

DON'T FEED THE ANIMALS: QUESO'S LAW AND HOW THE TEXAS
LEGISLATURE ABANDONED STRAY ANIMALS, A COMMENT ON
H.B.2328 AND THE NEW TEX. PENAL CODE § 42.092

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I. INTRODUCTION

A. *Boy Meets Cat: A Hypothetical*

Paul works the late shift at an all-night diner near the local college. One night, while taking the trash out, he notices a black and white cat sniffing around the trash cans outside. The cat, he learns, lives off the cheese, salsa, and other food customers leave behind. After a while, he starts referring to the stray simply as "Cat," in honor of Audrey Hepburn. Concerned that Cat isn't getting enough nutrition from leftover cheese and salsa, Paul starts intentionally saving tidbits from his own meals and sets up a donation box for food and loose change. The workers and regulars at the diner grow fond of Cat, so Paul never takes her home, even though nobody else takes care of her.

One night, very late, two brooding college students, Tim and Shane, are drowning their sorrows in coffee at the diner. When they finally leave, Cat, who had been investigating the trashcan near the door, stops and stares at them. Since neither of the students is a regular at the diner, they don't know Cat or her ways. They mistake her aloofness as one more rejection by the cold, cruel world. Their self-control breaks. One pulls a golf club from his car. He walks over to Cat and sets his feet. Cat just watches him; she has learned to trust people. The student winds up and swings, landing a blow squarely in her ribs and launching her across the parking lot. Cat screams wildly as she tumbles through the air until she lands in a lump. Inside the diner, Paul and some regulars hear Cat's wild screaming and run out to see what has happened. Several regulars point the finger at the college students. They jump into the car and speed away. Later that day,

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the police arrest the college students and charge them with cruelty to animals for the brutal attack on Cat.¹

Later that day, Paul takes Cat to a local veterinarian. The veterinarian diagnoses several broken ribs, some internal wounds, and a high risk of infection, with veterinary bills approaching \$5000. Even though Paul has recently been promoted to night-shift manager, that's a lot of money for him, far more than his little donation box has ever collected. He thanks the veterinarian and promises to consider his options carefully.

Paul is faced with three options. First, he can proceed with the treatment, finding \$5000 somewhere. Second, Paul can have Cat euthanized at a cost of about \$100. While this option is far less expensive, Paul does not have \$100. Finally, Paul can do nothing, which would cost him nothing. The first option is prohibitively expensive, and the third option is morally indefensible. A reasonable person in Paul's situation would probably choose euthanasia.

But Paul doesn't have \$100 in disposable income, so he decides to hold a fund-raiser. He returns Cat to the alley behind the diner until he can raise the money. Unfortunately, Cat dies from an infection complicated by the internal bleeding before Paul can raise enough money. The veterinarian, perturbed at Paul's failure to grasp the seriousness of Cat's injuries, has contacted the district attorney and wants to press charges for cruelty to animals.²

B. Queso's Law: What Paul Did Wrong

Cruelty to animals has been a crime in Texas since at least 1858.³ The statute, however, remained relatively simple until the twenty-first century.

¹Tim and Shane will almost certainly be convicted of Cruelty to Non-Livestock Animals. See Tex. Penal Code Ann. § 42.092(b)(1) (Vernon Supp. 2008) (stating that "a person commits an offense if the person intentionally . . . in a cruel manner kills . . . an animal"). Their conviction is an intended consequence of the statute that created § 42.092. This Comment examines the unintended consequences of that statute.

²This hypothetical is loosely based on an incident involving two Baylor University students who were indicted for animal cruelty after shooting, decapitating, and skinning a feral cat called "Queso." See generally Brandi Dean, *Cat Trial Begins*, BAYLOR LARIAT, Mar. 19, 2002, at 1; Stephen Dove, *Former Baseball Player Acquitted in Cat Trial*, BAYLOR LARIAT, Mar. 20, 2002, at 1. See discussion *infra* Part II.B.3.

³Act approved Feb. 12, 1858, 7th Leg., R.S., ch. 121, art. 713, 1858 Tex. Gen. Laws 156, 178, reprinted in 4 *H.P.N. Gammel, The Laws of Texas 1822-1897*, at 1028, 1050 (Austin, Gammel Book Co. 1898).

The underlying policy has shifted, particularly in the last ten years, from protecting animals as property⁴ to protecting animals as creatures intrinsically worthy of protection. Before 2007, feral animals did not fall within the class of animals protected by the statute. In the years leading up to the 2007 legislative session, however, juries acquitted several defendants on this very basis, including the highly controversial case involving two baseball players at Baylor University and a feral cat named Queso.⁵ To close this perceived loophole, the 80th Legislature passed H.B. 2328—what this Comment will refer to as “Queso’s Law”—with the intent that the class of protected animals would expand to include feral cats like Queso.⁶ The passage of Queso’s Law, however, substantially muddied the waters and may have done little more than trade one injustice for another.

Texas punishes several varieties of cruelty to animals. This Comment explores two particular varieties: neglect⁷ and abandonment.⁸ All the statutory varieties of animal cruelty, including neglect and abandonment, share two elements: acting with intent, knowledge, or recklessness; and having a particular relationship with the animal (“custody”). The difference between each of the varieties lies solely in the actions of the defendant. Neglect requires “fail[ing] unreasonably to provide necessary food, water, care, or shelter” to an animal⁹; abandonment “includes abandoning an animal . . . without making reasonable arrangements for assumption of custody by another person.”¹⁰ As will be shown, Paul has both neglected and abandoned Cat, at least in the statutory sense. He neglected her by failing to provide the necessary veterinary care to keep her alive, and he abandoned her when he left her on her own in the alley. Whether Paul would actually be convicted, of course, rests with the jury. As will be discussed below, several fact-specific questions are important and must be

⁴The animals protected in the earliest statute were “horse, mare, gelding, jack, jennet, mule, colt, cattle, sheep, goat, swine, [and] dog.” *Id.* With the possible exceptions of dogs, these are all farm animals; they are treated more like tools and less like pets.

⁵See generally Dean, *supra* note 2, at 1; Dove, *supra* note 2, at 1.

⁶Act of May 23, 2007, 80th Leg., R.S., ch. 886, 2007 Tex. Gen. Laws 2163. I refer to this as Queso’s Law because the legislative history indicates that the incident discussed *supra* in note 2 served as part of the impetus behind its passage. House Research Organization, Bill Analysis, Tex. H.B. 2328, 80th Leg., R.S. (2007).

⁷Tex. Penal Code Ann. § 42.092(b)(3) (Vernon Supp. 2008).

⁸*Id.* § 42.092(b)(4).

⁹*Id.* § 42.092(b)(3).

¹⁰*Id.* § 42.092(a)(1).

answered in each individual case. A conviction under these facts, however, would not merit reversal for legal insufficiency.

Queso's Law, among other things, broadened the definition of animal. Prior to the 80th Legislature, the statutory term animal was limited to two classes: domesticated living creatures and wild living creatures previously captured.¹¹ Queso's Law broadened that definition by adding the words "including any stray or feral cat or dog" immediately following the domesticated living creature category.¹² The statutory term animal now "means a domesticated living creature, including any stray or feral cat or dog, and a wild living creature previously captured. The term does not include an uncaptured wild living creature or a livestock animal."¹³ Prior to Queso's Law, whether feral animals like Cat were protected by the animal cruelty statutes was not clear. The legislature intended Queso's Law to answer that question affirmatively.

C. Punishing Paul under Queso's Law

Paul would probably be convicted. Society is particularly passionate about animal cruelty. The media coverage of the Queso incident illustrates that passion. When news of the Queso incident first broke in March 2001, newspapers from Atlanta,¹⁴ New York City,¹⁵ Toronto,¹⁶ and Ottawa¹⁷ ran stories, at least in brief. *Sports Illustrated* ran a brief on the story in its year-in-review issue.¹⁸ News of the acquittal and the public response was reported nationally in the *Washington Times*¹⁹ and prompted a spot on *Fox on the Record with Greta Van Susteren* in early April 2002.²⁰ In addition to the heavy media coverage, many individuals responded personally to the

¹¹ See Acts 1973, 63d Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883 (amended 2007) (current version at Tex. Penal Code Ann. § 42.092 (Vernon 2008)).

¹² Tex. Penal Code Ann. § 42.092(a)(2) (Vernon 2008).

¹³ *Id.*

¹⁴ *Nation in Brief*, ATLANTA JOURNAL-CONSTITUTION, Mar. 23, 2001, at 8A.

