as imprisonment.[80] Likewise, no alternative purpose to such a forfeiture may be rationally assignable to it. Moreover, the removal of an abused animal, which traditionally has had little monetary value, could not be considered excessive even if there were some other (punitive) rationale ascribable to the forfeiture.

Not only would a civil animal forfeiture provision pass the two-prong *Ursery* test, the basic rationales underlying *Ursery* for adopting such a provision are the same in the context of animal cruelty. The violence (and often other accompanying illegal activity) of animal cruelty threatens society with the same kinds of harms as those found in *Ursery*, or more broadly, crime in general. While one could argue that a man beating his dog creates little risk for society, it is equally plausible to argue that if the same man beat a person that would create little risk for anyone else either. The harms here include not only the damage to an individual victim, but the possibility that, if left unchecked, the aggressor may go out and hurt others. Perhaps even more important is the generalized notion that the atmosphere of violence itself is

[80] *Hudson*, 118 S.Ct. at 496.

harmful because it tends to inure society as a whole to the suffering of others. If there is a difference at all in inflicting pain on a non-human animal rather than a human animal, it is one of degree and not kind.[81] Also underlying *Ursery* is the acknowledgment by the Supreme Court that Congress has shown its resolve to fight these particularized and generalized evils using forfeiture, and that the Constitution allows Congress to do so. Thus, there is ample argument to support the use of aggressive forfeiture statutes as a means of both stopping current cases of animal cruelty and other misuses of animals, as well as deterring future such conduct.

D. The Tension Between Legal Fiction and Real Life

As discussed, the traditional notion of civil *in rem* forfeiture rested on the legal fiction that the thing itself is guilty of the offense and thus deserves to be forfeited.[82] Clearly, there is a tension here since animals that are the victims of abuse, or misused as the means to perpetrate another crime, are not "guilty" by any common sense understanding of the term. The property of an owner subject to criminal *in personam* forfeiture is not vulnerable to this conceptual awkwardness, because *in personam* forfeiture is concerned with punishing the defendant for his personal guilt.[83] At first blush, it may seem tempting to keep all animal forfeiture statutes criminal in nature to avoid the unwanted inference. However, civil forfeiture is a much more powerful tool than criminal forfeiture. One commentator describes it as "a defense attorney's nightmare":

> Criminal defense attorneys confronting their first civil forfeiture case feel like they are in an Alice-in-Wonderland world where the property owner generally has the burden of proof, the innocence of the owner is not a defense, rank hearsay is admissible to prove that the property is "guilty," and the government's right to the property vests at the time it is used illegally rather than at the time of the forfeiture judgment.[84]

Perhaps a better approach than avoiding a bad label is to emphasize how the meaning underneath that label has evolved. There is a simple answer to a judge who wants to know why he should declare an animal "guilty," even though he knows animals are not considered capable of mens rea and it creates an awkward inference that the victim is responsible for causing its own abuse. The answer is that the common law itself eventually recognized that civil forfeiture did not have anything to do with the property's guilt, but rather was punishment

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[81] Whether there is even a difference in degree is open to debate; however, that debate is outside the scope of this Comment.

[82] *Various Items*, 282 U.S. at 581. "It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient." *Id.*

[83] *Id.* at 581. "In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished." *Id.*

[84] Harrington, *supra* note 17, at 303.

for an owner's negligence in allowing his property to be misused.[85] In this context, the owner has allowed (indeed, has caused) his property (the animal) to be misused (through intentional or reckless mistreatment) and therefore should forfeit the property.

Justice Kennedy's elaboration of this notion illustrates the point. His concurrence in *Ursery* notes that distinguishing between *in rem* and *in personam* punishments "does not depend upon, or revive, the fiction . . . that the property is punished as if it were a sentient being capable of moral choice. It is the owner who feels the pain and receives the stigma of the forfeiture, not the property."[86] While the property referred to in *Ursery* was marijuana, not even arguably sentient, it is important to note that even if animals are sentient, they did not choose to be used or abused. Justice Kennedy makes some other useful points about civil forfeiture as well. He explains that *in rem* forfeiture is efficient because it allows the government to quiet title in one proceeding, and against the whole world rather than just a particular defendant.[87] Further, he makes clear that this type of forfeiture is not necessarily directed at the wrongdoer, but the owner who allows his property to be misused.[88] It may happen that the owner is also the wrongdoer, but since the forfeiture is not punishment for criminal wrongdoing, it is not an *in personam* punishment for double jeopardy purposes.[89] This is helpful in clearing up the currently murky intersection of animal cruelty statutes and forfeiture. Cruelty statutes are criminal in nature,[90] therefore any forfeiture provisions that exist therein are also criminal. However, *in rem* forfeitures are civil in nature. So, while a prosecutor cannot bring a criminal forfeiture proceeding against a defendant who has already been acquitted of animal cruelty for the same conduct or events regarding the same animal(s), the prosecutor could theoretically bring a civil forfeiture proceeding.

Thus, a solid understanding of the evolution of the rationale underlying civil forfeiture, along with clearly articulated guidance from the United States Supreme Court, should alleviate any concerns a prosecutor may have that an *in rem* forfeiture proceeding would label an animal "guilty" and somehow put its safety at extra risk. It also clarifies the scope of the Double Jeopardy Clause: both criminal and civil proceedings based on the same conduct or occurrences can be brought; it does not matter which comes first; and a successful civil

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85 *Austin*, 509 U.S. at 615.

86 *Ursery*, 518 U.S. at 295 (Kennedy, J., concurring).

87 *Id.* at 296.

88 *Id.* at 294.

89 *Id.* at 295.

90 All fifty states have animal cruelty statutes, although the amount of protection afforded in each varies. *Compare* 18 PA. CONS. STAT. ANN. § 5511 (West 1999) (statute is several pages in length), *with* S.D. CODIFIED LAWS § 9-29-11 (Michie 1995) (statute reads in its entirety: "Every municipality shall have power to prohibit and punish cruelty to animals.").

forfeiture does not depend upon whether the defendant is convicted, acquitted, or ever shows up for court at all.

III. The Major Forfeiture Statutes

There are existing federal laws that deal with animals and forfeiture, but they are generally in the context of illegal hunting or fishing in national parks,[91] or endangered species protection.[92] To see where the enforcement of cruelty laws could get the biggest boost, it is critical to examine the strongest forfeiture laws, even though they deal with other types of crime. At bottom, most crimes share certain dubious attributes and animal cruelty is no different: it victimizes individuals, degrades life, and weakens the fabric of society as a whole.

