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## EXPLORING THE BORDERLANDS BETWEEN WILD AND NON-WILD ANIMALS: WILDLIFE LAW AND POLICY IN TRANSITION

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Since we now live in a world in which, to one degree or another, all non-human animals are managed, what is the value of the age-old distinction between wild and non-wild animals? Come to think of it, where and when did this distinction originate and come to be seen as useful, and what was it used for, and by whom?<sup>1</sup> Is it a distinction that can be sustained or ought to be sustained if, as appears to be the case, the standards of care we expect to be applied to humans, most notably a general preference for humaneness and a specific prohibition on individual cruel treatment, are increasingly coming to be seen as reasonable for animals, too, whether they are wild or non-wild,<sup>2</sup>

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<sup>1</sup> Edmund Leach, *Anthropological Aspects of Language: Animal Categories and Verbal Abuse*, 2 ANTHROZOÖS 151–165 (1989) (reprinting Edmund Leach, *Anthropological Aspects of Language: Animal Categories and Verbal Abuse*, in NEW DIRECTIONS IN THE STUDY OF LANGUAGE 23–63 (E. Lenneberg, ed., 1964)). See also John Halverson, *Animal Categories and Terms of Abuse*, 11 MAN (new series) 505–516 (1976); Elizabeth Lawrence, *Introduction to “Anthropological Aspects of Language: Animal Categories and Verbal Abuse” by Edmund Leach and “Animal Categories and Terms of Abuse” by John Halverson*, 2 ANTHROZOÖS 148–150 (1976). The history and consequences of the early scientific enthusiasm in Britain for classifying and categorizing animals are traced in HARRIET RITVO, *THE PLATYPUS & THE MERMAID & OTHER FIGMENTS OF THE CLASSIFYING IMAGINATION* (1997). An American perspective appears in Etienne Benson, *From Wild Lives to Wildlife and Back*, 16 ENVTL. HIST. 418–422 (2011). Animals were part and parcel of the massive movements of people around the world that occurred in the nineteenth century, broadly treated in the case of the major British dominions in THOMAS DUNLAP, *NATURE & THE ENGLISH DIASPORA: ENVIRONMENT & HISTORY IN THE UNITED STATES, CANADA, AUSTRALIA, & NEW ZEALAND* (1999), and more recently assessed in the context of the acclimatization movement in Harriet Ritvo, *Going Forth and Multiplying: Animal Acclimatization and Invasion*, 17 ENVTL. HIST. 404–414 (2012).

<sup>2</sup> IRUS BRAVERMAN, *WILD LIFE: THE INSTITUTION OF NATURE* (2015); *WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW?* (Randall Abate, ed., 2015).

and most especially if they have been shown to have some degree of intelligence?<sup>3</sup>

In the articles making up this issue of the *Journal*, which appear in subsequent pages in the order we discuss them here, the contributing authors answer these questions from a down to earth and straightforward perspective, generally avoiding the sometimes convoluted and difficult to follow arguments that have preoccupied environmental philosophers and animal lawyers.<sup>4</sup>

In Australia, for example, to get down to brass tacks, it is arguably the case that before the advent of white settlement in 1788, there were species of animals that were native to the continent and living in conditions essentially unaffected by the aboriginal population. Such animals were in that sense Australian wild animals. But when white settlers brought non-native animals with them, for food and to perform work, and later imported other animals as pets or for the enjoyment of hunting them, or to perform specialized tasks native animals could not perform, or simply to surround themselves with familiar sights, the animal populations of Australia were irremediably altered, as indeed were the landscapes in which they lived.<sup>5</sup>

And later, as imported animals escaped, through accident or neglect, and reproduced successfully “in the wild” in large numbers alongside native animals and people, some of the once highly valued non-native animals came to be seen and to be legally identified as pests. Attempts were made to suppress them, even eradicate them, often without success despite many decades of trying. So for all practical purposes, some non-native species now thrive in Australia as if they were wild animals. And the reasons why they should be treated differently from animals that were once distinctive because they were native to Australia are increasingly unclear, particularly since some of the originally native species have adapted to the