¹⁵ *The Sports Blotter*, N.Y. POST, Mar. 23, 2001, at 099.

¹⁶ *Ball Notes Yank Hopes Left Is Right*, TORONTO STAR, Mar. 23, 2001, Sports.

¹⁷ *Knight Sees Day at Texas Tech*, OTTAWA SUN, Mar. 23, 2001, at 66.

¹⁸ Steve Rushin, *It Came from the Sports Page!*, SPORTS ILLUSTRATED, Dec. 24, 2001, at 90.

¹⁹ Hugh Aynesworth, *Cat Killers' Acquittal Raises Ire; Texas Animal-Rights Activists Fume over "Wild" Loophole*, WASH. TIMES, Apr. 2, 2002, at A06.

²⁰ *Fox on the Record with Greta Van Susteren: Interview with Russ Hunt Sr. and Bruce Friedrich* (Fox News Network television broadcast Apr. 3, 2002) (transcript number 040305cb.260).

Queso incident. An editor of the *Waco Tribune-Herald* reported, “Letters have poured in. *Trib* readers will not get to read all of them, [only] partly because of space”²¹ The defense counsel for one of the students charged in the Queso incident told me that, in all his years practicing criminal defense, his life has been threatened only once—during his involvement with the Queso incident.²² And the response to the Queso incident is not atypical. Consider the public response to allegations that professional football player Michael Vick was involved with dog fighting.²³ Clearly, animal cruelty outrages the public. Once a defendant is found, conviction is almost guaranteed; the only question is the severity of the sentence. Under these circumstances, Paul’s conviction would be merited and reasonably likely.

The proponents of Queso’s Law sought admirable goals. They wanted to make it easier to convict those who are cruel to animals and to punish them more severely. Subsection (c) of the new section 42.092 of the Texas Penal Code classifies neglect and abandonment both as Class A misdemeanors, punishable by up to \$4000 in fines or one year in jail, or both.²⁴ But what has Paul really done? He reached out to a stray kitten and tried to improve its life. Surely that’s not the kind of conduct targeted by the proponents of Queso’s Law. Paul’s case illustrates that the drafters of Queso’s Law may have thrown the baby out with the bath water.

D. Fixing Queso’s Law

This Comment considers Queso’s Law, its amendments to section 42.092 of the Texas Penal Code, and the impact of those amendments on animal cruelty law in Texas. Part II discusses the historical background of animal cruelty laws both in Texas, prior to the 80th Legislature, and elsewhere. Part III discusses animal cruelty law in the wake of Queso’s Law, including the elements of the offense as well as constitutional and policy concerns. Part IV proposes a solution to the concerns raised by Queso’s Law. Finally, the Comment concludes that the expanded definition

²¹John Young, Editorial, *A Stray Cat’s Afterlife*, WACO TRIBUNE-HERALD, Apr. 1, 2001, at 12A.

²²Interview with Rod S. Goble, Attorney at Law, in Waco, Tex. (Mar. 12, 2008).

²³See, e.g., David Downing, Editorial, *Michael Vick Let Us All Down with Actions*, POST-STANDARD (Syracuse, N.Y.), Sept. 4, 2007, at B2.

²⁴Tex. Penal Code Ann. § 49.092(c) (Vernon Supp. 2008); Tex. Penal Code Ann. § 12.21 (Vernon 2003).

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of animal created by Queso's Law is too broad and that slightly re-wording the definition to create a "custody carve-out" would better protect the interests of feral animals.

II. ANIMAL CRUELTY LAWS THROUGHOUT THE AGES

A. *Animal Cruelty Laws Outside Texas*

Hammurabi's Code, one of humanity's earliest codes, did not prohibit cruelty to animals.²⁵ Nor did Hebrew Mosaic Law, though it created an affirmative obligation to care for animals.²⁶ Later, as humankind developed and civilization flourished, lawmakers began to recognize the evil of cruelty to animals. In the seventeenth century, the first English settlers of Massachusetts expressly prohibited cruelty to animals.²⁷ Three hundred years later, the Model Penal Code outlined an offense for cruelty to animals.²⁸ By 1992, animal cruelty laws had become so pervasive in the United States that the American Law Reports published a special annotation.²⁹

²⁵*The Code of Hammurabi*, <http://www.wsu.edu/~dee/MESO/CODE.HTM> (last visited on Nov. 26, 2008). Sections 261 through 267 deal with the allocation of loss from the death of an animal. Sections 263 and 264 specifically articulate that a herdsman who kills cattle or sheep or "diminish[es] the number" must compensate the owner for the loss. The compensatory nature of the statute, however, makes it more akin to a tort than a crime.

²⁶*Exodus* 23:4–5 (requiring the Israelites to return oxen and donkeys who wander off and to help overloaded donkeys).

²⁷NATHANIEL WARD, MASSACHUSETTS BODY OF LIBERTIES, § 92 (1641), available at <http://www.bartleby.com/43/8.html> (prohibiting the "exercise [of] any Tyranny or Cruelty toward any brut creature which are usually for man's use").

²⁸MODEL PENAL CODE § 250.11 (1962).

²⁹Sonja A. Soehnel, Annotation, *What Constitutes Offense of Cruelty to Animals—Modern Cases*, 6 A.L.R.5TH 733 (1992) (citing cases from every State except Alaska, Delaware, Mississippi, Montana, Nevada, New Jersey, South Carolina, South Dakota, Virginia, West Virginia, and Wyoming); see also 4 AM. JUR. 2D *Animals* § 23 (2007) ("Statutes have been enacted in most jurisdictions which have for their common object the protection of animals from the . . . cruelty of persons . . .").

B. Animal Cruelty Laws in Texas

1. Before the Penal Code of 1973

Every penal code in Texas history has prohibited cruelty to animals.³⁰ The definition of animal has always been clearly defined, beginning with Article 713 of the Penal Code of 1858, which listed various specific animals, including dogs but, notably, excluding cats.³¹ Punishment was limited to a fine of \$250 with no possibility for confinement.³² In 1879, the Sixteenth Legislature moved the statute to Article 680 and expanded the protected class of animals to include “dog[s] or any other domesticated animal,” without altering the punishment.³³ In 1901, the legislature reduced the maximum fine for cruelty to animals to merely \$100.³⁴ Twelve years later, the Penal Code expressly prohibited neglect for the first time.³⁵ Over the next two decades, the legislature continued expanding and complicating the statute, adding abandonment to its prohibitions and broadening the definition of animal to include “every living dumb creature,” as well as increasing the maximum fine to \$200.³⁶ After a turbulent first seventy years, the statute stagnated between 1925 and 1973, when the legislature passed the current Penal Code. In sum, at the time of the 1973 codification, the State of Texas punished animal cruelty, including neglect and abandonment, by a fine of up to \$200.

³⁰ Act approved Feb. 12, 1858, 7th Leg., ch. 121, art. 713, 1858 Tex. Gen. Laws 156, 178, reprinted in 4 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1028, 1050 (Austin, Gammel Book Co. 1898).

³¹ *Id.*

³² *Id.*

³³ Tex. Penal Code of 1879, arts. 679–80, available at <http://www.sll.state.tx.us/codes/1879/1879pen2.pdf>.

³⁴ Act of Apr. 19, 1901, 27th Leg., R.S., ch. 121, § 1, 1901 Gen. Laws 289, 289 (amended 2007) (current version at Tex. Penal Code Ann. § 42.092 (Vernon Supp. 2008)). Re-codification in 1911 renumbered the provision a third time as article 1231, but this did not substantively alter the statute. Tex. Penal Code of 1911, art. 1231.

³⁵ Act of Mar. 31, 1913, 33d Leg., R.S., ch. 88, §§ 1, 12, 1913 Tex. Gen. Laws 168, 168 (amended 2007) (current version at Tex. Penal Code Ann. § 42.092 (Vernon Supp. 2008)); 2 Branch’s Texas Penal Code § 2212 (1916) (expanding the definition of cruelty to include “every act, *omission or neglect* whereby unnecessary or unjustifiable pain or suffering is caused, permitted or allowed to continue, when there is a reasonable remedy or relief” (emphasis added)).

³⁶ Act of Mar. 31, 1913, 33d Leg., R.S., ch. 88, §§ 1, 12, 1913 Tex. Gen. Laws 168, 168 (amended 2007); Act of Mar. 13, 1919, 36th Leg., R.S., ch. 59, § 1, 1919 Tex. Gen. Laws 99, 99 (amended 2007) (current version at Tex. Penal Code Ann. § 42.092 (Vernon Supp. 2008)).

