Animal & Natural Resource Law Review

Michigan State University
College of Law

July 2021

Volume XVII

The Animal & Natural Resource Law Review is published annually by law students at Michigan State University College of Law. The Review receives generous support from the Michigan State University College of Law. Without their generous support, the Review would not have been able to host its annual symposium. The Review also is funded by subscription revenues. Subscription requests and article submissions may be sent to: Professor David Favre, *The Animal & Natural Resource Law Review*, Michigan State University College of Law, 368 Law College Building, East Lansing MI 48824, or by email to msuanrlr@gmail.com.

Current yearly subscription rates are $27.00 in the U.S. and current yearly Internet subscription rates are $27.00. Subscriptions are renewed automatically unless a request for discontinuance is received. Back issues may be obtained from: William S. Hein & Co., Inc., 1285 Main Street, Buffalo, NY 14209.

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Animal & Natural Resource Law Review

Vol. XVII **2021**

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Peer Review Committee 2020-2021

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Peer Review Committee

Taimie L. Bryant is a Professor of Law at UCLA School of Law where she teaches Property and Nonprofit Organizations in addition to teaching different courses on animal law. Prior to receiving her J.D. from Harvard Law School, Professor Bryant earned a Ph.D. in anthropology from UCLA. Since 1995, she has turned her attention to animal rights, focusing both on the theoretical issues of conceptualizing such rights and on legislative and other legal regulations of human treatment of animals. Recent publications include *Similarity or Difference as a Basis for Justice: Must Animals be Like Humans to be Legally Protected from Humans?, False Conflicts between Animal Species,* and *Transgenic Bioart, Animals and the Law.*

David Cassuto is a Professor of Law at Pace University School of Law where he teaches Animal Law, Environmental Law, Property Law, and Professional Responsibility. Professor Cassuto has published and lectured widely on issues in legal and environmental studies, including animal law. He is also the Director of the Brazil-American Institute for Law & Environment. He holds a B.A. from Wesleyan University, an M.A. & Ph.D. from Indiana University, and a J.D. from the University of California, Berkeley, Boalt Hall School of Law.

David Favre is a Professor of Law at Michigan State University College of Law. He is Faculty Advisor to the *Animal & Natural Resource Law Review* and Chair of the Peer Review Committee of the Journal. As Editor-in-Chief of the *Animal Legal and Historical Web Center*, he has published several books on animal issues. Professor Favre teaches Animal Law, Wildlife Law, and International Environmental Law.

Peer Review Committee continued

Rebecca J. Huss was a Professor of Law at Valparaiso University School of Law in Valparaiso, Indiana. She has a LL.M. in International and Comparative Law from the University of Iowa School of Law and graduated magna cum laude from University of Richmond School of Law. Recent publications include *Companion Animals and Housing in Animal Law and the Courts: A Reader; Rescue Me: Legislating Cooperation between Animal Control Authorities and Rescue Organizations; Valuation in Veterinary Malpractice;* and *Separation, Custody, and Estate Planning Issues Relating to Companion Animals.* Professor Huss's primary focus in research and writing is on the changing nature of the relationship between humans and their companion animals and whether the law adequately reflects the importance of that relationship.

Peter Sankoff is an Associate Professor at the University of Western Ontario Faculty of Law who specializes in animal law, criminal law, and the law of evidence. He is the author or editor of five books, including *Animal Law in Australasia: A New Dialogue,* the first book ever published in the southern hemisphere to focus exclusively on animal law issues. Peter lectures and publishes on a variety of animal law topics. Professor Sankoff taught animal law at the University of Auckland from 2006-2010, and also as a Visiting Professor at Haifa University in Israel, and the University of Melbourne Australia. He has also taught an advanced animal law course entitled Comparative Concepts in Animal Protection Law at Lewis and Clark College of Law.

Steven M. Wise is President of the Nonhuman Rights Project and author of *Rattling the Cage Toward Legal Rights for Animals (2000), Drawing the Line Science and The Case for Animal Rights (2002), Though the Heavens May Fall The Landmark Trial That Led to the End of Human Slavery (2005),* as well as numerous law review articles. He has taught Animal Rights Law at Vermont Law School since 1990, and at Harvard Law School, John Marshall Law School, and will begin teaching at St. Thomas Law School. Mr. Wise has practiced animal protection law for over twenty-five years.

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A World Without Bees: Is the Precautionary Principle Our Only Hope Against Sulfoxaflor and Colony Collapse Disorder?

Thomas Cottle*

Introduction

"If we die, we're taking you with us" a quote of unknown origin attributed to "The Bees" has become a popular meme and is emblazoned on t-shirts and other items. This quote sums up the salient dilemma of bee decline due to pesticide use. Currently, a much-debated topic is sulfoxaflor, an active ingredient developed by Dow Chemical. In the United States (hereinafter "U.S."), sulfoxaflor has received unconditional registration from the Environmental Protection Agency (hereinafter "the EPA"), and pollinator activists have filed a petition to review and vacate this registration.[1] In the European Union (hereinafter "EU"), sulfoxaflor is also registered for use in all the member states, but it is subject to higher restrictions than in the U.S.[2] in regard to where and in what quantities it may be used. France is a pioneer in the regulation of sulfoxaflor, as it is the only EU member state to have entirely banned sulfoxaflor.[3] Sulfoxaflor's history is fraught with legislation, litigation, debate, and conflict in both the U.S. and the EU.

This note focuses on sulfoxaflor's journey, its present status, and how a precautionary principle, similar to that employed in the EU and France, would change the outcome for sulfoxaflor in the U.S. I suggest in the note that the U.S. should adopt a precautionary principle, at least in regard to pesticide registration and regulation, to combat pollinator Colony Collapse Disorder. Part I introduces the environmental risk associated with sulfoxaflor to explain why it is the topic of much heated debate. Part II and III discuss how the U.S. and EU have regulated sulfoxaflor based on current jurisdictional law. Part IV dives into a comparison between the two. Lastly, the effect of the precautionary principle in the U.S. is discussed in Part V.

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* I dedicate this article to my lovely daughter, Willow. I could not have done it without you.

[1] *See* Pollinator Stewardship Council v. the EPA, 806 F.3d 520 (9th Cir. 2015).

[2] *See* Commission Implementing Regulation 2015/1295, 2015 O.J. (L 199) (EU).

[3] *See* Tribunal Administratif [TA] [regional administrative court of first instance] Nice, Nov. 23, 2017,88 (Fr) (translated by author).

I. Environmental Risk Associated with Sulfoxaflor

In response to the concerns for bee health and population, the European Commission (hereinafter "Commission") restricted the use of the three most commonly used neonicotinoids, clothianidin, imidacloprid, and thiamethoxam, on May 30, 2018, as neonicotinoids pose a high acute risk to bees.[4] Neonicotinoids were approved in the EU in 2013, but only five of the seven types of neonicotinoids were approved, including clothianidin, imidacloprid, thiamethoxam, acetamiprid, and thiacloprid.[5] France bolstered the support for honey bee protection by imposing an even more restrictive ban on all five neonicotinoid chemicals allowed in France, effective September 1, 2018.[6] These five neonicotinoids are not banned in the U.S., but they are currently under review by the EPA.[7] However, multiple states in the U.S. have current bans on neonicotinoids.[8]

These chemicals are receiving so much attention and are being banned because they are heavily linked to Colony Collapse Disorder.[9] Neonicotinoids have been subject to many different studies, which have found that they decrease foraging abilities; disorient bees, making them unable to navigate; impair olfactory abilities, memory, and learning; and compromise the immune system.[10] It has been found that "[e]ven at minuscule doses, bees' cognitive and nervous system functions are seriously impaired by neonicotinoids.…bees are sufficiently debilitated by chronic exposure to pesticides, such that they become weaker, less effective foragers, and more vulnerable to common bee pathogens… [and] have caused a widespread epidemic of collapsing bee colonies and a sharp decline in the bee population."[11]

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[4] Commission Implementing Regulations 2018/783, 2018/784, 2018/785, 2018 O.J. (L 132) 31-43 (EU).

[5] *Neonicotinoids: Some Facts about Neonicotinoids*, Eur. Comm'n, https://ec.europa.eu/food/plant/pesticides/approval_active_substances/approval_renewal/neonicotinoids_en (last visited Mar. 27, 2020).

[6] *Ban on Neonicotinoid Insecticides: France Is Leading the Way in Europe,* French Gov't (Sept. 4, 2018), https://www.gouvernement.fr/en/ban-on-neonicotinoid-insecticides-france-is-leading-the-way-in-europe.

[7] *Pollinator Protection: Schedule for Review of Neonicotinoid Pesticides,* EPA, https://www.the EPA.gov/pollinator-protection/schedule-review-neonicotinoid-pesticides (last visited Mar. 27, 2020).

[8] *See* Md. Code Agric. § 5–2A–02; 2016 Conn. Pub. Acts 16-17 (Reg. Sess.).

[9] Evan Jensen, *Banning Neonicotinoids: Ban First, Ask Questions Later*, 5 Sea. J. Envtl. L. 47, 51-52 (2015).

[10] *Id*.; Richard J. Gill et al., *Combined Pesticide Exposure Severely Affects Individual-and Colony-Level Traits in Bees*, 491(7422) Nature 105, 105 (Nov. 1, 2012); Lu Chensheng et al., *Sub-Lethal Exposure to Neonicotinoids Impaired Honeybee Winterization Before Proceeding to Colony Collapse Disorder*, 67 Bull. Insectology 1, 125 (2014).

[11] Evan Jensen, *supra* note 9, at 54.

Neonicotinoids work similar to the drug nicotine found commonly in tobacco products.[12] Nicotine is highly toxic to mammals and invertebrates, to a lesser degree, by binding to a set of cholinergic receptors called the nicotinic acetylcholine receptors.[13] Because nicotine is toxic to many organisms and is not selective in what it harms, it was banned from being used as a pesticide in the U.S.[14] As a result, nicotine was reverse-engineered to be less toxic to mammals and more toxic to insects, which resulted in neonicotinoids. Neonicotinoids are now the most extensively used pesticides in the world.[15] Neonicotinoids work similarly to nicotine by permanently binding to the acetylcholine receptor, which at high levels over-excite neurons and can cause epilepsy, cell death, and nerve cell inactivation; and at low levels, target nerve cells become weaker and more vulnerable.[16] These chemicals are also systemic, which means that they are absorbed into the ground and the growing plant.[17] Another alarming alleged effect is that bees can become addicted to neonicotinoids, similar to humans becoming addicted to nicotine.[18] Multiple studies suggest pollinators acquire a preference to pesticide-laden foods over non-pesticide-laden foods when given the choice between the two.[19]

With the restrictions and bans being imposed on neonicotinoids, it was inevitable that there would be a replacement pesticide. This is where sulfoxaflor comes in. Technically, sulfoxaflor is not a neonicotinoid, rather it is a sulfoximine.[20] Although it is not considered a neonicotinoid, many pollinator activists and others are worried about its use because sulfoxaflor functions identically to neonicotinoids by binding to the insect nicotinic acetylcholine receptors.[21] There have been multiple studies confirming that

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[12] Istvan Ujvary, *Nicotine and Other Insecticidal Alkaloids*, *in* Nicotinoid Insecticides and the Nicotinic Acetylcholine Receptor 31 (J.E. Casida ed., 1999).

[13] *Id*. at 30.

[14] 7 C.F.R. § 205.602(j) (2018).

[15] *Neonicotinoids*, Cornell CALS, https://pollinator.cals.cornell.edu/threats-wild-and-managed-bees/pesticides/neonicotinoids/ (last visited Mar. 2, 2021).

[16] Anthony King, *What You Need To Know About Neonicotinoids*, Chemistry World (Mar. 24, 2018), https://www.chemistryworld.com/news/what-you-need-to-know-about-neonicotinoids/3008816.article#/.

[17] *Id*.

[18] '*Like Nicotine': Bees Develop Preference for Pesticides, Study Shows*, Guardian (Aug. 28, 2018), https://www.theguardian.com/environment/2018/aug/29/like-nicotine-bees-develop-preference-for-pesticides-study-shows.