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<sup>3</sup> FRANS DE WAAL, *THE AGE OF EMPATHY: NATURE'S LESSONS FOR A KINDER SOCIETY* (2009). De Waal was the keynote speaker at a conference organized by Dr. Ted Geier and the Interdisciplinary Animal Studies Research Group at UC Davis in the fall of 2014. Although the focus was much broader than the wild/non-wild distinction, early abstracts for versions of the articles in this issue can be accessed from the conference website: <http://www.nonhumans.org/november-2014-conference>. Similar themes were explored at an earlier conference, held at Yale University in December 2013. See *Personhood Beyond the Human*, <http://www.nonhumanrights.net>.

<sup>4</sup> Some of these difficult but important questions will be addressed in a future issue of the *Journal* on wild animals and justice, currently scheduled as 19(3) *J. INT'L WILDLIFE L. & POL'Y* (forthcoming 2016). They were raised preliminarily quite some time ago in RODERICK NASH, *THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS* (1989) and are more recently introduced and surveyed in ROBERT GARNER, *A THEORY OF JUSTICE FOR ANIMALS: ANIMAL RIGHTS IN A NONIDEAL WORLD* (2013).

<sup>5</sup> JOSEPH POWELL, *ENVIRONMENTAL MANAGEMENT IN AUSTRALIA, 1788–1914* (1976); GEOFFREY BOLTON, *SPOILS & SPOILERS: AUSTRALIANS MAKE THEIR ENVIRONMENT, 1788–1980* (1981); JOHN DARGAVEL, *FASHIONING AUSTRALIA'S FORESTS* (1995).

environment white settlers created in Australia by becoming pest species themselves.<sup>6</sup>

The practices involved in managing non-native pest species, typically by trying one way or another to kill some or all of their number, have become sufficiently controversial to warrant the institution of humane codes of conduct. But why isn't the impulse to mitigate the cruelty and suffering inflicted by culling and eradication campaigns on non-wild pest species in Australia mirrored in the case of wild pest species?

The question of whether and why wild species are privileged to suffer and die without regard to the humaneness of their experience is a question that naturally arises from Sophie Riley's analysis and critique in this issue of how the law treats pest animals in Australia. It is impossible to read her account without coming to the conclusion that the distinction between wild and non-wild is very much a moving target in Australian law and policy, and it has been so for some time.

This is precisely the conclusion Laura A. Watt reaches after a detailed examination of the ways in which people have interacted with the California tule elk. Had it not been for the intervention of Henry Miller, one of the most notoriously colorful figures in California environmental history,<sup>7</sup> the once-plentiful tule elk would have disappeared entirely from the state in the 1890s. Miller took it on himself to protect the remnant population, perhaps between two and ten animals, on his private ranch in Kern County in the southern portion of the Central Valley.

By the beginning of the First World War, elk numbers had bounced back to about 400. Although elk numbers statewide and at particular management sites have gone up and down since 1914, the species is neither listed as endangered nor threatened. But it is, of course, presently surviving reasonably well in California entirely as a managed species. From time to time, groups of animals have been translocated to places where they might thrive. They have been enclosed, sometimes permanently and sometimes as a prelude to roaming relatively freely. They have in extreme circumstances, such as drought, been fed and given water, much as if they were farm animals. Their behavior can certainly be wild or at least disorderly, damaging fences separating them from the beef cattle and dairy cows with which they might be sharing space and forage, for example. But this does not make the elk in any meaningful sense of the term California wild animals. They have not enjoyed that status in California since the end of the nineteenth century.

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<sup>6</sup> Steven White, *British Colonialism, Australian Nationalism and the Law: Hierarchies of Wild Animal Protection*, 39 *MONASH U. L. REV.* 452–472 (2013).

<sup>7</sup> DAVID IGLER, *INDUSTRIAL COWBOYS: MILLER & LUX AND THE TRANSFORMATION OF THE FAR WEST, 1850–1920*, 115–117 (2001); M. CATHERINE MILLER, *FLOODING THE COURTROOMS: LAW & WATER IN THE FAR WEST* (1993).