2. The Penal Code of 1973

The Texas Legislature began a massive project to codify the entirety of Texas statutory law under the aegis of the Texas Legislative Council in 1963.³⁷ The Council began working on the Penal Code in 1965.³⁸ The new Penal Code, passed on May 24, 1973, and effective January 1, 1974, placed the animal cruelty prohibition in section 42.11.³⁹

The 1973 Penal Code slightly expanded the prohibitions on neglect and abandonment, but it narrowed the protected class of animals. Where the 1925 neglect provision prohibited “*unnecessarily* fail[ing] to provide [an animal] with proper *food [or] drink*,” the 1973 provision prohibited “fail[ing] *unreasonably* to provide necessary *food, care, or shelter*.”⁴⁰ Significantly, the 1973 Penal Code replaced “unnecessarily” with “unreasonably” and added “care” and “shelter” to what an individual had to provide for an animal. However, both the 1925 and 1973 Penal Codes only punished neglect when the defendant had a custodial relationship with the victim animal.⁴¹

Similarly, the 1973 Penal Code expanded the prohibition on abandonment from “cruel abandonment” to the more inclusive “unreasonable” abandonment.⁴² Moreover, the 1973 Penal Code clarified that a defendant cannot criminally abandon an animal of which he does not have custody.⁴³ Additionally, the 1973 Penal Code narrowed the meaning of the term *animal*, from the 1925 Penal Code’s broad definition (“every

³⁷ Act of May 21, 1963, 58th Leg., R.S., ch. 448, §§ 1, 2, 1963 Tex. Gen. Laws 1152, 1152. See also Robert E. Freeman, *The Texas Legislative Council’s Statutory Revision Program*, 29 TEX. B.J. 1021, 1021 (1966).

³⁸ See T. Gilbert Sharpe, *A Proposed New Penal Code for Texas*, 35 TEX. B.J. 1111, 1111 (1972); Acts 1973, 63d Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 883 (amended 2007).

³⁹ Acts 1973, 63d Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 883 (amended 2007).

⁴⁰ Compare Act of Mar. 31, 1913, 33d Leg., R.S., ch. 88, § 1, 1913 Tex. Gen. Laws 168, 168 (amended 2007) (emphasis added), with Acts 1973, 63d Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 883 (amended 2007) (emphasis added).

⁴¹ Compare Act of Mar. 31, 1913, 33d Leg., R.S., ch. 88, § 1, 1913 Tex. Gen. Laws 168, 168 (amended 2007), with Acts 1973, 63d Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 883 (amended 2007).

⁴² Compare Act of Mar. 31, 1913, 33d Leg., R.S., ch. 88, § 1, 1913 Tex. Gen. Laws 168, 168 (amended 2007), with Acts 1973, 63d Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 883 (amended 2007).

⁴³ Acts 1973, 63d Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 883 (amended 2007).

living dumb creature”⁴⁴ to the much narrower “domesticated living creatures and captured wild animals.”⁴⁵ Finally, the 1973 Penal Code drastically increased the severity of the punishment for animal cruelty. Under the 1925 Penal Code, animal cruelty was punishable only by a fine of up to \$200. Under the 1973 Penal Code, animal cruelty became a Class A misdemeanor, punishable by fines of up to \$2000 and confinement for up to one year in prison.⁴⁶ In 1997, the legislature added an enhancement provision, making the third offense a state jail felony.⁴⁷

In interpreting most products of the codification project, these alterations would be considered little more than formal changes not affecting the substance of the statute.⁴⁸ Unlike with other codifications, however, the revision committee was charged with both re-codifying and reforming the prior criminal law.⁴⁹ Because the drafters intended to reform the prior penal law, one should not disregard these changes as merely formal.⁵⁰ The 1973 Penal Code substantively changed certain aspects of Texas criminal law, and those substantive changes should be recognized. The 1973 Penal Code did not alter the animal cruelty statute as extensively as other provisions,⁵¹ but the alterations made should not be ignored in interpreting the statute in its present state.

⁴⁴ Act of Mar. 31, 1913, 33d Leg., R.S., ch. 88, § 12, 1913 Tex. Gen. Laws 168, 170 (amended 2007).

⁴⁵ Acts 1973, 63d Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 883 (amended 2007).

⁴⁶ Act effective Jan. 1, 1974, 63rd Leg., ch. 399, § 1, 1973 Tex. Gen. Laws 883 (amended 1991) (current version at Tex. Penal Code Ann. § 12.21 (Vernon 2003)). The 1973 statute was amended in 1991 to increase the maximum fine to \$3000. Act of May 14, 1991, 72d Leg., R.S., ch. 108, § 1, 1991 Tex. Gen. Laws 681 (amended 1993) (current version at Tex. Penal Code Ann. § 12.21 (Vernon 2003)). The statute was amended again in 1993 to increase the maximum fine to \$4000. Tex. Penal Code Ann. § 12.21 (Vernon 2003).

⁴⁷ Act of May 26, 1997, 75th Leg., R.S., ch. 1283, § 1, sec. 42.09, 1997 Tex. Gen. Laws 4906 (amended 2007) (current version at Tex. Penal Code Ann. § 42.092(c) (Vernon Supp. 2008)).

⁴⁸ See Tex. Gov't Code Ann. § 323.007(b) (Vernon 2005) (prohibiting the Texas Legislative Council from “alter[ing] the sense, meaning, or effect of the statute”).

⁴⁹ See generally Page Keeton & Seth S. Searcy III, *A New Penal Code for Texas*, 33 TEX. B.J. 980 (1970).

⁵⁰ See *id.* at 984.

⁵¹ See, e.g., Acts 1973, 63d Leg., R.S., ch. 399, § 1, § 6.03, 1973 Tex. Gen. Laws 883, 883 (defining culpable mental states for the first time in Texas legal history).

3. The 1990s and 2000s Amendments

After codification of the 1973 Penal Code, the animal cruelty statute remained stagnant for two decades. In 1993, the legislature renumbered the animal cruelty statute as section 42.09 but made no substantive changes.⁵² In 2001, the 77th Legislature defined several important terms that had never before been defined under Texas law. First, the 2001 act defined custody: “‘Custody’ *includes* responsibility for the health, safety, and welfare of an animal subject to the person’s care and control, regardless of ownership of the animal.”⁵³ Second, the 2001 act defined the central element of neglect: “‘Necessary food, care, or shelter’ includes food, care, or shelter provided to the extent required to maintain the animal in a state of good health.”⁵⁴ Finally, the 2001 act defined abandon to include the failure to make “reasonable arrangements for assumption of custody by another person.”⁵⁵ Queso’s Law renumbered these provisions within the new section 42.092 but did not significantly alter the language.⁵⁶

In 2007, the 80th Legislature passed Queso’s Law, expanding the definition of animal. Representative Beverly Woolley of Houston introduced H.B. 2328 on March 2, 2007, which would have redefined animal to mean “a nonhuman mammal, bird, or captive amphibian or reptile that is not a livestock animal.”⁵⁷ On April 18, the House of Representatives amended the bill to retain the 1973 definition of animal.⁵⁸ Later, the Senate Committee on Criminal Justice substituted a bill adding the phrase

⁵² Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 1.01, sec. 42.11, 1993 Tex. Gen. Laws 3586, 3679 (amended 2007) (current version at Tex. Penal Code Ann. § 42.092 (Vernon Supp. 2008)).

⁵³ Act of May 24, 2001, 77th Leg., R.S., ch. 450, § 1, sec. 42.09, 2001 Tex. Gen. Laws 887, 888 (amended 2007) (current version at Tex. Penal Code Ann. § 42.092(a)(4) (Vernon Supp. 2008)) (emphasis added).

⁵⁴ *Id.* (current version at Tex. Penal Code Ann. § 42.092(a)(7) (Vernon Supp. 2008)).

⁵⁵ *Id.* (current version at Tex. Penal Code Ann. § 42.092(a)(1) (Vernon Supp. 2008)).

⁵⁶ See Act of May 23, 2007, 80th Leg., R.S., ch. 886, § 2, 2007 Tex. Gen. Laws 2163, 2165.

⁵⁷ Tex. H.B. 2328, 80th Leg., R.S. (2007), *available at* <http://www.legis.state.tx.us> (introduced version). As evidenced by the engrossed version of H.B. 2328, the legislators behind Queso’s Law intended to divide the animal cruelty statute into two statutes, one protecting livestock animals and one protecting non-livestock animals. Tex. H.B. 2328, 80th Leg., R.S. (2007), *available at* <http://www.legis.state.tx.us> (engrossed version).