[19] *Id*.

[20] EPA, Decision to Register New Uses for the Insecticide Sulfoxaflor (2019).

[21] Gerald B. Watson et al., *Novel Nicotinic Action of the Sulfoximine Insecticide Sulfoxaflor*, 41 Insect Biochemistry & Molecular Biology 432, 432 (2011).

> [t]he nicotinic acetylcholine receptor pharmacological profile of sulfoxaflor in aphids is consistent with that of imidacloprid. Additionally, the insecticidal activity of sulfoxaflor and the current commercialised neonicotinoids is affected by the point mutation in FRC Myzus persicae. Therefore, it is suggested that sulfoxaflor be considered a neonicotinoid, and that this be taken into account when recommending insecticide rotation partnering for effective resistance management programmes.[22]

In addition, the EPA concurred in its July 2019 re-approval of sulfoxaflor that it was "very highly toxic" to honey bees at all life stages.[23] Regardless of how toxic and neonicotinoid-like sulfoxaflor is, the EPA deems it safe enough for use with minor restrictions as of July 2019.[24] Sulfoxaflor's EU approval is discussed in later sections.

II. Sulfoxaflor Regulation in the U.S.

The U.S. covers pesticide regulation in two different acts. The main pesticide regulation is the Federal Insecticide, Fungicide, and Rodenticide Act (hereinafter "FIFRA"), but the Endangered Species Act (hereinafter "ESA") can also restrict pesticide use. This section discusses the application of these acts to pesticide regulation.

a. The Federal Insecticide, Fungicide, and Rodenticide Act

In the U.S., FIFRA prohibits the sale of pesticides not approved by the EPA. The EPA may by regulation limit the distribution, sale, or use of any pesticide "to the extent necessary to prevent unreasonable adverse effects on the environment."[25] Under FIFRA, unreasonable adverse effects on the environment are defined as

> (1) an unreasonable risk to man or the environment, taking into account the economic, social and

[22] Penny Cutler et al., *Investigating the Mode of Action of Sulfoxaflor: a Fourth-Generation Neonicotinoid*, 69 Pest Mgmt. Sci. 607, 607 (2012).

[23] Tara Cornelisse et al., *The Facts on Sulfoxaflor*, Ctr. for Biological Diversity 11 (Aug. 2019), https://www.biologicaldiversity.org/campaigns/pesticides_reduction/pdfs/Sulfoxaflor_Facts.pdf.

[24] *EPA Registers Long-Term Uses of Sulfoxaflor While Ensuring Strong Pollinator Protection*, EPA (July 12, 2019),
https://www.EPA.gov/newsreleases/EPA-registers-long-term-uses-sulfoxaflor-while-ensuring-strong-pollinator-protection.

[25] 7 U.S.C. § 136a(a) (2018).

> environmental costs and benefits of the use of any pesticide, or
> (2) a human dietary risk from residues that result from a use of a pesticide in or on any food inconsistent with the standard under section 346(a) of Title 21.[26]

To determine whether an "unreasonable adverse effect on man or the environment" exists, FIFRA uses a cost-benefit analysis "to ensure that there is no unreasonable risk created for people or the environment from a pesticide, taking into account the economic, social, and environmental costs and benefits of pesticide's use."[27]

The EPA has consistently interpreted and applied that an unreasonable adverse effect is best measured by "a cost-benefit balancing test under which it weighs the risks associated with the use of a pesticide against the economic and social benefits."[28] In its analysis, the EPA must determine whether the pesticide will perform its intended function without unreasonable adverse effects, but the EPA should not deny registration of a pesticide just because another pesticide meets the same requirements.[29] Moreover, "FIFRA expressly authorizes the EPA to waive all data requirements pertaining to efficacy and the EPA has, by rule, done so."[30] In short, the EPA does not require that a party wishing to register a pesticide under FIFRA show the economic or social benefit from its pesticide, but rather it assumes such benefits are inherent.[31] On the other hand, the EPA requires an applicant to submit risk-related data mostly comprised of data that relates to human health effects, and the limited data required related to wildlife and ecological effects only addresses "acute toxicity in a few species and do[es] not address chronic toxicity or behavioral, neurological or reproductive effects."[32] If the EPA determines from the applicant's data that the pesticide will accomplish its intended use without unreasonable adverse effects, the EPA will unconditionally register the pesticide.

The EPA has the authority under FIFRA to unconditionally register a pesticide as mentioned above,[33] or, if there is insufficient data, it may prematurely register a pesticide under a conditional registration "for a period reasonably sufficient for the generation and submission of

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[26] *Id.* at § 136(bb).

[27] Wash. Toxics Coal. v. the EPA, 413 F.3d 1024, 1032 (9th Cir. 2005).

[28] Mary Jane Angelo, *Killing Fields: Reducing the Casualties in the Battle Between U.S. Species Protection Law and U.S. Pesticide Law*, 32 Harv. Envtl. L. Rev. 95, 105 (2008).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 106.

[33] 7 U.S.C. § 136a(c)(5) (2018).

required data."[34] The EPA may conditionally register a pesticide for "(1) products with composition and proposed uses identical or substantially similar to currently registered pesticides; (2) products with proposed new uses; or (3) certain products with a new active ingredient."[35] For the first two prongs, the EPA must conclude that despite insufficient data, the conditionally registered pesticide would not exponentially increase the likelihood of an unreasonable adverse effect on the environment.[36] On the other hand, conditionally registering a pesticide with a new active ingredient requires that the EPA must determine the pesticide will not cause unreasonable adverse effects on the environment during the testing period and use of the pesticide is in the public interest.[37]

FIFRA gives the EPA broad power in determining whether to register a pesticide. If the applicant submits evidence that the new pesticide can accomplish its purpose with no unreasonable adverse effect on the environment (compared to alternatives on the market), the EPA will grant an unconditional registration.[38] On the other hand, if the applicant fails to meet its burden to show that the new pesticide will accomplish its purpose with no unreasonable adverse effect on the environment, the EPA can still register the pesticide for a period of time that it determines reasonable to gather more information on the pesticide.[39] With large players in the market, such as Dow Chemical and Monsanto, it is almost certain a pesticide will be granted some sort of registration regardless of its effect on the environment.

To accomplish this cost-benefit analysis effectively in regards to pollinators, the EPA, working with Health Canada's Pest Management Regulatory Agency and the California Department of Pesticide Regulation, presented the Pollinator Risk Assessment Framework via a White Paper to the FIFRA Scientific Advisory Panel in which it described a process to assess the risk of pesticides to pollinators.[40] Prior to this framework, the EPA's process in analyzing pesticide risk to pollinators was qualitative in the sense that the EPA relied on understanding the potential effect the pesticides could have on pollinators based on toxicity.[41] This proved to be an ineffective way of determining risk, so the new framework is based on measuring the risk quantitatively based on exposure to individual pollinators and the colony as a whole.[42] In

[34] 7 U.S.C. § 136a(c)(7)(C) (2018).

[35] Mary Jane Angelo, *supra* note 28, at 105-06.

[36] *Id.* at 106.

[37] *Id.*

[38] Mary Jane Angelo, *supra* note 28, at 105-6.

[39] *Id.*

[40] *How We Assess Risks to Pollinators*, EPA, https://www.the EPA.gov/pollinator-protection/how-we-assess-risks-pollinators#overview (last visited Mar. 27, 2020).

[41] *Id*.

[42] *Id*.

response to the ineffectiveness of the current risk assessment, the EPA developed regulations and guidance to determine what must be done in assessing risk to pollinators to more effectively apply FIFRA's cost-benefit analysis, which implements a tiered risk assessment framework to articulate more clearly what management and mitigation steps must be taken in pesticide registration than the EPA's previous risk assessment.[43] This risk assessment is broken into three tiers.

Tier I Assessments consist of acute and chronic toxicity analyses done in a laboratory to measure the risk a pesticide has on individual bees, including both larvae and adults.[44] The EPA compares the extent to which bees would be exposed to a pesticide in the environment with doses at which that pesticide is toxic to bees.[45] The tests included in Tier I are the Acute Oral Adult Toxicity, Acute Contact Adult Toxicity, Acute Larval Toxicity, 10-day Adult Chronic Toxicity, and 21-day Larval Toxicity.[46] The EPA uses these tests to determine the "acute median lethal dose" (LD_{50}), which is the dose at which half of the tested bees died, for both contact doses (bees directly sprayed with chemical) and oral doses (bees consuming chemical through nectar or pollen of treated plants).[47]

Tier II and III Assessments are studies structured to evaluate the effects of an insecticide on bees in the environment and focus on the pesticide's effect on the colony as a whole, as opposed to individual bees.[48] Tier II consists of semi-field studies where bees are placed in tunnels and forced to feed on pesticide-treated crops.[49] This tier reveals the pesticide's effect on bees' interaction, feeding habits, and behavior among the members of the hive.[50] Tier III consists of "Full Field" experimental and monitoring studies, which is the most environmentally realistic way to analyze exposure conditions.[51]

b. The Endangered Species Act

In the U.S., the ESA is another statute that may be used to indirectly restrict pesticide use. The ESA requires that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the

[43] Office of Chem. Safety & Pollution Prevention et al., White Paper in Support of the Proposed Risk Assessment Process for Bees 42-43 (2012).

[44] Office of Pesticide Programs, the EPA, Guidance on Exposure and Effects Testing for Assessing Risks to Bees 12 (2016).

[45] *Id*. at 13.

[46] *Id*. at 13-15.

[47] *Id*. at 22.

[48] *Id*. at 24.

[49] *Id*.

[50] *Id*.

[51] *Id*. at 33.

purpose of this chapter."[52] Both the Eighth Circuit[53] and Ninth Circuit[54] have held that although the EPA "registers pesticides under FIFRA, it must also comply with the ESA when threatened or endangered species are affected."[55] It is quite clear that "a pesticide registration that runs against the clear mandates of the ESA will most likely cause an unreasonable adverse effect on the environment under FIFRA."[56] The Eighth Circuit in *Defenders of Wildlife v. EPA* noted, however, that an action with the sole goal of attempting to cancel a pesticide registration should be sought under FIFRA, but the EPA cannot ignore the ESA when regulating pesticides.[57] The 2004 Ninth Circuit case, *Washington Toxics Coalition v. EPA*, was another victory in favor of safeguarding the environment akin to *Defenders of Wildlife v. EPA*. The Ninth Circuit held that the EPA's failure to regulate fifty-four pesticide active ingredients was a substantial ESA consultation violation and ordered the EPA to "initiate and complete consultation regarding the effects of those pesticide registrations."[58] Although the EPA must follow FIFRA in pesticide regulation, precedent exists to indicate that the EPA must perform a consultation under the ESA if endangered or threatened species are potentially affected by a pesticide.

Under the ESA's section 7 consultation process imposed on federal agencies, any agency action must be done "in consultation with and with the assistance of" the Secretary of Commerce or the Secretary of the Interior.[59] Depending on the circumstances, consultation consists of two separate processes, formal consultation or informal consultation. The Fish and Wildlife Service and the National Marine Fisheries Service (hereinafter "Services") are responsible for consulting with the federal agencies on any action that "may affect a listed species and designated critical habitats" set out in the ESA.[60] The determination of whether an agency action "may affect" a protected species or habitat is different than the section 7 wording of "likely to adversely affect" a protected species or habitat in that a "may affect" conclusion arises when "a proposed action may pose any effects on listed species or designated critical habitat."[61] If a "may affect" situation arises, the agency must

[52] 16 U.S.C. § 1531(c)(1) (1988).

[53] *See* Defs. of Wildlife v. the EPA, 882 F.2d 1294, 1299 (8th Cir. 1989).

[54] *See* Wash. Toxics Coal. v. the EPA, 413 F.3d 1024, 1032 (9th Cir. 2005).

[55] *Id*.

[56] *Defs. of Wildlife*, 882 F.2d at 1299.

[57] *Id.*

[58] *Wash. Toxics Coal.*, 413 F.3d at 1029.

[59] 16 U.S.C. §§ 1536(a)(2), 1532(15) (2020).