What, then, is the value, now and for the future, of managing the California tule elk as if it were a wild animal? Is it generally good wildlife law and policy to restore to non-wild animals the wild standing they once had, perhaps as part of some broader public policy commitment to ecological restoration, or rewilding?<sup>8</sup>

At the Point Reyes National Seashore on the doorstep of San Francisco and adjacent to Marin County, amidst productive and valuable organic farms and ranches, these are far from academic questions. Ever since tule elk were reintroduced to this area in 1978, having been locally extirpated in 1872, almost exactly 100 years previously, a number of powerful individuals and groups, probably including the federal management agency that became responsible for the seashore in 1962, have harbored the conceit that Point Reyes might once again be the home of wild and free-roaming elk. But inasmuch as what is now the seashore includes or is adjacent to some of the oldest and most productive farmland in the state, itself protected by law as a valuable resource, making the elk wild again, if such a thing is possible and desirable, means something else in the seashore environment will have to give.

As Laura A. Watt observes, the politics of elk management at Point Reyes involve fascinating manipulations by political actors of the wild and non-wild distinction, leading to distortions of logic and argument that may seem to be intensely real to the participants directly involved but more than a little surreal when those of us on the outside learn, for example, that advocates of a wilder seashore want the designated wilderness area in which elk are living to undergo habitat modification and have artificial water sources to support wilder elk.

Of course, from an advocacy point of view, the opportunity to manipulate human perceptions of what is wild and what is non-wild about animals is an asset rather than a liability.<sup>9</sup> Suzanne Barber takes a look at the strategy and tactics of the groups in China that have, she argues, become part of a large and diverse and influential animal welfare movement since the decline of

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<sup>8</sup> DAVE FOREMAN, *REWILDING NORTH AMERICA: A VISION FOR CONSERVATION IN THE 21<sup>ST</sup> CENTURY* (2004); CAROLINE FRASER, *REWILDING THE WORLD: DISPATCHES FROM THE CONSERVATION REVOLUTION* (2010); MARC BEKOFF, *REWILDING OUR HEARTS: BUILDING PATHWAYS OF COMPASSION & COEXISTENCE* (2014).

<sup>9</sup> As can be seen from the portrayal of the tule elk controversy in Julie Phillips, *A Citizen's Guide to the Tule Elk of California* (California Nature Center, Center for Biological Diversity, 2013), online at [http://www.biologicaldiversity.org/campaigns/protecting\\_Point\\_Reyes\\_elk/pdfs/TuleElkBrochure.pdf](http://www.biologicaldiversity.org/campaigns/protecting_Point_Reyes_elk/pdfs/TuleElkBrochure.pdf), (last visited 4 August, 2015), and in "Tule elk are an ecologically critical part of the landscape of Point Reyes, while cattle grazing permits in the national park are a privilege for a few livestock owners. Ranch leaseholders shouldn't be able to dictate Park Service policy that hurts or kills park wildlife. The Park Service is required to manage Point Reyes National Seashore without impairing its natural values and for the maximum protection, restoration and preservation of the local natural environment," *Protecting Point Reyes Elk from Ranchers*, Center for Biological Diversity, online at [http://www.biologicaldiversity.org/campaigns/protecting\\_Point\\_Reyes\\_elk/](http://www.biologicaldiversity.org/campaigns/protecting_Point_Reyes_elk/) (last visited 4 August 2015).

Maoism. The economic and social policies put in place by the Mao regime to attack poverty and hunger, accelerate Chinese development, and build a modern state had little patience with or sympathy for wildlife conservation or animal welfare.<sup>10</sup>

Under Mao, animals were understood first and foremost to be productive resources, and concerns for their welfare and even love of pets were portrayed as excessively bourgeois, and possibly rebellious. Such concerns were not to be allowed to stand in the way of the widespread deployment of industrialized and collective farming practices and mass campaigns to rid China of animal and insect pests.