⁵⁸ H.J. of Tex., 80th Leg., R.S. 2063–64 (2007). The definition in the amendment slightly modified the 1973 definition in light of the intended division of the old animal cruelty statute into two new statutes.

“including any stray or feral cat or dog.”⁵⁹ The Senate passed the substituted bill on May 21, the House concurred two days later, and Governor Rick Perry signed the bill into law on June 15.⁶⁰ The definition of animal now reads: “a domesticated living creature, including any stray or feral cat or dog, and a wild living creature previously captured [but] does not include an uncaptured wild living creature or a livestock animal.”⁶¹

This new definition is generally clear. Cattle and sheep, for example, will almost certainly be considered livestock animals. Fire ants and coyotes will almost certainly be considered uncaptured wild living creatures. Household pets will almost certainly be considered domesticated living creatures. And “stray or feral cats or dogs,” while undefined in the statute, are generally recognizable as lying somewhere between domesticated living creatures and uncaptured wild living creatures. Thus, in most situations, a particular animal will clearly belong to one of the statutory categories, either within or without the class of protected animals. The problem, however, lies in the application of that definition to the prohibitions.

III. ANIMAL CRUELTY LAW AFTER QUESO’S LAW

This Comment focuses on the impact of Queso’s Law on the crimes of animal neglect and animal abandonment. Section 42.092 will be explored in-depth to determine: first, the elements of neglect and abandonment; second, the constitutionality of section 42.092; and third, the policy implications of Queso’s Law. Throughout the following text, the analysis will be applied to the hypothetical situation involving Paul and Cat discussed in Part I.A to assist in clarifying the impact of Queso’s Law.

A. *The Elements of Animal Cruelty*

This Comment analyzes two of the several animal cruelty crimes: neglect and abandonment. As discussed above, these two crimes share circumstantial and mental state elements and differ only as to the criminal act. To be convicted for either crime, a person with custody of the animal

⁵⁹Tex. H.B. 2328, 80th Leg., R.S. (2007), available at <http://www.legis.state.tx.us> (as reported by the Senate Comm. on Criminal Justice).

⁶⁰S.J. of Tex., 80th Leg., R.S. 2448 (2007); H.J. of Tex., 80th Leg., R.S. 5525, 7404–05 (2007).

⁶¹Tex. Penal Code Ann. § 42.092(a)(2) (Vernon Supp. 2008). The final definition reflects the legislature’s intent to divide the old animal cruelty statute. Because this Comment focuses on the non-livestock animal statute, that distinction will be ignored.

must have acted intentionally, knowingly, or recklessly.⁶² To be convicted for neglect, the defendant must have unreasonably failed to provide necessary food, water, care, or shelter to an animal.⁶³ To be convicted for abandonment, the defendant must have unreasonably abandoned the animal.⁶⁴ As will be shown, each of these elements can be found in Paul's relationship with Cat.

1. Custody of the Victim Animal

Whether an individual has custody of an animal is rarely the paramount issue in a case.⁶⁵ When it does arise, the dispute is typically over who had custody, not whether anyone had custody.⁶⁶ It is a very rare case indeed (at least before Queso's Law) where a defendant could argue "I don't have custody of this animal, nor does anyone else, so I've done nothing wrong." Feral cats,⁶⁷ however, have become the exception. Feral cats, by definition, are "domestic animals that [have] returned to a wild state."⁶⁸ Because of their "wild state," they seem to be outside the protection of animal cruelty prohibitions that depend on custody. But Queso's Law expressly extended protection to feral cats, thereby grafting the issue of custody onto situations like Paul's, where an individual apparently assumes responsibility for a feral cat. Therefore, we must determine whether Paul has custody of Cat.

Custody has been an element of neglect and abandonment for as long as the crimes have been punished under Texas law.⁶⁹ The statutory term

⁶²*Id.* § 42.092(b)(3)–(b)(4). It may be worth noting that Queso's Law also expanded the law by prohibiting reckless animal cruelty for the first time in Texas history.

⁶³*Id.* § 42.092(b)(3).

⁶⁴*Id.* § 42.092(b)(4).

⁶⁵*But see* Sonja A. Soehnel, Annotation, *What Constitutes Offense of Cruelty to Animals—Modern Cases*, 6 A.L.R.5TH 733, 757–58 (1992) (citing seven cases where custody of the animal was contested but not indexing the issue of custody).

⁶⁶*See, e.g.,* State v. Yorzcyk, 356 A.2d 169, 171 (Conn. 1974) (reversing conviction for animal neglect where evidence showed that someone other than the defendant had custody of the animals at the time of the neglect).

⁶⁷For the remainder of this Comment, for ease of reference, I will refer only to "feral cats" and not "stray or feral cats or dogs." The term "feral cats" should be interpreted within this Comment as referring to the entire classification.

⁶⁸BLACK'S LAW DICTIONARY 96 (8th ed. 2004).

⁶⁹*See* Act of Mar. 31, 1913, 33d Leg., R.S., ch. 88, § 1, 1913 Tex. Gen. Laws 168, 168 (amended 2007).

remained undefined, however, until 2001.⁷⁰ That act defined custody as including responsibility for an animal subject to the individual's care and control, whether or not that individual owned the animal.⁷¹ If we understand the statutory meaning of custody, determining whether a particular person had custody should not be difficult.

The Court of Criminal Appeals endorsed a two-step process for determining the meaning of a statutory term in *Sanchez v. State*.⁷² First, the fair and objective meaning should be discerned from the text.⁷³ Second, the fair and objective meaning should be examined for any ambiguities.⁷⁴ If no ambiguities exist—that is, the meaning would be plain to anyone reading the text⁷⁵—then the fair and objective meaning controls.⁷⁶ But if the fair and objective meaning is ambiguous or would lead to “absurd consequences that the legislature could not possibly have intended,” then those ambiguities can be resolved by consulting extratextual sources.⁷⁷

a. The literal text is ambiguous

Literally, the statute states that custody includes “responsibility for the health, safety, and welfare of an animal subject to the person’s care and control, regardless of ownership of the animal.”⁷⁸ Custody of an animal thus involves at least three factors: (1) responsibility for the animal, (2) care of the animal, and (3) control of the animal. The wording indicates that custody may or may not require all three factors. The only reported opinion explicitly construing custody—ever—was handed down by the Austin Court of Appeals on July 26, 2001,⁷⁹ during the short period between the

⁷⁰ See *McDonald v. State*, 64 S.W.3d 86, 88–89 (Tex. App.—Austin 2001, no pet.) (noting the lack of case law regarding the statutory meaning of custody).

⁷¹ Act of June 6, 2001, 77th Leg., R.S., ch. 450, § 1, sec. 42.09, 2001 Tex. Gen. Laws 887, 888 (amended 2007).

⁷² 138 S.W.3d 324, 325 (Tex. Crim. App. 2004).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Salinas v. United States*, 522 U.S. 52, 60 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991)).

⁷⁶ *Sanchez*, 138 S.W.3d at 325.

⁷⁷ *Id.*

⁷⁸ Tex. Penal Code Ann. § 42.092(a)(4) (Vernon Supp. 2008).

⁷⁹ *McDonald v. State*, 64 S.W.3d 86 (Tex. App.—Austin 2001, no pet.).

signing on June 6 of the act⁸⁰ expressly defining custody and its effectiveness on September 1.⁸¹ The timing of the opinion indicates that it neither prompted nor influenced the passage of the 2001 act. The opinion, therefore, interprets pre-2001 law and cannot illuminate the current meaning of the term.⁸²

The Supreme Court of the United States has held that a text is clear and unambiguous if its meaning and applicability to particular conduct would be “plain to anyone reading the Act.”⁸³ Thus, we should attempt to apply the plain meaning of the text to our hypothetical. Since the Supreme Court requires plainness “to anyone”—clearly including both lawyers and laypeople—we should consult both legal and lay dictionaries.⁸⁴ For ease of analysis, we will consider each factor in turn.