Currently, there are six major federal laws that include forfeiture provisions:[93] money laundering,[94] racketeering,[95] drug trafficking,[96] obscene materials,[97] sexual exploitation of children,[98] and intellectual property.[99] Many other laws carry forfeiture provisions as well.[100]

A brief discussion of each of the major statutes listed above is in order. The money laundering statute is extremely broad, imposing criminal and civil forfeiture of real and personal property for dozens of offenses. It also authorizes the seizure of property traceable to the profits from those offenses, involving: money,[101] financial institutions,[102] and numerous types of fraud.[103] The Racketeer Influenced and Corrupt Organizations Act (RICO) was originally targeted to stop mob activity. However, this statute now encompasses an even wider range of criminal activity, including: state felonies such as murder and gambling, to embezzlement, extortion, witness retaliation, counterfeiting, white slave traffic, and illegal immigration, to name just a few.[104] RICO itself contains no civil forfeiture provision, but many of the offenses indictable under it are also indictable under other statutes that

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91 Yellowstone National Park Protection Act of 1894, 16 U.S.C. § 26 (1994) (hunting and fishing regulations for Yellowstone).

92 Endangered Species Act of 1973, 16 U.S.C. § 1540 (1994).

93 Kim, *supra* note 53, at 543-47.

94 Money Laundering Control Act of 1986, 18 U.S.C. §§ 981, 982 (1994).

95 Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. § 1963 (1994).

96 Comprehensive Drug Abuse Prevention and Control Act of 1984 21 U.S.C. §§ 853, 881 (1994).

97 Child Protection and Obscenity Enforcement Act of 1988, 18 U.S.C. § 1467 (1994).

98 Child Protection Act of 1984, 18 U.S.C. §§ 2253, 2254 (1994).

99 Copyright Act of 1976, 17 U.S.C. §§ 506-509 (1994).

100 *See, e.g.*, 21 U.S.C. § 883 (1994) (seizure of adulterated or misbranded food, drugs, or cosmetics); 15 U.S.C. § 2071(b) (1994) (forfeiture of hazardous products); 47 U.S.C. § 510 (1994) (seizure of unlicensed transmission or communication devices).

101 18 U.S.C. §§ 982(a)(1), 981(a)(1)(A).

102 *Id.* §§ 982(a)(2), 981(a)(1)(C).

103 *Id.* §§ 982(a)(3)-(8), 981(a)(1)(D).

104 18 U.S.C. § 1961(1).

do carry civil forfeiture provisions.[105] The forfeiture provisions for drug trafficking cover all property derived from proceeds,[106] as well as any property used to commit or facilitate the offense.[107] The criminal forfeiture provision not only has a civil counterpart, it specifically states that the government need only prove that the items in question are subject to forfeiture by a preponderance of the evidence.[108]

The obscene materials statute provides for the forfeiture of illegally produced or distributed obscene materials,[109] any property traceable to the profits from the offense,[110] as well as any property used to commit or promote the offense.[111] In a similar vein, the statute prohibiting the sexual exploitation and other abuse of children covers the forfeiture of all types of pornographic images of children.[112] In addition, the statute contains a powerful civil provision which states that forfeited property will not be repleviable.[113] The contraband will be destroyed and any other forfeited property will be disposed of as the Attorney General sees fit.[114] The statute offers a defendant very limited opportunity to contest the seizure,[115] and is not subject to judicial review.[116] Finally, the intellectual property statute affords roughly the same criminal forfeiture provisions as the other statutes,[117] and carries a civil provision as well.[118]

Civil forfeiture provisions are especially powerful crime-fighting weapons for the statutes that carry them. Except for the money laundering statute, which is structured somewhat differently, criminal forfeiture provisions contain powerful tools also, including: 1) most of the language regarding the consequences of a statutory violation is worded as "shall" forfeit—indicating that forfeiture is mandatory, not discretionary;[119] 2) the categories of property forfeitable is not limited solely to contraband, but includes all items used to commit the offense, all profits from the offense, and even all items traceable to the profits from the offense;[120] 3) seizure may be authorized without notice to the

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105 *Id.* For example, the money laundering prohibitions contained in 18 U.S.C. §§ 1956, 1957 allow prosecution under the civil forfeiture provision of § 982.

106 21 U.S.C. § 853(a)(1).

107 *Id.* § 853(a)(2). Note that there is no provision for the contraband itself; that is assumed forfeited upon arrest.

108 *Id.* § 853(d).

109 18 U.S.C. § 1467(a)(1) (1994).

110 *Id.* § 1467(a)(2).

111 *Id.* § 1467(a)(3).

112 18 U.S.C. §§ 2253(a)(1)-(3), 2254(a)(1)-(3).

113 *Id.* § 2254(c).

114 *Id.* § 2254(f).

115 *Id.* §2254(h).

116 *Id.* § 2254(f).

117 17 U.S.C. §§ 506(a)-(b) (1994).

118 *Id.* § 509(a).

119 *See, e.g.*, 18 U.S.C. § 982(a)(1) (1994) ("shall order that the person forfeit").

120 *See, e.g.*, 18 U.S.C. §§ 1467(a)(1)-(3) (1994) ("any obscene material"; "any property . . . constituting or traceable to gross profits"; "any property used or intended to be used to commit . . . offense").

owner or opportunity for a hearing if the government has probable cause to believe that the property is likely to be forfeitable and notice may jeopardize its availability;[121] 4) in making the determination whether to forego notice, the court may consider information that would be inadmissible under the Federal Rules of Evidence;[122] 5) district courts have nationwide service of process, regardless of the location of the property in question;[123] and 6) forfeited property shall neither revert back to the defendant, nor can the defendant or anyone on the defendant's behalf buy it back from the government.[124] Clearly, forfeiture provisions such as these would provide an immeasurable boost to the impact of often poorly written and frequently under-enforced laws regarding animal cruelty.

IV. THE WEAKNESSES OF CRUELTY LAWS[125]

A. *Brief History of Animal Cruelty Laws*

Animal protection in Anglo-American jurisprudence technically pre-dates the United States Constitution. The 1641 Body of Liberties enacted by the Massachusetts Bay Colony Puritans gave "unique protections" to women, children, servants, and even animals.[126] History subsequently showed that meaningful rights for any of these groups remained a long way off.

In the meantime, cruelty against animals did not appear to be a crime under either English or United States common law.[127] Owners could bring a civil action for the loss of an animal under trespass.[128] Acts against animals might be indictable as a public nuisance, but this was premised on the notion that

> [t]he pain and suffering of the animal was not as much of a legal concern during this time as was the moral impact of the action on humans. What a

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121 *See, e.g.*, 18 U.S.C. § 1963(d)(2) (1994) ("temporary restraining order . . . may be entered . . . without notice").