A longer view of history shows that Maoist attempts to socialize the Chinese into treating animals as little more than productive resources pushed against other very longstanding and much more empathetic views of how people and animals could and should interrelate in China.<sup>11</sup> And Barber is able to suggest how, in the post-Mao era, these older and more empathetic narratives running very deep in Chinese culture and religion are being revisited and repackaged in various ways as a way of connecting the modern Chinese animal welfare movement to a broad base of popular support.

The key to success, Barber argues, lies in the ability of the groups in the movement both to construct appealing empathetic narratives about animals and to localize them, which is another way of saying that active concern about animal welfare is being made to seem not only a very good thing but also a quintessentially Chinese thing to express. The groups and organizations Barber discusses now work on a wide range of issues, extending to species conservation, the welfare of companion and domesticated animals, public education about humane treatment, and food safety.<sup>12</sup> And across all of them, established categories and distinctions, such as wild and non-wild, which have long ordered views about how humans should treat animals, appear to be less and less useful.

So where and when might we catch a glimpse of how the utility of treating animals with compassion made its way onto the public policy agenda? And when that happened, were wild and non-wild animals both the subjects of legislation? Victor J. Krawczyk and Monica A. Hamilton-Bruce take us back to the formative period of animal welfare law in late Georgian Britain. They revisit the processes by which, through a variety of media, compassion for animals was taught to a reasonably broad public and how, given what was actually known at the time in a limited way about the causes and nature

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<sup>10</sup> A point made with respect to wildlife conservation and protected areas in Geoffrey Wandesforde-Smith, Kristen Denninger Snyder, & Lynette Hart, *Biodiversity Conservation and Protected Areas in China: Science, Law, and the Obdurate Party State*, 17 J. INT'L WILDLIFE L. & POL'Y 85–101 (2014).

<sup>11</sup> The indispensable work in English is ROBERT MARKS, *CHINA: ITS ENVIRONMENT & HISTORY* (2012).

<sup>12</sup> On the origins and nature of the environmental movement in China, see *id.* at 319–330; Guobin Yang, *Environmental NGOs and Institutional Dynamics in China*, 181 CHINA Q. 46–66 (2005).

of animal suffering, growing social intolerance of that suffering prompted Parliament to take up the issue. They focus on the legislative work of Richard Martin and Thomas Erskine, the former being the chief proponent of what became known as Martin's Law of 1822, the first statute to protect non-wild animals from human abuse.<sup>13</sup>

They make it clear, however, that Parliament did not concern itself at the time with wild animals or with protecting them from human harm. In fact, there was a conscious effort to exclude them from legal protection. Although it was acknowledged that animals could be sentient beings, wild animals were thought to have less human qualities than their domesticated counterparts. So there was less need to relieve the suffering they endured because of human mistreatment. Wild animals, Erskine argued in 1809 in proposing a bill to prevent malicious and wanton cruelty to animals, were not covered by the reciprocity of interest and feeling and, thus, the moral trust that governed relations between people and the animals that were their property.

When wild animals have fulfilled their principal duty by reproducing, "they know no more, and die of old age, or cold, or hunger, in view of one another, without sympathy, or mutual assistance, or comfort."<sup>14</sup> It was, in other words, *essential to their nature* that they be allowed to live lives that were, in Hobbes's famous phrase, nasty, brutish, and short and unalleviated by human intervention.

Later, in the Victorian period, as increasing knowledge about animal sentience created additional purchase for compassionate legislation, additional protections were enacted—most notably, as a result of the work of the antivivisection movement, the 1875 statute to prevent abuse of and cruelty to animals used in scientific experiments. Even here, however, the main focus was on animals that were more or less domesticated outside the laboratory context, such as dogs. And it was not until the last year of Queen Victoria's reign that Parliament debated a bill to regulate the treatment to which some wild animals were subjected in captivity.<sup>15</sup>

Two strong themes are underlined by this history lesson. The first is that compassionate legislation and subsequent rules and regulations for the treatment of animals have been gaining incremental purchase on the animal kingdom since the end of the nineteenth century. The trajectory has been to try to deal more reasonably and humanely with those animals with which people