(i) Responsibility

The first factor in establishing custody is whether the defendant was responsible for the animal. The legal and lay definitions of responsibility coincide. *Black's Law Dictionary* defines responsibility by reference to the term liability, which it defines as “[t]he quality or state of being legally obligated or accountable.”⁸⁵ *Webster's Unabridged Dictionary* defines responsibility in several ways, most notably as being “answerable or accountable, as for something within one's power, control, or management . . . chargeable with being the author, cause, or occasion of something (usually followed by *for*).”⁸⁶ Webster further notes that the term is synonymous with answerability (being “liable to be asked to give account; responsible”⁸⁷) and accountability (being “subject to the obligation to report, explain, or justify something”⁸⁸).⁸⁹ These definitions together

⁸⁰ Act of June 6, 2001, 77th Leg., R.S., ch. 450, § 1, sec. 42.09, 2001 Tex. Gen. Laws 887, 888 (amended 2007).

⁸¹ H.J. of Tex., 77th Leg., R.S. 5217 (2001); Act of June 6, 2001, 77th Leg., R.S., ch. 450, § 3, 2001 Tex. Gen. Laws 837, 838 (amended 2007).

⁸² See discussion of *McDonald* *infra* Part III.A.1.a.

⁸³ *Salinas v. United States*, 522 U.S. 52, 60 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991)).

⁸⁴ See *id.*

⁸⁵ BLACK'S LAW DICTIONARY 1338 (8th ed. 2004); *id.* at 932.

⁸⁶ WEBSTER'S UNABRIDGED DICTIONARY 1641 (Random House 2001).

⁸⁷ *Id.* at 86.

⁸⁸ *Id.* at 13.

⁸⁹ *Id.* at 1641.

suggest that responsibility is the state of being the one to whom people look for answers when something goes wrong. In our hypothetical, Paul took Cat to the veterinarian and, after she died, the veterinarian looked to Paul for an explanation. Thus, Paul was responsible for Cat within the plain meaning of the term.

(ii) Care

The next question is whether Cat was subject to Paul's care. The term care is amorphous, having different meanings in different contexts. The legal definition most appropriate in the animal cruelty context is the definition which is applicable in the family law context: "the provision of physical or psychological comfort to another."⁹⁰ Similarly, Webster defines the term as, among other things, a "source of worry, attention, or solicitude" or the "function of watching, guarding, or overseeing."⁹¹ Care, thus, is concern evidenced by action. By setting up the donation box and providing Cat with food and some medical treatment, Paul exhibited concern for Cat. Thus, whatever care may mean in section 42.092, Cat is subject to Paul's care.

(iii) Control

The final factor is whether Paul exercised control over Cat. Black defines control in terms of exercising power or influence over something.⁹² Similarly, Webster defines control in terms of exercising restraint, direction, or domination.⁹³ So, the party with control can cause the other party to do or not do something. Here, it is much less clear that Paul could cause Cat to do or not do anything. She lived mostly independently, looking to him only for occasional (or even frequent) food. Therefore, Paul can strongly argue that he did not have control over Cat.

(iv) Paul Might Have Had Custody

Under the facts of our hypothetical, Paul was responsible for and cared for Cat but did not exercise control over her. By using the term "includes" without any limit, the statute resists plain application. Cat is essentially a

⁹⁰ BLACK'S LAW DICTIONARY 225 (8th ed. 2004).

⁹¹ WEBSTER'S II NEW COLLEGE DICTIONARY 168 (Houghton Mifflin Co. 1999).

⁹² BLACK'S LAW DICTIONARY 353 (8th ed. 2004).

⁹³ WEBSTER'S UNABRIDGED DICTIONARY 442 (Random House 2001).

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wild animal, a textbook case of a feral cat. Thus, the textual definition of custody may not describe Paul's relationship with Cat, but the prosecutor could (rightly) argue that the definition of custody is not limited to relationships involving responsibility, care, *and* control; rather, the concept is broader than the literal text (i.e., responsibility *or* care *or* control). Thus, Paul's relationship to Cat can—but also may not—be described as custodial. In other words, the textual definition is not very helpful. The meaning and its application to Paul's conduct would not necessarily be plain to anyone reading the statute. The literal text is therefore not clear and unambiguous.

b. Legislative intent resolves the ambiguity

When a statute is determined not to be clear and unambiguous, the Court of Criminal Appeals, via *Sanchez*, suggests looking to extratextual sources to resolve the ambiguities.⁹⁴ The lodestar in resolving textual ambiguities is legislative intent.⁹⁵ To find legislative intent, courts consider three factors: the old law, the evil to be corrected, and the object to be obtained.⁹⁶ An important tool in this search is the legislative history of the particular statute.⁹⁷ Finally, Texas has abrogated the rule of lenity for statutes within the Penal Code, requiring instead that they be construed according to “the fair import of their terms, to promote justice and effect the objectives of the code.”⁹⁸

(i) The Old Law

When the legislature amends a statute, courts presume that the legislature intended to change the law.⁹⁹ Determining what custody meant prior to 2001 will help determine what custody means now. The term first appeared in the statute in 1913.¹⁰⁰ In the nine and a half decades since, only one reported opinion has ever construed the term: *McDonald v. State*, a

⁹⁴ *Sanchez v. State*, 138 S.W.3d 324, 325 (Tex. Crim. App. 2004).

⁹⁵ *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996).

⁹⁶ *Id.*

⁹⁷ *Howard v. State*, 690 S.W.2d 252, 254 (Tex. Crim. App. 1985) (en banc).

⁹⁸ Tex. Penal Code Ann. § 1.05(a) (Vernon 2003).

⁹⁹ *Ex parte Trahan*, 591 S.W.2d 837, 842 (Tex. Crim. App. 1979).

¹⁰⁰ Act of Mar. 31, 1913, 33d Leg., R.S., ch. 88, § 1, 1913 Tex. Gen. Laws 168, 168 (amended 2007).

2001 case out of the Austin Court of Appeals.¹⁰¹ The *McDonald* opinion, handed down after the passage but before the effective date of the 2001 act, can only clarify the old law.¹⁰² In *McDonald*, the defendant was prosecuted for abandonment. He testified that, without his knowledge, his son's friend put a puppy in his van. While driving to the grocery store, his wife heard sounds coming from the back, so he pulled over, coincidentally near an entrance to an Austin hike and bike trail. He opened the back door of his van and picked up a black bag, promptly dropping it when it squirmed. He testified that he never realized there was a puppy in the van until the puppy climbed out of the bag and ran down the trail. During the investigation, McDonald continuously denied ever owning the puppy. The question, however, was not whether McDonald owned the puppy but whether he had custody of the puppy.

The Austin Court of Appeals referred to *Black's Law Dictionary* and *Webster's Third New International Dictionary* to determine the plain and ordinary meaning of the then-undefined statutory term custody.¹⁰³ The Austin Court held that the term meant "guarding or keeping, or taking immediate control," but noted that "the term is elastic."¹⁰⁴ Affirming McDonald's conviction, the court noted: "Even if the jury determined that McDonald discovered the dog in his van and then let it go at the trail entrance, a finding that he has exercised sufficient 'custody' over the animal to violate the statute is not unreasonable."¹⁰⁵ Essentially, the brief interaction between dropping the bag and watching the puppy climb out and run away created the statutory custodial relationship.¹⁰⁶ Under the law prior to the 2001, then, custody generally referred to a relationship characterized by guarding, keeping, or taking immediate control.

¹⁰¹ 64 S.W.3d 86 (Tex. App.—Austin 2001, no pet.).

¹⁰² See *supra* Part III.A.1.a.

¹⁰³ *McDonald*, 64 S.W.3d at 88–89; see also *Floyd v. State*, 575 S.W.2d 21, 23 (Tex. Crim. App. [Panel Op.] 1978) (mandating the use of the plain and ordinary meaning of undefined terms).

¹⁰⁴ *McDonald*, 64 S.W.3d at 89 (citing BLACK'S LAW DICTIONARY 384 (6th ed. 1990); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 559 (1966)).

¹⁰⁵ *Id.* at 88–89.

¹⁰⁶ As of this writing, no other opinions have been handed down squarely confronting the issue of custody under either Tex. Penal Code § 42.09 or § 42.092. This is unsurprising because, as discussed above, defendants rarely contest the issue of custody.

