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# Living with Owning


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## Living with Owning

MATT AMPLEMAN\* AND DOUGLAS A. KYSAR†

*In October, 2011, Terry Thompson committed suicide by gunshot after cutting open the cages of fifty-six exotic animals on his farm in Zanesville, Ohio. Fearing for public safety, law enforcement officers systematically hunted down the escaped animals in an episode that garnered international attention and prompted renewed discussion of the propriety of exotic animal ownership. This Article retells and discusses the circumstances surrounding Terry Thompson's unhinging, applying frameworks of legal theory, chiefly in the realm of property law, to assess the fabric that held Thompson's delicate system together and the tensions that led to its unravelling. As an autopsy, the article documents the systems that failed in theoretical and specific terms. After a brief introduction to the law and policy of owning exotic animals, we offer a sequence of competing visions for property, stewardship, personhood, governance, empathy, and physical ordering or disordering as they apply to the ownership of exotic animals in Ohio. Though Thompson had acquired his menagerie through legal means, he resented oversight of government authorities, generating friction that reverberated across the lines of tension named above. The Article concludes with discussion of the need—contra Terry Thompson—to surrender control in ownership relations, community life, and, ultimately, the modern state.*

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† Joseph M. Field '55 Professor, Yale Law School. This article owes its origin to a presentation at Bates College for the conference, "Property: Claims to Ownership and Responsibilities of Stewardship." We are grateful to Steve Engel for including us in that event and to conference participants for helpful suggestions and feedback. A version of the Article was delivered as the 2016 Addison C. Harris Lecture at the Indiana University Maurer School of Law, and we are grateful to attendees of that lecture for stimulating conversation and comments. We have also benefitted from discussion with participants of faculty workshops at Yale Law School, the Legal Studies and Business Ethics Department of Wharton, and The Baldy Center for Law & Social Policy at SUNY Buffalo Law School. The authors dedicate this essay to David Larry Kysar—lover of wildness, skeptic of law, bidder for chaos, lost sadly and soon.

*All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.*

Ohio Constitution, Art. 1, Sec. 1

*Private property shall ever be held inviolate, but subservient to the public welfare.*

Ohio Constitution, Art. 1, Sec. 19

#### THE KINGDOM

Terry Thompson had built a kingdom. His seventy-seven acres of land held a shanty village of crates, cages, gates, lean-tos, and shelters that housed fifty-six non-human animals. Of those animals, two bears lived in an empty pool basin. A Siberian tiger roamed the nearby lawn. Inside the brick farmhouse that Thompson shared with his wife, Marian, three macaques groomed themselves in a dirt-floor den. Surrounding the macaques were motorcycle parts, vintage guitars, and a collection of 133 firearms, including an unregistered semi-automatic rifle and eight other guns that violated federal registration or ownership laws. Wedged in Zanesville, Ohio between Kopchak Road and a stretch of Interstate 70, the Thompsons' kingdom held a wealth of subjects that seemed inimitable.

Their kingdom was equally precarious. In 2008, federal agents from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) breached the gate of the property and affixed a red laser sight on Terry's chest. Rushing to the back of the house, the agents found Marian, unclothed as she changed between feeding different animal species so their scents would not carry. The week prior, Thompson had threatened a United States Department of Agriculture inspector. Bragging about his gun collection, Terry promised that he would shoot anyone who stepped foot on his land. Thompson did not fulfill that promise; instead, he was overwhelmed by the raid. Three years later, he was convicted and sentenced to twelve months of incarceration on federal firearms charges. Eighteen days after his confinement ended, Thompson released his animals from their prisons, cut bolts and destroyed fencing on many of his animals' cages—ensuring that the animals could not easily be recaptured after their release—and then fired a bullet through his throat.

The chaos that followed was well-documented, and heartbreaking. With the concurrence of Jack Hanna—celebrity zookeeper and director emeritus of the Columbus Zoo—deputies from the Muskingum County Sheriff's Office hunted down the animals one by one overnight and into the early morning. They worked to stem any harm the animals might otherwise cause to the residents of Zanesville or to motorists on nearby Interstate 70.

As the macabre hunt progressed, the story leaked out in scattered dispatches: the 911 recording of an improbably calm, elderly neighbor relating that she “live[s] next to Terry Thompson and there's a bear and a lion out”;<sup>1</sup> a highway warning sign worthy of magical realist fiction; photographs of the limp carcasses of lions, bears, wolves, and other once fearsome creatures neatly arrayed for accounting outside a

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1. Chris Jones, *Animals: The Horrific True Story of the Zanesville Zoo Massacre*, ESQUIRE (Feb. 6, 2012), <http://www.esquire.com/news-politics/a12653/zanesville-0312/> [<https://perma.cc/W63P-KKME>].

barn on the Thompson property. These surreal reporters' notes from the heartland circled the globe, bringing unwanted attention to this mid-Ohio town of slightly more than 25,000. Back in Zanesville, after seventeen hours of response and rescue work, the cadavers of eighteen domesticated "Buckeye" Siberian tiger hybrids lay on the rain-soaked Thompsons' property. Along with dozens of other slaughtered cadavers, the tigers proved a display of embarrassment to the excesses of the Muskingum County Animal Farm.

In its unraveling, this saga speaks loudly about property, community, order, loss, and love. Far from exotic, the story highlights conceptual matters foundational to law and living, that motivate decisions and actions with profound consequences, yet that often escape our mental grasp. Such matters include the presumed distinction between a category of living beings considered legal "persons" and a category of ownable "things"; the aim of the liberal political tradition to somehow promote, with equal verve, both liberty of action and security from harm; the paradigms of "ownership" and "stewardship" that compete for dominance within property law theory and that purport to characterize, in distinct ways, the rights and obligations of property holders; the juxtaposition of democratic self-regulation and technocratic managerial control as alternate rather than interdependent modes of governance; our human love of "wild" animals and desire for closeness with them, even as we fear their lethality and try to contain it within cages; and, ultimately, the grand dialectic of control and chaos that laid tracks that October night in Ohio.

Although studied here through a singular Midwestern tragedy and a seemingly idiosyncratic area of law—exotic animal ownership regimes—these conceptual tensions are, we believe, emblematic of fundamental conversations about the place of property in society. Lacking satisfactory intellectual coherence, they nonetheless persist and reach toward a greater understanding of the nature of community and why—in Thompson's case—the community ruptured and failed. Here we examine that rupturing primarily through an exegesis of the story, rather than through a more conventional law review article structure. Legal and theoretical analysis *is* interspersed throughout, including sections that address the common law of exotic animal ownership, cultural and cognitive divisions between humans and nonhuman animals, stewardship as a complementary approach to property ownership, Ohio's statutory and regulatory response to the events in Zanesville, and a subsequent court battle over the constitutionality of that response. However, our central focus remains on the story throughout, in hopes that we might learn simply by paying close attention to its tangled, tragic, and seemingly inexplicable details.

In adopting this approach, we nod appreciatively to theorists who posit that reality in the law is "not merely recounted by narrative but *constituted* by it."<sup>2</sup> At core, we seek to use tensions in Thompson's story to problematize infrequently examined, but foundational, assumptions about stewardship, love, property, and selfhood. In particular, two lines of tension—between ownable things versus subjective beings, and between liberty of action versus security from harm—play large in this narrative. These lines appear in the distinctive presence of nonhuman animals in the story and in the state of Ohio's statutory efforts to prevent future tragedies from exotic animal

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2. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 111 (2000) (emphasis in original).

ownership. Before examining these features of the story, we take a step back to consider nonhuman animals' conventional treatment under the law, beginning with the law of property in domestication pursuant to which Terry Thompson built his collection of things.

#### CULTIVATING THE GARDEN

At common law, wild animals are neither possessed nor self-possessed.<sup>3</sup> Deer, foxes, and canaries serve as famous examples.<sup>4</sup> Feed a fox daily with scraps from your cutting board: the shrewd attendee will not be yours. It is not until he is caught or killed that the fox will become the beholder's property.<sup>5</sup> Even after being caught, wild animals who escape or are released may cease to be the property of previous owners. Absolute *legal* ensnarement typically must occur through taming or domestication.<sup>6</sup> Until that point, loose, wild animals in most jurisdictions are objects of the state, and capturing and killing them requires a permit and a license.<sup>7</sup> In this way, each state in the United States enjoys some of the privileges of sovereignty that the King of England had in owning the forest and its wildlife.<sup>8</sup>

Notwithstanding those background principles, most exotic animals owned by individuals fall into a separate category of property: They are not wild. They have been bred in domestic settings or are otherwise domesticated, even if they remain more dangerous and unfamiliar than the average house pet.<sup>9</sup> On the Thompsons' farm, for example, the tigers mistakenly portrayed by news reports as wild and endangered Bengal tigers were actually a domesticated cross of Siberian and Bengal tigers that

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3. See GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* 41 (1995).

4. See, e.g., *Manning v. Mitcherson*, 69 Ga. 447 (1883) (an escaped and ensnared canary was property of the original owner, as the canary had been domesticated); *Buster v. Newkirk*, 20 Johns. 75 (N.Y. Sup. Ct. 1822) (deer was unowned until killed); *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

5. *Pierson*, 3 Cai. at 179 (mortal wounding and continuous pursuit, ensnaring, or actual possession of the fox was required for ownership).

6. See IRUS BRAVERMAN, *ZOOLAND: THE INSTITUTION OF CAPTIVITY* 138 (2013) (“[C]ourts have established that ‘wild animals reduced from the wild state in compliance with applicable law become property of an individual.’”).

7. See, e.g., *Nicholson v. Smith*, 986 S.W.2d 54, 60 (Tex. Ct. App. 1999) (“[*Ferae naturae* is a common law doctrine tracing its origins back to the Roman empire whereby wild animals are presumed to be owned by no one specifically but by the people generally. Specifically, *ferae naturae* provides that wild animals belong to the state . . . .” (footnotes omitted) (citation omitted)); see also *Geer v. Connecticut*, 161 U.S. 519 (1896).

8. See 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*412–16. Echoes of royal privilege also appear in the ownership of exotic animals by individuals, who perhaps seek to symbolize their “sovereign” power over backyard domains much as royal menageries once did for entire kingdoms and empires. See BRAVERMAN, *supra* note 6, at 26.

9. The RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 22(b) (AM. LAW. INST. 2010) defines a wild animal, for which an owner may be held strictly liable for harm caused, as “an animal that belongs to a category of animals that have not been generally domesticated and that are likely, unless restrained, to cause personal injury.”

had been bred in Ohio for several generations.<sup>10</sup> Most statutes considering exotic animals refer to them as just that: exotics, not as “formerly-wild” or “often-found-in-the-wild.” The law passed in Ohio after Terry Thompson killed himself refers, alternately and somewhat confusingly, to “dangerous wild animals,”<sup>11</sup> a category that includes twenty listed species whose wildness seems inherent to their name—such as bears, wildcats, and wolves—but whose bodies are subject to ownership and control.

Domestication aside, the construction of the statute and the moniker “dangerous” reflect a public safety motive for regulating exotic animal ownership.<sup>12</sup> This motive is apparent in the narrative preceding the statute’s passage as well: Ohio’s Dangerous Wild Animals Act was a direct response to Thompson’s death. However, its roots run to another tragedy: the law mimics an executive order<sup>13</sup> that was promulgated after the mauling of twenty-four-year-old, Ohio-native Brent Kandra by a captive black bear in August 2010.<sup>14</sup> Kandra was employed as the animal caretaker of another notorious exotic animal owner, Sam Mazzolla, who lived southwest of Cleveland, across the street from a new high-end suburban development. Mazzolla’s collection rivaled Terry Thompson’s: eight bears, twelve wolves, a lion, four tigers, and likely coyotes, dogs, and skunks as well. Mazzolla had filed for bankruptcy several months before the mauling death—financial insolvency apparently stalks exotic-animal owners, whose ability to acquire exotic animals outpaces their ability to keep them. Mazzolla had previously lost his license to exhibit animals and pled guilty to the illegal sale and attempted sale of skunks and to the transport of a black bear to Toledo without a license.

Kandra’s death disturbed Ohioans and awoke the governor’s office to the state’s regulatory void. Before its demise, Sam Mazzolla’s operation menaced his neighbors as they lay in bed on Ohio’s late summer nights. In Zanesville, unsettling noises likewise escaped from the cages lining the driveway at Kopchak Road. Given the physical omens vibrating in these towns—and the presence of other attacks prior to 2010<sup>15</sup>—the lack of regulation in Ohio prior to Thompson’s death raises hackles. At the time of Thompson’s suicide, Ohio had among the least-developed exotic animal

10. CHARLES SIEBERT, *ROUGH BEASTS: THE ZANESVILLE ZOO MASSACRE, ONE YEAR LATER* loc. 325–26 (2012) (ebook).

11. OHIO REV. CODE ANN. § 935.04 (LexisNexis 2012).

12. To be “owned” by a private person in the conventional sense, the exotic animal must be tamed, yet the possibility remains that the animal will be incompletely broken.

13. Ohio Exec. Order No. 2010-17S (Jan. 6, 2011), <http://www.gongwer-oh.com/129/execorder10-17s.pdf> [<https://perma.cc/439R-A9LK>].

14. Unless otherwise specified, for information pertaining to Sam Mazzolla’s exotic animal operation, see Thomas J. Sheeran, *Caretaker Dies Following Bear Attack at Ohio Exotic Animal Farm with Troubled History*, L.A. TIMES (Aug. 20, 2010, 7:58 PM), <http://latimesblogs.latimes.com/unleashed/2010/08/caretaker-dies-following-bear-attack-at-ohio-exotic-animal-farm-with-troubled-history.html> [<https://perma.cc/6HCZ-GXGX>].

15. See Carolyn Pesce, Dennis Cauchon & Oren Dorell, *Scary Safari in Ohio Ends with Carnage, Questions*, USA TODAY, (Oct. 19, 2011, 10:20 PM), <http://usatoday30.usatoday.com/news/nation/story/2011-10-18/exotic-animals-loose-ohio/50821092/1> [<https://perma.cc/98XK-HW6R>] (“Ohio has some of the nation’s weakest restrictions on exotic pets and among the highest number of injuries and deaths caused by them. The Humane Society of the United States has documented 22 incidents with dangerous exotic animals in Ohio since 2003, demonstrating risks to public health and safety and animal welfare.”).

ownership laws in the United States. Indeed, essentially no restrictions applied to a noncommercial owner such as Terry Thompson.<sup>16</sup> The severity of the regulatory void is underscored by a little-noted infraction issued in connection with the Muskingum County Animal Farm massacre. Late on the evening of Terry Thompson's death, as word of the events spread, five young residents from a nearby town drove to the Thompson farm and surreptitiously loaded one of the fallen tigers into the back of their Jeep Cherokee. After they were caught and the tiger carcass returned—whose absence otherwise would have thrown off the sheriff department's count and perpetuated the Zanesville chaos—the youth were charged with misdemeanor theft of property.<sup>17</sup> Apparently, in this Buckeye rendering of the Night-watchman State, no other legal or regulatory stricture described their actions. To the observing global public, a senseless slaughter of animal life had followed an inexplicable breakdown of personal and communal order. To the extant legal system, five private parties stole chattel from another—never mind that both the chattel and its owner were dead.