122 *See, e.g.*, 13 U.S.C. § 853(e)(3) (1994) ("court may receive and consider . . . evidence . . . that would be inadmissible under the Federal Rules of Evidence").

123 *See, e.g.*, 18 U.S.C. § 2253(k) (1994) ("district courts . . . shall have jurisdiction . . . without regard to the location of any property which may be subject to forfeiture under this section").

124 *See, e.g.*, 18 U.S.C. § 1467(g) (1994) ("any property right or interest . . . shall not revert to the defendant, nor shall the defendant or any person acting in concert with him . . . be eligible to purchase forfeited property").

125 Telephone Interview with Pamela Frasch, Director of the Zero Tolerance for Cruelty Campaign for the Animal Legal Defense Fund (ALDF) (May 1999); Interview with Doreen Kozak, Humane Investigator, Chicago Anti-Cruelty Society, in Chicago, Ill. (May 1999); Interview with Dr. Gene Mueller, former Executive Director of Animal Care and Control for the City of Chicago, in Chicago, Ill. (May 1999) (currently Dr. Mueller holds the position of Executive Director of the Chicago Anti-Cruelty Society).

126 Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 539 (1996).

127 David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800s*, 1993 DET. C.L. REV. 1, 5-6 (1993).

128 *Id.* at 5.

man did in the privacy of his home to his animals, his children, and sometimes even his wife, was his concern alone, not that of the legal system.[129]

Further legislation developed in the 1800s, with England leading the way.[130] Philosopher and lawyer Jeremy Bentham argued that animals should be accorded protection under the law.[131] His persuasive writings helped influence the British parliament to eventually pass an animal protection bill.[132] The Royal Society for the Protection of Animals also formed during this time.[133]

Efforts to protect animals in the United States prior to this British law had been very limited in scope.[134] The laws of the time contained hard to prove intent language such as "willful" or "malicious." Furthermore, they often only applied to conduct against an animal "belonging to another;" in other words, owners could treat their own animals any way they wanted.[135] Most notably, these laws only applied to commercially valuable animals such as horses and cows.[136] The first real advance in animal protection laws came in the 1860s.[137] Henry Bergh, impressed with the developments in England, persuaded the New York Legislature to charter the American Society for the Prevention of Cruelty to Animals (ASPCA) and make several revisions to the State's narrow cruelty laws.[138] Other states followed suit.[139]

These forms of protection eventually expanded to companion animals such as dogs and cats, but ironically ended up excluding the very animals those laws initially sought to protect. For example, states now routinely exclude farming practices such as branding and castration from their cruelty laws,[140] even though scarring flesh with a burning

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129 *Id.* at 6.

130 *Id.* at 2-4.

131 It was Bentham who wrote:

> The day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. . . . It may come one day to be recognized, that the number of legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps, the faculty of discourse? But a full-grown horse or dog is beyond a comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month old. But suppose the case were otherwise, what would it avail? the question is not, Can they *reason*? nor, Can they *talk*? but *Can they suffer*?

JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 310-11 n.10-11 (1781).

132 Favre & Tsang, *supra* note 127, at 3-4.

133 *Id.* at 4.

134 *Id.* at 5.

135 *Id.* at 7-9.

136 *Id.* at 6-12.

137 *Id.* at 5.

138 *Id.* at 13-14.

139 *Id.* at 21-22.

140 *See, e.g.*, WYO. STAT. ANN. § 6-3-203(f)(v) (Lexis 1999) ("Nothing in . . . this section may be construed to prohibit . . . [t]he use of commonly accepted agricultural and livestock practices on livestock").

iron and gouging out male genitalia with a knife (both often done without anesthesia) would certainly be considered "cruel" by any common sense understanding of the term.

Currently all fifty states have anti-cruelty laws; however, there is a vast range of difference in the protection they provide. For example, in addition to exemptions for customary husbandry practices, many statutes also specifically exempt practices such as hunting and medical research.[141] Additionally, the intent requirement still exists in some statutes,[142] putting an extra burden on prosecutors to prove that the defendant not only harmed the animal, but meant to do so at the time he committed the act. Further, there is often other language which makes the task even more difficult: "many anticruelty statutes only prohibit the infliction of 'unnecessary' or 'unjustified' cruelty," which is interpreted "not by reference to some abstract moral standard but in light of the conduct's relation to some socially accepted activity."[143] The concept of socially accepted activity is generally viewed in economic terms, as activity which generates social wealth.[144] The only activities that are prohibited are those that are considered "gratuitous" (i.e., decrease overall social wealth or have no benefit that is recognized as "legitimate").[145] Thus, courts have held that it is illegal to beat a horse for no reason, but it is legal to administer the same beating in an effort to train the animal.[146]

Even without specific "unjustified" language, anti-cruelty statutes still start from the premise that the law is concerned with the people who use the animals, not the animals themselves.[147] As such, any benefit to the animal merely represents a fortunate overlap of interests between what the law recognizes as good for society and what the law does not recognize (but happens to be good) for the animal.

This is the opposite premise of laws that restrict what people can do to other people. Those laws *are* viewed from the perspective of what is in the best interest of the victim. The critical difference is that people have rights;[148]

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141 *See, e.g.*, MICH. COMP. LAWS ANN. §750.50(8)(h) (West 1999) ("Scientific research"). There is certainly an argument to be made here that these so-called "acceptable" uses of animals themselves constitute a form of cruelty, but that is outside the scope of this paper. For an excellent discussion of the protections afforded by various anti-cruelty laws, *see* Pamela Frasch et al., *State Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69 (1999).

142 *See, e.g.*, CAL. PENAL CODE § 597(a) (West 2000) ("maliciously and intentionally maims, mutilates, tortures, or wounds a living animal . . . .").

143 GARY L. FRANCIONE, RAIN WITHOUT THUNDER 136 (1996).

144 *Id.* at 132-33.

145 Id.

146 State v. Avery, 44 N.H. 392, 396 (1862) ("Punishment administered to an animal in an honest and good faith effort to train it is not without justification.").

147 BERNARD E. ROLLIN, ANIMAL RIGHTS AND HUMAN MORALITY 120-25 (2d ed. 1992).

148 For an excellent discussion of whether non-human animals should have legal rights, see STEVEN M. WISE, RATTLING THE CAGE—TOWARD LEGAL RIGHTS FOR ANIMALS (2000).