(ii) The Evil To Be Corrected and the Object To Be Obtained

The remaining two factors explaining legislative intent are nearly interchangeable and will be discussed together: the evil to be corrected and the object to be obtained.¹⁰⁷ According to the House Committee's analysis of the introduced version of the 2001 act, the legislature considered the animal cruelty laws insufficiently deterrent.¹⁰⁸ The legislators introducing the 2001 act had two major goals: (1) to reduce the required mental state and (2) to enhance the classification of the various offenses by one level.¹⁰⁹ The bill as passed, however, accomplished neither. It merely added a few definitions and partially enhanced the classification.¹¹⁰ The new definition of custody was part of the introduced version of the bill and never changed throughout the legislative process.¹¹¹ The legislature apparently believed that the additional definitions would increase the deterrent effect of the statute, perhaps by clarifying the offense and brightening the line between criminal and non-criminal conduct. Bright lines deter more effectively than broad definitions because the wrongdoer knows clearly when he crosses the line. Broad definitions, on the other hand, use less clear, dull lines, smeared in the name of reasonableness. A wrongdoer may or may not ever know whether he has crossed the line, thereby giving him a reasonable argument against liability, if only to himself at the moment of decision. Thus, the post-2001 definition of custody should be brighter and narrower than the pre-2001 definition.

c. Conclusion: Paul Had Custody of Cat

Considering all these factors, did Paul establish the required custodial relationship with Cat so that he violated the statute? The legislature sought to narrow the definition of custody, so the more reasonable construction is

¹⁰⁷ *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996).

¹⁰⁸ H. Comm. on Criminal Jurisprudence, Bill Analysis, Tex. H.B. 653, 77th Leg., R.S. (2001) (introduced version).

¹⁰⁹ Tex. H.B. 653, § 1, 77th Leg., R.S. (2001) (introduced version).

¹¹⁰ Act of June 6, 2001, 77th Leg., R.S., ch. 450, 2001 Tex. Gen. Laws 837 (current version at Tex. Penal Code Ann. §§ 42.09, 42.092 (Vernon Supp. 2008)).

¹¹¹ Compare Tex. H.B. 653, § 1, 77th Leg., R.S. (2001) (introduced version), with Act of June 6, 2001, 77th Leg., R.S., ch. 450, 2001 Tex. Gen. Laws 837 (current version at Tex. Penal Code Ann. §§ 42.09, 42.092 (Vernon Supp. 2008)).

that the relationship between the defendant and the victim should resemble the relationship illustrated by the definition. That is, custody is that relationship with an animal that would justify holding an individual legally responsible for the animal's condition because he assumed responsibility for, or care or control of, the animal. By taking responsibility for and caring for Cat, Paul established a custodial relationship sufficient to violate the statute. Merely lacking control doesn't justify a finding that he lacked custody. Even without control, Paul's relationship to Cat resembled the relationship illustrated by the statute. These facts satisfy the first element of both neglect and abandonment.

2. Intent, Knowledge, or Recklessness

To commit the offense of neglect or abandonment, the defendant must act "intentionally, knowingly, or recklessly."¹¹² Section 6.03 of the Texas Penal Code defines these mental states, and the issues regarding them have been litigated extensively.¹¹³ In this context, it is sufficient to note that the jury would have little difficulty finding that Paul acted with any of the required mental states. Paul acted intentionally because his conscious objective was to leave Cat in the alleyway, without the care or shelter, then or in the future, that would have saved her.¹¹⁴ Paul acted knowingly because he was aware that he was leaving Cat in the alleyway or that her death was a reasonably certain result of his leaving her there, or both.¹¹⁵ Finally, Paul acted recklessly when he consciously disregarded a substantial and unjustifiable risk that his conduct would result in Cat's death.¹¹⁶ Moreover, juries can infer the requisite mental state from circumstantial evidence, so little doubt exists that the jury would find that Paul had the requisite mental state.¹¹⁷ As this brief analysis shows, the issue of mental state will rarely be significant in prosecutions for neglect or abandonment, and, indeed, would not be a significant hurdle in convicting Paul.

¹¹²Tex. Penal Code Ann. § 42.092(b) (Vernon Supp. 2008).

¹¹³See *id.* § 6.03 & annots.

¹¹⁴See *id.* § 6.03(a).

¹¹⁵See *id.* § 6.03(b).

¹¹⁶See *id.* § 6.03(c).

¹¹⁷*Pine v. State*, 889 S.W.2d 625, 629 (Tex. App.—Houston [14th Dist.] 1994, writ ref'd); see also *Martinez v. State*, 48 S.W.3d 273, 276 (Tex. App.—San Antonio 2001, pet. ref'd) (“[A] jury may infer a culpable mental state from the circumstances surrounding the offense of cruelty to animals.” Note that, at that time, the only culpable mental states were intent and knowledge.).

3. Neglect or Abandonment

The only significant difference between the crimes of neglect and abandonment is the timing of the condemned conduct. Neglect is the unreasonable failure in the present to provide necessary food, water, care, or shelter to an animal in the person's custody.¹¹⁸ Abandonment is the unreasonable failure to provide for the future care of an animal in the person's custody.¹¹⁹ These crimes are essentially identical except as to the timing of the harm: neglect occurs in the present, and abandonment occurs in the future. Each will be discussed in turn.

a. Neglect

Neglect is the unreasonable failure to provide necessary food, water, care, or shelter to an animal in the defendant's custody.¹²⁰ In addition to the custodial relationship and the requisite mental state, essentially two elements are important: (1) a failure to provide and (2) the unreasonableness of that failure. As discussed above,¹²¹ Paul has both custody and the requisite mental state. The first element—failure to provide—would be “plain to anyone reading” the statute.¹²² Whether an individual has failed to provide the food, water, care, or shelter “required to maintain the animal in a state of good health”¹²³ is not legally ambiguous. Whether the defendant has or has not provided enough is a fact question. In our hypothetical, Paul failed to provide the level of care required to maintain Cat in a state of good health by failing to promptly return her to the veterinarian for treatment. Additionally, the statute's unreasonableness requirement is not legally ambiguous. Whether a defendant acted unreasonably is a question of fact. This element allows the finder of fact to exercise common sense and discretion in deciding whether to punish an individual like Paul for failing to sufficiently provide for a particular animal. The jury could find that Paul acted unreasonably, so the jury could convict Paul for neglect.

¹¹⁸Tex. Penal Code Ann. § 42.092(b)(3) (Vernon Supp. 2008).

¹¹⁹*Id.* §§ 42.092(a)(1), (b)(4).

¹²⁰*Id.* § 42.092(b)(3).

¹²¹*See supra* Parts III.A.1.c. and III.A.2.

¹²²*See Salinas v. United States*, 522 U.S. 52, 60 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991)).

¹²³Tex. Penal Code Ann. § 42.092(a)(7) (Vernon 2008) (defining “necessary food, water, care, or shelter”).

b. Abandonment

Abandonment is the unreasonable failure to provide for the future care of an animal presently in a person's custody.¹²⁴ The defendant must first establish a custodial relationship with the animal and then terminate that relationship without "making reasonable arrangements for assumption of custody by another person."¹²⁵ To support a conviction, the failure to arrange for future care must be unreasonable.¹²⁶ As with the crime of neglect, there are no legal ambiguities regarding the conduct; either the defendant made arrangements for future care or he didn't, and if he didn't, then he either acted reasonably or unreasonably. These are fact questions. In our hypothetical, Paul established a custodial relationship with Cat, and he may or may not have terminated that relationship when he returned her to the alley. Unquestionably, he made no arrangements for anyone else to assume custody of Cat. Paul could argue that he did not terminate his custodial relationship and therefore could not have criminally abandoned Cat. That question, however, is a question for the finder of fact. It is not unlikely that an unsympathetic jury would convict Paul, finding that he unreasonably terminated the custodial relationship.

4. Paul's Conviction

As the foregoing paragraphs illustrate, whether an individual engaged in the conduct forbidden by section 42.092(b)(3) and (4) is a question of fact, as is the question of whether the individual established a custodial relationship with the animal. Unlike the custody question, however, the conduct question will almost never be legally ambiguous. Factual ambiguities could only arise with respect to reasonableness—which cannot be avoided—and to custody, which, as discussed above, is an entirely murky question. In our hypothetical, the only difficult issue is whether Paul established the requisite custodial relationship with Cat. As the foregoing has shown, however, Paul has committed either animal neglect or abandonment, if not both.

¹²⁴ *Id.* §§ 42.092(a)(1), (b)(4).

¹²⁵ *Id.* § 42.092(a)(1).

¹²⁶ *Id.* § 42.092(b)(4).

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A. *The Constitutionality of Tex. Penal Code § 42.092*

Savvy defendants attack both the prosecution's case and the statute's constitutionality. Paul can attack section 42.092 under both the Federal Constitution and the Texas Constitution, though the protections afforded by each mostly coincide. Paul has at least three constitutional claims. First, he can challenge section 42.092 as unconstitutionally vague. Second, he can challenge the statute as violating the cruel and unusual punishment clauses of both constitutions. Finally, he can challenge section 42.092 under the First Amendment to the United States Constitution.