[60] Jamie Rappaport Clark, *Foreword* to U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., *Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act 9* [hereinafter "Consultation Handbook"] (1998).

[61] *Id*. at xvi.

either opt to seek a "written concurrence from the Services that the action 'is not likely to adversely affect'…listed species" via the optional informal consultation process or initiate a formal consultation process.[62]

A federal agency whose action may affect a listed species or habitat may, at its discretion, opt for an informal investigation to determine whether a formal investigation is required.[63] Based on information provided to the Services by the federal agency, the Services can use their expertise to determine whether the agency action's effect is likely to adversely affect a listed species or habitat and offer suggestions to the proposed action; if the Services determine that it is not likely to have adverse effects, they can concur with the agency in writing to waive the formal consultation requirement.[64] If the Services determine there is a likelihood of adverse effects or if an agency does not request or receive a written concurrence, a formal consultation is required, which imposes a three part process that:

> 1) determines whether a proposed Federal action is likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat;
> 2) begins with a Federal agency's written request and submittal of a complete initiation package; and
> 3) concludes with the issuance of a biological opinion and incidental take statement by either of the Services.[65]

A biological opinion is a document that describes the Services' opinion on whether agency action is likely to jeopardize a listed species or habitat, a summary of the information on which the Services bases their opinion, and details of the effects of the action on the listed species.[66] An incidental take statement exempts agencies from certain section 9 "taking" restrictions, as long as the agency complies "with the reasonable and prudent measures and the implementing terms and conditions of incidental take statements."[67] If the agency determines that it does not have legal authority, the reasonable and prudent alternatives are not economically and technologically possible, or refuses to implement the Services' reasonable and prudent alternatives, then the agency can apply to the Endangered Species Committee (hereinafter "ESC") for exemption from section 7(a)(2) requirements.[68]

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[62] *Id*. at xiv-xvi.
[63] *Id*. at xv.
[64] *Id*.
[65] *Id*. at xiv.
[66] *Id*. at xi.
[67] *Id*. at 4-47.
[68] *Id*. at 4-43; 16 U.S.C. § 1536(g).

c. Pollinator Stewardship Council v. the EPA

In 2010, Dow Agrosciences LLC (hereinafter "Dow") applied to register three different products containing the active ingredient sulfoxaflor with the EPA. After receiving the applications and studies from Dow, the EPA found that there were data gaps in Dow's studies and that sulfoxaflor was considered to be highly toxic to pollinators.[69] As a result, the EPA conditionally approved the registration for sulfoxaflor, lowering the maximum single application rate of 0.133 pounds of active ingredient per acre (a.i./A) to 0.09 pounds a.i/A among other mitigation measures such as crop-specific restrictions and guidelines on labels.[70] The EPA also required Dow to complete additional studies to determine the toxicity to pollinators.[71] On May 6, 2013, while awaiting additional studies, the EPA unconditionally registered sulfoxaflor, justifying its position with mitigation measures of 0.09 pounds a.i./A, increased minimum interval between sprays, and certain crop-specific restrictions.[72]

In response to the unconditional registration, Pollinator Stewardship Council and other plaintiffs filed a petition to review in the Ninth Circuit, which vacated the EPA's unconditional registration of sulfoxaflor and remanded it for further testing on September 10, 2015 (amended November 12, 2015).[73] The Ninth Circuit in *Pollinator Stewardship Council v. the EPA* vacated the EPA's unconditional registration of sulfoxaflor and remanded to the EPA because the EPA lacked sufficient data regarding the risk of sulfoxaflor on bees and "without sufficient data, the EPA has no real idea whether sulfoxaflor will cause unreasonable adverse effects on bees, as prohibited by FIFRA."[74] Under FIFRA, a court reviewing the EPA's decision to register a pesticide must defer to the EPA's decision, "if it is supported by substantial evidence when considered on the record as a whole."[75] This is not a very high evidentiary bar for the EPA to overcome because "substantial evidence means more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[76] Although this standard of review affords the EPA less deference than the arbitrary and capricious standard, most often the EPA "meets its burden under both the arbitrary and capricious standard and the substantial evidence standard."[77]

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[69] *Pollinator Stewardship Council*, 806 F.3d at 527-28.
[70] *Id* at 526-27.
[71] *Id*. at 527.
[72] *Id*.
[73] *Id*. at 520.
[74] *Id*. at 532.
[75] *Id*. at 528; *see also* 7 U.S.C. § 136n(b).
[76] Nat. Res. Def. Council v. the EPA, 735 F.3d 873, 877 (9th Cir. 2013).
[77] *Pollinator Stewardship Council*, 806 F.3d at 534 (N.R. Smith, J., concurring).

No matter how low of a hurdle these standards of review pose to the EPA, "the hurdle exists for a reason, and the EPA cannot simply walk around it. '[T]he agency must, at a minimum, support its conclusions with studies that the agency deems reliable.'"[78] In spite of the fact that the substantial evidence standard represents a relatively low hurdle for the EPA to overcome in order to register a pesticide, the EPA failed to meet this standard in 2015. In analyzing the data provided by the EPA, the court focused solely on the Pollinator Risk Assessment Framework to determine whether the EPA met the substantial evidence standard under FIFRA's cost-benefit analysis. In the EPA's Tier I studies, the EPA measured the acute median lethal dose for both contact and oral doses, 0.13 micrograms for contact and 0.052 micrograms for oral, and determined that sulfoxaflor was "extremely toxic."[79] Next, the EPA divided the expected environmental concentrations with the acute medial lethal dose to find a risk quotient, which is determined to be a level of concern if it supersedes 0.4 for bees and would trigger a Tier II study.[80] The risk quotient for sulfoxaflor for oral exposure was eighty-three and contact exposure was 2.8, both largely exceeding the level of concern.[81]

For the Tier II studies, the EPA received six tunnel semi-field studies conducted over the course of several years and implemented sporadic changes, "in terms of application rate, number of tunnels, times the study was replicated, the timing of pesticide application, duration of observation period, and the time of year at which the study was conducted."[82] The court stated that most significantly, all but one of the Tier II studies were accomplished at much lower application rates (ranging from 0.006 to 0.088 pounds a.i./A) than the maximum application rate Dow applied for, 0.133 pounds a.i./A.[83] The remaining study that did have applications at the maximum proposed application rate of 0.133 pounds a.i./A was plagued by other severe problems.[84] The study limitations include the following issues: of the seven applications of sulfoxaflor during the study, only two used the maximum rate, while the other five applications used lower rates; cotton was used as the test crop for this study, which is a poor test crop because it does not have sufficient pollen for the bees to collect to get accurate assessments; and this study was done to quantify sulfoxaflor residue in the cotton's pollen and nectar and not to determine the effects of sulfoxaflor on bees, which the EPA confirmed was limited information.[85] After reviewing Tier II data,

[78] *Id*.
[79] *Id*. at 524.
[80] *Id*. at 525.
[81] *Id*.
[82] *Id*. at 526.
[83] *Id*.
[84] *Id*.
[85] *Id*.

the EPA concluded that the data was limited to application rates lower than the application rates for which Dow originally applied.[86] The EPA also concluded that the "'direct effect of sulfoxaflor…at the maximum application rate in the U.S. is presently unknown.' Furthermore, due to various limitations in all of the studies, the effect of sulfoxaflor, when applied at the maximum proposed rate, on both brood development and long-term colony health was 'inconclusive.'"[87]

The EPA concluded that Dow must perform additional Tier II studies before giving sulfoxaflor unconditional registration, and there is no evidence suggesting these studies have ever been done in the record.[88] Regardless, the EPA conditionally registered sulfoxaflor at 0.09 pounds a.i./A with imposed crop-specific restrictions and other mitigation measures while awaiting the test results.[89] The EPA determined that the conditional registration of sulfoxaflor would not cause "catastrophic loss to brood during the time period required for the conditional studies to be performed and assessed," but within seven months of the conditional registration, the EPA unconditionally registered sulfoxaflor at 0.09 pounds a.i./A in spite of its "very highly toxic" to bees classification and regardless of not receiving the required additional studies from Dow.[90] The EPA based its decision to unconditionally register sulfoxaflor on the argument that "applying sulfoxaflor according to the label would not cause 'unreasonable adverse effects' on bees, and that 'the benefits of [sulfoxaflor] compared to registered alternatives…outweighed the costs and therefore justified registration."[91]

The EPA's conclusion that sulfoxaflor, if used according to the label, would not cause any adverse side effects to bees is clearly an unreasonable decision based on the facts as a whole. It may be true that sulfoxaflor is safer than the currently registered pesticides, but the EPA did not base this decision on substantial evidence. The Tier I studies all proved sulfoxaflor is highly toxic to bees through contact or consumption with risk quotients much higher than the level of concern. Therefore, Tier II studies were required to determine sulfoxaflor's effect on the colony, but as discussed, those studies were flawed. The court concluded that as a result of the Tier I studies, "[the] EPA acted in accordance with its regulations and common sense in proceeding to Tier II," but it has consistently held that it would not allow the EPA to "avoid its own regulations when actual measurements were 'in the neighborhood' of measurements that would not trigger such concern."[92]

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[86] *Id.*
[87] *Id*.
[88] *Id*.
[89] *Id*. at 526-27.
[90] *Id*. at 527.
[91] *Id*. at 528.
[92] *Id*. at 531.

d. Current State of Sulfoxaflor in the U.S.

On October 14, 2016, the EPA registered sulfoxaflor with limited uses.[93] The EPA then unconditionally registered sulfoxaflor on July 12, 2019 for new uses, added additional once restricted uses, and also removed certain restricted plants that were included in the 2016 registration.[94] It claims that Dow submitted the required studies and that sulfoxaflor's effect on pollinators is minimal when used properly.[95] The Pollinator Stewardship Council and others filed a petition for review in light of the July 12, 2019 unconditional registration under case no. 19-72280 on September 6, 2019, and the Center for Food Safety and others also filed a petition for review under case no. 19-72109 for sulfoxaflor registration on August 20, 2019.[96] The court consolidated these cases and appellate briefs are due in early spring of 2020.[97] These petitions for review claim that the EPA's July 12, 2019 order be set aside because it is contrary to federal law under FIFRA, that the EPA failed to consult with the Department of Fish and Wildlife Services before registering sulfoxaflor as required by ESA, and that the EPA did not present sufficient evidence to prove otherwise.[98]

III. Sulfoxaflor Regulation in Europe and France

Pesticide regulation in the EU is guided by Regulation (EC) No. 1107/2009 and Directive 2009/128/EC, which is very similar to FIFRA and its Pollinator Risk Assessment respectively. All EU member states also follow the same standards. A very important element underlying pesticide regulation is the precautionary principle, which is used to mitigate risk and look out for future generations. The next section will first discuss the precautionary principle and second sulfoxaflor's regulation in the EU and France.

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[93] *See The EPA Issues Sulfoxaflor Registration for Some Uses*, EPA, https://www.the EPA.gov/pesticides/the EPA-issues-sulfoxaflor-registration-some-uses (last visited Mar. 27, 2020).

[94] *See* the EPA, Decision Memorandum Supporting the Registration Decision for New Uses of the Active Ingredient Sulfoxaflor on Alfalfa, Cacao, Citrus, Corn, Cotton, Cucurbits, Grains, Pineapple, Sorghum, Soybeans, Strawberries and Tree Plantations and Amendments to the Labels 3 (2019).

[95] *Id*.

[96] *See* Petition for Review at 1-2, Center for Food Safety v. the EPA, Case No. 19-72109 (9th Cir. Aug. 2019).

[97] *See* Order to Consolidate at 1, Center for Food Safety v. the EPA, Case No. 19-72109 (9th Cir. Aug. 2019).