> For the notion of rights builds protective fences around the individual and declares that there are certain things that cannot be done to him even for the general benefit, and even when he stands alone. Even if he has no power to resist the majority, even if his activity leads to general inconvenience, there are certain areas where he ought not be touched or stifled, despite the cost to the majority, simply because he is a moral object, and those areas are essential to him .... Rights mean we don't have to depend on the unreliable goodwill of others.[149]

The history of anti-cruelty statutes as laws which protect the interests of the property owner, rather than the property, sets the stage for the problems that follow.

B. Poorly Worded Statutes

The problem with removing an animal from a dangerous situation often starts with a poorly worded statute. No federal law covers cruelty to animals and many state statutes are weak and often unclear.[150] Frequently, they are missing forfeiture provisions completely.[151] Thus, it can be difficult for officials to be sure when the law allows them to seize an animal in the first place. Additionally, the requirements for impoundment vary depending upon whether law enforcement officers or humane officials are charged with the task.[152] This can also make it difficult just to initiate the process. Moreover, in some jurisdictions it can be especially difficult to get a search or seizure warrant. Judges have a strong notion of property rights. Neighbors do not always want to come forward to complain. Prosecutors, swamped with crimes against humans, cannot always listen.

C. Surviving a Pre-Conviction Forfeiture Hearing

Assuming a humane or police officer can gain control of the animal, defendants who appear for pre-conviction forfeiture hearings may assert all of the usual complaints. These generally include allegations of due process violations[153] and unreasonable search and seizure.[154] The fact that the animal itself is not contraband (i.e., a defendant would never argue he should get his gram of cocaine back pending trial), that the laws protecting animals are usually weak, and that the notion of property rights is strong, all combine to make it difficult for a court to find in favor of the animal's safety rather than the owner's right to do with her property as she pleases.

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149 ROLLIN, *supra* note 147, at 116-17.

150 *See, e.g.*, ALA. CODE § 13A-11-14 (1975). The statute does not define the acts that would constitute cruel mistreatment or neglect. Furthermore, no matter how badly an animal is treated the crime is only a misdemeanor.

151 *Id. See also* S.D. CODIFIED LAWS § 9-29-11 (Michie 1995).

152 Telephone Interview with Pamela Frasch, *supra* note 125.

153 U.S. CONST. amend. V.

154 *Id.* amend IV.

D. *Retaining Custody of an Animal if the Owner is Acquitted*

In cases where the owner is criminally convicted of animal cruelty, forfeiture of the animal(s) is widely accepted.[155] However, if the owner is acquitted, not necessarily due to innocence, but perhaps due to a technicality or because the government could not prove its case beyond a reasonable doubt, then what happens? Does the judge have the discretion to give the animal back to its owner? Does the owner have a right to get his animal property back? These answers are clear under the forfeiture doctrines that have developed for other forms of property. Yet, this is the current murky state of anti-cruelty laws that lawyers face if they try to get animals out of abusive or dangerous situations. The patchwork of possible fates that await an animal caught in this situation is as varied as the jurisdictions meting out their own interpretations of justice. For this reason, the major laws governing asset forfeiture are needed to protect animals.

V. Possible Solutions: Making Forfeiture Work for the Forfeited

A. *Bringing a Successful Cruelty Charge*

1. *Criminal Forfeiture After a Criminal Conviction*

This scenario faces only two of the three obstacles outlined above, namely overcoming statutory shortfalls and surviving the forfeiture hearing.[156] While these still pose significant challenges, the means to deal with these obstacles are already largely in place even without the added power of modern forfeiture doctrine. For example, if an anti-cruelty statute does not provide for forfeiture on its face, it may be possible to combine it with another statutory provision that does, like a county ordinance.[157] Furthermore, the concerns frequently raised by defendants at pre-conviction forfeiture hearings generally should not withstand judicial scrutiny. The most common assertions follow.

First, a defendant may assert a lack of probable cause. However, this type of challenge is usually denied because the burden of proof here is so low. The government only needs to demonstrate reasonable

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155 However, there are exceptions to this rule. In *Jett v. Municipal Court,* the owner of a petting zoo turtle was convicted of cruelty after humane officials found the turtle had infected eyes and a cracked shell, among other ailments. 223 Cal. Rptr. 111 (Ct. App. 1986). The trial court ordered the owner to give up the turtle, but the appellate court reversed, saying that California's cruelty law only provided for forfeiture of fighting animals. *Id.* California amended its cruelty statute subsequent to this case. Cal. Penal Code § 597K (West 2000).

156 *See* discussion *infra* Part IV.B-C.

157 For example, since the Illinois anti-cruelty statute does not have a forfeiture provision, Cook County Board of Animal Control also relies on municipal ordinance 7-12-080 Removal of Neglected Animal. This ordinance delegates authority to seize abused or neglected domesticated animals to the Animal Control Executive Director. Interview with Dr. Gene Mueller, *supra* note 125.

grounds to believe that the property is subject to forfeiture,[158] requiring more than mere suspicion, but less than *prima facie* proof.[159] This is far less than enough evidence to support a conviction. The very low threshold showing required at this stage makes it very difficult for someone to claim the government acted improperly.

The government also holds numerous other advantages at this point. In contrast to most other types of proceedings, claimants to seized property must first establish standing to challenge the forfeiture.[160] Then, also unlike most other types of proceedings, claimants must carry the burden of proof. They must prove by a preponderance of evidence that the property is not subject to forfeiture.[161] Two types of defenses may be raised here: 1) that the property was not used illegally (i.e., the wrong property was seized); or 2) that any illegal use was made without the knowledge or consent of the claimant.[162] Both of these defenses should present special difficulties in cases of animal forfeiture. Abused or mistreated animals often show scars or other signs of suffering, and to qualify for the statutory "innocent owner" defense, a claimant must demonstrate actual innocence, not merely assert innocence.[163] Furthermore, the government may use hearsay to prove its case, while claimants may not.[164]

Second, defendants may raise due process[165] and lack of notice challenges. However, many of the Fifth Amendment protections afforded defendants in criminal proceedings do not apply in a civil context.[166] This could be helpful in the future if animal forfeiture is brought as a civil action.[167] Of more immediate importance is the fact that the United States Supreme Court has consistently recognized that where due process protections are accorded, they have limitations.[168] Here, regardless of whether a forfeiture proceeding is civil or criminal, the general due process requirement of notice does not apply to the seizure of personal property.[169] In *Calero-Toledo v. Pearson Yacht Leasing Co.*, the Court recognized the special challenge that the

158 Kim, *supra* note 53, at 539.

159 *Id.* at 540.

160 *Id.*

161 *Id.*

162 *Id.* at 540-41.