1. Vagueness

A penal statute is unconstitutionally vague when it fails "to apprise an accused of the nature of the offense with which he is charged."¹²⁷ The Texas Court of Criminal Appeals considered and expressly rejected a vagueness challenge to the neglect prohibition and implicitly rejected a vagueness challenge to the abandonment prohibition in 1976.¹²⁸ The prohibitions upheld then have, if anything, become less vague in the intervening thirty-two years.¹²⁹ Therefore, despite the statute's ambiguities,¹³⁰ Paul's counsel would risk sanctions if he challenges section 42.092(b)(3) or (b)(4) on vagueness grounds.

2. Cruel and Unusual Punishment

The constitutional prohibitions on cruel and unusual punishment are not new, though the law remains rather murky. Justice Scalia tells us that the federal prohibition on cruel and unusual punishment dates back to the English Declaration of Rights of 1689.¹³¹ A century after the Declaration of Rights, several States prohibited cruel and unusual punishment in their own constitutions, then federalized the prohibition when they ratified the Eighth

¹²⁷ *McCall v. State*, 540 S.W.2d 717, 719 (Tex. Crim. App. 1976).

¹²⁸ *Id.* at 719 (noting that a 1927 decision striking down a portion of the animal cruelty prohibition for indefiniteness did not strike down any portion of the statute except the prohibition on "needlessly killing" an animal (citing *Cinadr v. State*, 108 Tex. Crim. 147, 300 S.W. 64 (1927))).

¹²⁹ For example, as discussed *supra* in Part II.B.3, the legislature defined several key terms in 2001. Act of June 6, 2001, 77th Leg., R.S., ch. 450, 2001 Tex. Gen. Laws 837 (current version at Tex. Penal Code §§ 42.09, 42.092).

¹³⁰ *McCall*, 540 S.W.2d at 719–20.

¹³¹ *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (Scalia, J., concurring).

Amendment as part of the Bill of Rights.¹³² The Texas provision dates back to the Constitution of the Republic of Texas and has been part of every subsequent constitution.¹³³ Notably, the Federal Constitution prohibits “cruel and unusual”¹³⁴ punishment, whereas the Texas Constitution prohibits “cruel or unusual”¹³⁵ punishment.

a. Federal Law

What constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution is not entirely clear. The United States Supreme Court first promulgated a proportionality principle in 1910.¹³⁶ The significance of the proportionality principle, however, remained unclear until 1977, when the Supreme Court “unqualifiedly” demanded proportionality in striking down a capital sentence imposed for the rape of an adult woman.¹³⁷ Six years later, Justice Powell, writing for a 5-4 majority in *Solem v. Helm*, enumerated a three-factor test to help determine whether a particular punishment, even non-capital punishment, violates the proportionality principle.¹³⁸ Less than ten years after *Solem*, Justice Scalia severely criticized the *Solem* test in his concurrence in *Harmelin v. Michigan*, but he was joined only by Chief Justice

¹³² *Id.*

¹³³ Repub. Tex. Const. of 1836, Declaration of Rights, § 11, reprinted in 1 *H.P.N. Gammel, The Laws of Texas 1822–1897*, at 1069, 1083 (Austin, Gammel Book Co. 1898).

¹³⁴ U.S. CONST. amend. VIII.

¹³⁵ Tex. Const., art. I, § 13. Texas first adopted the disjunctive language in 1836 and has retained it in every subsequent constitution. Repub. Tex. Const. of 1836, Declaration of Rights, § 11, reprinted in 1 *H.P.N. Gammel, The Laws of Texas 1822–1897*, at 1069, 1083 (Austin, Gammel Book Co. 1898); Tex. Const. of 1845, art. I, § 10; Tex. Const. of 1861, art. I, § 11; Tex. Const. of 1866, art. I, § 11; Tex. Const. of 1869, art. I, § XI; Tex. Const., art. I, § 13.

¹³⁶ See generally *Weems v. United States*, 217 U.S. 349 (1910) (discussing the constitutionality of *cadena temporal*). According to Justice Scalia, *cadena temporal* comes from the Spanish Penal Code and requires “incarceration at hard and painful labor with chains fastened to the wrists and ankles at all times.” *Harmelin*, 501 U.S. at 990 (internal quotation marks removed).

¹³⁷ See generally *Coker v. Georgia*, 433 U.S. 584 (1977).

¹³⁸ *Solem v. Helm*, 463 U.S. 277, 291 (1983). The three factors compare the harshness of the punishment to: (1) the gravity of the offense, (2) the punishment imposed for other crimes in the same jurisdiction, and (3) the punishment imposed for similar crimes in other jurisdictions.

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Rehnquist.¹³⁹ Despite Justice Scalia's vigorous dissent, the *Solem* test remains controlling.¹⁴⁰ Given the limited success of defendants challenging statutes under the *Solem* test¹⁴¹ and the presumption of constitutionality,¹⁴² Queso's Law would probably survive a challenge under the Eighth Amendment to the United States Constitution.

b. Texas Law

Although the Texas prohibition of cruel or unusual punishment is younger than the federal prohibition, the law is much clearer and the analysis is quick and easy. If a sentence lies within statutory limitations, then, as a matter of law, the punishment is neither cruel nor unusual.¹⁴³ This means two practical things. First, a penal statute can only be challenged on appeal after conviction and sentencing. Second, the Court of Criminal Appeals has given the legislature the power to determine the constitutional meaning of cruel or unusual punishment, so that very few sentences will be overturned as violating Texas's cruel or unusual punishment clause. Unless the trial court blatantly violates the law, Paul's sentence cannot violate the Texas Constitution's prohibition of cruel and unusual punishment.

1. The Establishment Clause

One individual has challenged Texas's animal cruelty statute under the First Amendment to the Federal Constitution. Michael Lee Hastey filed a federal lawsuit against, among others, the Governor and Attorney General of Texas, alleging that former section 42.09 violates, among other things, the Free Exercise and Establishment Clauses of the First Amendment.

¹³⁹ *Harmelin*, 501 U.S. at 962–94 (Scalia, J., concurring). Part of Justice Scalia's opinion was adopted by five justices and is the majority opinion, but the part in which he criticized *Solem* was adopted only by himself and Chief Justice Rehnquist.

¹⁴⁰ See generally *Lockyer v. Andrade*, 538 U.S. 63 (2003) (finding that *Solem* and *Harmelin* control for purposes of habeas corpus relief); *Ewing v. California*, 538 U.S. 11 (2003) (approving a three-strikes scheme under *Solem* and *Harmelin*).

¹⁴¹ See generally *Harmelin*, 501 U.S. 957; *Lockyer*, 538 U.S. 63; *Ewing*, 538 U.S. 11.

¹⁴² *Ex parte Granviel*, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978) (en banc).

¹⁴³ *Samuel v. State*, 477 S.W.2d 611, 614 (Tex. Crim. App. 1972) (“[T]his court has frequently stated that where the punishment assessed by the judge or jury was within the limits prescribed by the statute the punishment is not cruel and unusual within the constitutional prohibition” of Art. I Sec. 13 of the Texas Constitution.).

After the trial court dismissed the suit, the Fifth Circuit summarily rejected Mr. Hastey's arguments. Most significantly, the Fifth Circuit noted the secular purpose, the primary effect, and the minimal risk for excessive entanglement between government and religion inherent in section 42.09, concluding that Texas's animal cruelty statute does not violate the Establishment Clause.¹⁴⁴ The changes affected by Queso's Law provide little reason to believe that the Fifth Circuit's analysis would change, and Paul's counsel would risk sanctions for arguing that, after Queso's Law, section 42.092 now violates the First Amendment.

B. The Policy Effects of Queso's Law

1. Queso's Law Discourages Good Samaritans

The drafters of Queso's Law intended to protect feral cats.¹⁴⁵ The statute as passed expressly broadens the protected class of animals to include feral cats. For most of the conduct prohibited under Texas's animal cruelty statute, expanding the protected class clearly protects feral cats.¹⁴⁶ For the prohibitions, however, that depend on a custodial relationship—namely, neglect and abandonment—this is not so clear. Under Texas law, as Paul's situation and the *McDonald* case¹⁴⁷ illustrate, a person may unwittingly create a custodial relationship with an animal, thereby subjecting themselves to prosecution and conviction if they improperly terminate that relationship. Thus, Queso's Law may actually discourage individuals from helping feral cats for fear of prosecution by the State when they return the animal to its prior environment.