#### A LEXICAL DIVISION

The disjoint between popular reactions and legal treatment belies more fundamental divisions. While the legal and statutory treatment of exotic animals adheres to norms of possession and public safety, the international attention to the Zanesville massacre was motivated by an outpouring of grief and concern over loss of the Thompsons' animals—a motive premised on what we might call the unspeakable kinship that humans hold with nonhuman animals. This kinship is “unspeakable” because our very language tends to prefigure a distinction categorical in nature between human and nonhuman animals. To even describe the relation is to do violence to it. Ironically, the English “human” draws from Genesisitic notions of flesh coming from clay, inanimate earth, and more directly, medieval dichotomies of earth and heaven, whereas the word “animal” draws from notions of air, inhalation, or even of souls.<sup>18</sup> Absent this elemental, and seemingly reversed, lexical schism—between human and animal, earth and air—is it possible to imagine a more fully realized communion among animals, a communion of the kind apparently sought by Terry and Marian Thompson?<sup>19</sup>

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16. Speaking of his animals to a local news reporter, Thompson said, “I have them because I love them and am willing to do whatever I have to take care of them. . . . What I don't have them for is profit . . .” Nicole Weisensee Egan & Jeff Truesdell, *Exotic Animal Owner Terry Thompson: What Happened?*, PEOPLE (Oct. 22, 2011, 4:20 PM), <http://people.com/celebrity/terry-thompson-ohio-zoo-owner-the-inside-story/> [https://perma.cc/Z9LS-2YUR]. Ohio drew a distinction between accredited commercial and noncommercial owners of exotic animals, exempting the former from the dangerous wild animal law. OHIO REV. CODE ANN. § 935.03 (LexisNexis 2013 & Supp. 2016).

17. Jones, *supra* note 1.

18. See *Human*, ERNEST KLEIN, A COMPREHENSIVE ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE (1966); *Animal*, ERNEST WEEKLEY'S AN ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH (1921).

19. Perhaps this communion was the one glimpsed by Derrida in a brief passage involving his cat and his own surprise at having experienced embarrassment when he was seen naked by

This aspiration to kinship emerges in the popular conversation concerning the Zanesville disaster as well. During and after the event, regard and respect for non-human animals became an unmistakable theme. Many reporters asked why the animals were not tranquilized and recaptured, a humane alternative that officials like Hanna had deemed too risky under the circumstances.<sup>20</sup> Television journalist Diane Sawyer later led Hanna to admit the event would haunt him “for the rest of [his] life,”<sup>21</sup> even as he held firm to the view that no other route of response was viable during the crisis. For months afterwards, animal lovers around the world reportedly called the Zanesville 911 hotline to curse and berate the dispatch operator for her perceived role in the massacre.<sup>22</sup> Closer to the scene, Marian Thompson revealed her filial connection to the animals by pleading, “Please don’t take my babies.”<sup>23</sup> Hanna reportedly secured her consent to the removal of the few remaining live animals only by promising, “I’ll take care of your children.”<sup>24</sup>

Marian’s words were reflective of her and Terry’s possessive and well-documented love for their animals,<sup>25</sup> a love that was echoed in the broad and fierce response to the hunting death of Cecil the lion by a Minnesota dentist in 2015<sup>26</sup> and to the intentional killing of Harambe, a male gorilla at the Cincinnati Zoo, after a

his cat following a shower. That sensation of self-consciousness before the gaze of a cat suggests a kind of mutuality or kinship that may have existed “before the names,” or “outside of the names.” After all, why should I be embarrassed before *you*, a mere thing? See Jacques Derrida, *The Animal That Therefore I Am (More To Follow)*, 28 *CRITICAL INQUIRY* 369, 373 (David Wills trans. 2002); see also *id.* at 392 (“The animal is a word, it is an appellation that men have instituted, a name they have given themselves the right and the authority to give to another living creature . . .”).

20. Alexander Chancellor, *The Killing of Exotic Animals in Ohio Unleashed Wild Sentimentality*, *GUARDIAN* (Oct. 20, 2011 3:00 PM), <http://www.theguardian.com/commentisfree/2011/oct/20/exotic-animals-ohio-wild-sentimentality> [https://perma.cc/6CYD-NDS9]; see also Jones, *supra* note 1 (describing the difficulty of safely tranquilizing large animals, especially under rainy nighttime conditions).

21. *World News Tonight with Diane Sawyer* (ABC television broadcast Oct. 20, 2011), <http://abcnews.go.com/blogs/headlines/2011/10/jack-hanna-on-zanesville-ohio-animals-would-have-had-carnage/> [https://perma.cc/RDG5-JWM6].

22. When someone finally called with an actual emergency, the operator broke down in relief. Jones, *supra* note 1.

23. Chancellor, *supra* note 20.

24. Egan & Truesdell, *supra* note 16. Hanna and the Columbus Zoo did not fulfill this promise: while in the custody of the Zoo, one of the Thompsons’ animals—a panther named Anton—“was euthanized [sic] after a steel door slammed on his neck while he was being transported from one cage to another.” Kathy Thompson, *Ohio Exotic Animal Owner Speaks Out 1st Time Since Ordeal*, *USA TODAY* (Jan. 23, 2013, 4:09 PM), <http://www.usatoday.com/story/news/nation/2012/10/18/ohio-exotic-animals/1640871/> [https://perma.cc/2AY7-MSWD] (Kathy Thompson is a Zanesville reporter of no relation to Terry Thompson).

25. Reflecting on his visit to the Thompsons’ farm a year before Terry’s suicide, Dr. Robert Masone stated, “If I could describe what I felt that day on that farm with one word it was love.” Egan & Truesdell, *supra* note 16.

26. See Christina Capecchi & Katie Rogers, *Killer of Cecil the Lion Finds Out That He Is a Target Now, of Internet Vigilantism*, *N.Y. TIMES* (July 29, 2015), <http://www.nytimes.com/2015/07/30/us/cecil-the-lion-walter-palmer.html> [https://perma.cc/UKZ2-8RME].



young boy wandered into the gorilla's enclosure.<sup>27</sup> Although most U.S. citizens live a great distance from the physical needs and majesty of exotic or wild animals, our culture rings with a pronounced concern for their well-being. That popular concern does not transfer to all species, as animal rights proponents lament.<sup>28</sup> Nonetheless, a broad scholarly literature has developed applying notions of animal "rights" to the numerous agricultural, laboratory, and companion animals that populate our nation alongside human animals.<sup>29</sup> Acknowledging such rights—for example, the right to a safe living environment free from abuse—implicitly treats nonhuman animals as subjects that may hold interests of their own accord in our legal system. Whether chimpanzees have legal standing to invoke the writ of habeas corpus, for example, has been discussed in at least one recent court order in a case brought by The Nonhuman Rights Project.<sup>30</sup> In addition to its symbolic value, such standing could provide a form of practical vindication for those outraged at cruelty or neglect of animals.

However, most proponents of animal rights hold grander aims than passage of anti-cruelty statutes and recognition of legal standing. What they ultimately seek is to problematize the dividing line that separates "persons" from mere "things" at the basic level of language, cognition, and culture. That line does unnoticed yet foundational work in identifying the individuals who are eligible to join the political community with all its attendant rights of membership, including the right to own non-eligible individuals.<sup>31</sup> When Marian Thompson lamented the loss of "49 beings that were the heart and soul of [her] existence,"<sup>32</sup> she hinted at a vision in which all life is considered sovereign, coequal, and capable of communion with other life.<sup>33</sup> Such a vision is, of course, fanciful, as the Thompsons' own backyard rendering attests.

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27. Mike McPhate, *Zoo's Killing of a Gorilla Holding a Boy Prompts Outrage*, N.Y. TIMES (May 30, 2016), <http://www.nytimes.com/2016/05/31/us/zoos-killing-of-gorilla-holding-a-boy-prompts-outrage.html> [https://perma.cc/2FY5-JARN].

28. See, e.g., Eric de Place, *Charismatic Animals Get All the Love*, GRIST (May 12, 2005), <http://grist.org/article/the-case-for-charisma/> [https://perma.cc/TF5T-NW5X].

29. See generally ENCYCLOPEDIA OF ANIMAL RIGHTS AND ANIMAL WELFARE (Marc Bekoff ed., 2d ed. 2010).

30. Decision and Order, *The Nonhuman Rights Project, Inc. v. Stanley*, No. 152736/15 (N.Y. Sup. Ct. July 29, 2015). For historical precedent, proponents of animals' legal standing often cite the fact that animals were periodically treated as legal subjects in medieval court proceedings. See generally Anila Srivastava, "Mean, Dangerous, and Uncontrollable Beasts": *Mediaeval Animal Trials*, MOSAIC, March 2007, at 127. The social meaning and significance of this legal practice is hotly contested among historians, with many viewing animals' legal standing in ecclesiastical courts as signifying a felt need to reinforce a biblically ordained hierarchy of being rather than actual beliefs regarding animal moral agency. See, e.g., E.P. Evans, *THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS* 40 (1906).

31. See Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 BOS. C. ENVTL. AFF. L. REV. 471 (1996).

32. Thompson, *supra* note 24.

33. Cf. Elan Abrell, *Lively Sanctuaries: A Shabbat of Animal Sacer*, in ANIMALS, BIOPOLITICS, LAW 134, 149 (Irus Braverman ed., 2016) ("Human and nonhuman animals in sanctuaries form . . . multispecies assemblages through which they share intersubjective experiences with each other, generating their own atmospheres of animal legality in which oppositions between human/animal, freedom/captivity, care/control, and subject/property are both challenged and reconfigured.").

But we must also question the conventional vision of a stable hierarchy of being, especially one that has historically viewed political membership as tightly bound up with the ability to own things and that has often been constructed in ways grotesque.<sup>34</sup> Neither vision reflects a natural order; instead each is a product of human ethical imagination or lack of imagination.

Respecting that nuance, this Article does not specifically interrogate questions of standing for animals or the traditional legislative aims of animal rights proponents. Instead we examine a broader, more conflicted social element of property ownership which is present regardless of animals' legal standing: the concept of "stewardship." As will become clear in the following sections, the form and topic of stewardship, while helpful in its aim to encompass potentially conflicting interests in possession, ultimately offers no easy answers for the case of Terry Thompson.

#### FOR I ALSO AM A STEWARD

Like guardianship, trusteeship, or pastoral care,<sup>35</sup> "stewardship" provides an ethical and historical counterpoint to notions of property focused narrowly on individuals' selfish interests in ownership.<sup>36</sup> The core idea captured by the stewardship concept is the notion that individual property owners have certain obligations to

34. Problematically, to underscore the line's significance, animal rights activists sometimes cite historical periods in which whole classes of humans were similarly disempowered or even subject to ownership and enslavement. See PETER SINGER, *ANIMAL LIBERATION* (HarperCollins rev. ed. 2009) (1975). The analogy is controversial in part because it seems capable of working in two directions: validating either the dignity of animals or the indignity of humans. See Anne Peters, *Liberté, Égalité, Animalité: Human-Animal Comparisons in Law*, 5 *TRANSNAT'L ENVTL. L.* 25, 35–36 (2016).

The city of Zanesville has something of a history of challenging supposed ontological givens and of reaching toward a more just and inclusive community. Officially nicknamed the "City of Natural Advantages," Zanesville was also once prominently referred to as the "City of Lost Boundaries." *City of Lost Boundaries*, *JET*, Nov. 22, 1951, at 10. An article in *Jet* magazine in 1951 explained: "A racial melting pot for more than a century, Zanesville, Ohio, is a city of lost boundaries. Entire families have been crossing and recrossing the color line for so many generations that today it is virtually impossible to tell which families are white and which are colored without visiting city cemeteries, which are still segregated." *Id.* at 10. After observing that economic circumstances for some 7000 identified black Zanesville residents in 1951 remain bleak, the article closed on an optimistic note, predicting that Zanesville might become "America's most-thoroughly integrated city," and quoting a resident as saying, "That old discrimination is breaking down. Things are looking up as never before." *Id.* at 12.

As of 2013, the city's percentage of African-American residents had dropped below ten percent, down from almost twenty percent in 1951, with a large percentage of those residents living in poverty. See *id.*; *Zanesville, Ohio*, DATA USA, <https://datausa.io/profile/geo/zanesville-oh/#demographics> [<https://perma.cc/EHW6-VJZP>] (reproducing American Community Survey five-year estimates to show the number of black or African American individuals both living in Zanesville (1862) and living in Zanesville and in poverty (622), respectively).

35. See BRAVERMAN, *supra* note 6, at 21–22 (applying Foucault's concept of pastoral power to the context of zoos, where meticulous and even zealous management of an animal's environment reflects a shepherd-like control by authorities).

36. See, e.g., James P. Karp, *A Private Property Duty of Stewardship: Changing Our*

the community that govern the use and care of their property.<sup>37</sup> As an affirmative obligation to consider and fulfill the interests of others in this manner, stewardship transcends the bedrock harm principle of liberalism.<sup>38</sup>

While stewardship is often discussed in the context of resource management—be they financial or natural resources<sup>39</sup>—it is less prominent in debates over animal ownership. To be sure, notions of stewardship have been applied to the goals and methods of the Endangered Species Act, but the purpose of that act is to conserve species as collective entities rather than to protect any individual lives comprising a species.<sup>40</sup> Here we seek to characterize stewardship for the specific context of individual animal ownership, where the owners' communal obligations extend not only

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*Land Ethic*, 23 ENVTL. L. 735 (1993). For a classic statement of the self-interested view, see 2 WILLIAM BLACKSTONE, COMMENTARIES \*2:

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

For important qualifications, see A. M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 113 (A. G. Guest ed., 1961) (“[I]t would be a distortion—and one of which the eighteenth century, with its overemphasis on subjective rights, was patently guilty—to speak as if this concentration of patiently garnered rights was the only legally or socially important characteristic of the owner’s position. The present analysis, by emphasizing that the owner is subject to characteristic prohibitions and limitations, and that ownership comprises at least one important incident independent of the owner’s choice, is an attempt to redress the balance.”); Carol M. Rose, *Canons of Property Talk, or, Blackstone’s Anxiety*, 108 YALE L.J. 601 (1998).