[98] *See* Petition for Review, *supra* note 96, at 2-3.

a. The Precautionary Principle

A fundamental pillar of pesticide regulation in the EU is the precautionary principle. This principle is a more recent addition to European law, with its initial mention in the first draft of a German bill aimed at securing clean air during the 1970s.[99] The idea behind *Vorsorgeprinzip*, the German translation of "the precautionary principle," is that the current generation is responsible to future generations to ensure "that the natural foundations of life are preserved and that irreversible types of damage…must be avoided."[100] In order to accomplish this goal, the precautionary principle demands

> the early detection of dangers to health and environment by comprehensive, synchronized (harmonized) research, in particular about cause and effect relationships…, it also means acting when conclusively ascertained understanding by science is not yet available. Precaution means to develop, in all sectors of the economy, technological processes that significantly reduce environmental burdens, especially those brought about by the introduction of harmful substances.[101]

Although the German rendition of the precautionary principle was the first example, a variety of definitions of the precautionary principle are included in a multiplicity of international treaties.[102] Two international treaties, the London Declaration and the Rio Declaration, do not require intervention, but rather include language such as "may require action" and "according to their capabilities."[103] However, the *EU Communication on the Precautionary Principle* "[r]equires intervention to maintain the high level of protection chosen by the EU."[104] As this note focuses on the EU, I will apply the definition of the precautionary principle described in the previous sentence.

Put simply, the basis of the precautionary principle is to ensure a high level of environmental protection by permitting protective measures to be taken "without having to wait until the reality and extent of those risks become fully apparent or until the adverse effects materialise."[105]

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[99] UNESCO, The Precautionary Principle: World Commission on the Ethics of Scientific Knowledge and Technology 9 (2005).

[100] *Id*. at 10.

[101] *Id*.

[102] *See id*. at 12.

[103] *See id*.

[104] *Id*. at 13.

[105] Emanuela Bozzini & Elen Stokes, *Court Upholds Restrictions on*

But this authority is not unlimited and it has been consistently held that institutions applying the precautionary principle must follow the proper procedure, which includes three stages.[106] First, the institution must identify the potentially adverse effects arising from a phenomenon; second, the institution must assess the risk to public health, safety, and the environment which relate to the phenomenon; and third, when the institution identifies potential risks that exceed what is acceptable for society, it must adopt proper protective measures to employ risk management.[107]

When an institution is identifying potentially adverse effects, it may not use hypothetical risks; rather, some form of scientific analysis is required to solidify a position that the risks are plausible and not easily refuted.[108] However, because the precautionary principle relates to poorly known outcomes and probability, the scientific analysis must confirm that there is an unquantified possibility of risk.[109] Once the potential risks are identified, the institution must determine whether such risks are unacceptable.[110] The definition of "unacceptable" differs between international treaties, but what each definition has in common is that "they contain value-laden language and thus express a moral judgment about acceptability of the harm."[111] If the risk is deemed 'unacceptable', one must implement proportional measures to intervene "before possible harm occurs, or before certainty of such harm can be achieved."[112] The precautionary principle is used by both the EU and France in the pesticide regulation mentioned below.

b. Regulation in Europe

The current EU regulation for pesticides was adopted in 2009 when a "pesticide package," containing Regulation (EC) No. 1107/2009 (hereinafter "1107/2009") and Directive 2009/128/EC (hereinafter "2009/128/EC"), repealed the outdated Directives 79/117/EEC and 91/414/EEC, which previously regulated pesticide use.[113] This "pesticide package" was adopted on October 21, 2009, with 1107/2009's purpose to regulate the "placing of plant protection products on the market,"[114]

Neonicotinoids A Precautionary Approach to Evidence, 9 Euro. J. Risk Reg. 585, 586 (2018).

[106] *See id*. at 586-87.

[107] Joined Cases T-429/13 and T-451/13, *Bayer CropScience AG v. Eur. Comm'n*, ECLI:EU:T:2018:280, ¶ 111 (2018).

[108] *See* UNESCO, *supra* note 99, at 13.

[109] *Id*.

[110] *See id*.

[111] *Id*.

[112] *Id*.

[113] Commission Regulation 1107/2009, 2009 O.J. (L 309) 1 (EC).

[114] *Id*.

and 2009/128/EC's purpose to "establish a framework for Community action to achieve the sustainable use of pesticides."[115] Most countries apply a risk-based approach, and while the EU initially used this approach, it adopted a new pesticide package in 2009 to move towards a more hazard-based approach.[116]

The difference between hazard and risk in risk assessment is quite stark. If a chemical has the "intrinsic potential…to cause harm," it is a hazard, while "the likelihood of harm in specific circumstances" constitutes a risk.[117] The Commission uses a common analogy to differentiate the two elements: "a lion is intrinsically a hazard, but a lion safely constrained in a zoo is not a risk, since there is no exposure."[118] Under 1107/2009, any substance "meeting the criteria to be classified as hazardous in accordance with Regulation (EC) No 1272/2008" is considered a "substance of concern" and will not be allowed.[119] There are seven hazardous active substances mentioned in the new regulation, including mutagens; carcinogens; substances that are toxic for reproduction; substances that are persistent, bioaccumulative, and toxic for the environment; persistent organic pollutants; substances that are very persistent and very bioaccumulative; and substances that are endocrine disruptive.[120] Specifically in connection to the honeybee population, if a pesticide is not considered to be one of the seven hazardous active substances, then it will be approved, following a risk-assessment to assure it "will result in a negligible exposure of honeybees, or has no unacceptable acute or chronic effects on colony survival and development, taking into account effects on honeybee larvae and honeybee behaviour."[121]

The risk-assessment required under 1107/2009 for assessing risk of a pesticide to honeybees is outlined in a guidance document written by the European Food Safety Authority (hereinafter "EFSA").[122] This risk-assessment is nearly synonymous to the Pollinator Risk Assessment Framework adopted by the EPA. The EFSA's Guidance Document outlines a three-tiered risk assessment with a simple, cost-effective Tier I to assess acute and chronic effects of exposure of the pesticide to bees at all stages of life, a more advanced Tier II to refine

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[115] Council Directive 2009/128/EC, 2009 O.J. (L 309) 71 (EC).

[116] *Id*., Commission Regulation, *supra* note 113, at 1.

[117] Emanuela Bozzini, Pesticide Policy and the Politics in the European Union: Regulatory Assessment, Implementation, and Enforcement 30 (2017).

[118] *Frequently Asked Questions: Endocrine Disruptors*, Eur. Comm'n (June 15, 2016), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_2151.

[119] Commission Regulation, *supra* note 113, at 7.

[120] *Id*. at annex II, §§ 3.6.2 - 3.8.2.

[121] *Id*. at 3.8.3.

[122] EFSA, *Guidance Document on the Risk Assessment of Plant Protection Products on Bees*, 11(7) EFSA J. 3295 (2014).

exposure estimates that will likely result in negligible exposure, and Tier III to assess the uncertainties from the lower tiers through case by case studies, such as field studies.[123] At each tier, a pesticide is either found to cause a negligible risk to bees requiring no further assessment or that higher tiered assessments are required to determine the level of risk the pesticide poses to bees .[124]

In Tier I, acute and chronic effects are assessed through exposure via oral consumption (consumption of pollen and nectar from treated plants and consumption of contaminated water) and via contact (spray deposits, contact with treated plants, and contact with contaminated water).[125] In order to determine whether more assessment is needed, a comparison between the hazard quotient (hereinafter "HQ") (used for contact exposure) or exposure toxicity ratio (hereinafter "ETR") (used for oral exposure), and a threshold trigger value that the EFSA sets to meet its specific protection goals.[126] HQ and ETR are a ratio of the predicted environmental concentration of a pesticide to its toxicity to bees (the LD_{50}).[127] If the HQ or ETR are higher than the threshold trigger value, movement to higher tiered studies are required.[128]

Under the Guidance Document, Tier I assessments "use standardised scenarios and decision rules which are designed to provide an appropriate degree of certainty. Higher tier assessments are not standardised, and so the degree of certainty they provide has to be evaluated case by case."[129] Simply put, Tier I assessments are composed of laboratory studies to measure acute and chronic effects on bees, and higher tiered studies are composed of semi-field and field studies to analyze residues of a pesticide in the pollen and nectar collected in the hive and eaten by the colony.[130]

On July 27, 2015, the EC implemented Regulation (EU) 2015/1295, which approved sulfoxaflor in the EU.[131] However, the EFSA noted that it would be necessary to require conditions, restrictions, and further confirmatory information in regards to sulfoxaflor.[132] The Commission's decision to approve sulfoxaflor provided the maximum application rate would be twenty-four grams of active substance per hectare (hereinafter "g a.s./ha").[133]

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[123] *Id*. at 2, 8-9, 52, 54.

[124] *Id*.

[125] *Id*. at 13-14.

[126] *Id*. at 8, 84-85.

[127] *Id*.

[128] *Id*.

[129] *Id*. at 54.

[130] *Id*. at 78-79.

[131] Commission Implementing Regulation, *supra* note 2.

[132] *Id*. at 7-8.

[133] Commission *Final Review Report for the Active Substance Sulfoxaflor*, at app. II (29 May 2015).

c. Regulation in France

Although Dow exhaled a sigh of relief that sulfoxaflor was approved in the EU, obstacles remained. Not one month after sulfoxaflor was registered in France on September 27, 2017, an Administrative Tribunal in Nice, France suspended the sale and use of sulfoxaflor.[134] Générations Futures brought a suit in response to the French Agency for Food, Environmental, and Occupational Health and Safety's (hereinafter "ANSES") registration of sulfoxaflor and moved for an interim order suspending the operation of ANSES's decision.[135] Générations Futures brought this motion under Article L. 521-1 of France's Code of Administrative Justice, which allows an urgent applications judge to order a suspension of an agency decision, or some of its effects, when the urgency justifies the suspension and when the urgency reports a proper means to create, in the state of instruction, a serious doubt as to the legality of the decision.[136] Générations Futures requested the court to suspend the registration of two sulfoxaflor containing pesticides under Article 5 of the Charter for the Environment, an amendment to the French Constitution, and under Article 191 of the Treaty on the Functioning of the European Union.[137]

Article 5 states, "When the occurrence of any damage, albeit unpredictable in the current state of scientific knowledge, may seriously and irreversibly harm the environment, public authorities shall, with due respect for the *principle of precaution* and the areas within their jurisdiction, ensure the implementation of procedures for risk assessment and the adoption of temporary measure commensurate with the risk involved in order to deal with the occurrence of such damage."[138] Article 191 states, "Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the *precautionary principle* and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."[139]

The court emphasized that this procedure stems from the principle of precaution consecrated by the stipulations in previous Court of Justice of the European Union decisions, such as the emergency

[134] Tribunal Administratif, *supra* note 3.

[135] *Id*.

[136] *Id*. ¶ 3.

[137] *Id*. ¶¶ 4-5.

[138] Constitution française Oct. 4, 1958, Charter for the Environment, art. 5 (Fr.) (emphasis added).

[139] Treaty on the Functioning of the European Union, art. 191, Oct. 26, 2012, 2012 O.J. (C 326) (emphasis added).

measures against Mad Cow Disease in 1998,[140] that "when uncertainties persist regarding the existence or the significance of risks, protective measures may be taken without waiting for the reality and gravity of these risks to be fully demonstrated."[141] The Tribunal Administratif furthered this feeling when it held that "when it proves to be impossible to determine with certitude the existence or the significance of the alleged risk because of the insufficient, inconclusive, or imprecise nature of the study results, but that the probability of a real damage persists assuming that the risk will become reality, the principle of precaution justifies the adoption of restrictive measures."[142]

The court based its decision to suspend the registration of sulfoxaflor on the following reasons. Although ANSES stated its decision to register sulfoxaflor based on scientific reports that concluded conformity with the criteria that there be no unacceptable effect on bees, ANSES did admit that 1) sulfoxaflor is toxic to bees in direct contact and in certain doses; and 2) sulfoxaflor is authorized to be used only by professionals trained to use phytopharmaceutical products.[143] The court held the authorization to place sulfoxaflor on the market does not guarantee with certainty "exclusive and compliant use of sulfoxaflor by these professionals, effective training on how to use the product, or that the doses used without inspection while applying the product do not present a danger to bees, whose population is already fragilized, and public health."[144] The court also noted that a press release written by the Minister of Ecological and Inclusive Transition and the Minister of Agriculture presented new scientific data on sulfoxaflor and requested ANSES to review the newfound studies, which confirmed an incertitude concerning the innocuity of sulfoxaflor.[145] The court relied on this information to hold the urgency justified the suspension of sulfoxaflor's registration under the precautionary principle to prevent health risks to bees and humans until it is fully decided on its legality.[146]

More recently, the Ministry of Ecological and Inclusive Transition published a decree by amending Article D. 253-46-1 of the Rural and Maritime Fisheries Code to include a provision that states, "The active substances presenting modes of action identical to those in the family of neonicotinoids and mentioned in the second paragraph of II of article

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[140] *See* Case C-157/96, The Queen v. Ministry of Agric., Fisheries & Food,1998 E.C.R. I-02211; Case C-180/96, U.K. of Gr. Brit. & No. Ir. v. Comm'n of the European Cmtys., 1998 E.C.R. I-02265.