Opponents of this interpretation will likely argue that, realistically, no prosecutor would bring charges against a sympathetic defendant like Paul. A 2001 case out of San Antonio, however, answers this objection squarely. The San Antonio Court of Appeals describes Defendant Andrea Martinez as “an eighty-three year old [sic] widow . . . known in her neighborhood for

¹⁴⁴ See generally *Hastey v. Bush*, 82 Fed. App'x 370 (5th Cir. 2003).

¹⁴⁵ House Research Organization, Bill Analysis, Tex. H.B. 2328, 80th Leg., R.S. (2007).

¹⁴⁶ See Tex. Penal Code Ann. § 42.092 (Vernon Supp. 2008). For example, the prohibitions in subsections (b)(1) (torturing, killing, or seriously injuring), (b)(5) (cruelly transporting), (b)(7) (causing fighting between animals), and (b)(9) (seriously overworking) clearly can apply regardless of whether there is a custodial relationship between the defendant and the victim animal. *Id.*

¹⁴⁷ *McDonald v. State*, 64 S.W.3d 86 (Tex. App.—Austin 2001, no pet.).

taking in homeless animals,” despite surviving on only \$400 each month from Social Security.¹⁴⁸ Ms. Martinez had been caring for the victim dog for two years when the City of San Antonio began investigating her.¹⁴⁹ The investigator seized the dog, noting its lethargy, non-responsiveness, severe skin condition, and apparent malnourishment, and the dog was eventually euthanized.¹⁵⁰ At trial, Ms. Martinez testified that, because she could not feasibly take the dog to a veterinarian for treatment, she tried a home remedy.¹⁵¹ The jury convicted Ms. Martinez of cruelty to animals, and the judge sentenced her to one year in prison and a \$1000 fine.¹⁵² Her sentence was probated for two years, conditioned on Ms. Martinez performing one hundred hours of community service at a local animal shelter.¹⁵³

On appeal, the San Antonio Court of Appeals uneasily—but unanimously—affirmed.¹⁵⁴ Justice Rickhoff, for the majority, noted in the sole footnote: “Failure to provide necessary care is cruelty to animals and a criminal offense, even though the record in this case reveals neglect arising out of a *lack of resources rather than outright cruelty*.”¹⁵⁵ Justice Lopez, in her concurrence, notes, “If there was ever a case that screamed for prosecutorial discretion, it is this case While the jury faced with the evidence discussed in the majority opinion had no choice but to find Martinez guilty, I question why this case was ever prosecuted at all.”¹⁵⁶ Despite its clear distaste for the decision, the San Antonio court affirmed a conviction and sentence in a case with a highly sympathetic defendant. Justice Rickhoff’s admonition should be noted: “As appellate judges we cannot apply our own philosophy of justice, but may only apply the law to the facts of a particular case.”¹⁵⁷ It is specious, therefore, to argue that the State will only prosecute the viciously cruel and not nice people like Paul and Ms. Martinez.

¹⁴⁸ *Martinez v. State*, 48 S.W.3d 273, 275, 277 n.1 (Tex. App.—San Antonio 2001, pet. ref’d).

¹⁴⁹ *Id.* at 276.

¹⁵⁰ *Id.* at 275–76.

¹⁵¹ *Id.* at 277. One should note that her home remedy involved sulfur, a scent the absence of which partially led to the investigator’s decision to seize the dog. *Id.* at 276.

¹⁵² *Id.* at 275.

¹⁵³ *Id.*

¹⁵⁴ *Id.* (“We [affirm] with some discomfort.”).

¹⁵⁵ *Id.* at 277 n.1 (emphasis added).

¹⁵⁶ *Id.* at 278 (Lopez, J., concurring).

¹⁵⁷ *Id.* at 275 (majority opinion).

As the *Martinez* case demonstrates, the animal cruelty statute makes no distinction between cruelty through inability and cruelty by choice. Paul had three undesirable options. First, he could have attempted to provide the medical treatment through the veterinarian at a cost of \$5000. Second, he could have euthanized Cat at a cost of \$100. Third, he could do nothing, at no cost. The first option was financially impossible, and the third option was morally indefensible. Like Ms. Martinez, Paul chose the only option he really had. Because of Paul's economic situation, Cat died and Paul was prosecuted. A slightly more affluent person might have \$100 in disposable income and would not have been prosecuted. By prosecuting Paul and not the more affluent person, the State is drawing a line between can and cannot, punishing cruelty through inability as harshly as cruelty by choice. Because Paul cannot afford euthanasia, he is deemed cruel; because the other person can afford euthanasia, she is not. Surely a more efficient way exists to discourage those who would be cruel through inability than by incarcerating or fining them.

Queso's Law simply goes too far. By broadening the definition of animal without a corresponding restriction of custody, Queso's Law subjects individuals like Paul to prosecution and conviction despite all their good intentions and innocent incapacities. Justice Lopez worried that "nothing was gained [from prosecuting Martinez] except to alienate a senior member of our community from the justice system that should protect her. Hopefully, Martinez's love for animals will facilitate her efforts to perform her community service and to put this experience behind her."¹⁵⁸ Even if Martinez can "put this experience behind her," she cannot escape the black mark of a conviction for cruelty to animals from her record. She will likely think twice before offering to care for an unwanted animal in the future. Her community will likely be deterred from caring for degenerate animals. The result of all this is that more feral cats with infectious diseases will go untreated, except by financially insecure humane societies. Surely the proponents of Queso's Law did not intend for this. The laudable policy is betrayed by the overly broad language of the statute.

2. Queso's Law Corrects an Evil That May Not Exist

An important question to ask of Queso's Law is whether a feral cat is actually harmed by statutory abandonment. Feral animals learn to survive

¹⁵⁸ *Id.* at 278–79 (Lopez, J., concurring).

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in a feral state, so perhaps they are not harmed—they may even be helped—by being returned to that state. If feral animals are not harmed by being returned to a feral state, then no evil exists to be corrected. Research and analysis to answer this question is beyond the scope of this Comment. While feral cats clearly ought to be protected against actively cruel individuals—like those who would beat a living cat with a golf club or run over a small puppy with a lawnmower—feral cats do not need protection from people like Paul and Ms. Martinez. Maybe they don't need protection from neglect or abandonment at all.

IV. PROPOSED SOLUTION: CUSTODY CARVE-OUT

Queso's Law can be fixed to promote its objectives and eliminate its problems. I propose amending the definition of animal to generally include feral cats but expressly carve them out from the prohibitions on abandonment and neglect. This could be accomplished by deleting the language added in 2007 and adding a new sentence at the end of the definition. The new definition would read: "Animal' means a domesticated living creature and a wild living creature previously captured. The term does not include an un-captured wild living creature or a livestock animal. Except for the purposes of Subsection (b)(3) [neglect] and (b)(4) [abandonment], the term includes any stray or feral cat or dog." The amended definition would promote the objectives of Queso's Law by broadening most of the prohibitions to include feral cats while providing a measure of immunity to those who, like Paul and Ms. Martinez, try to help unfortunate feral cats with dire health issues. Essentially, the amended definition would make it legally impossible to neglect or abandon a feral cat. Under the current law, an individual could accidentally acquire custody of a feral cat, but under the amended definition, such accidental acquisitions would be impossible.

The proposed definition of animal would not immunize those who establish a more traditional custodial relationship with formerly feral cats. Once the custodial relationship has been established, an animal is no longer feral but domesticated and subject to the protections of section 42.092. The only persons immunized by the new definition are those who, like Paul and Ms. Martinez, temporarily assist a feral cat in dire straits. They will no longer have reason to fear imprisonment or fines as a result of being a Good Samaritan.

V. CONCLUSION: DON'T FEED THE ANIMALS—YET

Americans disagree about a lot of things, but nobody disagrees that cruelty to animals is wrong. Animals deserve our protection, especially those, like cats and dogs, that choose to live among us. The Texas Legislature responded in 2007 to its perception that Texas law didn't do enough to punish animal cruelty by passing several statutes, including Queso's Law. The Legislature's attempts at protecting feral cats should be applauded. But Queso's Law, by creating the possibility of unwittingly creating a custodial relationship with a feral cat, goes beyond merely deterring bad behavior (e.g., beating a cat with a golf club) and begins deterring good behavior as well (e.g., taking that cat to a veterinarian for treatment). By slightly re-defining animal, the Legislature could encourage both the decent treatment of animals and the prosecution of the viciously cruel.