37. David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public’s Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311, 319 (1988).

38. See JOHN STUART MILL, *On Liberty*, in ON LIBERTY, UTILITARIANISM, AND OTHER ESSAYS 1, 13 (Mark Philp & Frederick Rosen eds., Oxford Univ. Press new ed. 2015) (1859) (asserting that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others”).

39. See, e.g., 25 MICH. CIV. JURIS. *Water* § 36, Westlaw (database updated Aug. 2016); 55 N.Y. JUR. 2D *Environmental Rights* § 95, Westlaw (database updated Aug. 2016) (allowing the state to enter into stewardship agreements with persons, which “must require that the beach or shoreline area be preserved and maintained in its natural state or managed to enhance or restore the natural values that it provides”); Tamara C. Belinfanti, *Shareholder Cultivation and New Governance*, 38 DEL. J. CORP. L. 789, 789 (2014) (describing a U.K. Investor Stewardship Code adopted to reduce investor short-termism); see also Bashar Nuseibeh & Steve Easterbrook, *Requirements Engineering: A Roadmap*, PROC. CONF. ON FUTURE SOFTWARE ENGINEERING 35 (2000) (explaining the stewardship-like “requirements engineering” framework, which posits that the views of people and organizations impacted by software development should be incorporated into the development process).

40. 16 U.S.C. § 1531 (2012). For a fascinating back-and-forth on this distinction that devolves into an apparent proxy battle over human reproductive rights couched in terms of whether the impairment of breeding habitat causes “harm” to a living piping plover or only to its potential offspring, see the opinions of Justice O’Connor and Justice Scalia in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). Note that popular opinion often cuts toward the primacy of individuals over species: we express outrage

to their human neighbors but also to the animals themselves. The animal context brings to the fore a feature of stewardship not always recalled; namely, its potential to highlight not only needs and concerns of the community, but also teleological interests of the stewarded property itself. Aldo Leopold's land ethic—a classic expression of stewardship in the context of natural resources management—emphasized this potential through his call for an “ecological conscience” that would guide human land governance according to a simple, if elusive, principle: “A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.”<sup>41</sup> Such an ethic of teleological preservation and fulfillment may be even more challenging to follow in the case of animal ownership where interests must be inferred *and* potentially individuated.<sup>42</sup>

We venture this tentative characterization of stewardship for the animal ownership context alongside close conceptual cousins. It reflects but does not replicate a trustee relationship where property is held for a named beneficiary.<sup>43</sup> It pertains to but transcends guardianship where paternalistic powers fall short of the right to dispose of such property.<sup>44</sup> And it approximates but differs from pastoral care where the state exercises power over entities that are unequivocally regarded as subjects.<sup>45</sup> When taken as this form, stewardship raises several practical questions: who is the steward, what is the thing being stewarded, for what interests is the thing being stewarded, what actions constitute stewardship, and how might the steward or an external party judge the adequacy of those actions? In the narrative we recount here the fifty-six exotic animals are the things being stewarded; Terry, Marian, and their animal caretaker, John Moore, are stewarding, with the latter substantially serving as an agent; the interests include the animals' continued, healthy, and even self-realized existence as well as interests of the surrounding community; and the actions are numerous and linked, extending to other actors beyond the immediate stewards. Taking the sum of these answers, Terry Thompson's stewardship is judged deficient due to

at the death of individual animals as subjects more than we do at the diminution of species over time, whose decline and disappearance we scarcely register.

41. ALDO LEOPOLD, *The Land Ethic, in A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* 201, 224–25 (1949).

42. Consider, analogously, the individuation required for pastoral care. See BRAVERMAN, *supra* note 6, at 22 (“The shepherd counts the sheep; he counts them in the evening to see that they are all there, and he looks after each of them individually. He does everything for the totality of his flock, but he does everything also for each sheep of the flock.” (quoting MICHEL FOUCAULT, 8 February 1978, in SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE, 1977–1978, at 115, 128 (Michel Senellart ed., Graham Burchell trans., 2007))). Braverman's characterization of pastoral power offers the most striking similarities to the construction of stewardship we discuss fleetingly here. Our characterizations of pastoral care and stewardship diverges from Braverman and Foucault in our effort to view stewardship as an act of self-interested, property-owning individuals who may also serve analogously to (or as agents of) states in their pastoral care-like functions.

43. Here the beneficiary may be the property itself, that is, the nonhuman animals.

44. In the Thompsons' case, they earned income through the labor of their animals. In the adopt-a-beach stewardship program, 55 N.Y. JUR. 2D *Environmental Rights* § 95, natural resources are disposed of for others' benefit.

45. In their treatment, the animals on the Thompsons' property occupy a mixed status as both subjects and personal property.

the animals' violent and premature deaths, along with the distress and trauma spread widely by their release.

Despite its cataclysmic finale, however, the Thompsons' farm was not devoid of a semblance of stewardship. Terry, Marian, and their caretaker, John Moore, carefully orchestrated animal feedings.<sup>46</sup> They scavenged for road kill and bought bulk meat waste from grocers. With considerable patience and effort, they treated all items before feeding them to the animals. Hundreds of pounds per day passed through their hands. They did so to nourish and satisfy their flock, and in a way that shielded the animals from acquiring a taste for fresh meat. Such an effort necessarily entailed an aspect of service and stewardship, and it was done for, if not a community good, at least a benefit that surpassed the Thompsons' private sphere. Their collection provided some excitement to the town and some recognition as well: The exotics had been displayed on local TV shows and had achieved national exposure through appearances on *Leno*, *Letterman*, and *Rachael Ray*, and at events such as Bloomberg's corporate parties.<sup>47</sup> Closer to home, the Thompsons often showed their smaller animals at schools, 4-H meetings, and other children's events.<sup>48</sup> Of course, not all of the excitement was welcome in town. Police had been called repeatedly to Kopchak Road on reports of stray animals.<sup>49</sup> Most often horses had escaped, but a mountain lion and grizzly bear had also left the grounds, only to be led back by the weighty hand of Terry Thompson.<sup>50</sup>

This ambivalent approach of Thompson's—at times stewarding and at times neglecting responsibility, that is, when stewardship meant keeping the animals on-site<sup>51</sup>—mirrors a broader societal ambivalence towards the dominion or stewardship of animals.<sup>52</sup> Rooted in the book of Genesis, that ambivalence has pervaded Western understanding of creation and its biblical purpose. The ambivalence is understandable, given the text's dual charge. The first two chapters of Genesis include imperatives of varying force to alternately (1) cultivate and (2) subdue—or have dominion over—the “fish of the sea and over the birds of the sky and over every living thing that moves on the earth.”<sup>53</sup> A second quote—from the second creation story in

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46. Unless otherwise specified, for the information pertaining to animal feedings at the Thompsons' and presentations, see SIEBERT, *supra* note 10, at loc. 342–46.

47. *Id.* at loc. 350–55.

48. *Id.* at loc. 47–51.

49. *Id.* at loc. 40–41.

50. *Id.* at loc. 41–45.

51. An argument can be made that a “self-realized” exotic animal will occasionally escape from its enclosure just as an occasional “self-realized” toddler might escape into a gorilla enclosure, although the authors express concern for these instances. Cf. McPhate, *supra* note 27 (describing popular outrage at the killing of Harambe the gorilla after a child fell into its enclosure). Thompson may have believed as much in planning his animals' release. On the subject of animal resistance to enclosure and mistreatment, see Kathryn Gillespie, *Nonhuman Animal Resistance and the Improprieties of Live Property*, in ANIMALS, BIOPOLITICS, LAW, *supra* note 33, at 117.

52. See JOHN GRIM & MARY EVELYN TUCKER, *ECOLOGY AND RELIGION* 37–40 (2014); Lynn White Jr., *The Historical Roots of Our Ecologic Crisis*, 155 *SCIENCE* 1203 (1967) (examining medieval views of dominance and “[a]n [a]lternative Christian [v]iew” that celebrates harmony with nature, with St. Francis of Assisi as a model of that view).

53. *Genesis* 1:28 (New American Standard Bible) (footnotes omitted).

Genesis—even hints that cultivation is not only humankind’s responsibility, but the very purpose for which humans were created: “Then the LORD God took the man and put him into the garden of Eden to cultivate it and keep it.”<sup>54</sup>

Stewards should not be surprised by this Janus-faced aspect of the property relation. Any cultivation requires a modicum of control of the thing to be cultivated. Eve and Adam would fail their garden-tending duties if they were not licensed to prune diseased trees or set fire to overgrown thickets. They would need to exert control, much as we do now, to fine-tune plant genetics and, much as earlier civilizations did, to radically alter their landscapes.<sup>55</sup> As it happened, Eve and Adam could not exert control over themselves.<sup>56</sup> Likewise, Thompson failed his stewardship duties when he chose to abandon control of himself, most explicitly by suicide.<sup>57</sup>

#### AN ARM OF THE STATE

Thompson’s unhinged qualities played out in smaller, discrete episodes before the final tragedy. These events prefaced his ultimate undoing—revealing fundamental flaws in his character and triggering a state response that played out in antagonistic

54. *Genesis* 2:15 (New American Standard Bible). This mission has been interpreted as one of husbandry, see Steve Bishop, *Green Theology and Deep Ecology: New Age or New Creation?*, THEMELIOS, April/May 1991, at 8, 9, a complementary regime of action and ownership to our discussion of stewardship. As discussed in Hellenic writings, husbandry is anthropocentric and instrumental, positing the creation of fruit as the appropriate end of a practice of husbandry. Granted, the fruits of husbandry need not be tangible. See 3 PHILO, *On Husbandry*, in PHILO IN TEN VOLUMES 104, 113 (F.H. Colson & G.H. Whitaker trans., 1930) (“[I]t makes it its aim to sow or plant nothing that has no produce, but all that is fitted for cultivation and fruit-bearing, and likely to yield yearly tributes to man, its prince; . . . [T]here must also be soul nourishment, . . . wisdom and temperance and all virtue. For these when sown and planted in the mind will produce most beneficial fruits, namely fair and praiseworthy conduct.”).

55. The mixed-prairie woodland systems of Ohio’s pre-European landscape were the product of human manipulation by fire, clearing, cultivation, seed selection, and other manipulations. See Kendra McLauchlan, *Plant Cultivation and Forest Clearance by Prehistoric North Americans: Pollen Evidence from Fort Ancient, Ohio, USA*, 13 HOLOCENE 557, 557 (2003) (“[In 2000–1500 BCE,] North American Woodland societies were likely modifying vegetation more extensively through agriculture and other land-clearing activities than has been assumed previously.”); Doug MacCleery, *Understanding the Role the Human Dimension Has Played in Shaping America’s Forest and Grassland Landscapes: Is There a Landscape Archeologist in the House?*, ECO-WATCH (Feb. 10, 1994), <http://forestpolicy.typepad.com/ecowatch/ew940210.htm> [<https://perma.cc/AQE8-7RL8>].

56. Self-control is regrettably gendered in this creation story and most renderings of it. In Thompson’s story, Marian seems to be the model for self-control in balance to Terry’s excesses, but such a dynamic also can be problematically gendered, if, for example, one holds Marian to such a standard of control but not Terry. See *infra* text accompanying note 169 (raising additional questions regarding our limited understanding of Marian’s role in the Zanesville saga).

57. Thompson also would have failed if he was unable to control others, for example, by leading back the stray grizzly or mountain lion that had left his land and threatened to do mischief on the land of another less versed in their care and management. Cf. *Fletcher v. Rylands* (1865) 159 Eng. Rep. 737; 3 H. & C. 774.

and destructive ways. Thompson was a divisive and often feared member of his community. The instances of animal escape mentioned above were mere nuisances compared to Thompson's threats to those who dared cross him. Thompson's eighty-two-year-old neighbor, Fred Polk, found himself on the wrong side of those threats when Thompson's beloved Rottweilers escaped and, on two separate occasions, attacked Polk's calves.<sup>58</sup> The first time it happened, Thompson atoned by promising Polk that he would keep the dogs in check. The second time, the Rottweilers killed two calves, and Polk shot the dogs dead before Thompson arrived. Collecting their bodies in the front seat of his pickup, Thompson drove off wordless, silent on his promise and the penalty for breach that Polk had exacted.

In the months and years afterward, whenever Polk invited friends to hunt on his property, Thompson would pace the adjacent border with a gun on his shoulder. Thompson's reaction was tied to his love of animals and his hatred of hunting generally. It was a fierce love, one that could sever ties with his human animal counterparts. Another neighbor, Sam Kopchak, once declined Thompson's offer to pet a bear cub that Thompson held to his chest.<sup>59</sup> Following the refusal, Thompson reportedly snapped at Kopchak, "People don't understand animals."<sup>60</sup> Reading these words, it is not hard to imagine that in Thompson's lexical division, "people" are the disfavored subjects.

Indeed, Thompson's behaviors suggested a more violent break with his species. When inspectors appeared on his property, Thompson would allegedly growl: "I'll be damned . . . I'll let them animals go!"<sup>61</sup> Terry reportedly threatened similar harm at his sentencing on gun charges.<sup>62</sup> The words and actions of other authorities before the attack suggest a widespread awareness of Terry Thompson's volatility and the real threat he posed to those around him. "We were just afraid that this was going to happen. It wasn't a matter of if it was going to happen, it was a matter of when," David Durst, the Muskingum County Humane Officer, declared.<sup>63</sup>

For all the awareness of Terry's threats and resulting effort to remove his animals, local authorities and state actors failed to avert disaster. Some, such as Ohio Governor John Kasich, greeted the tragedy with equanimity, reasoning that "[a]ll the statutes in the world don't keep something like what happened from happening. . . . I mean, who would have ever dreamt the guy's gonna commit suicide, open up the cages?"<sup>64</sup> On this view, liberal legal orders seem required to endure occasional

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58. Unless otherwise specified, for the information pertaining to this encounter between Thompson and Fred Polk, see SIEBERT, *supra* note 10, at loc. 359–70.

59. Jones, *supra* note 1.

60. *Id.*

61. Wayne Drash, *Ohio Animal Owner Supplied Cub for Heidi Klum*, CNN, (Oct. 20, 2011, 5:06 PM), <http://www.cnn.com/2011/10/19/us/exotic-animal-owner/> [<https://perma.cc/UTV3-NF4W>].