[141] *Tribunal Administratif*, *supra* note 3, ¶ 6.

[142] *Id*.

[143] *Id*. at ¶ 7.

[144] *Id*.

[145] *Id*.

[146] *Id*. at ¶ 8

L. 253-8 include the following: Flupyradifurone; Sulfoxaflor."[147] Article L. 253-8 section II states "the use of phytopharmaceutical products that contain one or more active ingredients presenting modes of action identical to those in the neonicotinoid family and seeds treated with these products are prohibited."[148]

IV. Comparison Between U.S. and EU Pesticide Regulation

This section discusses the different ways pesticides are registered and regulated in the EU and the U.S., how they are similar, and how they differ. Initial consideration seems to show the process used by both the EU and the U.S. follow the same methodology; however, closer inspection reveals that the EU applies a stricter procedure and incurs stricter outcomes.

At first glance, the processes to register a pesticide under FIFRA and under 1107/2015 are very similar. Both the EPA and the Commission follow a guidance document to determine the risk a pesticide presents for bees the EPA follows the Pollinator Risk Assessment Framework and the Commission follows the Guidance Document on the Risk Assessment of Plant Protection Products on Bees. These documents both outline a multi-tiered assessment program that must be followed in order to register a pesticide and determine at what quantities the pesticide may be used. Both multi-tiered assessments include Tier I laboratory assessments to measure the LD_{50} (median lethal dose) for both acute and chronic toxicity levels of a pesticide via oral and contact exposure.[149] At Tier I, both documents also use equations to determine the risk quotients, levels of concerns, and toxicity exposure ratios to determine what amount of active ingredient may be used.[150] Both risk assessments also implement semi-field studies if there are any inconclusive or worrisome results at Tier I, and the purpose of these studies is to analyze the

[147] *Décret n. 2019-1519 du 20 Décembre 2019 Listant les Substances Actives Contenues dans les Produits Phytopharmaceutiques et Présentant des Modes D'action Identiques à Ceux de la Famille des Néonicotinoïdes* [Decree n. 2019-1519 of Dec. 2019 Listing the Active Substances Contained in the Phytopharmaceutical Products and Present Modes of Action Identical to Those in the Family of Neonicotinoids], Journal Officiel de la République Française 38 [J.O.] [Official Gazette of France] (Dec. 31, 2019) (translated by author); Article D. 253-46-1 du Code Rural et de la Pêche Maritime [Rural and Maritime Fisheries Code art. D. 253-46-1] (translated by author).

[148] Rural and Maritime Fisheries Code, *supra* note 147, at art. L. 253-8.

[149] *See e.g.,* Office of Pesticide Programs, *supra* note 44, at 29; EFSA, *supra* note 122, at 231-35.

[150] *Id*.

sublethal effects/nesting behavior such as colony strength, brood pattern and development, and foraging activity among other hive activity.[151] If both the laboratory and semi-field assessments result in inconclusive findings, field studies are required to address concerns with either acute or chronic toxicity or sublethal effects.[152]

However, regardless of the procedural similarities between the risk assessment documents, there are important differences in the assessments and results. For example, under the EPA's document, the multi-tiered assessments should be conducted in a manner similar or consistent to the Organization for Economic Cooperation and Development (hereinafter "OECD") guidelines; however, the EPA is not mandated to perform according to OECD guidelines and has, in fact, acknowledged that when it registered sulfoxaflor in January 2013, "the semi-field studies submitted for Tier 2 did *not* comport with OECD guidelines."[153] The EU, however, states that OECD guidelines should be followed.[154]

Another large difference is the maximum application rate of sulfoxaflor permitted under the registration. In the U.S., the EPA approved sulfoxaflor to be applied at a maximum rate of 0.09 lbs a.i./A,[155] and in the EU, the EFSA approved sulfoxaflor to be applied at a maximum rate of 0.024 kg a.i./ha[156]. Converted to the imperial measurement system, the EFSA approved sulfoxaflor to be used only at a maximum application rate of 0.02 lbs a.i./A. Although the EPA placed limitations lowering the maximum application rate for certain crops, the lowest maximum application rate placed on crops starts at 0.047 lbs a.i./A.[157] The lowest maximum application rate in the U.S. is more than twice the maximum application allowed on any crops approved by the EFSA.

The question then arises, if the assessments are so similar, why are the maximum application rates dramatically different? The EU only allows a maximum application rate of 0.02 lbs a.i./A of sulfoxaflor, and France has outright banned sulfoxaflor. I suggest this is due to the precautionary principle present in the EU and France, which allows them to take more precautionary measures in regulating and restricting pesticides.

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[151] *Id*.

[152] *Id*.

[153] Office of Pesticide Programs, *supra* note 44, at 24, 50; *Pollinator Stewardship Council,* 806 F.3d at 529, 537.

[154] EFSA, *supra* note 122, at 202-04, 208, 211, 226-31.

[155] The EPA, *Decision Memorandum Supporting the Registration Decision for New Uses of the Active Ingredient Sulfoxaflor on Alfalfa, Cacao, Citrus, Corn, Cotton, Cucurbits, Grains, Pineapple, Sorghum, Soybeans, Strawberries and Tree Plantations and Amendments to the Labels* [hereinafter Decision Memorandum] at 23.

[156] Commission *Final Review Report for the Active Substance Sulfoxaflor* at 3, 7-8 (May 29, 2015).

[157] Decision Memorandum, *supra* note 155, at 11.

V. Effect of a Precautionary Principle on Sulfoxaflor Registration in the U.S.

This section addresses the likely outcome of the current 2019 litigation against the EPA to vacate its decision to unconditionally register sulfoxaflor. As I mentioned above, it is unlikely that the outcome of the current litigation will vacate the EPA's decision under either FIFRA or the ESA. However, the benefit and influence of a precautionary principle similar to the EU and France would greatly alter the results.

a. Analytical Approach Under the Federal Insecticide, Fungicide, and Rodenticide Act and the Endangered Species Act

As mentioned above, according to the EPA guidance document regarding the multi-tiered assessment program and the holding in *Pollinator Stewardship Council v. the EPA*, if the risk quotient surpasses the level of concern of 0.04, Tier II studies are required.[158] If more recent Tier II, semi-field studies provide substantial evidence to support the EPA's decision to unconditionally register sulfoxaflor as of July 2019, the EPA will likely overcome the low hurdle required for the Ninth Circuit to give it deference in the court's decision. Unlike the EPA's comment in 2015 that there were data gaps in the 2013 studies for sulfoxaflor,[159] the EPA has since stated that there are no data gaps for the 2019 unconditional registration of sulfoxaflor and it has received additional Tier II studies, including three tunnel studies, two colony feeding studies, and fourteen field residue studies.[160] These new studies tested exposure from 0.02 to 0.09 lbs a.i./A, which includes the entire range of maximum application rates for all crops.[161] To date, the EPA "has a very robust set of pollinator exposure and effects data for sulfoxaflor…the Tier II data set consists of 11 semi-field (tunnel) studies, 2 colony feeding studies and 16 field residue studies analyzing pollen and nectar residues in a dozen crops."[162] It would not be difficult for a court to determine that the EPA met the substantial proof standard and, therefore, would not vacate the EPA's unconditional registration.

The next complaint is that the EPA did not "consult with the United States Fish and Wildlife Service or the National Marine Fisheries Service to ensure that the registration decision for new uses of sulfoxaflor will not jeopardize any listed species or destroy or adversely

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158 *Pollinator Stewardship Council*, 806 F.3d at 525-26.

159 *Id*.

160 Decision Memorandum, *supra* note 155, at 8, 23.

161 *Id*. at 8-9.

162 *Id*.

modify any of their critical habitats."[163] When the Ninth Circuit vacated the EPA's decision to register sulfoxaflor, it did not answer whether sulfoxaflor would need to be analyzed under the ESA.[164] Since the Ninth Circuit's decision, seven species of yellow faced-bees were added to the endangered species list in September 2016, which are: Hylaeus anthracinus, Hylaeus assimulans, Hylaeus facilis, Hylaeus kuakea, Hylaeus mana, Hylaeus longiceps, and Hylaeus hilaris.[165] However, according to the U.S. Fish and Wildlife Service's Environmental Conservation Online System, which lists all the threatened and endangered species, these seven species of yellow-faced bees are found only in the state of Hawaii.[166] It is unsurprising that the EPA "does not believe the environment or the public would be best served by delaying the registration of new uses for sulfoxaflor to complete consultation. Focusing the limited resources of the EPA, the Services on completing a consultation on the effects of sulfoxaflor would by necessity come at the expense of putting more resources into evaluating and consequently regulating, where appropriate what the EPA believes to be more toxic compounds, that, among other things, pose greater risk to endangered species than does sulfoxaflor."[167]

Although it is necessary that the EPA perform a consultation before registering a pesticide that may affect an endangered species under 16 U.S.C. 1536, the most that would happen is that a court would require that the EPA perform a consultation regarding sulfoxaflor. It is likely the EPA could be granted an exception under 16 U.S.C. 1536(h) or be given an incidental take statement based on the EPA's argument for not consulting.

The likelihood of sulfoxaflor receiving any meaningful, additional restrictive measures under current U.S. law seems extremely slim. However, if the U.S. were to adopt the precautionary principle "a mythical concept, perhaps like a unicorn,"[168] as John Graham, former head of U.S. Office of Information and Regulatory Affairs, called it a different result would likely occur.

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[163] Petition for Review, *supra* note 96, at 3.

[164] *See generally Pollinator Stewardship Council*, 806 F.3d 520.

[165] 50 C.F.R. § 17.11-17.12 (2019).

[166] ECOS Environmental Conservation Online Service, FISH AND WILDLIFE SERVICE, https://ecos.fws.gov/ecp/listedSpecies/speciesListingsByTaxGroupPage?statusCategory=Listed&groupName=Invertebrate%20Animals&total=303 (last visited Mar. 22, 2020).

[167] Decision Memorandum, *supra* note 155, at 10.

[168] Samuel Loewenberg, *Precaution is for Europeans*, N.Y. Times (May 18, 2003), https://www.nytimes.com/2003/05/18/weekinreview/precaution-is-for-europeans.html.

b. Analytical Approach Under the Precautionary Principle

Regulation 1107/2009, the equivalent to FIFRA as mentioned above, deems its provisions

> are underpinned by the precautionary principle in order to ensure that active substances or products placed on the market do not adversely affect human or animal health or the environment. In particular, Member States shall not be prevented from applying the precautionary principle where there is scientific uncertainty as to the risks with regard to human or animal health or the environment posed by the plant protection products to be authorised in their territory.[169]

The French Constitution also includes a precautionary principle in its Charter on the Environment, which led the Tribunal Administratif de Nice to vacate sulfoxaflor's registration and ultimately to the French government outright banning it.[170]

When the EFSA banned the three main neonicotinoids in the EU, Bayer CropScience AG (hereinafter "Bayer") and others brought a lawsuit claiming the EFSA identified only hypothetical risks, performed an inadequate risk assessment, and took unproportionate protective measures when compared to the risks.[171] The court explained that the first stage did not require extra explanation, but the next two stages called for clarification.[172]

The court noted the EFSA identified a high acute risk to honeybees from exposure to dust drift of neonicotinoids, from exposure to residues in nectar and pollen of plants treated with neonicotinoids, and from exposure to guttation of neonicotinoids.[173] These risks were also based on scientific studies the EFSA assessed, so the court rejected the claim that the risks identified were merely hypothetical.[174]

Risk assessment consists of two different elements; first, there must be a scientific assessment of the risks, and second, there must be a determination of what level of risk is deemed unacceptable for society.[175]

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[169] Commission Regulation 1107/2009, 2009 O.J. (L 309) 6 (EC).