163 *Id.*

164 Monica P. Navarro, *Salvaging Civil Forfeiture under the Drug Abuse and Control Act*, 41 WAYNE L. REV. 1609, 1627 (1995).

165 U.S. CONST. amend. V, cl. 3 ("nor be deprived of life, liberty, or property, without due process of law . . .").

166 Kim, *supra* note 53, at 539.

167 *See* discussion *infra* Part V.A.2.

168 *See, e.g.*, Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). Lawrence Mitchell was a consumer who defaulted on a payment plan for appliances. The Supreme Court rejected Mitchell's argument that due process requires that he be allowed to retain full possession and use of the defaulted goods until the end of the adjudication. *Id.* The Court held "[d]ue process of law guarantees 'no particular form of procedure; it protects substantial rights.'" *Id.* at 610.

169 *Calero-Toledo*, 416 U.S. at 663.

mobile nature of personal property can pose.[170] The Justices held that the government's interest in securing the Court's jurisdiction over the property and the risk that the property may otherwise disappear[171] justified the lack of notice.[172]

Congress has also spoken quite clearly on this matter. Several major federal statutes contain forfeiture provisions that authorize on their face the possibility of notice-less seizure if the government has reason to believe that notice would jeopardize the availability of the property.[173] In states that have passed mirror legislation,[174] or states that follow the Lockstep Doctrine generally,[175] the state's current view on the appropriateness of notice-less seizure of property guides the trial court generally.

In the specific context of animal cruelty, the likelihood of a claimant prevailing on the issue of notice has traditionally varied with the conduct in question. While there has been less disagreement among courts that immediate, notice-less seizure is appropriate in extreme cases of abuse, again, other areas remain unclear. However, the fact that many anti-cruelty statutes are silent as to forfeiture, and even those which address the issue usually do not indicate notice requirements specifically, they may actually provide a tactical advantage. Prosecutors should be able to use both *Calero-Toledo*'s rationale and any statutory ambiguities to defeat a statutory or constitutional challenge to notice-less seizure in the cruelty context.

Third, defendants may allege that the search or seizure was unreasonable. The Fourth Amendment's reasonableness requirement generally means that governmental agents need to have probable cause and a valid warrant,[176] although there are exceptions to both the warrant requirement and even the minimal probable cause standard.[177] Not all of the exceptions apply to personal property, but those

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170 *Id.*

171 *Id.* at 679.

172 However, notice is required for seizures of real property. United States v. James Daniel Good Real Property, 114 S.Ct. 492 (1993). Although even here, the court made an exception for "exigent circumstances." *Id.* at 505.

173 *See, e.g.*, 18 U.S.C. § 1963(d)(2) (1994) (RICO); 21 U.S.C. § 853(e)(2) (1994) (drug trafficking); 18 U.S.C. § 1467(c)(2) (1994) (obscene materials).

174 *See, e.g.*, Illinois Drug Asset Forfeiture Procedure Act 725 ILL. COMP. STAT. 150/6, 150/9 (West 1992).

175 The Lockstep Doctrine is based on the notion that state supreme courts should construe state laws and constitutions the same way the U.S. Supreme Court interprets corresponding federal laws and the U.S. Constitution. For example, Illinois followed the Supreme Court's lead by holding that criminal acquittal does not bar civil forfeiture under the Double Jeopardy Clause. *See, e.g.*, People v. One Single Family Residence, 678 N.E.2d 1048 (Ill. 1997); *In re* P.S., a Minor, 676 N.E.2d 656 (Ill. 1997).

176 U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . .").

177 Jeremy J. Calsyn et al., *Investigation and Police Practices: Warrantless Searches and Seizures*, 86 GEO. L.J. 1214, 1214 (1998).

that do would be as useful in the context of animal forfeiture as any other property seizure.

The first applicable exception is a search incident to valid arrest.[178] Police may search a lawfully arrested person without a warrant, or even probable cause, for evidence. The scope of this search extends to the area within the suspect's immediate control and includes closed closets and other spaces adjacent to the place of arrest.[179] This exception would not apply to a defendant who commits a crime unrelated to animals (such as bank robbery), and is later arrested at his home where he happens to have a pet. However, the exception does apply when the arrest is for cruelty because then the animal is evidence.

The second exception is a seizure of items in plain view.[180] As its name suggests, this doctrine allows police to seize an item that is in plain view without a warrant. A plain view seizure is justified if the following three conditions are met: 1) the police must be able to show that they did not violate the Fourth Amendment in order to get the item into view; 2) the officer must have a lawful right of access to the evidence itself; and 3) the incriminating character of the evidence seized must be immediately apparent.[181] For example, a dog left tied to the middle of a front yard during a rain or snowstorm provides a graphic example of neglect that is in plain view. The Supreme Court has extended this doctrine to include plain touch, and about half the circuits have adopted plain smell or plain hearing corollaries.[182] These corollaries would be useful in situations where neglect is evidenced by the smell of feces, or cruelty is evidenced by cries of pain. The extension of the plain view doctrine also impacts the next category.

A third exception is exigent circumstances.[183] Exigent circumstances exist if there is probable cause for a search or seizure and one or more of the following conditions are present: the evidence is in imminent danger of destruction, public or police safety is threatened, the police are in hot pursuit of a suspect, or the suspect is likely to flee before the officer can obtain a warrant.[184] Police may not cause an exigency, but if such circumstances do exist, officers need not comply with the federal "knock and announce" statute.[185] It is generally acceptable to remove an animal from dangerous or abusive circumstances, where the animal constitutes the "evidence" in immediate danger of destruction and an owner is unlikely to wait to beat his pet until the police come back with a warrant.[186] The problem, however, is that often the

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178 *Id.* at 1229-34.
179 *Id.* at 1231-32.
180 *Id.* at 1234-39.
181 *Id.* at 1235-37.
182 *Id.* at 1238-39.
183 *Id.* at 1239-47.
184 *Id.* at 1239.
185 *Id.* at 1244.
186 Telephone Interview with Pamela Frasch, *supra* note 125.

cruelty is not discovered until after the animal is dead. Charges still may be filed, but the question of forfeiture becomes moot.