62. SIEBERT, *supra* note 10, at loc. 407–22.

63. Drash, *supra* note 61.

64. Andrew Welsh-Huggins & John Seewer, *Zanesville, Ohio Animal Owner Reportedly Traded Guns for Tiger, Monkey*, HUFFINGTON POST, (Oct. 21, 2011 8:17 PM), [http://www.huffingtonpost.com/2011/10/21/zanesville-ohio-exotic-animals-escape-killed\\_n\\_1026064.html](http://www.huffingtonpost.com/2011/10/21/zanesville-ohio-exotic-animals-escape-killed_n_1026064.html) [[https://web.archive.org/web/20151109162937/http://www.huffingtonpost.com/2011/10/21/zanesville-ohio-exotic-animals-escape-killed\\_n\\_1026064.html](https://web.archive.org/web/20151109162937/http://www.huffingtonpost.com/2011/10/21/zanesville-ohio-exotic-animals-escape-killed_n_1026064.html)].

spasms of violence simply as part of the price of freedom. But Kasich's question was rhetorical and defensive. His administration was under fire for allowing former governor Ted Strickland's executive order on exotic animals—the one that was passed after Brent Kandra's death—to expire.<sup>65</sup> Kasich's question also seemed ignorant of Terry Thompson's specific alleged threats.

More than ignored, Thompson felt antagonized and even abandoned by the state. He was a Vietnam War draftee who had served as a twenty-year-old private second-class, whose duties included “Helicopter Deck Helper” and “General Clerk.” He deployed for fifty weeks from January 1969 to January 1970, a time that, according to his closest friends and associates, fundamentally changed his demeanor and relation to the state.<sup>66</sup> As a returned soldier, Thompson talked about survivor's guilt, outrage at the draft, and concern in having killed as a helicopter gunner on rescue missions.<sup>67</sup> He chided police officers who pulled him over, expressing resentment of paternalistic safety laws. He threatened inspectors who sought to enter his property.<sup>68</sup> Seemingly all arms of the state were suspect: constraining his liberty while functionally deaf to the grievances he bore as a former draftee at the hands of the same state.

These grievances simmered through years of building tension between Thompson and the state that was enhanced by pervasive state monitoring and interference. Thompson was visited thirty-five times by the sheriff's office prior to his death.<sup>69</sup> The ATF covertly tracked Thompson through an informant.<sup>70</sup> Sheriff Lutz openly discussed his intent to remove Thompson's animals.<sup>71</sup> When considered on their own, these actions appear as prudent efforts to contain a volatile figure. When viewed together and in context—particularly through the lens of Lutz's statements—they seem like a coordinated effort to deprive Thompson of his “children,” a campaign that helped drive Thompson to his end.<sup>7</sup>

In a classic regulatory scheme, inspections such as these provide a check against mismanagement. Other possible interventions include prosecutions, licensure, registration, permitting, record keeping, audits, and bankruptcy proceedings. The first five of these measures are employed in the Dangerous Wild Animal Act.<sup>72</sup> Such formal means of interference in poor stewardship may divert potentially destructive personalities such as Terry's from a perceived inevitable end. But an equally valid reading

65. *See id.*

66. SIEBERT, *supra* note 10, at loc. 195–97.

67. “Well, where were you when I was in Vietnam in a foxhole, people shooting at me, if you're trying to protect me?” Thompson chided when given a ticket for not wearing a seatbelt. *See* Chris Heath, *18 Tigers, 17 Lions, 8 Bears, 3 Cougars, 2 Wolves, 1 Baboon, 1 Macaque, and 1 Man Dead in Ohio*, GQ (Feb. 6, 2012, 1:00 AM), <http://www.gq.com/story/terry-thompson-ohio-zoo-massacre-chris-heath-gq-february-2012> [<https://perma.cc/HYS5-WP7C>].

68. SIEBERT, *supra* note 10, at loc. 383. (“He said ‘I'll shoot anybody that steps foot on this land. I'll do this and that.’”).

69. *See* Jones, *supra* note 1.

70. *See* Liz Navratil, *Zanesville Exotic-Animal Owner Terry Thompson Lived and Died on the Edge*, PITTSBURGH POST-GAZETTE (May 14, 2012, 9:27 AM), <http://www.post-gazette.com/local/region/2012/05/13/Zanesville-exotic-animal-owner-Terry-Thompson-lived-and-died-on-the-edge/stories/201205130226> [<https://perma.cc/V37M-6FJV>].

71. *See* Jones, *supra* note 1.

72. OHIO REV. CODE ANN. §§ 935.04 (registration), 935.15 (record keeping), 935.05-07 (permitting), 935.24 (prosecution) (LexisNexis 2013).



of Thompson's story is that frequent contact with local and federal authorities itself fated his traumatic undoing.

Thompson's later years were ones in which the state's tendrils extended repeatedly and deeply into his life. In addition to the ATF raid and the repeated visits of the Muskingum County Sheriff Office, there were the tax liens and a prison sentence.<sup>73</sup> A few years earlier, he had been convicted of animal cruelty charges that friends regarded as trumped up, and he endured a second failed attempt by authorities to prosecute him for animal mistreatment.<sup>74</sup> Close acquaintances expressed the theme of a system exerting unsustainable pressure on Thompson: "He'd been pushed to the limit and he snapped," said Dr. Robert Masone, an anesthesiologist and frequent social visitor to the Thompson farm.<sup>75</sup> Terry "was [driven] to the point where he didn't have any other way out," said Max Perdue, a longtime friend.<sup>76</sup>

To offer another way out, the state of Ohio may have, and did eventually, focus efforts on preventative rather than post hoc interventionist measures for exotic animal owners.<sup>77</sup> The Dangerous Wild Animals Act requires surety bonds and liability insurance that raise the barriers to entry for owning exotic animals.<sup>78</sup> These financial requirements seem designed to filter out those prone to threadbare management, as Thompson was. By focusing on the moment of acquisition, such a prohibition avoids the intervention trap that Terry and local authorities fell into—where enforcement of the law failed to subdue or neutralize the threat that Terry posed, but rather precipitated it.

Noting this dynamic, the state's treatment of Thompson—more than two-dozen visits, a professed intention by the sheriff's office to take his animals away, and covert surveillance by the FBI<sup>79</sup>—raise additional questions about the regulatory functions exercised over him, namely: Does the price of freedom also include abandonment of those, like Thompson, who take its promises too seriously or for whom self-realization seems to entail intolerable risks to others? Who was stewarding the person of Terry Thompson, as a subject displaced and then returned to his place of birth after military service, and why was that charge ostensibly unfulfilled? Where, between neglect and the authorities' seeming antagonism of Terry, lies the intervention that might reach our troubled kin?<sup>80</sup>

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73. See *infra* text accompanying note 151.

74. Egan & Truesdell, *supra* note 16.

75. *Id.*

76. *Id.* (alteration in original).

77. In addition to the various raids and prosecutions that Thompson faced, officials also could have used public nuisance suits as an ex post effort to address problematic exotic animal situations. See, e.g., *Summit Cty. Bd. of Health v. Pearson*, 809 N.E.2d. 80, 81 (Ohio Ct. App. 2004) (upholding determination that a privately owned "collection of exotic and domestic animals, including lions, tigers, leopards, bears, foxes, pigeons, dogs, and an alligator" posed a public nuisance due to excessive odor and unsanitary conditions).

78. OHIO REV. CODE ANN. §§ 935.05(D), 935.08(D).

79. See *supra* text accompanying note 70.

80. Members of the Zanesville City Planning Commission worried in a 1913 report that the city's very culture was one of individual isolation and disinterest in communal well-being: It seems that each citizen has been content with his lot, and selfish in his personal well-being, either too busy or too strangely indifferent to care for or interest himself in the general welfare of the city and its people. It is not one man alone, or

## STEWARDS OF THE WILD

Outside Zanesville, the larger Ohio community of exotic animal traders held divided views about the Thompsons. It was a surprisingly robust community owing to Ohio's lax regulations prior to the Zanesville escape. However, several years before Terry shot himself, the nearby and nationally prominent Mt. Hope exotic animal auction ceased carrying animals deemed to be dangerous to public safety, citing bad publicity and scrutiny of such sales when the animals later escape into surrounding communities.<sup>81</sup> In the wake of Thompson's death, many auction buyers expressed resentment that Thompson's actions would jeopardize their ownership of seemingly non-dangerous animals as well. Others expressed sympathy for Thompson and fear that their animals would be seized by federal authorities. Some went so far as to posit that Thompson's suicide was staged as a rationale by unknown possessors of government authority to seize his animals. Regardless of concerns or intentions, the decision by the Mt. Hope auction owner-managers, Thurman and Chester Mullet, to no longer host trades and sales of the largest wildcats, apes, bears, giraffes, elephants, and like animals reflected a slowly-evolving ethos about the propriety and drawbacks of such exchanges.

Their actions represent what one might consider preemptive self-regulation on the part of animal traders.<sup>82</sup> The traders made a decision that limited their business, albeit in a self-interested way. The minority of dangerous animals that they sold could lead to a public relations nightmare if one of the animals injured or killed a human neighbor. Even a series of nonviolent animal escapes could turn the tide of public opinion against the auction, if the public became convinced that the animals were a threat to lives they considered sacrosanct. Such a fear is not without basis. Most individuals outside of the exotic animal community are likely unaware of its scope and impact: As many as 30,000 large privately-owned exotic animals live in the United States, including 10,000 to 15,000 big cats;<sup>83</sup> as many as 246 maulings and 21 deaths from

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any one set of men, who is thus afflicted, but it is a disease that seems to have become a general affliction. The spirit seems to be one of general apathy, with a motto: "Let the other fellow do it."

WILSON W. BUCHANAN, EDWARD R. MEYER & WILLIAM W. HARPER, REPORT OF THE CITY PLANNING COMMISSION TO THE CHAMBER OF COMMERCE PUBLISHED FOR THE INFORMATION OF CITIZENS AND TAXPAYERS OF ZANESVILLE, OHIO 7 (1913), <https://books.google.com/books?id=zDhAAQAAMAAJ&lpg=PA8&dq=zanesville%20city%20planning%20commission&pg=PA7#v=onepage&q&f=false> [https://perma.cc/JHF3-3QXL].

81. See SIEBERT, *supra* note 10, at loc. 267–71. Unless otherwise specified, for information on the Mt. Hope Auction, see SIEBERT, *supra* note 10, at loc. 225–301.

82. For a more reactive example of self-regulation, see Charles F. Sabel & William H. Simon, *Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering*, 110 MICH. L. REV. 1265, 1279–80 (2012), in which the authors discuss the California Leafy Greens Products Handler Marketing Agreement as one example of a private-public collaboration. The agreement was designed specifically for self-regulation, albeit after harm had occurred to food-poisoned consumers and on regulatory ground that had been ceded by the FDA. *Id.*

83. Christopher M. Lucca, Note, *Keeping Lions, Tigers, and Bears (Oh My!) in Check: The State of Exotic Pet Regulation in the Wake of the Zanesville, Ohio Massacre*, 24 VILL. ENVTL. L.J. 125, 126 (2013).

captive large cats alone have occurred in the past eleven years.<sup>84</sup> The policy change the Mullet brothers enacted at the Mt. Hope auction was a way of imposing self-constraints in advance of, and hopefully instead of, a public outcry and a subsequent shift in law and regulation.

As is now well appreciated, self-limitation and internal-norm imposition is pervasive in merchants' guilds and similar networks, including those formed for the purpose of hunting wild animals. In their heyday, hunters of whales, foxes, ducks, etc., typically claimed their property via rules that took the form of social norms or customs rather than formal legal fiat.<sup>85</sup> Robert Ellickson's analysis of whaling cultures powerfully evidences this local process as a natural, sociologically-driven means of property rule development rooted in community but respected by law.<sup>86</sup>

Early property rules arguably developed collectively within these kinds of close-knit groups, rather than from a monarch or congress.<sup>87</sup> Those groups could identify deviants, chastise them, and thereby protect the narrow interests of the people who were hunting.<sup>88</sup> Other property rules might consider slightly broader interests. For instance, fox hunting adjudications might nod to interests of farmers in protecting their hens.<sup>89</sup> Fencing norms might attend to interests of both crop owners and grazers.<sup>90</sup> However, in most of these circumstances, the interests encompass a relatively narrow sphere of individuals with frequent contact, sharing of information, and rough

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84. Adele Young, Note, *Caged Cats: Private Ownership of Lions and Tigers*, 38 WM. & MARY ENVTL. L. & POL'Y REV. 535, 540 (2014); see also THE HUMANE SOC'Y OF THE U.S., BIG CAT INCIDENTS (2012), <http://www.humanesociety.org/assets/pdfs/wildlife/captive/big-cat-incidents.pdf> [<https://perma.cc/BA7E-VXJQ>] (asserting that, "[s]ince 1990, more than 300 dangerous incidents involving [privately owned] big cats have occurred," including 20 human deaths).

85. See *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805) (foxes); Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J. L. ECON. & ORG. 83, 89–94 (1989); see also JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* (1988); HUNUD ABIA KADOUF, *LAW, CUSTOM AND PROPERTY RIGHTS AMONG THE ĀMA/NYIMAN OF THE NUBA MOUNTAINS IN THE SUDAN* 216 (2013) ("Should a person kill an animal, but not be quick enough to collect it before the corpse is touched by a fellow-hunter, then the person who has touched the corpse acquires a right to one foreleg of the dead animal.").

86. Ellickson, *supra* note 85, at 83, 89–94. Where judges note the local customs in determining property rights, as was done by Judge Lowell in *Swift v. Gifford*, 23 Fed. Cas. 558, 559–60 (D. Mass. 1872), such customs may generate substantive law, not codified but preserved by doctrine. Ellickson, *supra* note 85, at 90 n.24.

87. Ellickson, *supra* note 85, at 94.

88. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES*, 56–57 (1991) (chronicling—as a foundational and influential study—the informal property rules of a ranching community in Shasta County, California); see also Ellickson, *supra* note 85, at 85–86.