[170] *See* Tribunal Administratif, *supra* note 3.

[171] Joined Cases T-429/13 and T-451/13, *Bayer CropScience AG and Others v. European Commission*, ECLI:EU:T:2018:280 at 334-35 (2018).

[172] *Id*. at 111.

[173] *Id.* at 385.

[174] *Id.* at 415.

[175] *Id.* at 122 (quoting judgment of April 12, 2013, Du Pont de Nemours (France) and Others v. Commission, T-31/07, not published, EU:T:2013:167, p 138).

When the EFSA makes a decision in the context of pesticide regulation under Article 21 of Regulation No 1107/2009, it "must always take account of the latest scientific and technical knowledge."[176] Bayer and others claim the EFSA failed to take into account all of the relevant studies available, the court disagreed and found that the EFSA based its decision on multiple Tier I and higher tier studies, including many studies which Bayer claimed the EFSA did not consider.[177]

Bayer and others claimed the risk management employed by the EFSA was also improper because the measures taken were not proportionate to the alleged risks.[178] The court rejected this claim stating, "it must be held that the fact that the Commission deemed the risk mitigation measures that might be taken insufficient did not permit the inference that the contested measure manifestly exceeded what was necessary in order to achieve the objectives pursued."[179]

Sulfoxaflor poses nearly identical risks as neonicotinoids, and similarly, France banned the use and sale of sulfoxaflor.[180] The way France suspended and banned sulfoxaflor was in a nearly identical fashion and for nearly identical reasons to how the EFSA banned the three most commonly used neonicotinoids. Because of the similarity, France likely applied the precautionary principle properly and will likely not have its decision overturned if Dow brings an action. To strengthen this argument, ANSES did not appeal the Nice court's decision to suspend sulfoxaflor because its mode of action is identical to neonicotinoids, and ANSES supported the French government's later decision to ban it completely.[181]

It is likely that France's novel decision regarding sulfoxaflor will influence the EU to follow suit. If a precautionary principle were present in the U.S., it would also be likely that sulfoxaflor would be banned due to its mode of action.

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[176] *Id.* at 358.

[177] *Id.* at 382.

[178] *Id.* at 502.

[179] *Id.* at 565.

[180] Communiqué de Presse [Press Release], Ministère de la Transition Écologique et Solidaire [Ministry of the Ecological and Inclusive Transition], Protection des Pollinisateurs: Le Gouvernement Confirme L'interdiction D'utilisation des Deux Substances Phytopharmaceutiques Ayant un Mode D'action Identique à Celui des Néonicotinoïdes [Protection of Pollinators: The Government Confirms the Prohibition of the Use of Two Phytopharmiceutical Substances Having a Mode of Action Identical to That of Neonicotinoids] (Dec. 31, 2019) (translated by author).

[181] ANSES, *Decision of the Nice Administrative Court: ANSES Withdraws Marketing Authorisations for Two Insecticides Containing Sulfoxaflor*, (Dec. 6,2019), https://www.anses.fr/en/content/decision-nice-administrative-court-anses-withdraws-marketing-authorisations-two-insecticid-0.

If the EU and the U.S. followed France's example in banning sulfoxaflor, they would also be justified under the precautionary principle. The precautionary principle in the EU "requires intervention to maintain the high level of protection chosen by the EU."[182] If there are potentially identifiable, unacceptable risks related to sulfoxaflor backed by scientific analysis, the EU and the U.S. would be required to implement proportional measures. The EPA has stated that sulfoxaflor is highly toxic to pollinators at all life stages,[183] and scientific studies supporting this statement suggest sulfoxaflor's mode of action is identical to neonicotinoids.[184] France based its decision to ban sulfoxaflor on these grounds, and the EU banned three neonicotinoids based on this uncertainty.

Because sulfoxaflor is nearly identical to neonicotinoids, is highly toxic to bees, and its chronic effect is uncertain, a precautionary principle in the U.S. would impose higher restrictions on sulfoxaflor or altogether ban its use.

Conclusion

Current U.S. pesticide regulation under FIFRA and ESA does not offer sufficient protection to bees. Sulfoxaflor's registration will likely not be vacated, putting bees at risk of continual Colony Collapse Disorder.

If we desire to have similar results to France regarding pollinator protection, the U.S. must implement a similar precautionary principle to what is seen in the EU and France. We can see the results of the precautionary principle in the EU and France related to sulfoxaflor by the more restrictive measures. The EU registered sulfoxaflor to be used on fewer crops than in the U.S. and permits a lower maximum application rate of 0.02 lbs a.i./A compared to 0.09 lbs a.i./A in the U.S. This effect is seen more drastically in France who entirely banned sulfoxaflor in December of 2019.

Without such a protection, the EPA will continue registering pesticides, such as sulfoxaflor and neonicotinoids, that are harmful to pollinators and will do so at much higher rates than the EU and France. In turn, Colony Collapse Disorder will worsen, and the results are likely catastrophic.

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[182] UNESCO, The Precautionary Principle: World Commission on the Ethics of Scientific Knowledge and Technology 13 (2005).

[183] Cornelisse et al., *supra* note 23, at 11.

[184] Watson et al., *supra* note 21, at 432.

Animal Welfare Laws in Kuwait: All Bark, No Bite

Fatemah Albader*

Introduction

Animals are not protected through any legal framework in Kuwait. They are not protected from animal abuse. While there are some animal welfare laws in the country to protect animals, they are not enforced in practice, and animal abuse remains rampant.[1] The only possible enforced protection of animals stems from Article 253 of Kuwait's criminal code, which states:

> "Any person who kills an animal owned by another, or gives it a poisonous or harmful substance, or injures it, or renders it useless or reduces its usefulness, deliberately and unjustifiably, shall be punished with a fine and/or imprisonment for a period not exceeding two years. The previous penalties shall be imposed on anyone who intentionally causes the transmission of an infectious disease to an animal owned by another."[2]

The law, then, treats the animal like property belonging to an individual, and the pet owner becomes the victim of the crime, not the pet. The provision, however, is incomprehensive and lacking. Outside of the special circumstances provided herein, Article 253 does not protect against animal abuse generally, nor does it protect stray animals. Moreover, it does not criminalize abuse by pet owners, only third parties. Consequently, pet owners who abuse their own pets do not violate Article 253.

It is no surprise that animal abuse and cruelty is highly prevalent in Kuwait, whether aimed toward stray or owned animals. It is normal to see stray cats or dogs on the streets, found runover and in unpleasant conditions. Considered a nuisance, individuals, private entities, and

* The author would like to thank, first and foremost, the editors of ANRLR on their substantive, significant, and rigorous work during the editing and review process. The author would also like to credit Natalie Mousa for her invaluable research assistance.

[1] MOI Kuwaitnews, *ONE campaigns against animal cruelty in Kuwait at 360 Mall*, YouTube (Oct. 18, 2013), https://www.youtube.com/watch?v=Czg-_B2Gumk.

[2] Kuwait Law No. 16 of 1960 promulgating the Penal Code (*translated*), art. 253.

government authorities will deliberately poison stray animals, leading to their deaths.[3] Pet owners often give up their animals after a while, throwing them out to the streets to fend for themselves having never before lived on the streets. Probably most disgracefully, animals in the Friday Market, a market that sells animals, wait to be sold in terrible living conditions. These market animals are often crammed in very small cages, and many appear malnourished and severely ill due to the terrible conditions they are kept in.[4] An Instagram advocate account, @fridaymarketgenocide, shows the cruelty these animals face in the Friday Market.[5]

Despite existing laws, places like the Friday Market continue to operate. Abuse of animals on the streets still occurs. Abandoning previous pets by throwing them to the streets is still widespread. As difficult as it is to speak on the mistreatment of animals, the time is ripe to alert the Kuwaiti government on the practice that has been allowed to flourish for so long. This article advocates that the laws in Kuwait must change to the benefit of all animals, both strays and owned. In doing so, this article takes a comparative approach, comparing animal rights and welfare laws in different jurisdictions, namely the United States and Switzerland. This article proposes the possibility of an international law framework to govern animal abuse and cruelty, and the feasibility of implementation.

I. Overview Of The Limitless Scope Of Animal Cruelty In Kuwait

As difficult as it may be, the best way to effectuate positive change for animal welfare in Kuwait is to bring to the forefront the abuse faced by animals across the country. This next section provides some examples of the major types of cruelty and abuse witnessed by both stray and owned animals. Each example provides significant obstacles to the protection of these animals.

The Friday Market. The Friday Market is an unregulated marketplace where animals are sold. While the market mostly consists

[3] *See, e.g.*, *Cat Poisoned to Death,* Arab Times (May 15, 2018), https://www.pressreader.com/kuwait/arab-times/20180515/281676845556118; Muna Al-Fuzai, *Stop Killing Dogs*, Kuwait Times (June 16, 2019), https://www.pressreader.com/kuwait/kuwait-times/20190616/281569472244255; Touch of Hope (@touch_of_hope_q8), Instagram, https://www.instagram.com/p/BvOXqNKhGXh/ (last visited Nov. 16, 2020).

[4] Comet Confetti, *Animal Cruelty at Souk Al Hammam*, YouTube (Dec. 10, 2016), https://www.youtube.com/watch?v=x6Rp_jmnsQQ.

[5] Friday Market Genocide (@fridaymarketgenocide), Instagram, https://www.instagram.com/fridaymarketgenocide/ (last visited Nov. 16, 2020).

of cats, dogs, birds, rabbits, and turtles, it is not uncommon to find exotic animals, such as monkeys, for sale. The treatment of these animals, however, is appalling. Cats and dogs, for example, are often taken from their mothers at a very young age and sold in the market.[6] Painted water turtles, turtles that are painted with colorful designs, were recently sold in the market, without any water.[7] If missing pets are found, they are normally taken to be sold in the Friday Market.[8] The animals are also kept in dangerous conditions, leading to suffering and eventual death. If a buyer is not found within a couple of weeks, many of the "unwanted" animals are killed to make space for other animals.[9] If animals are sick or have died, it is not uncommon to find them thrown in nearby trash cans.[10]

Stray Animals. Strays experience the most dangerous forms of abuse.[11] Children in Kuwait are a leading cause of violence perpetrated against strays, torturing them for fun.[12] Children are often seen throwing rocks at stray dogs or running over stray cats with their bicycles.[13] These young, uneducated children often find it pleasurable to inflict harm on the strays they encounter.[14] This violence could be avoided with properly educating children to have compassion toward animals.[15] Adults also engage in abusive behavior toward strays such as failing to consider stopping their vehicle to check on the animal if they accidentally run over a stray.[16] Videos often surface showing people electrocuting animals.[17] Most disturbingly, if calls are made for the municipality to attend to a stray in need, the municipality's response is to poison the stray with rat poison, resulting in a slow and painful death.[18]

Individuals and businesses will also poison strays they consider a nuisance.[19] No matter who is doing the poisoning, when these animals

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[6] *Animal Rights Article in Arab Times,* Desert Girl on Kuwait: Blogger (Feb. 8, 2018), http://desertgirlkuwait.blogspot.com/2018/02/animal-rights-article-in-arab-times-feb.html.

[7] Friday Market Genocide, *supra* note 5.

[8] *Animal Rights Article in Arab Times, supra* note 6.

[9] *Id.*

[10] *Id*.

[11] *See id*.

[12] *Id.*

[13] *Id;* Atyab Alshatti, *Need for Awareness Campaign on the Rights of Animals*, Arab Times Online (June 19, 2018), https://www.arabtimesonline.com/news/need-for-awareness-campaign-on-the-rights-of-animals/.

[14] Alshatti, *supra* note 13.

[15] *Id*.

[16] *Id*.

[17] *Id*.