A final exception to the warrant requirement is consent searches.[187] Government agents may conduct a search, without either a warrant or probable cause, if an individual consents. Consent may be either express or implied, but need not necessarily be knowing and intelligent.[188]

A fourth defense available to a defendant is a double jeopardy claim.[189] However, this Fifth Amendment argument is unlikely to prevail, given the clarity with which the Supreme Court has recently spoken on this topic.[190] Moreover, many state statutes expressly provide that any criminal penalties imposed do not preclude the possibility of civil penalties.[191] Finally, the Takings Clause may present another source of constitutional argument for an owner facing a deprivation of property.[192] Unfortunately, the immense scope of the Takings Clause doctrine necessitates separate treatment from this Comment.[193]

2. *Criminal Forfeiture After a Criminal Acquittal*

Under this scenario, not only do prosecutors have to surmount the obstacles outlined above, but they also must face the shakiest legal ground of all; whether animal property needs to be returned to its owner if the owner is acquitted. Anti-cruelty forfeiture statutes are unclear on this point at best.[194] Depending on the jurisdiction, there may be analogous case law where another kind of property was never returned which might persuade a judge. A moral argument might work with a sympathetic judge, but that is not much to go on.

The best solution in this case is legislation. A civil forfeiture provision, patterned after one of the current civil forfeiture laws and added to a state anti-cruelty statute, would alleviate all the uncertainty. As analyzed above, forfeiture of a mistreated animal would certainly be understood as a civil sanction under the *Ursery* test. Double jeopardy does not apply to civil *in rem* forfeitures, so if the defendant is convicted criminally of animal cruelty, the conviction does not block the

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187 Calsyn, *supra* note 177, at 1247-58.

188 *Id.* at 1247.

189 U.S. CONST. amend. V, cl. 2 ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.").

190 *See* discussion *supra* Part II.B.

191 720 ILL. COMP. STAT. 5/1-4 (West 1993) (Civil Remedies Preserved).

192 U.S. CONST. amend. V, cl. 4 ("nor shall private property be taken for public use, without just compensation.").

193 The author is unaware of any articles that specifically deal with animal forfeiture and the Takings Clause. For a good general discussion of the Takings Clause, see Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531 (1995); William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

194 *See* N.H REV. STAT. ANN. § 644:8(IV) (1999) (providing specifically for forfeiture in cases of conviction but is silent regarding acquittal).

possibility of later bringing civil forfeiture proceedings for the same underlying event or conduct. If the defendant is acquitted, it still does not bar the possibility of forfeiture because the burden of proof on the government is much lower for the civil forfeiture proceeding than for the criminal trial.

B. Tying Cruelty into Another Statute

1. If the Defendant Engages in Criminal Conduct in Addition to Cruelty, the Animal May Be Forfeited as an Instrumentality of a Predicate Offense Which Carries a Forfeiture Provision

The power of modern forfeiture doctrine could clearly help animals which are being misused as the instrumentalities of crime in instances where the defendant engages in criminal conduct in addition to cruelty. It would also likely help animals that are the objects of cruelty, since, these conceptually distinct categories tend to overlap in reality. For example, a defendant convicted of zoophilia under the Obscene Materials Act would forfeit any animals depicted in the photos.[195] A defendant facing drug trafficking charges who used guard dogs for protection would forfeit the dogs.[196] In fact, here the defendant would not even have to be convicted, as the drug trafficking statute carries a civil forfeiture provision as well.[197]

Since instrumentalities of crime are generally forfeitable, the key is to describe the animal as such an instrumentality. For example, if the narcotics at the heart of a drug bust are forfeitable, why not the dogs at the center of an animal fighting ring? If the laboratories used to produce crack cocaine can be seized, so too should the dogs that guard the labs. Moreover, a defendant that uses drug money to buy his dog dinner maintains that (dog) property from proceeds just the same as he maintains a house from proceeds when he pays the mortgage with drug money.

It is important to note that the effort to keep animals within the framework of property does start to break down at this point. First of all, one of the main reasons why the government pursues asset forfeiture so aggressively is because the money generated by the seized items at auction helps to fund future crime-fighting efforts.[198] By contrast, most animals seized, either in the cruelty context or as an instrumentality to another crime, have little if any market value.[199] Moreover, any financial value the animal does have is irrelevant, if not

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195 18 U.S.C. § 1467 (1994).

196 13 U.S.C. § 853 (1994).

197 *Id.* § 881 (1994).

198 Kim, *supra* note 53, at 527.

199 Unless the animal seized is a pure breed, with all the appropriate paperwork, courts have traditionally considered an animal's "market value" to be the replacement cost of a similar animal from the pound, generally $25-$50. Morgan v. Kroupa, 702 A.2d 630, 636 (Vt. 1997); Richardson v. Fairbanks North Star Borough, 705 P.2d 454 (Alaska 1985).

inimical, to the reasons why society should be interested in removing animals from these situations. As discussed, these reasons include both the welfare of the individual animal and the benefit to society of deterring violence.[200] While shelters and animal rescue groups across the country probably would be willing (if not always financially able) to help place these animals in better homes, state and federal government would have to accept that this type of forfeiture is not going to be a money-making proposition. However, this is not without precedent. Child pornography is always destroyed and never resold,[201] simply because that destruction is deemed to be in the best public interest, even if not in the best financial interest of the public purse.

Another area where the animals-as-property analogy breaks down in the instrumentality context also supports the argument that powerful forfeiture laws can and should be employed to benefit animals. This has to do with the age-old notion that owners will take good care of their property so they will get the best use out of it. For example, it is not true that people who have guard dogs treat them well so the dogs are the best guard dogs they can be.[202] Contrary to popular belief, not even pit bulls and rottweilers are born distrustful or mean.[203] Some people "train" them to be that way by brutalizing them.[204] Furthermore, assuming that there was such a thing as a "naturally mean" guard dog, even if its illegally-employed owner fed the dog steak and provided a silk doggie bed, this does not change the fact that the dog should still be removed from the environment of illegal activity. This is perhaps most intuitively illustrated by analogy: if a drug dealer fed his child steak and let him sleep on silk sheets, should not that child still be removed from the home?

There are also some practical reasons to tie cruelty into other statutes by characterizing animals as instrumentalities. First of all, when defendants are involved in animal cruelty and another offense, the cruelty charge usually gets dropped out of the picture.[205] The instrumentality rationale thus provides a parallel means of enforcing laws that are already on the books but often under-enforced or entirely unenforced. Second, even if a cruelty conviction is obtained, the governing statute does not always provide for forfeiture.[206] The instrumentality rationale thus fills a gap in existing laws. Most importantly, from the practical perspective of combating the most crime as quickly as possible, major statutes with forfeiture provisions are already in place.[207] They are simply not being used as aggressively as possible.

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200 *See* discussion *supra* Part II.C.

201 18 U.S.C. §§ 2253 (g), 2254(f) (criminal and civil respectively).

202 Telephone Interview with Pamela Frasch, *supra* note 125.

203 *Id.*

204 *Id.*

205 *Id.*

206 *See* discussion *supra* Part IV.B.

207 *See* discussion *supra* Part III.