89. See *Pierson*, 3 Cai. at 180.

90. The classical example states that as grazers begin to outnumber row croppers, the burden to construct fences falls on the latter. More recent assessments also consider risk-spreading property regimes of pastoralists who prefer the diversification options that open lands provide them. See, e.g., Gary D. Thompson & Paul N. Wilson, *Common Property as an Institutional Response to Environmental Variability*, 12 CONTEMP. ECON. POL'Y 10 (1994); ELLICKSON, *supra* note 85.

parity of power. The interests of the hunted nonhuman animals, not surprisingly, lay light-years beyond the bounds of these rules. So too do the interests of human whale watchers, beach goers, or novelists.<sup>91</sup>

Some decentralized property regimes might conceivably encompass broader interests not immediately represented or even readily apparent to holders of power. We could term these “stewardship regimes,” although the distinction is not complete. Public zoos across the United States, for example, are increasingly treating their animals in ways that acknowledge the animals’ emotional and physical needs in addition to their entertainment value.<sup>92</sup> In 2004, the Detroit Zoo let go of its only elephants, Winky and Wanda, because it was unable to construct the 20-acre enclosure that would have been large enough for the ailing elephants’ needs.<sup>93</sup> A zoo memorandum explained that Winky and Wanda had evolved to travel up to thirty miles per day, and that their relatively cramped quarters in Detroit had left them with severe arthritis.<sup>94</sup> They were sent to a 30-acre enclosure at a refuge in California where, ideally, they could live out their days in a more elephant-like manner.<sup>95</sup>

It is unusual for a zoo to willingly transfer flagship personalities. The charisma and presence of such creatures is a major selling point to zoo goers, especially young visitors who may influence family decision making whether or not they appreciate the welfarist reasons that Winky and Wanda needed to move to California. Detroit zoo officials were reportedly the first to relinquish such marquee animals out of voluntary regard for the animals’ well being.<sup>96</sup> However, other zoos are following suit with a host of similarly motivated managerial decisions. For instance, many zoos are using enclosures with more natural plants and other sight obstructions that improve animals’ experiences even at the cost of reducing their visibility to human visitors.<sup>97</sup> More broadly, as Irus Braverman describes in her masterful study of North American zoos, “the human stance of domination and control toward animals has been re-defined as one of care and stewardship.”<sup>98</sup>

These decisions may indeed be acceptable to contemporary zoo goers, but they clearly make sacrifices for the sake of constituents not directly represented in patron surveys, donor reports, or board membership. Stewardship might be said to exist in accepting such interests that are not merely derivative of those immediately represented, including those of children, animals, future generations, or other

91. Whaling customs inconveniently deviated from Herman Melville’s monolithic description. See Ellickson, *supra* note 85, at 88.

92. See Alexandra Ossola, *The Future of Zoos is Being Nice to the Animals—Not Making It Easy To Watch Them*, FAST COMPANY: CO.EXIST (Feb. 25, 2015, 8:32 AM), <http://www.fastcoexist.com/3042458/the-future-of-zoos-is-being-nice-to-the-animals-not-making-it-easy-to-watch-them> [https://perma.cc/8HZV-G63F].

93. See Hugh McDiarmid Jr., *Detroit Zoo Elephants Going to a Refuge*, DET. FREE PRESS (Feb. 13, 2015, 7:20 PM), <http://www.freep.com/story/news/local/michigan/oakland/2015/02/13/detroit-zoo-winky-wanda-refuge/23355697/> [https://perma.cc/8ZUZ-FMKK].

94. See *id.*

95. See *Winky and Wanda—A Tale of Two Elephants*, DETROIT ZOO, <http://detroitzoo.org/about/your-detroit-zoo/elephants/> [https://perma.cc/XY3W-J6D3].

96. See McDiarmid, *supra* note 93.

97. See Ossola, *supra* note 92.

98. BRAVERMAN, *supra* note 6, at 5.

unenfranchised groups. More modestly, a sort of nested stewardship could occur where the interests of those unenfranchised groups grow embedded in the interests of acknowledged stakeholders.

Stewardship in this way is not inimical to structures of property ownership. In fact, stewardship, so conceived, depends critically on many of the “incidents of ownership”<sup>99</sup> that Tony Honoré famously laid out. It does not demand a relinquishment or giving over, but instead an active use and possession of the familiar sort, albeit focused on a larger set of interests than classically assumed.<sup>100</sup> Without such traditional incidents of ownership, the steward’s goals would be unreachable under the general framework of government assumed in the liberal legal tradition. If the Smithsonian National Zoo lacked control over its pandas—including, it must be said, their reproductive organs—the Zoo would be powerless to effect its goal of breeding captive pandas.<sup>101</sup> Similarly, if the Nature Conservancy did not own millions of acres of land and easements to that land, it would be an ineffective steward of those resources. The choice to exploit fossil fuels on its land may be a controversial decision,<sup>102</sup> but the power to make that choice, one way or another, is necessary to effectuate the Conservancy’s mission of stewardship.

Ultimately, if ownership and stewardship are a dichotomy, each end of that dichotomy requires the other to exist. Stewardship requires some sense of control, and ownership requires sustainability and prudence for the fruits of that ownership to be realized. Even the animal owner who wishes nothing more than to consume his catch depends on a breeding stock that is not similarly devoured. Hence, the libertarian separatist can no more shed dependence on a well-stewarded commons than the selfless steward can avoid the mantle of domination. The Thompsons’ caretaker, John Moore, revealed something of this dialectic when he described his anguish at having to help tally bodies for Muskingum County Sheriff officials the morning after Terry Thompson’s death: “When you feed [the animals] every day and you water them and play with them and they respond to your love for them and love you back, how hard do you think that is?”<sup>103</sup> Moore’s words speak of stewardship in pursuit of shared

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99. Honoré, *supra* note 36, 107.

100. See BRAVERMAN, *supra* note 6, at 21 (describing the “intertwined nature of care and power” in the context of zoos).

101. Technically, the zoo does not “own” the pandas, as they are on loan from the Chinese government in exchange for annual financial contributions. The changing phases of China’s diplomatic use of pandas—from high-profile state gifts to long-term loans according to a “capitalist lease model based on financial transactions” to the use of pandas to promote “deep trade relationships characterized by trust, reciprocity, loyalty, and longevity”—deserves its own case study which, fortunately, exists. See Kathleen Carmel Buckingham, Jonathan Neil William David & Paul Jepson, *Diplomats and Refugees: Panda Diplomacy, Soft “Cuddly” Power, and the New Trajectory in Panda Conservation*, 15 ENVTL. PRAC. 262, 262 (2013). We are grateful to Linda Greenhouse for calling our attention to the unique legal arrangement governing ownership of captive pandas.

102. Justin Gillis, *Group Earns Oil Income Despite Pledge on Drilling*, N.Y. TIMES (Aug. 3, 2014), [www.nytimes.com/2014/08/04/science/group-earns-oil-income-despite-pledge-on-drilling.html](http://www.nytimes.com/2014/08/04/science/group-earns-oil-income-despite-pledge-on-drilling.html) [https://perma.cc/UK9B-YFBC].

103. SIEBERT, *supra* note 10, at loc. 524–25.

existence and required love, even as the animals' need for feeding and watering reveals their subjugation under human ownership.<sup>104</sup>

#### SUBJECTS OF THE STATE

Stewardship is not a legal regime, nor can its tenets satisfactorily prevent the harm that arose in Zanesville on October 19, 2011. These concerns are more directly addressed by regulatory regimes of the kind passed in Ohio, but these regulatory regimes also impose a harm or deprivation on the class of regulated activities and persons. In the spring of 2012, in the legislative session immediately after the Zanesville tragedy, the Ohio General Assembly, with John Kasich's signature, passed the Dangerous Wild Animal Act.<sup>105</sup> The law's central elements outlaw the sale, possession, breeding, and acquisition of dangerous wild animals—a category including wolves, great cats, bears, alligators, other large mammals and reptiles, and most non-human primates.<sup>106</sup> Members of the Association of Zoos and Aquariums (AZA) and the Zoological Association of America (ZAA) are exempted from the law.<sup>107</sup> Pre-existing owners of dangerous wild animals may not breed, acquire, or sell these animals, and they may continue owning them only if they also register their animals, pay a substantial annual permit fee, pass a criminal background check, embed microchips in the animals' bodies, own sufficiently sized and equipped animal shelters, adopt a plan of action in case of escape, and demonstrate proof of appropriate training and experience to house, feed, and handle the animals.<sup>108</sup> Sterilization of certain dangerous male animals is also required unless a qualified veterinarian opines that sterilization is medically contraindicated.<sup>109</sup> No new licenses would be issued for those wishing to raise or sell members of the defined category of beings named dangerous wild animals.<sup>110</sup>

The new statute not only regulated an activity, it prohibited a type of property ownership that was practically endemic in Ohio due to its previously lax limitations, that is, the avocational creation and maintenance of large exotic animal assemblages. If Mt. Hope had not taken itself out of the business of fostering the sale of dangerous

104. Cf. Abrell, *supra* note 33, at 136 (noting “the paradoxes of sanctuary life—mainly, the fact that the benefits of care necessarily come with limits on animal autonomy”).

105. OHIO REV. CODE ANN. §§ 935.01–.99 (LexisNexis 2013).

106. *Id.* §§ 935.01, .02.

107. *Id.* § 935.03(A)(1), (B)(1).

108. *Id.* § 935.04–.07.

109. *Id.* § 935.06(A)(4). No similar veterinary advice exemption was included for the law's microchipping requirement, an omission that became a central focus of a subsequent legal challenge to the law. Veterinary experts for plaintiffs expressed the view that anesthetizing elderly animals for the sole purpose of inserting a microchip would be cruel and medically inadvisable, a view for which the district judge hearing the case expressed sympathy. *Wilkins v. Daniels*, 913 F. Supp. 2d 517, 539 (S.D. Ohio 2012), *aff'd*, 744 F.3d 409 (7th Cir. 2014) (“The Court is empathetic to the Plaintiffs' situation in this case and especially to the difficulties faced in completing the microchipping requirement.”). Still, the plaintiffs' concerns were dismissed with the faint promise that they might be able to invoke an “equitable defense” of medical necessity—not specified in the new law—in the event they were prosecuted for failing to microchip an elderly animal. *Id.*

110. § 935.02(B)(1).

wild animals in Ohio, it would have been forced out. The owners themselves, of bears, tigers, cape buffaloes, wild African dogs, etc., would need to comply with the new Ohio regulations or seek accreditation with the AZA or ZAA as an alternative private compliance method.<sup>111</sup> In practice, people like Terry Thompson would have to get big or get out. Accredited zoos require much more infrastructure and costs than Thompson's operation.<sup>112</sup> Without an exemption, owners would see their collection steadily dwindle through death or confiscation.<sup>113</sup> Anticipating the law's effects, the state of Ohio constructed an animal-containment facility to temporarily house seized exotics a cost of \$2.9 million.<sup>114</sup> The era of Terry Thompsons was coming to an end via regulation, their animals transferred to state oversight and care.

Noting the reciprocal harms addressed and created by this regulation, we see in Zanesville a process whereby individuals surrendered to the authority of the state, but only after protestations of violence, ala Terry Thompson, or nonviolent legal actions. Exemplifying the latter, aggrieved exotic animal owners filed suit in 2012, seeking an injunction against the new Ohio law and a declaration that its requirements violate constitutional rights to speech, property, and due process.<sup>115</sup> The record of the case is instructive, as it documents plaintiffs' expressions of the deprivation at hand.

In their complaint, the plaintiffs argued that the law's onerous permitting requirements, coupled with the exemption from those requirements for accredited members of the AZA or the ZAA, compelled them to subsidize the speech of, and associate with, organizations they deemed objectionable.<sup>116</sup> Subsumed in the legal argument, however, is a claim that Ohio was quashing an exercise of property rights of extreme personal significance to the plaintiffs. The state of Ohio candidly admitted that the permitting requirements under its new scheme were far more exacting than

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111. *Id.* § 935.03(B).

112. See Alan Johnson, *Fewer Wild Animals Being Kept by Ohioans in Wake of 2012 Law*, COLUMBUS DISPATCH (Feb. 14, 2016, 9:54 AM), [www.dispatch.com/content/stories/local/2016/02/14/ohio-moving-slowly-away-from-wild-animals-business.html](http://www.dispatch.com/content/stories/local/2016/02/14/ohio-moving-slowly-away-from-wild-animals-business.html) [<https://perma.cc/9VF4-YPLN>] (describing Noah's Lost Ark, a private exotic animal sanctuary that has continued to operate in Ohio following the new regulations).

113. See *id.* (“[T]here were 206 exotic animals, including snakes and reptiles, registered in the state last year, but that number is expected to shrink when the count is updated in a few weeks. At the same time, the list of owners of restricted species will drop to 52 or so this year from 56 last year. Only one new permit owner has been added, and several are dropping off the list as their animals die or are moved out of state.”).

114. See Alan Johnson, *Exotic Animal Holding Center Should Get Busier Jan. 1*, COLUMBUS DISPATCH (June 30, 2013, 10:58 AM), <http://www.dispatch.com/content/stories/local/2013/06/30/nobody-home.html> [<https://perma.cc/8J89-XRKB>]. It is worth contrasting Ohio's decision to build this facility with the approach of states such as Pennsylvania that permit the government to euthanize seized animals. See 34 PA. STAT. AND CONS. STAT. ANN. § 2963(e) (West, Westlaw through 2016 Regular Session Acts 1 to 101) (noting “disposal” of exotic animals as available penalty for violating regulatory provisions). For a general discussion of the right to destroy one's property, see Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005).

115. Verified Complaint at 12–25, *Wilkins v. Daniels*, 913 F. Supp. 2d 517 (S.D. Ohio 2012) (No. 12-1010).

116. *Id.* at 12–14.

analogous accreditation criteria for the AZA or the ZAA.<sup>117</sup> Thus, to plaintiff exotic animal owners, Ohio was forcing them either to surrender ownership of their beloveds or to join an associational guild they found distasteful.<sup>118</sup> Even “liquidation” of the animals—not that the plaintiffs desired it—was unavailable due to the new law’s transfer and breeding restrictions, which rendered the animals economically valueless. These various serpentine incursions, so offensive to libertarian sensibilities, were all the more galling given that the plaintiffs, for their part, sincerely believed that their backyard republics represented a more perfect union, one inclusive of threatened and maligned creatures that “people don’t understand.”<sup>119</sup>

The plaintiffs lost at both the district and appellate court levels.<sup>120</sup> At the appellate level, the court was quick to rule that the AZA/ZAA exemptions did not exert an unconstitutional pull on private, unassociated owners, given the availability of other regulatory compliance options, such as exemptions for circuses, research facilities, or “educational institutions that display a single dangerous wild animal as a sports mascot.”<sup>121</sup> The court failed to acknowledge that these exemptions were useless to plaintiffs and simply represented the comparative lobbying strength of the exempted organizations. No such political clout existed for plaintiffs, who the appellate court identified somewhat derisively as “self-described exotic animal enthusiasts.”<sup>122</sup>

This primarily avocational nature of plaintiffs’ pursuit weighed heavily against them: As the Sixth Circuit noted, “In compelled subsidy cases, plaintiffs have generally been presented with a binary choice between subsidizing speech or quitting their jobs.”<sup>123</sup> The panel did not address the fact that, for plaintiffs, “jobs” might

117. For instance, the regulations allegedly mandated a shelter size of 5000 square feet for privately owned hyenas, whereas the standard under ZAA rules would only be 600 square feet. *Wilkins*, 913 F. Supp. 2d at 528. A member of the state task force that advised on the new regulations, Polly Britton, testified on behalf of the Ohio Association of Animal Owners, a loose network of exotic animal owners who opposed the regulations and the perceived hegemony of professional zoological organizations. Britton testified that state officials during task force meetings openly expressed a desire that the new rules “be so strict that owners could not, or would not, be able to keep their animals.” *Wilkins v. Daniels*, 744 F.3d 409, 412 (6th Cir. 2014).