[18] *See Animal Rights Article in Arab Times*, *supra* note 6.

[19] *See In Kuwait, It's Animals, Not People, Who Need to Protest*, Albawaba (Feb. 16, 2012), https://www.albawaba.com/editorchoice/kuwait-its-animals-not-people-who-need-protest-413225.

are poisoned it is done without warning to nearby residents, who will walk their own dogs on the same streets.[20] In one situation, a French national in Kuwait walked his dog in a local park where his dog was exposed to food injected with rat poison that was left in the area to get rid of strays.[21] Because there are not any emergency vet hospitals in Kuwait, the dog later died that day after suffering for hours.[22] When animal rights activist Tamara Hayat spoke on animal rights issues in Kuwait at a public awareness event, she stated: "Kuwait needs a reliable and dependable animal control department that does not resort to rat poison as the only solution. Within this department, there needs to be veterinary care and a regulated government-sponsored shelter."[23] Unfortunately, these are merely aspirational and often taken for granted in other countries with proper facilities.

Dumped Animals. The problem of strays is already massive without owners dumping their pets on the streets. If former pet owners cannot find a home to relinquish their pets to, they will dump them onto the streets or in the desert, quickly leading to death since these animals never learned how to survive on their own.[24] The most common reasons for dumping pets are sickness, the pet gives birth and is no longer wanted, the owner realizes how much responsibility is required to raise the pet, or when the pet becomes loud and vocal.

Breeders. There are no enforceable rules governing breeding in Kuwait. As such, anyone can breed and sell litters, whether conceived professionally or accidentally. The problem is that because breeding is unregulated, there is no protection for the health and welfare of these animals. Many of these animals easily transfer communicable diseases because of the lack of regulation. In comparison, each state in the United States strictly regulates breeding to ensure the health and safety of the animals.[25] Massachusetts, for example, does not allow the sale of cats or dogs younger than eight weeks old.[26] In Kuwait, baby animals are a novelty and may be purchased as young as one week old. Like the

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[20] Mark Makhoul, *Dogs Being Killed by Poison in the Free Trade Zone*, TwoFortyEightAM (Feb. 15, 2012), https://248am.com/mark/kuwait/dogs-being-killed-by-poison/.

[21] *Id.*

[22] *Id*.

[23] *Animal Rights Article in Arab Times*, *supra* note 6.

[24] *See, e.g.,* Touch of Hope (touch_of_hope_q8), Instagram (Mar. 24, 2019), https://www.instagram.com/p/BvaGFxJhjFN/.

[25] See, e.g., Fla. Stat. § 828.29 (2020); *What are Pennsylvania's Dog Laws*, Pa. Dep't Agric., https://www.agriculture.pa.gov/Animals/DogLaw/pa-dog-laws/Pages/default.aspx (last visited Nov. 16, 2020); *Massachusetts Law About Animals*, Mass.gov, https://www.mass.gov/info-details/massachusetts-law-about-animals (last visited Nov. 16, 2020); Cal. Health & Safety Code § 122045 - 122315 (West 2020).

[26] *Massachusetts Law About Animals*, *supra* note 25.

United States, South Australia also has strict rules governing the sale of animals and requires all pets to be microchipped and desexed before being sold by breeders.[27] This would immensely reduce the massive population of strays and unwanted animals in Kuwait.[28]

Dog Owners. Dogs, whether stray or owned, face a tough situation in Kuwait because Kuwait is an Islamic country where dogs are viewed as impure. The Islamic religion prohibits keeping dogs inside the home and proclaims that if dogs were kept inside the home, angels would not enter.[29] Thus, most Muslim dog owners will keep their dogs locked in a cage outside in their yards. Because of the religious belief that dogs are impure, there is not much compassion towards them.[30] The religion is used to justify abuse and neglect toward dogs. This occurs despite the fact that, Islam considers cruelty to all animals a major sin and is akin to cruelty imposed on a human being.[31] Still, cruelty against dogs in Kuwait is widespread. In one incident, between twenty-four and forty American-trained guard dogs were killed by Eastern Securities of Kuwait, a Kuwaiti company, allegedly in response to a contract being revoked.[32] An employee of the company argued that the dogs were euthanized due to health problems,[33] though it is difficult to imagine a situation where twenty-four to forty dogs needed to be euthanized all at the same time.

Boarding Facilities. One of the most heartbreaking situations occurs when pet owners keep their pets in boarding facilities only to never get them back upon their return. Because these facilities are unregulated, many boarding facilities operate in their own individual

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[27] *Breeding and Selling: What You Need to Know*, Gov. S. Austl., http://www.salisbury.sa.gov.au/files/assets/public/general_documents/breeder_information_factsheet.pdf (last visited Nov. 16, 2020).

[28] *See* Osama M. El-Azazy et al., *Potential Zoonotic Trematodes Recovered in Stray Cats from Kuwait Municipality, Kuwait*, 53(3) Korean J. Parasitology 279, 279 (2015).

[29] Ahmed Shaaban, *Is Keeping Dogs Allowed in Islam or Not?*, Khaleej Times (Aug. 1, 2016, 7:27 AM), https://www.khaleejtimes.com/nation/general/is-keeping-dogs-allowed-in-islam-or-not; Mohammed Hanif, *Opinion: Of Dogs, Faith and Imams*, N.Y. Times (July 24, 2015), https://www.nytimes.com/2015/07/25/opinion/sunday/mohammed-hanif-of-dogs-faith-and-imams.html.

[30] *See id.*

[31] Sira Abdul Rahman, *Religion and Animal Welfare An Islamic Perspective*, 7(2) Animals 11, 11 (2017); *see generally Universal Declaration on Animal Welfare*, World Soc'y Prot. Animals, https://www.worldanimalprotection.ca/sites/default/files/media/ca_-_en_files/case_for_a_udaw_tcm22-8305.pdf (last visited Nov. 16, 2020).

[32] Kate Irby, *Dozens of bomb-sniffing dogs killed in Kuwait*, Miami Herald (June 23, 2016, 4:26 PM), https://www.miamiherald.com/news/nation-world/world/article85568492.html.

[33] *Id*.

capacities.[34] One specific boarding/shelter account, @5la_3ndy, received backlash for taking in pets and never returning them, leading to much grief.[35] Cats are often found in sick conditions at the boarding facility.[36] Without laws to shut down places like @5la_3ndy, even with reports filed with the competent authorities, these places are allowed to flourish to the detriment of pets and pet owners.[37]

Exotic Animals. While there are laws in Kuwait prohibiting exotic animals, like other animal laws, the law is not enforced in practice.[38] Thus, Kuwaitis are able to own exotic animals without fear of repercussions.[39] Monkeys, cheetahs, lions, and tigers are often sought out by Kuwaitis as a status symbol.[40] In one article, a Kuwaiti woman boasts about being able to evade the law by having proper connections that allow her to keep her cheetahs.[41] The problem, however, is that when these wild animals mature, or when they attack, they are abandoned. In one instance, a lion was seen roaming the streets of Kuwait.[42] In another instance, a man shot a lion who was wanted by the police for mauling a woman to death.[43] While exotic animals are outside of the scope of this paper, laws that prohibit the trade of exotic animals should be enforced so as to prevent further exacerbating the problem of animal welfare in Kuwait.

Thankfully, there are many advocates against animal abuse in Kuwait, both local and international. Many of the Kuwaiti rescues, operating out-of-pocket and within their individual capacities,[44] take it upon themselves to locate animals in need and will take care of them before shipping them to their new homes in the United States or Canada.[45] Moreover, Kuwaiti rescues have partnered with nonprofit American rescues to save animals from abuse and neglect in Kuwait and work

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[34] *See, e.g.*, Ali Al-Saadi (@5la_3ndy), Instagram, https://www.instagram.com/5la_3ndy/ (last visited Nov. 16, 2020).

[35] *See, e.g.*, iCare (icareq8), Instagram, https://www.instagram.com/p/CHdqm4RBJsG/ (last visited Nov. 16, 2020).

[36] *Id*.

[37] *Id*.

[38] Sebastian Castelier & Quentin Müller, *Meet the Kuwaitis Who Live With Their Pet Cheetahs*, Middle East Eye (Nov. 8, 2018), https://www.middleeasteye.net/features/meet-kuwaitis-who-live-their-pet-cheetahs.

[39] *Id*.

[40] *Id*.

[41] See *id*.

[42] Habib Toumi, *Lion Caught Roaming Kuwait Streets*, Gulf News (Sept. 8, 2013), https://gulfnews.com/world/gulf/kuwait/lion-caught-roaming-kuwait-streets-1.1228655.

[43] Castelier & Müller, *supra* note 38.

[44] There are no government-run animal shelters or rescues in Kuwait.

[45] *See, e.g.*, Touch of Hope, *supra* note 3.

to relocate animals from Kuwait to the United States.[46] When one of these American rescues is asked why it rescues dogs from Kuwait rather than the United States, the rescue's response is, "[i]n Kuwait, there is no hope for these starving, abused, abandoned dogs. The Kuwaiti government does little to control the stray dog population or stop the abuse."[47] Thus, there is hope for the animals that are saved, though it is still a small percentage of the total amount of stray animals.[48] The majority of animals are not so lucky, and the rescues are limited by time, money, and resources.[49] The fate of many animals in Kuwait will inevitably include suffering, abuse, and cruelty,[50] which will only stop when animal welfare laws are promulgated and enforced.

Laila D'Souza, one of the major cat rescuers in Kuwait, operates her Instagram account under the handle @rescueforwinston. In a personal interview, D'Souza discussed the difficulties she faces in helping to protect animals in Kuwait.[51] She claimed that the lack of regulation providing for animal rights, paired with the lack of government response or other legal action taken against animal abusers, has negatively impacted her ability to properly protect and advocate on behalf of animals in Kuwait.[52] Other major barriers to the protection and advocacy of animals include a disconnect and lack of understanding due to cultural differences, the lack of 24-hour veterinary care, and the lack of foster care and proper adopters.[53] In fact, D'Souza is forced to send all of the cats she rescues abroad, due to a shortage of competent adopters in the country.[54]

D'Souza vowed to strengthen her role as cat rescuer and animal rights advocate after her own cat, Winston, died from heat stroke as a direct result of the negligence of the cargo staff at the Kuwait Airport.[55] In addition to rescuing cats, D'Souza personally traps, neuters, vaccinates,

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[46] *See Our Story*, World Animal Guardians Rescue, https://www.worldanimalguardiansrescue.org/the-story (last visited Nov. 16, 2020); *see also About Us*, Wings of Love, Kuwait, https://www.wingsoflovekuwait.com/about-us (last visited Nov. 16, 2020).

[47] *See About Us*, *supra* note 46.

[48] *Id.*

[49] *Animal Rescue Resources and Shelters Kuwait*, Desert Girl on Kuwait (Nov. 7, 2017), http://desertgirlkuwait.blogspot.com/2017/11/helping-animals-in-kuwait.html.

[50] KARE Kuwait, *Rescues of @KAREQ8 Animal Helping Volunteer Group in Kuwait*, YouTube (Mar. 21, 2016), https://www.youtube.com/watch?v=Y2xv6NZUC90.

[51] Interview with Laila D'Souza, @rescueforwinston, in Kuwait (Nov. 13, 2020).

[52] *Id*.

[53] *Id*.

[54] *Id*.

[55] *Id*.

and returns stray cats to their colonies to try to ensure their health and welfare.[56] She also educates the public and advocates, *inter alia*, against the practices that take place in the Friday Market, where many animals die on a daily basis due to inadequate facilities and fast-spreading disease.[57] One of the most important reasons D'Souza gives for why mistreatment of animals has flourished is because the government does not prioritize animal rights nor are there consequences for abusing, dumping, or neglecting animals.[58] She states: "[t]here are laws that exist for animal protection and rights, but there is no implementation."[59] In addition, corruption and having the proper connections often results in individuals not being held accountable for their actions.[60] The global rise of COVID-19 has only exacerbated the problem with respect to treatment of animals. People have abandoned and dumped their cats in the streets, for fear that they might catch the disease, or due to unemployment.[61]

D'Souza supports the enforcement of existing laws and recommends strengthening the current legal framework so that those who poison, dump, abuse, neglect, or illegally sell animals will be held responsible.[62] Moreover, she stresses the importance of applying for a permit to sell animals, with strict regulations governing the granting of permits.[63] Finally, she recommends that the State implement a policy of mandated spaying and neutering of strays to lower their population.[64] For D'Souza, pioneering a cultural shift in the perception of animals as cognisant, complex beings with emotions and lives rather than as accessories or property would make a big difference in the implementation and enforcement of laws to protect animals.