2. *It May Be Possible For the Animal Abuse Itself to Form the Predicate Offense Under a Statute Which Carries a Forfeiture Provision*

The instrumentality rationale applies to situations involving multiple criminal activities. Yet, what if animal cruelty is the only issue in question? It may be possible for the cruelty itself to form the predicate offense under a statute which carries a major forfeiture provision. For example, a racketeering activity under RICO may include "any act or threat involving murder . . . which is chargeable under state law and punishable by imprisonment for more than one year."[208] The term "murder" refers to an act committed against a person because that is what murder means under criminal law.[209] However, there is arguably a persuasive analogy to be made here. Criminal homicide is defined as when "[a] person . . . purposely, knowingly, recklessly, or negligently causes the death of another human being."[210] Cruelty to animals is defined as when "[a] person . . . purposely or recklessly . . . kills . . . any animal belonging to another without legal privilege . . . ."[211] Thus, in theory RICO could be extended to cover defendants who live in states with felony anti-cruelty statutes where a conviction can impose a prison sentence of more than one year.[212] The practical drawback for using RICO in the cruelty context is that the defendant would need to kill two animals first, to form the "pattern of racketeering" a conviction requires,[213] because even the strictest anti-cruelty laws do not punish for threatening an animal. Still, RICO may hold greater promise in the instrumentality context. For instance, there is no reason why organized dog fighting, an illegal form of gambling, could not form the basis of a RICO enterprise.

3. *Amend State and Federal Laws Which Carry Forfeiture Provisions to Include Animal Cruelty as a Predicate Offense*

One way legislation could improve the current situation, as discussed earlier, would be to add civil forfeiture provisions to current state animal cruelty statutes. The same result could also be achieved by literally adding "cruelty" as a predicate offense (as opposed to simply analogizing it to a predicate offense, as discussed above) to an already-existing state or federal statute that carries forfeiture

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208 18 U.S.C. § 1961(1)(a) (1994).

209 BLACK'S, *supra* note 6, at 1019.

210 MODEL PENAL CODE § 210.1 (1985).

211 *Id.* § 250.11. Many states have moved away from the common law-based "belonging to another" language, thus criminalizing acts of violence committed by the animal owner. *Id.* However, very few states make negligent behavior towards an animal culpable. *Id.*

212 *See, e.g.*, OR. REV. STAT. § 167.322(2) (1999) ("Aggravated animal abuse in the first degree is a Class C felony,"); *Id.* § 161.605(3) (providing a maximum prison term of five years for a Class C felony).

213 18 U.S.C. § 1962(b) (1994).

provisions, preferably civil. In an ideal world of course, it would not be necessary to bootstrap cruelty onto a more powerful, better-enforced statute to ensure the safety and well-being of a living creature. However, we do not live in an ideal world. Given the current legal status of animals as property, it is important to be able to identify possibilities for positive social change that argue within that framework.

State legislatures are clearly empowered to add animal cruelty as a predicate offense to state laws which carry forfeiture provisions. This is because cruelty to animals traditionally has been an area of state control. However, the federal government likely would also be able to legislate in this area. The Commerce Clause[214] may provide a constitutional source of power, and there is a doctrinal argument to be made as well. Doctrinally, anti-cruelty law is similar to both property and criminal law in that they all traditionally have been areas of state control.[215] Nonetheless, Congress's efforts during the last few decades to battle rising crime with legislation has led to the passage of major legislation affecting both property and criminal law, including laws that authorize the forfeiture of both the objects and the instrumentalities of crime in order to punish that crime. Thus, federal regulation to combat crime against animals—through forfeiture of animals that are either the objects or the instrumentalities of crime—would be equally appropriate and grounded in precedent.

There are several advantages to amending legislation in this manner. Primarily, it is relatively simple. Revising an already-existing statute to include cruelty would require only the addition of a few words, and therefore, less language over which legislators may squabble. If there is less room to squabble, it is also likely that the provision would pass more quickly. Furthermore, a small amendment would be less likely to contain unforeseen loopholes that would allow defendants to escape liability. Admittedly, convincing legislators to take the welfare of animals into account has historically been a losing battle. Given society's entrenched notions about the status of animals as property, it remains a long-shot today. However, the growing recognition of the connection between animal abuse and domestic violence may mean the political and social climate is ready for a change.[216] If so, amending a few words in a statute may be just the sort of "quick fix" around which voter-conscious legislators could rally.[217]

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214 U.S. CONST. art. I, § 8, cl. 3 ("[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

215 *See* discussion *infra* Part V.A.1.

216 For a discussion of the link between human violence and animal cruelty, see Randall Lockwood, *Animal Cruelty and Violence Against Humans: Making the Connection*, 5 ANIMAL L. 81 (1999); Frank Ascione, Ph.D., CRUELTY TO ANIMALS AND INTERPERSONAL VIOLENCE (1998).

217 Although it certainly would be valuable if a crackdown on animal abuse also led to a reduction in domestic violence, it is worth noting a flaw in this logic. Justifying greater protection to animals on the grounds that it benefits people is like arguing slaves should not have had to pick cotton because their owners needed the exercise. The

An advantage to legislating at the national level is that the recognition of cruelty in a federal statute would act to fill a huge gap in the protection our laws are supposed to provide. It would, in effect, create a national anti-cruelty statute that would protect truly the most under-protected segment of our society. For example, a specific mention would fit easily under section 1961(1)(a) of RICO,[218] which casts an extremely broad net anyway. Anti-cruelty laws theoretically could be exempt from the "punishable by imprisonment for more than one year" requirement. Thus, this approach could even include the decreasing number of states which still carry misdemeanor statutes.[219]

Conceptually, the incorporation of anti-cruelty statutes fits perfectly into the Sexual Exploitation and Other Abuse of Children Act,[220] which does contain a civil forfeiture provision.[221] The policy arguments here are practically unbeatable. The same kinds of concerns, such as the need to protect powerless victims and the value to society of not becoming inured to violence, which led lawmakers to pass harsh laws with tough forfeiture provisions in the context of child abuse (another traditional area of state control), also exist for animal abuse. Forfeiture serves not only the remedial purpose of preventing the continued illegal use of the property, but the deterrent purpose of discouraging future such use. Furthermore, it compensates society for the cost that all violent crime imposes.

C. Changing the Paradigm Altogether

Ideally, laws to protect animals would be patterned after laws which protect other vulnerable segments of society, such as children, the elderly, or the disabled. For example, instead of creating stronger forfeiture laws to protect animals as property, why not create "guardianship" and "termination of guardianship right" laws to protect animals as sentient beings?