118. The precise nature of the plaintiffs’ objections to the AZA and ZAA remained vague in the district court opinion. More helpful are various position statements issued by the Responsible Exotic Animal Ownership (REXANO), a national non-profit organization that seeks to advance the interests of private exotic animal owners. See *REXANO Position Statement: Private Ownership of Captive Exotic and Wild Animals in USA*, REXANO (2007), [http://www.rexano.org/Rexano\\_Position.htm](http://www.rexano.org/Rexano_Position.htm) [<https://perma.cc/JA9E-S8Y7>]. REXANO appears to regard AZA/ZAA members as overly commercialized institutions that offer visitors only limited opportunity to encounter exotic animals. See John Curtis, *The Myth of AZA Accreditation*, REXANO (Feb. 2007), <http://www.rexano.org/AZAMythArticle.htm> [<https://perma.cc/9H2T-9Z9V>]. REXANO’s strong support of private ownership rights is connected to a belief that such rights enable a fuller relationship and bond with exotic animals through more intimate, less mediated encounters.

119. *Supra* text accompanying note 58.

120. *Wilkins*, 744 F.3d at 419; *Wilkins*, 913 F. Supp. 2d at 545.

121. See *Wilkins*, 744 F.3d at 412.

122. *Id.* at 413.

123. *Id.* at 415. Similarly, in Massachusetts, governing regulations specifically prohibit issuance of exotic animal ownership permits to applicants when their “purposes or intentions



simply be an instrumental means toward their primary life end of building and sustaining community with nonhuman animals. This deprivation is not speculative or insubstantial: in the future, plaintiffs' encounters with such creatures will only occur within distanced, mediated contexts such as zoos and other approved institutions. In such contexts, where fear and intimacy have been carefully minimized, plaintiffs might legitimately question whether exotic animals can produce an authentic experience of the sublime—which, on the most charitable interpretation, is the aim of their enthusiasm.<sup>124</sup>

Plaintiffs fared no better with their argument that the state's requirement of implantation of a passive integrated transponder (PIT) chip under the skin of living animals constitutes a compensable physical taking of private property. In the Sixth Circuit panel's view, such a requirement did not involve government occupation or a government-authorized occupation by a third party. Instead, the regulations were viewed as being akin to requirements for "license plates on cars, warning labels on packaging, lighting on boats, handrails in apartment buildings, and ramps leading to restaurants."<sup>125</sup> This result seemed ordained notwithstanding testimony from plaintiffs' experts that some elderly animals might die during the anesthesia procedure required prior to implanting the animals with microchips.<sup>126</sup> The plaintiffs' fateful mistake on this score was to argue the case as a physical, rather than a regulatory, taking. To the appellate panel, the possibility of an offensive *physical* occupation just did not register: "[E]ven after appellants implant the microchips, they retain the ability to use and possess their animals and the implanted microchips."<sup>127</sup>

Giorgio Agamben's notion of "bare life"<sup>128</sup> here finds vivid illustration: Excluded from subjecthood, exposed to bodily violation, and rendered perfectly legible to the state, exotics under the new regime seem perfectly assimilated to the property form, no different from the digital wafer embedded under their skin. Indeed, the animals hardly seem to be animate property at all, let alone sovereign lives capable of holding

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[are] based purely on curiosity, impulse or novelty, or to provide for personal amusement or entertainment." 321 MASS. CODE REGS. § 2.12(9)(b) (West, Westlaw through Sept. 9, 2016). In so specifying, the regulations constitute something of a sumptuary code for exotic animals, dictating who may own them and for what purposes. The sumptuary code analogy also applies for regimes that dictate *which* dangerous animals are appropriate and customary for individuals to own. In *Rhoades v. City of Battle Ground*, a city in Washington State passed an ordinance making it illegal to possess inherently dangerous animals within city limits. 63 P.3d 142 (Wash. Ct. App. 2002). The ordinance contained a licensing exception for "dangerous dogs" but not for dangerous exotic animals, a disparity that plaintiffs unsuccessfully challenged as arbitrary and discriminatory. *Id.* at 147–49

124. *Cf. infra* text accompanying note 177 (quoting Aldo Leopold on sublime encounters).

125. *Wilkins*, 744 F.3d at 419; *see also Wilkins*, 913 F. Supp. 2d at 542 ("The procedure is undoubtedly at least minimally invasive to the animal, but this requirement is a function of government regulation of dangerous wild animals, not governmental physical appropriation or invasion.").

126. *See Wilkins*, 913 F. Supp. 2d at 522.

127. *Wilkins*, 744 F.3d at 419. *See also id.* ("There is little difference between a law requiring a microchip in an animal and a law requiring handrails in apartment buildings.").

128. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Daniel Heller-Roazen, trans., 1998). For an insightful application of the "bare life" notion to the context of animals, *see Abrell, supra* note 33, at 140–43.

secrets even the state cannot know. At trial, the state's experts testified at length regarding the public benefits of "microchipping" and "traceability" for potentially dangerous animals, focusing on issues of identification, containment, and disease control.<sup>129</sup> Plaintiffs' experts, in contrast, emphasized the potential pain and health risks to the animals themselves from undergoing microchip implantation. The Sixth Circuit, for its part, elided the question of animal pain and subjecthood simply by stressing that the procedure is "commonly used."<sup>130</sup>

Here, as elsewhere,<sup>131</sup> epistemic debates purportedly rooted in science and empiricism seem also to work as theaters for the expression of social values, anxieties, and commitments. Dr. Stull—the state's expert, confident that he could anesthetize a sixteen-year-old African lion even though he had never personally examined it<sup>132</sup>—represented technocratic expertise and all those who see their position validated and enhanced through its authority. The plaintiffs' expert, Dr. Jo Anne Green, in contrast represented the relatively voiceless, including, in this litigation, those private individuals who own legally voiceless exotic animals. Dr. Green sought to validate the wisdom and experience of the plaintiff caretakers by dismissing the need for technocratic tracking devices. Speaking of plaintiff Cyndi Huntsman and her two elderly big cats, Dr. Green opined: "[Huntsman] has a history of both of the animals. She knows where they came from and how long they have been there. I don't see any reason to PIT tag those animals."<sup>133</sup> Dr. Green contrasted Huntsman's familiar, loving stewardship with the state's "quite painful" intervention, which would necessitate "inserting a 14 gauge needle under the animal's skin."<sup>134</sup> Speaking of the elderly cats, she opined that the state's prescription "would be cruel and unjustified."<sup>135</sup>

This attempt to speak for the voiceless necessitated a response from the state's experts, one of whom confidently claimed, "I have microchipped many animals who didn't even notice anything was happening."<sup>136</sup> The problem of *other* other minds<sup>137</sup> was here on full display. Unlike philosophers and scientists, the legal system cannot withhold judgment pending further evidence and analysis, even with respect to unanswerable questions. Through the conjuring magic of burdens of proof and standards of review, plaintiffs' claims failed,<sup>138</sup> as did their appeal. A request for a rehearing in the Sixth Circuit was denied, after which the plaintiffs presumably accepted,

129. *Wilkins*, 913 F. Supp. 2d at 529.

130. *Wilkins*, 744 F.3d at 411.

131. See Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149 (2006).

132. See *Wilkins*, 913 F. Supp. 2d at 530.

133. *Id.* at 527.

134. *Id.*

135. *Id.*

136. *Id.* at 529 (Dr. Paul Stull, D.V.M, Assistant Chief, Division of Animal Health, Ohio Department of Agriculture).

137. See J.D. Singer, *Sharing the Flesh of the World: Merleau-Ponty and the Problem of Animal Minds* (Mar. 12, 2011) (Metaphysical Society of America 62nd Annual Meeting Aristotle Prize paper), <http://www.metaphysicalsociety.org/2011/Session%20XI.Singer.pdf> [<https://perma.cc/JE6G-4463>].

138. The district court judge was particularly candid in noting the harm wrought by the act, despite its constitutionality:

albeit with regret, that the rule of law had definitively ruled against them. They had been forced to surrender control to the sovereign, and to the sovereign's delegates.<sup>139</sup>

Terry Thompson presents an alternative to the plaintiffs' legal, nonviolent mode of objection. On a deep level, he never surrendered complete control to the state, although his last acts did subordinate his body and property to the state while simultaneously expressing defiance. Like the other exotic-animal owners, Terry also surrendered control through a lifetime of organized transactions, as is necessary to co-exist with one's peers and survive in the modern nation state. While the prospect of implanting tracking chips into humans, rather than animals, remains a distant dystopian future, control is ceded in far more mundane and multifarious ways. Driver's licenses, insurance requirements, traffic signs, language conventions, and attendant behavioral proprieties—by limiting oneself to these customs and laws, we gain the ability to travel, work, interact, and generally not provoke or agitate one another, through a set of shared expectations. More fundamentally, we guarantee each other a greater freedom from harm by limiting our potentially harmful actions. Those harmful actions run the gamut from driving on the left side of the road, to murder, to waste dumping, to releasing nonhuman animals thought to be dangerous. To avoid the consequences of these deeds, we collectively agree to refrain from perpetrating them.

Likewise, we surrender control when we construct bureaucracies and technocracies for the collective good, recognizing the harms that are afflicted as well. When granting power to an agency, Congress—in the name of us—admits that we cannot control essential functions of our state and its economy democratically: setting environmental, health, and safety standards; regulation of banking or labor markets; provision of social services; and so on. On the first motion, we surrender partial control to our families and local communities. On the second, we surrender control to political systems. In the modern state, we yield to a third, surrendering control to technocratic agencies, admitting that we do not have enough information, expertise, or time to oversee those who make decisions nominally on our behalf.<sup>140</sup> This line tracks technocracy as the outgrowth of democracy, rather than the enemy of it. Liberal democracy and the market economy enabled, or at least accompanied, extraordinary growth in commerce, technology, and society, so much so that technocracy, in turn,

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As a final matter, the Court notes that it is sympathetic to the exotic animal owners who will not be able to retain possession of their beloved animals as a result of the operation of the Act, and it recognizes that the circumstance may lead to the severance of strong bonds between the animals and their owners.

*Wilkins*, 913 F. Supp. 2d at 544.

139. Lost in the proceedings was an opportunity to consider the animals' interests directly, rather than through the related constitutional claims of their owners. Grappling head-on with the state's desire for "traceability" might have been useful judicial practice for more worrisome efforts by the state in the future to categorize and control "bare life." For valuable discussion along those lines, see the works gathered in *REFRAMING RIGHTS: BIOCONSTITUTIONALISM IN THE GENETIC AGE* (Sheila Jasanoff ed., 2011).

140. See FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT* 85 (1900) ("The fact is, then, that there is a large part of administration which is unconnected with politics, which should therefore be relieved very largely, if not altogether, from the control of political bodies. It is unconnected with politics because it embraces fields of semi-scientific, *quasi*-judicial and *quasi*-business or commercial activity—work which has little if any influence on the expression of the true state will.") (emphasis in original).

has arisen to respond to their complexities. The Nightwatchmen's State so well breeds freedom, we might say, that it must quicken and adapt to tame its offspring.<sup>141</sup>

#### TRAVERSING THE GULF

Control plays out in fraught and sometimes fatal ways in the context of exotic-animal ownership. Note that Brent Kandra—the twenty-four-year-old who died of a bear attack in August 2010, triggering the executive order which had lapsed by the time of Terry Thompson's death—also bonded with the animals he cared for, including the bear that killed him. "It's one that he played with constantly, every time that he was here," Sam Mazzola said.<sup>142</sup> The familiarity was not enough to avert disaster. Brent died of blunt and sharp injuries. The bear was out of its cage for its usual feeding. Sam Mazzola was the only witness. He had to blast a fire extinguisher on the bear to drive it back into the metal structure. That the bear's provocation was unknown challenges the limits of our empathy. "We don't know whether something startled the bear or what prompted the bear to get aggressive with the caretaker," Lorain County Sheriff's Capt. James Drozdowski said.<sup>143</sup> If Kandra knew of the bear's trigger, of course, he might have evaded the attack.

Here, and in other instances,<sup>144</sup> a gulf of language between us and our nonhuman counterparts aggravates the problem of interspecies stewardship. We have cultural heroes and heroines who seek to traverse that gulf, bringing back ethnographies of our nonhuman kin. Jane Goodall is only the most visible example: hundreds of behavioral biologists have sought to transcribe the wants, needs, desires, fears, ailments, aspirations, and anxieties of nonhumans.<sup>145</sup> Even so, the gulf of language and experience remains and has for millennia served as a blockade on empathy and

141. We hasten to add a final and most inescapable dependency: the control wielded by nature over the conditions for life's existence. Through human invention and management, we seek constantly to expand the possible frontier of nature's bounty. We succeed to such a degree that some imagine us actually liberated from nature's limits. Those thoughts too depend on phosphorous. Cf. *Jacob Moleschott*. ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/biography/Jacob-Moleschott> [<https://perma.cc/ZX7R-BH8G>] (Dutch-Italian physiologist and philosopher "noted for the statement 'no phosphorus, no thought'").

142. Unless otherwise specified, for the following information pertaining to Brent Kandra and Sam Mazzola, see Sheeran, *supra* note 14.

143. *Id.*

144. In 2009, a two-hundred-pound chimpanzee with no history of violence brutally attacked a woman in Connecticut that the chimp had known for years. Officials speculated that the attack was prompted by the woman significantly changing her hairstyle such that the chimp mistook her for an intruder. Andy Newman, *Pet Chimpanzee Attacks Woman in Connecticut*, N.Y. TIMES (Feb. 17, 2009), <http://www.nytimes.com/2009/02/17/world/americas/17iht-chimp.1.20241928.html> [<https://perma.cc/CE2Q-67T2>]. Later, a theory surfaced that the chimp was carrying Lyme disease, which, in rare circumstances, can cause psychosis. Andy Newman & Anahad O'Connor, *Woman Mauled by Chimp Is Still in Critical Condition*, N.Y. TIMES (Feb. 17, 2009), <http://www.nytimes.com/2009/02/18/nyregion/18chimp.html> [<https://perma.cc/78XA-JF94>]. The true cause of the attack seems likely to have died with the chimpanzee, Travis, who was shot on the scene after a Xanax-laced tea provided by its owner failed to subdue the animal.