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<sup>13</sup> Ivan Kreilkamp, *The Ass Got a Verdict: Martin's Act and the Founding of the Society for the Prevention of Cruelty to Animals, 1822*, BRANCH: Britain, Representation, and Nineteenth-Century History (Dino Franco Felluga, ed.), [http://www.branchcollective.org/?ps\\_articles=ivan-kreilkamp-the-ass-got-a-verdict-martins-act-and-the-founding-of-the-society-for-the-prevention-of-cruelty-to-animals-1822](http://www.branchcollective.org/?ps_articles=ivan-kreilkamp-the-ass-got-a-verdict-martins-act-and-the-founding-of-the-society-for-the-prevention-of-cruelty-to-animals-1822) (last visited 4 August 2015).

<sup>14</sup> From an 1809 speech to the House of Lords by Lord Thomas Erskine, reproduced in DAVID MUSHET, *THE WRONGS OF THE ANIMAL WORLD* 279 (1839).

<sup>15</sup> HARRIET RITVO, *THE ANIMAL ESTATE: THE ENGLISH & OTHER CREATURES IN THE VICTORIAN AGE* (1989).

are directly engaged in the everyday pursuit of their lives, to produce food, perform work and provide companionship, for example, and then to reach out to those animals who are more remotely located in relation to most human experience, because they are “out there, in the wild,” and perhaps governed by laws of nature with which it would be unnatural for humans to interfere.

But the second and unmistakable theme we see here is that science has inexorably eroded the basis for assuming that wild and non-wild animals are essentially distinct and deserve, therefore, different standards of treatment by people.<sup>16</sup> As a basis for ordering our relationships to non-human animals, whether wild or not wild, and the way we treat them, relative to the way we treat each other as human animals, the wild/non-wild distinction has lost its bite. The more we know about animals, it seems, the less we are persuaded to treat them as if they were entirely non-human and lacking human qualities we would respect in law, if they were people rather than animals.

Suppose now, however, we shift our gaze from animals about which we know a great deal, because they are in some economic sense close to us, or because we think we derive great benefit from knowing that they exist, as symbols of the natural order of things that we would like to see continue forever, and focus instead on what from a human point of view are less charismatic species.<sup>17</sup> Take, for example, the common hippopotamus, a species not widely known for its ability to evoke warm, fuzzy feelings in humans.

It turns out, as Kristen Denninger Snyder shows, that because the common hippopotamus is a relatively uncharismatic species we don't know nearly as much about it as we do about its more glamorous brethren. And we certainly don't know enough about it to ensure its proper conservation, either in the wild or in captivity. By the same token, however, it is clear from her remarkably comprehensive account that the more we do know about hippos, the less it appears to be the case that we should treat the captives in zoos and aquaria, for example, in some fundamentally different way than we treat hippos in the wild.

Science, then, is potentially a great leveler between the wild and the non-wild. And if some way could be found for the environmental conservation movement to spend more of its scarce resources on relatively uncharismatic species, such as the common hippopotamus, animal welfare would see a marked universal improvement.

<sup>16</sup> This theme runs strongly through Thomas Kelch, *A Short History of (Mostly) Western Animal Law: Pt. I*, 19 *ANIMAL L.* 23–62 (2012); Thomas Kelch, *A Short History of (Mostly) Western Animal Law: Pt. II*, 19 *ANIMAL L.* 347–390 (2013).

<sup>17</sup> Nigel Leader-Williams & Holly T. Dublin, *Charismatic Megafauna as “Flagship Species,”* in *PRIORITIES FOR THE CONSERVATION OF MAMMALIAN DIVERSITY: HAS THE PANDA HAD ITS DAY?* 53–81 (A. Entwistle & N. Dunstone, eds., 2000); Frédéric Ducarme, Gloria Luque, & Franck Courchamp, *What Are “Charismatic Species” for Conservation Biologists?*, *BIOSCIENCES MASTER REVIEWS*, July 2013, at 1–8 (Ecole Normale Supérieure de Lyon), available at <http://biologie.ens-lyon.fr/ressources/bibliographies/pdf/m1-11-12-biosci-reviews-ducarme-f-2c-m.pdf?lang=en> (last visited 4 August 2015).