Illinois law provides a good example. The Juvenile Court Act provides for guardianship of minors and/or placement in another home.[222] This protection is available when a court finds the minor's parents to be either unfit or unable to adequately care for the child.[223] The statute's policy statement makes clear that the Act is primarily concerned with the welfare of the child and the best interests of the commu-

owners (fat and happy from having all their meals and freshly rolled cigarettes brought to them) probably did need the exercise. However, the argument misses the mark. Animals likewise should be protected from abuse for their own benefit, regardless of whether it benefits humans. Race is not a reason to exclude someone from protection under the law; neither is species.

218 *See* discussion *supra* note 95 and accompanying text.

219 18 U.S.C. § 1961 (1994).

220 18 U.S.C. § 2253 (1994).

221 *Id.* § 2254.

222 705 ILL. COMP. STAT. ANN. 405/1-405/6 (West 1993).

223 *Id.* 405/2-27(1). Note, however, that financial circumstances alone are not enough to warrant removal.

nity.[224] Likewise, any parallel provisions adopted for animals would serve the same purposes. The Act stresses the desirability of eventual reunification of the family, but makes clear that parental rights can be terminated under certain circumstances. Those circumstances include, but are not limited to: 1) when the child or any child of that parent is abandoned, tortured, or chronically abused;[225] 2) the parent is convicted of first or second degree murder of any child or conspiracy or solicitation for such;[226] 3) the parent is convicted of aggravated sexual assault;[227] 4) that parent's rights with respect to another child have been involuntarily terminated;[228] and 5) in extreme cases of the inability to care for a child combined with an extremely poor prognosis for treatment or rehabilitation.[229] All of these circumstances also exist in animal abuse and neglect cases. Just like children, animals could benefit from these protections. The Act says it "shall be administered in a spirit of humane concern, not only for the rights of the parties, but also for the fears and the limits of understanding of *all* who appear before the court."[230] The statute also assures the same procedural rights to minors as provided to adults, except in instances where minors are given greater protection.[231] Further, the Act specifically states that "[t]he parents' right to the custody of their child shall not prevail when the court determines that it is contrary to the health, safety and best interests of the child."[232] The Act gives a final admonition that it shall be "liberally construed."[233] Illinois thus recognizes that no segment of society is more in need of humane concern and procedural rights to protect its best interests than a segment that is otherwise unable to protect itself. This most certainly applies to children. It could, and should, also apply to animals.

In addition to a provision for guardianship, Illinois provides for termination of parental rights under the Children and Family Services Act.[234] Abused minors can be permanently removed from a bad home when the perpetrator of the abuse is the parent, the parent has been convicted of aggravated battery of the child, and the child has been committed to the Department of Children and Family Services for care and service.[235] Animals could likewise benefit by being removed from bad homes. As a practical matter, the local animal control could stand in for the Department of Children and Family Services and a convic-

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224 *Id.* 405/1-2(1).
225 *Id.* 405/1-2(1)(a)(i)(A-C).
226 *Id.* 405/1-2(1)(a)(ii)(A-C).
227 *Id.* 405/1-2(1)(a)(ii)(D).
228 *Id.* 405/1-2(1)(b).
229 *Id.* 405/1-2(1)(c).
230 *Id.* 405/1-2(2) (emphasis added).
231 *Id.* 405/1-2(3)(a).
232 *Id.* 405/1-2(3)(c).
233 *Id.* 405/1-2(4).
234 20 ILL. COMP. STAT. ANN. 505/1-505/41 (West 1993).
235 *Id.* 505/35.2.

tion for animal cruelty could be construed as the equivalent of aggravated battery upon a person.

The advantages of patterning animal protection laws after child protection laws would accrue to both animal victims and defendant guardians. The "right" of the animal to be free from suffering could truly be protected as a substantive right. This balancing approach takes the animal's interests into account, rather than treating the animal as merely the ends (property) to someone else's means (usage). Defendants' rights would also be better recognized. Laws concerning deprivation of parental rights include much greater due process protections than property forfeiture laws.[236]

Unfortunately, the practical disadvantages of this model will likely keep it from becoming a reality, at least for a very long time. First and foremost, it requires at least a partial rejection of the deeply-entrenched framework in our legal system that animals are property. Even if this hurdle could be overcome, child welfare has traditionally been, and is still to this day, an area of regulation left to the states.[237] Thus, it would require fifty separate successful efforts to affect real change. Moreover, even if states agreed to model laws removing animals from dangerous and abusive environments after laws removing children from similar environments, the result would still be a patchwork of protection that varied from state to state.

Finally, it should be noted that in one perverse sense it may actually serve the animals' best interests to be considered property under the law. Animals' very status as property makes their removal easier because it helps defeat arguments by abusive or neglectful owners that they are entitled to the same sort of extended due process in a forfeiture proceeding that a defendant parent would get in a child custody hearing. This, of course, creates a double-edged sword. While it may make it easier to get an animal out of a bad situation, it perpetuates the sort of framework that helps to make this type of tragedy so possible, and prevalent, in the first place.

VI. CONCLUSION

It may be many years, if ever, before our nation, or any other for that matter, accords any real legal rights to animals. Yet, in the meantime, there is still much our legal system can do to protect its weakest charges from cruelty in all its forms.

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236 Parents who may lose custody of their children are always entitled to a hearing. *See, e.g.*, 705 ILL. COMP. STAT. ANN. 405/2-27 (West 1993) (placement; legal custody or guardianship). However, persons who face the forfeiture of property are not necessarily entitled to a hearing. *See* discussion *infra* Part III.

237 The only real federal legislation in this area relates to Native American child welfare. 25 U.S.C. § 1920 (1994) (improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception); 25 U.S.C. § 1922 (1994) (emergency removal or placement of child; termination; appropriate action).

If a defendant is engaging in multiple criminal activities which include animal cruelty, forfeiting the animal as an instrumentality of one of the other crimes at issue would be a means of removing that animal from dangerous or abusive circumstances. Even if cruelty is the only conduct involved, with some creative lawyering, it may be possible for the cruel conduct itself to form a predicate offense under a law which carries a solid forfeiture provision. Furthermore, courts, through their opinions, or citizens, through their votes, may be able to convince legislatures to take action. Lawmakers could either add stiff civil forfeiture provisions to current state criminal cruelty statutes, or simply add cruelty as a predicate offense to an already-existing state or federal law which carries a stiff forfeiture provision. Ultimately of course, laws that recognize the merit of giving animals guardianship status, rather than property status, finally would bring the United States to a level of jurisprudence where there truly would be at least the possibility of justice for *all.*