145. See generally CARL SAFINA, *BEYOND WORDS: WHAT ANIMALS THINK AND FEEL* (2015).

stewardship.<sup>146</sup> In that respect, the problem of *other* other minds is foundational to ethics, politics, and law. It haunts the liberal vision of equal regard in just the right way, exposing a gap between aspiration and action as vast and gnawing as a slaughterhouse.<sup>147</sup>

Terry Thompson sought to defy that gap in his singular way, but his empathy was compromised. While he created something of a human-nonhuman world, he did not do so through careful study of animal signs, vocalizations, and behaviors. His means of defying the lexical gap was as most companion animal owners': through physical contact and unilateral, despotic assumption of a custodial role. This is not to say that the kingdom lacked intimacy. In local footage aired later on ABC news, Thompson is seen giving his hand to a black bear who mouths on it, as if it were a pacifier.<sup>148</sup> Marian was known to let one of the Celebes crested macaques share her bed at night.<sup>149</sup> News coverage of these familial relationships took on a pornographic air when covered nationally,<sup>150</sup> a form of intrusion that, like ATF raids and tax liens, cannot contain its consequences.

Intrusions or none, the upshot is that the Thompsons' "babies" were swimming in a pool with no water: a financially troubled operation that was headed towards insolvency. At his death, Terry had nearly \$70,000 in unpaid taxes outstanding and fifty-six exotic animal mouths to feed, plus the mouths of other farm animals and dogs, his farm hand to pay, and his own needs to attend to.<sup>151</sup> Up until his death, there appear to be no reported attacks initiated by these tigers, lions, bears, or monkeys. Perhaps the Thompson's threadbare operation provided just enough empathic leadership to avert prior disaster.<sup>152</sup> Perhaps as well, his sacrifice was genuine: His offer to

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146. It bears asking whether successful stewardship requires or approximates empathy. In turn, if empathy requires envisioning the other's thought process, it bears asking whether we can appropriately inhabit animals' minds. *See generally id.* One answer to this inquiry is that we can, but only through great effort. *See generally id.* (describing elegant, but extensively developed, methods of studying animal thoughts and behavior).

147. *See* DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 195–97 (2010).

148. *Good Morning America* (ABC television broadcast Oct. 21, 2011), <http://abcnews.go.com/GMA/video/wild-animals-ohio-widow-survivors-back-14785422> [<https://perma.cc/DTN7-9YGE>].

149. *See* Heath, *supra* note 67.

150. *E.g.*, *Good Morning America*, *supra* note 148.

151. *See* Kelly Mills, *Still Problems with Kopchak Road Farm*, WHIZ NEWS (May 2, 2012), <https://www.whiznews.com/content/news/local/2012/04/30/still-problems-with-kopchak-road-farm> [<https://perma.cc/LQ4B-BAF8>].

152. Remarkably, even during the release, hunt, and transfer of the animals on Terry Thompson's farm, the only human injury reported was an agent whose hearing was partially lost due to the incessant sonic blasts of gunfire during the hunt. *See* Jones, *supra* note 1. As journalist Chris Jones put it, "Depending on your proximity to Zanesville, Ohio, and your feelings about the relative value of animal life, what happened at the farm was either one of the worst mass shootings in American history or a miracle." *Id.* The June 12, 2016, shooting at a gay Orlando night club has since surpassed all other mass shootings in the United States, with forty-nine dead and fifty-three wounded. *49 Killed at Orlando Gay Nightclub in Worst Mass Shooting in U.S. History*, CHI. TRIB. (June 12, 2016, 10:53 PM), <http://www.chicagotribune.com/news/nationworld/ct-orlando-nightclub-shooting-20160612-story.html> [<https://perma.cc/4U69-A7WN>].

take in orphans of other exotic animal owners seems—at least partially—directed toward some vaguely glimpsed vision of interspecies community. In this light, his willingness to take on insurmountable financial obligations can be read as a willing exposure to risk for the sake of others. However, in exposing himself, Thompson exposed his animals to risk as well.

Thompson's case therefore clarifies that sacrifice alone does not fulfill the role of stewardship. One can sacrifice in the name of others but still harm their interests. Neither does volunteering alone constitute good stewardship. It was Thompson's excessive volunteering of his resources to other burdened exotic animal owners that hastened his defeat. Many commentators, including Jack Hanna and Terry's sister Polly, came to view Terry's final actions as driven in part by his financial straits.<sup>153</sup> With this burden in mind, Polly Thompson offered the unsettling vision of Terry Thompson at the end of his life, "looking at every animal, thinking, 'How am I going to do this?'"<sup>154</sup> She envisioned him "standing on that hill," thinking, "Nobody wants me,"<sup>155</sup> as if he were occupying the same role that his animals did before he acquired them: orphaned and out of place in the peopled communities of rural Ohio. True or apocryphal, these visions mirror a deeply troubled Thompson, who failed as a steward in spite of—or perhaps hastened by—the efforts of local authorities.

#### HERE'S THE THING

In their respective enterprises, Ohio's exotic-animal owners had their avocations and even sense of selfhood at stake.<sup>156</sup> The freedom to build one's own creative kingdom is nowhere in the Declaration of Independence or the Constitution, but it can easily be seen to emerge from the rights enumerated in those documents. To many of Thompson's kind, the threads of life, liberty, and property do not separate. Indeed, property ownership is arguably a necessary element of identity formation in modern societies.<sup>157</sup> Terry Thompson, Sam Mazzola, and others take this sense of identity in property to impressive and highly visual proportions, given the nature and size of their collections. It is common to drive past rural homesteads and see similar collections, often of nonfunctioning vehicles. In southern Missouri towns,

153. See Welsh-Huggins & Seewer, *supra* note 64.

154. *Id.* Polly assented to the unfortunate role of testifying against her brother during his trial for animal welfare violations. *Id.*

155. *Id.*

156. See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (articulating a contemporary personhood perspective as a theory of and basis for some property rights). For a chilling reinterpretation of Professor Radin's personhood theory with potential relevance to the case of exotic animal ownership, see Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VA. L. REV. 635, 642 (2012) ("If personhood is fostered by bad conduct, in cases where 'human flourishing' and 'the freedom to live one's life on one's own terms' through property ownership is a function of mistreating others, it becomes much more difficult to resolve property disputes on the basis of personhood.")

157. See ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* (1961) (finding that the inmates who were deprived of possessions in "totalizing institutions" suffered a loss of self or personal defacement that some counteracted by stashes of minimal items).

decommissioned school buses are the special token seen in many people's lawns. In western Pennsylvania, some yards boast a fleet of weathered fishing boats perpetually awaiting restoration. These collections can become magnetic spectacles: An estimated three thousand fee-paying buyers and curiosity seekers showed up at the Thompsons' farm when Marian held an auction of her dead husband's sprawling collection.<sup>158</sup> This role of property accumulation is not trivial; it shows a creative control that is more than just a means to a utilitarian end. This is why dispossession can be so severe an intrusion, even though the property lost may seem trivial or eccentric to others.<sup>159</sup>

Still, when creative control is the primary or only end of one's acquisitiveness, destruction can arise. The impossibility of complete control or the anticipation of artistic destruction may drive a willing embrace for the end. Terry Thompson's taste for acquiring unwanted animals grew disproportionate to his resources. As his collection grew, the guiding force of Terry's habits seemed unmistakably to be empire building rather than caretaking. Those who transferred their exotic animals to him were reportedly distressed by the ramshackle operation. "They'd visit and see the situation and they'd freak out," County Humane Officer David Durst said. "[T]hey'd call me. . . . [And t]hey'd say, 'I was horrified.'"<sup>160</sup> Although done with a promise of care, the acquisitions were driven by Terry's penchant for oversized risk taking. He was also a speedboat record holder and was rumored to fly his crop duster below a local highway overpass.<sup>161</sup> In this frame, Thompson's operation was indifferent to the possibility of collapse, or even encouraging of it. As evidenced by his frequent statements to that effect, Terry had destruction in mind as a final creative pathway for a sustained period of time.

The day before he released the animals, Thompson told John Moore he had a plan to address his marital problems, adding, "[Y]ou will know it when it happens."<sup>162</sup> In his final act—when it happened—Thompson was an artist, deranged, that captured the imagination of the country and the world through his destructive performance.

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158. See Eric Lyttle, *Thousands Attend Auction of Property Owned by Zanesville Exotic-Animal Owner*, COLUMBUS DISPATCH (Aug. 15, 2013, 6:36 AM), <http://www.dispatch.com/content/stories/public/2013/08/14/Thompson-farm-auction.html> [<https://perma.cc/P8BX-CURF>] (listing vintage cars, motorcycles, ultralight gliders, a hovercraft, and dozens of horses among items to be sold).

159. Signs of our penchant for possession and collection can be found closer to urban and suburban areas as well. Just north of Cincinnati, the city of Lebanon, Ohio, boasts the Midwest's largest flea market, Traders World, a vast emporium of other people's treasures. Traders World encompasses more than 500,000 square feet of retail space across sixteen pavilion-like buildings. When seen from the sky it mimics the austere grandeur of concentrated animal feeding operations. When seen up close, Traders World is replete: murals of thirty-foot long dolphins, life-size plastic giraffes and elephants. Much of it seems directed toward the animal kingdom in a strange resemblance of the exotic animal trade in Ohio. "It's a shopping safari . . . Enjoy the hunt!" reads the main page of the Traders World website. TRADERS WORLD, <http://www.tradersworldmarket.com/> [<https://perma.cc/4ACN-XN8C>] (ellipsis in original).

160. Drash, *supra* note 61.

161. See Heath, *supra* note 67.

162. *Id.*

## A BID FOR CHAOS

Thompson's ultimate means of creative destruction, and indeed self-necessitated vengeance, was an unpublicized artwork at first. The first person to notice anything wrong on that day in October was Sam Kopchak, Thompson's neighbor.<sup>163</sup> Kopchak was walking his Arabian-pinto horse, Red, to the barn for the night when the horse bolted uncharacteristically. Red's behavior tipped Kopchak off to the broader disturbance he had not yet seen: horses in the nearby field circling proximally to the dark figure of a bear. The equine maelstrom was an omen. After securing Red in hand, Kopchak turned and started walking to the barn. He froze. An African lion stood fifteen feet to his left, its face against a wire fence that was the only barrier between it and Kopchak and his horse. The latter two made it to the barn, walking briskly and calmly, without inciting the lion to test that barrier.

Ultimately, however, it was the exotics that lost in this game of composure. When Sheriff Matt Lutz, Sergeant Steve Blake, and Deputy Jonathan Merry arrived after a calm but insistent call from the Kopchaks' house, they began tracking down escapees one by one. A lioness was shot under a neighbor's porch after it bared its teeth at Merry, its pursuer. Likewise, a black bear charged Merry in Fred Polk's driveway and was shot and killed at a distance of less than twenty feet. Merry and his colleagues killed two more lions, a tiger, and a wolf in the early going, with another forty-three large exotic animals to fall in the ensuing hours.

Overnight and through the next day, rain set in as the world learned of Terry Thompson and his defunct menagerie. Highway signs on Interstate 70 flashed the surreal warning, "CAUTION EXOTIC ANIMALS," and the sheriff's men hunted into the night a scared and disoriented flock of animals meant for other lands. John Moore, the Thompsons' animal caretaker, was enlisted to help find the animals, document their deaths, and identify them by their bodies. Many asked why tranquilizers were not used to bring down the animals, and the popular media mistakenly reported that eighteen of the dead were rare Bengal tigers. Sedation was virtually impossible, animal handlers including Jack Hanna explained. Tranquilizers act on a delay, and animals often charge in response to being shot by such darts. Regardless, John Moore asserts that up to six cats were shot in locked cages, including a pregnant tiger close to giving birth to her cubs.<sup>164</sup> Another twelve animals shot by law enforcement were less than a year old and nondangerous in Moore's view.<sup>165</sup> Despite these criticisms from a not-disinterested Moore, most commentators have supported the decisions and actions of the law enforcement officers.

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163. Unless otherwise specified, for information pertaining to the night of Terry's death and the events that followed, see SIEBERT, *supra* note 10 at loc. 463–529.

164. The officers involved assert that large cut holes in the cages rendered them useless. Jones, *supra* note 1.

165. Moore testified for plaintiffs against the new Ohio Dangerous Wild Animals Law. He stated that, on the night of the tragedy, when he was trying to convince the initial deputies on the scene that he could safely reconfine many of the animals, "the next thing, a truck load of deputies come in with assault rifles and stuff. And that's when it all took off." *Wilkins v. Daniels*, 913 F. Supp. 2d 517, 532 (S.D. Ohio 2012), *aff'd*, 744 F.3d 409 (7th Cir. 2014). When he again told Sheriff Lutz that "we could put some of these animals back," the sheriff responded, "it's a public-safety thing, you know." *Id.*



The dangers were well apparent to Barb Wolfe, a veterinarian affiliated with the Columbus Zoo, who assisted law enforcement officers on the night of the animal release. When a tiger was located the following morning loose and alive in some trees, Wolfe attempted to tranquilize the beast. After slowly creeping to within fifteen feet of the tiger, she raised her rifle and shot a dart into its hide. Someone observing from a distance shouted in excitement after she hit her target. The noise startled the tiger, which leapt to its feet and charged Wolfe. She tried to retreat but became snagged in brush, at which point Jay Lawhorne, a former marine and SWAT team member who had helped lead the overnight hunt, unloaded several rounds into the charging tiger, enabling Wolfe to escape. Ten minutes later Wolfe crept back into the woods to find the tiger still alive and conscious. At that point, “Lawhorne raised his M4 to his shoulder, and he pulled the trigger, and the last Zanesville tiger finally fell, the sound of the bullets echoing between the trees.”<sup>166</sup>

Intentionally or not, Thompson had weaponized his animals in the eyes of the law. Most were shot as they emerged from darkness or enclosures in a state of panic and agitation. The moment of chaos extended for hours, and the officers doubted their ability to protect the land beyond Thompson’s gate, where other animals and their children were bedding down for the night.

#### THE ABSENT STEWARD

Terry Thompson had lived through Vietnam. He knew what carnage looked like. But he did not see the carnage he created: officers shooting the flesh off tigers to retrieve Terry’s splintered body, narcotics experts firing at the flaming thermal image of a grizzly in the night—imagery that would torment the responders for months and even years afterward. Thompson shot himself sometime before four thirty in the afternoon. He made no immediate indication to his friends what he would do that day. At his sentencing a year before, he allegedly promised to “let all [his] animals loose and then blow [his] brains out.”<sup>167</sup> But he was silent on that intention nearer to the day of his death. John Moore, his farm hand, had talked with Thompson on the phone for two hours the morning of the event. Thompson reportedly left saying “[s]ee you tonight at five-thirty.”<sup>168</sup> Moore, instead, was one of the first to see Thompson dead, with a gunshot wound in his throat, a bite mark on his head, and his pelvis in shreds. Thompson had smeared himself with chicken guts before he shot himself. A “Buckeye” tiger had taken Thompson’s invitation and was ripping the flesh from his crotch.

The final act of sacrifice was vintage Terry Thompson: absurd, messy, a memorial unto itself. He created an image of hell that his animals and their pursuers could not escape. One commentator likened his scattered beasts to “deeply disoriented carousel animals whose creators had deserted them.”<sup>169</sup> One bear, a former involuntary entertainer, was shot as it clung to the heights of a telephone pole. Others wandered aimlessly only to charge when they were confronted and then brought down with bullets.

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166. Jones, *supra* note 1.

167. SIEBERT, *supra* note 10, at loc. 422.

168. *Id.* at loc. 435–36.

169. *Id.* at loc. 99.

One of the monkeys, likely bearing hepatitis, was eaten by a tiger. At the end of the carnage, only six animals were recaptured alive. The rest were buried in a mass grave on the Thompson farm. Terry had cursed and killed his kingdom as he died himself, part eaten by his beloved.

Perversely Christlike, Thompson's chicken-gut surrender is barbaric in a way that only animal sacrifice can echo. Fresh raw meat of any source claims a wildness most of us are not prepared to accept as nourishment. Thompson became that wildness. His sinews broke in the mouth of a tiger before the first of his animals would be shot. The only power left to Thompson was to relinquish control and let his kingdom collapse. Marian had left him. The state had subjugated his life, first with the trauma of an ATF raid then through the orderly proceeding of a court. Thompson's private kingdom had been orchestrated with such a high degree of control that its resulting chaos was only a natural unwinding. It was as if a dam had been breached. Thompson said his last rites as water rushed through cracks he had created with bolt cutters, a Magnum revolver, and a dream of wildness.

Marian Thompson was not present to be swept away by the deluge. Thompson shot himself while she was out of state on horse-training work. Marian had allegedly left Terry for another man while Terry was in prison. Despite that choice, she was the one to come home to Kopchak Road, keep house, and take care of the remaining animals after the breach. After the Dangerous Wild Animal Act was passed, Marian duly registered those five animals.<sup>170</sup> She also paid off the back taxes on the Muskingum County Animal Farm and fought for, and won, the return of forty weapons that were confiscated from Terry under federal firearms charges. Marian strategically avoided media attention in the days and months after the release. After securing the return of her remaining animals, which had been sent to the Columbus Zoo in the immediate aftermath of Terry's breakdown, Marian did send an email to local press indicating that she would write a book on the episode. John Moore, the animal caretaker for the Thompsons, wrote one himself with little fanfare.<sup>171</sup>

Absent Marian's view, the story remains one dominated by male voices: Terry Thompson, John Moore the caretaker, Johnathan Merry the deputy, the judge in Thompson's sentencing, Fred Polk the neighbor, Jack Hanna, and Chris Jones and Chris Heath who wrote feature-length articles on the massacre in *Esquire* and *GQ* respectively. The exceptions to this rule are Kathy Thompson, a local journalist, and Terry's sister Polly, who testified against Terry in his animal welfare trial and spoke to reporters after his death.<sup>172</sup> Marian was also, problematically, the one whose personal privacy was the most violated by the ATF raid as she stood exposed for the entirety of the raid, given no opportunity to properly clothe herself while agents swept the house. In the fuller story, she transcends the role that otherwise is pinned to her: the traumatized wife of the suicidal Thompson, the female body that was exposed by the raid. We do not know more of her role because of her understandable decision to limit her exposure. We do know that financially and physically, Marian

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170. Six animals were seized; five were returned. See Thompson *supra* note 24.

171. TERESA HEADLEY & JOHN MOORE, EIGHTEEN DAYS TO THE MASSACRE: AN EXOTIC CAREGIVER'S PERSPECTIVE (3d ed. 2013).

172. Veterinarian Barb Wolfe also achieves notice in the public reporting. See *supra* text accompanying note 166.

bore the burden of establishing normalcy in a place that was publicly scarred by her husband's ultimately selfish actions.

Thompson's selfishness is visible even in acts that purport to kindness or self-sacrifice. In his final offering, a symbol of perverted love, Thompson baited his animals to a certain death. Any animal that fed on him would be marked and killed for having tasted human flesh. More broadly, the fact of Thompson's death was likely to lead to a fatal end for all of his released charges: For one, the erstwhile hunters would have a palpable image of their own mortality and that of the nearby human residents they were meant to protect. Secondly, without the mystical guiding hand of Thompson, the response team was unlikely to trust Moore or any other trainer to secure the animals alive, whether or not they had fed on illicit meat. Thompson's act of release was meant to be irreversible: Cages were compromised such that they ceased to be a haven for those animals who might otherwise have survived the night. No refuge would be safe. Few bodies would be spared.

Further, with the sacrifice of his own body, Thompson crossed the line of language and of empathy heretofore discussed as dividing the species. He violated a sacrosanct directionality of meat implicit in our Western morality systems: Humans can eat nonhuman animals, but no one can eat human flesh. It is important to note that Terry's attempted transubstantiation was seemingly done out of love for himself, rather than for his animals. Even in releasing his nonhuman animals and killing himself, Terry exercised creative-destructive control. Although they walked "free" for a matter of hours, their fates were sealed. Although they ate of his flesh, they did so at his direction. Terry's distorted vision of a unified kingdom, a mutual domain of human and nonhuman animal life, was premised on denying his animals those things which he possessed: autonomy, property, land, and environs he could shape to his desires. Their environs were derelict cages in muddy fields, a continent and an ocean away from the terrain where most of their species originated.

The Dangerous Wild Animals Act may have averted the Zanesville, Ohio, animal massacre had it been in place in the 1990s and 2000s. Terry Thompson's acquisition would have been limited more directly by the strictures of the law. Without auctions of exotic animals, excluded now by the law, the Muskingum County Animal Farm may have never existed. Terry's first exotic animal, a lion cub named Simba that he purchased for Marian's birthday, may have never been sold in Ohio. Instead, once Terry Thompson acquired his flock, our stewardship of him arguably became doomed to fail. Any effort to dispossess him of his nonhuman animals drove him to threats and violence. The state could have enacted a law against suicide by exotic animal release and gunshot. It could have enacted a law hastening removal of exotics from potentially offending parties. But, to John Kasich's point,<sup>173</sup> once Terry decided to break the law, deterrence was pointless and confiscation almost certainly would have been preempted by disaster. In this narrative of failed stewardship, what is missing is the state's control.

The state could not control Terry in the way that he controlled his animals. Short of seizing the animal Terry with a coordinated raid, the state had no power to dictate his immediate actions. Thus the tensile dichotomy breaks down here: where the state's control of Terry never was, or was—but snapped. Likewise, we may question

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173. See *supra* text accompanying note 64.

how possible it is to successfully own or steward exotic animals in perpetuity, notwithstanding the tens of thousands of large animals living in backyard cages throughout the United States today. Control over exotic animals and other beings is not secure unless, perhaps, we tame them. But in taming them, their being is changed. To capture its motion, we grasp a spinning coin. To feel free, some must see only death.<sup>174</sup>

#### SPEAKING IN WILD TONGUES

Stewardship and ownership need the wisdom and control, respectively, of each to meet the goals of either. The other oppositions present in this story—order-chaos, love-fear, democracy-technocracy, freedom-security—also are complex and intertwined. Behind walls of apparent order destructive pressure builds. In loving truly, we render ourselves vulnerable to fearsome pain and disappointment. A successful democracy could not function without deferring some decisions to unelected minds. Freedom from harm requires limitations on one's own and others' actions. Those limitations are themselves a type of harm. Real violence, for example, was perpetrated on Terry and Marian Thompson during the government's ATF raid.<sup>175</sup>

When acknowledging these poles and their coexistence, integrative thinking and perhaps religious guidance may be of some use: Religion, in its better shades, can offer individuals a means of accepting such dualities and limitations, or even acknowledging, grappling with, and sometimes overcoming seemingly fated failures. At its worst, individuals can use religion to justify violence when their limited world is threatened. Thompson did not profess a religion, but the specific choice of his bodily sacrifice amounts to a religious act: it expresses meaning, perhaps transcendent in Thompson's eyes, through a ritual that has no clear economic import. Through the act, Thompson acknowledged, but lashed out at, a limitation on his life. It is an essential limitation: constraining one's action to live in society, including close communities and the broader regulatory state. At times, Thompson seemed willing in his life to accept other fundamental limitations: the kind necessary to live in relationship with one's immediate kin. Kin here includes the fifty-six nonhuman residents in Thompson's home. They were the only kin Thompson had left at Kopchak Road when Marian left. He loved them, selfishly but intensely, and too consumingly to keep Marian, and others, in his life.

The distant world loved Thompson's animals too, but was not willing to enter into their society unprotected. Kathy Thompson, a Zanesville reporter of no direct relation to Terry, had such intentions when she visited the Thompson's property several years prior, anticipating that the big cats would be in cages. They were not: A full-grown panther walked through Kathy's legs and looked up at her while she idly watched Marian bottle feed a cougar. Kathy, to her own surprise, petted a Siberian

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174. See Rainer Maria Rilke, *The Eighth Elegy*, in *THE POETRY OF RAINER MARIA RILKE* 39 (A.S. Kline trans., 2001) ("Since near to death one no longer sees death, and stares ahead, perhaps with the large gaze of the creature."). The authors thank Robert Post for drawing our attention to Rilke's vision of the sublime in death as rendered in these elegies.

175. This reciprocal nature of harm is well-known in the field of law and economics, although its tragic aspect fails to register there. See R. H. Coase, *The Problem of Social Cost*, 3 *J. LAW ECON.* 1, 2 (1960).

tiger in the Thompsons' yard. "I thought, I'm never going to have this opportunity again," Kathy recounted about her visit to the Thompson's.<sup>176</sup> The latent power of these animals had thrilled her. In communing with them we become strangers to ourselves as much as we become kin to the animals. Aldo Leopold understood the heart of this appeal when he described seeing the "fierce green fire dying" in the eyes of a wolf he had hunted.<sup>177</sup> The fire was "something new to [him] . . . something known only to her and to the mountain."<sup>178</sup> Leopold was etching a new conservation ecology. By narrating wolves' role as a keystone species, he echoed an interconnectedness of things tracked by field notes and calculus. He also spoke to an intimacy inherent in our experience of predators. We love them because they threaten us like few other beings can. We experience an old adage in reverse: "Those who can hurt you, you may love the most."

Thompson undoubtedly knew this as well, but he failed to limit himself in ways that were necessary to keep his beloveds in his life and him in theirs. He did not operate by the rules of his neighbors, guilds, or government. Years after his death, it was Marian who put their house in order, while his ashes rested in an urn emblazoned with the American flag. His collection of guns was not only illegal, but inordinate; and his penchant for antics betrayed a sense of defiant separatism. When Thompson was released from prison he bought a bicycle from Walmart and rode it fifty miles home to 270 Kopchak Road instead of calling a friend or family member for a ride.<sup>179</sup> The decision echoed his walk home in a rainstorm from a local airstrip when he returned from Vietnam, a veteran.<sup>180</sup> Thompson reportedly felt betrayed by his country. (Who would not, brought home from indiscriminate horror to indiscriminate shame?) He was an isolated soul who had chosen not to play by the rules. His story calls us to consider how we reach those in universities, workplaces, small towns, and backwoods who choose self-immolation over self-limitation. How do we alter the paths of those who risk self-destruction and violence when they feel unfree?

Those questions notwithstanding, Terry Thompson *can* teach us where and how stewardship fails: when it operates ignorant of societal or physical limitations; when the "sovereign expressions of life"<sup>181</sup>—any life—go unacknowledged; when pride relinquishes responsibility to others out of spite. Further, the response to Thompson's actions can teach us how stewardship incrementally moves forward: with greater complexity and attention to the needs of others; with heeding of self-limitations required for healthy relationships, communities, and political systems within which we may otherwise feel encaged; and with recognition that such self-limitation is actually necessary for any self-possession that can genuinely exist.

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176. SIEBERT, *supra* note 10, at loc. 150.

177. ALDO LEOPOLD, *Thinking Like a Mountain*, in *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE*, *supra* note 41, at 129, 130.

178. *Id.*

179. SIEBERT, *supra* note 10, at loc. 425–26.

180. *Id.* at loc. 426–27.

181. *See generally* K. E. LØGSTRUP, *BEYOND THE ETHICAL DEMAND* (Susan Dew & Heidi Flegal trans., 2007) (elaborating on Løgstrup's previously posited concept of "sovereign expressions of life," which holds that other-regarding behaviors or impulses—translated as mercy, trust, sincerity—break through one's otherwise selfish thoughts and habits to form an essential aspect of human relational behavior).

The slide into dysphoria had been long in the making for Zanesville. In the aftermath of the event, some of Terry Thompson's neighbors recalled portents. Some described to reporters what it had felt like to be awakened at night by occasional spine-dusting screams from the Thompsons' property, animalian sounds the neighbors described as "unreal," and we might add otherworldly.<sup>182</sup> Although owned by Thompson, those animals belonged elsewhere. Their presence often seemed that of ghosts, even as the threat and suffering they represented was incarnate. Hence, the most basic lesson of the Zanesville saga: our neighbors' screams are real and of this world. Only in language and other models can harms be "external."

The less basic lesson is harder to voice: violence is not expunged from legal ordering, even when premised on stewardship. But violence accompanied by recognition and respect is not reducible to chaos. Consider again Ohio's newly promulgated exotic-animal ownership regime. By requiring fulfillment of stringent animal welfare standards or accreditation with zoological associations, Ohio's statute moves toward a set of modified property rights that take into account a slightly larger sphere of interests: those of the nonhuman animals who have previously been treated little different from other kinds of ownable chattel. Although traced, micro-chipped, and *other*-ed by the law, they also are treated with the distance, space, and, yes, even fear that their selves and bodies command. Incorporating those dignity interests—even indirectly—is a movement at the edges of the liberal state, where democracies consider the needs of those not formally present in deliberations or voting booths. Stewardship lies in that council. As it should: we should love those that speak in wild tongues, heeding limits we adopt at will to participate in our relationships, communities, democracies, and environments.

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182. See Jones, *supra* note 1.