II. The Current Legal Framework Governing Animal Welfare In Kuwait

Article 253 of Kuwait's Criminal Code protects pet owners from abuse by third parties.[65] Therefore, when a third party abuses a pet, the injured party is the pet owner, not the pet.[66] However, strays and pets abused by their owners are not protected by Article 253.[67]

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[56] *Id.*
[57] *Id*.
[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *See* Kuwait Law No. 16, art. 253, *supra* note 2.
[63] *Id*.
[64] *Id*.
[65] *Id.*
[66] *Id*.
[67] *Id*.

In 2014, the Gulf Cooperation Council (GCC), consisting of six Arab States in the Gulf region including Kuwait, introduced the Animal Welfare Law for the Gulf Cooperation Council Countries, which was subsequently ratified in 2015 into Kuwaiti law.[68] The law protects all animals from harm, suffering, and injury inflicted by any person, including pet owners and third parties.[69] The law also provides that, in the event that animals are surrendered, former pet owners should do so through proper procedures to ensure the health and welfare of the pets.[70] Anyone who violates Articles 2, 4, 5, or 6 of the Animal Welfare Law in Kuwait will be punished with imprisonment for a term not exceeding six months and/or a fine not exceeding 1,000 Kuwaiti Dinars (almost $3,300).[71]

These Articles prohibit the infliction of pain and suffering on pets by pet owners and by those who are entrusted to care for pets.[72] In particular, pets must be provided with adequate living facilities, and, in the case of abandonment, owners must coordinate with the competent authorities to ensure the health and welfare of these animals.[73] Pets are entitled to sufficient quantities of food to maintain their health and, if transported, transportation must be done so as not to put the animal in any risk of danger.[74]

An individual that is found to be in violation of Articles 7, 8, 9, or 10 of the Animal Welfare Law shall be punished with imprisonment for a term not exceeding one year, and/or a fine not exceeding five thousand Kuwaiti Dinars (almost $16,400).[75] Again, the penalty is doubled for repeat offenders.[76] Article 7 prohibits the advertisement or sale of animals showing symptoms of disease or fatigue.[77] Article 8 determines the limits for animals used in exhibition or competition.[78] Article 9 prohibits the abandonment of animals and provides the proper authorities with the right to dispose of neglected or stray animals in accordance with government regulations.[79] Finally, Article 10 prohibits the use of animals for scientific experiments without a license from the proper authorities.[80]

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[68] Al-Fuzai, *supra* note 3; Alshatti, *supra* note 13; Kuwait Law No. 112 of 2015 (*translated*) (approving the Animal Welfare Law for the Gulf Cooperation Council Countries).

[69] Kuwait Law No. 112, *supra* note 68, at art. 2, 4, 5, 6.

[70] Al-Fuzai, *supra* note 3.

[71] Kuwait Law No. 112, *supra* note 68, at art. 2.

[72] *Id*. at art. 2, 4, 5, 6.

[73] *Id*. at art. 2 & 4.

[74] *Id*. at art. 5 & 6.

[75] *Id*. at art. 2.

[76] *Id*.

[77] *Id*. at art. 7.

[78] *Id*. at art. 8.

[79] *Id*. at art. 9.

[80] *Id*. at art. 10.

The animal welfare law as enacted in Kuwait also prohibits the sale and ownership of exotic pets, such as lions and tigers.[81] Violators may be punished with imprisonment for a term not exceeding one year, a fine not exceeding twenty thousand Kuwaiti Dinars (almost $65,500), or both.[82] The fine is doubled for repeat offenders.[83]

It appears that Kuwaiti law governing animal welfare is very strict. The law, however, does not go far enough. It does not protect strays, making no mention as to whether or not animal abuse toward strays is prohibited.[84] Furthermore, the law is not enforced.[85] While Islamic law is a main source of Kuwaiti legislation, as described in the Kuwaiti Constitution, there are still daily occurrences of pet abuse.[86] For example, the Friday Market continues to operate, former pets continue to be abandoned on the streets; and pets are often tortured for fun. Thus, the law does not go far enough. Although the Islamic religion strictly prohibits cruelty to animals, animal abuse and neglect continue to proliferate. Therefore, to ensure the consistent application with Kuwaiti law, including religious law, the government must begin to enforce animal welfare laws, promulgate more expansive animal welfare laws, and investigate and prosecute animal abusers. A good starting point would be to adopt legal frameworks similar to that of other States that protect animals in all aspects. The next sections will provide an overview of some of the best laws protecting animals worldwide, and specifically examine the practices of the United States and Switzerland.

III. Animal Welfare Legal Framework And Practice In The United States

In the United States, animals are protected throughout all levels of government.[87] Thus, there are federal, state, local, and county laws protecting animal welfare.[88] However, most of the laws governing animal cruelty in the United States are implemented at the state level, which vary.[89] Yet, all fifty states classify animal cruelty as a felony, which carries a minimum sentence of imprisonment of over one year.[90]

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[81] *See id*. at art. 3 (making an exception for licensed zoos or circuses).

[82] *Id*.

[83] *Id*.

[84] *Id*.

[85] Interview with Laila D'Souza, *supra* note 51.

[86] Kuwait Const. art. 2 (adopted Nov. 11, 1962) (reinst. 1992).

[87] *Laws that Protect Animals*, Animal Legal Def. Fund, https://aldf.org/article/laws-that-protect-animals/ (last visited Nov. 16, 2020).

[88] *Id.*

[89] *Id*.

[90] *Id*.

Each state determines what constitutes animal cruelty and the penalties associated therewith.[91] Generally, these laws include the regulation of animal shelters, vaccinations, and treatment of companion animals.[92] Some states have hot car laws, which criminalize leaving animals in a car in the heat, and go so far as to allow individuals, in some circumstances, to rescue these animals without liability.[93] Other laws gaining momentum include anti-tethering laws, which regulate how long pets can be tied up outside.[94]

Laws such as these would provide immense benefit to animals in Kuwait. Islam prohibits keeping a dog in the home, therefore, most pet dogs are kept outside the home. This in and of itself is extremely inhumane, but even more so when one takes into consideration the hot summer temperatures in Kuwait, which can easily rise to over 100 degrees Fahrenheit.[95]

There are also federal laws protecting against animal cruelty in the United States, including the Preventing Animal Cruelty and Torture (PACT) Act, which was recently signed into law.[96] The PACT Act makes it a federal crime "for any person to purposely engage in animal crushing in or affecting interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States."[97] The Act also makes it a federal crime for individuals to create and distribute animal crushing videos.[98] Animal crushing is defined as conduct where an animal "is purposely crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury."[99] In 2018, a Kuwaiti influencer with almost 800,000 followers on Instagram[100] filmed himself opening the trunk of his car to reveal that his pet dog had been locked inside during a summer heatwave in Kuwait.[101] Later that day, the influencer filmed the same dog at the bottom of a pool, dead, adding that the dog had "committed suicide."[102] It is likely that the dog suffered

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[91] *Id*.

[92] *Id*.

[93] *Id*.

[94] *Id*.

[95] *See generally Average Day and Night Temperature in Kuwait (Al Asimah) In Fahrenheit*, Weather & Climate, https://weather-and-climate.com/average-monthly-min-max-Temperature-fahrenheit (last visited Nov. 16, 2020).

[96] *See generally* Preventing Animal Cruelty and Torture Act, Pub. L. No. 116-72, 133 Stat. 1151 (2019).

[97] *Id*. at § 48(a)(1).

[98] *Id*. at § 48(a)(2-3).

[99] *Id*. at § 48(f)(1).

[100] *See* Abdullah Aljasser (@3bodka), Instagram, https://www.instagram.com/3bodka/?hl=en (last visited Nov. 16, 2020).

[101] Tamara Qabazard (@qabazard), Instagram, https://www.instagram.com/p/BjsnlrWHJp7/?taken-by=qabazard (last visited Nov. 16, 2020).

[102] Mark Makhoul, *Influencer Stuffs Dog in Trunk of Car then Shares Picture*

from heat stroke and jumped into the pool to cool down and was then unable to swim back up.[103] More recently, a man filmed himself playing with a hanging car cage chain, with a visibly scared sugar glider holding on to the inside of the mini cage.[104]

Implementing a law like the PACT Act in Kuwait would ensure that people would be held accountable for their mistreatment of animals. If someone intentionally engages in any form of animal cruelty, he or she should be held accountable.

IV. Animal Welfare Legal Framework And Practice In Switzerland

Article 80 of the Swiss Constitution provides direct protection for animal welfare.[105] This article calls for regulation in favor of animal welfare, such as keeping and caring for animals, the sale of animals, and the humane killing of animals.[106] Moreover, under Article 118, the Swiss Constitution requires legislation to combat both dangerous human and animal diseases.[107]

In compliance with Swiss constitutional protection, animals are protected by, *inter alia*, the Animal Welfare Act of 2005.[108] Specifically, Article 4(2) states: "[n]o one may inflict pain, suffering or harm on an animal, induce anxiety in an animal or disregard its dignity in any other way without justification. The mishandling, neglect or unnecessary overworking of animals is forbidden."[109] Anyone who intentionally or negligently kills an animal without provocation, inflicts pain or suffering or induces anxiety, mistreats, neglects, or unnecessarily overworks an animal is subject to criminal prosecution, with a harsher term of imprisonment and/or fine for willful conduct.[110] Those who abandon animals by leaving them behind are also subject to criminal prosecution.[111]

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of his Dog Dead, TwoFortyEightAM (June 7, 2018), https://248am.com/mark/animals/influencer-stuffs-dog-in-trunk-of-car-then-shares-picture-of-his-dog-dead/; Farah Hamdo, *Help Bring Attention to a Social Media Influenser Who Let His Dog Drown*, Change.org, https://www.change.org/p/people-for-the-ethical-treatment-of-animals-peta-help-bring-attention-to-a-social-media-influenser-who-let-his-dog-drown (last visited Nov. 16, 2020).

[103] Hamdo, *supra* note 102.

[104] Help The Animal (@help_the_animal), Instagram (Nov. 15, 2020), https://www.instagram.com/p/CHmzlO-jjlM/ .

[105] Bundesverfassung [BV] [Constitution] Apr. 18, 1999, SR 101, art. 80 (Switz.).

[106] *Id*.

[107] *Id*. art. 118.

[108] Tierschutzgesetz (TSchG) [Constitution] Dec. 16, 2005, art. 80, para. 1, 2, 120 (Switz).

[109] *Id*. art. 4(2).

[110] *Id*. art. 26.

[111] *Id*.

Swiss law thus prohibits all forms of animal cruelty, whether inflicted on stray or owned animals, and requires that all dogs be microchipped so that ownership may be traced back in case of abandonment.[112] It also requires that people who own only one cat to provide the cat with daily human contact or with views of another cat.[113]

It is no surprise, then, given Switzerland's strong protection of animals, that Switzerland has received an "A" grade in 2020 for its laws against causing animal suffering by the World Animal Protection's Animal Protection Index.[114] The Index "ranks 50 countries around the world according to their animal welfare policy and legislation."[115] It grades countries' animal welfare laws and practices based on ten different indicators, addressing a wide variety of the most important animal welfare issues worldwide.[116] Grades range from A, being the highest, and G, being the lowest.[117] The World Animal Protection has stated: "Switzerland has implemented legislation prohibiting deliberate acts of animal abuse, as well as a failure to act in case of animal cruelty. Switzerland should act as an example for other European countries in terms of having detailed anti-cruelty legislations."[118]

However, in ranking Switzerland's laws that apply to companion animals, the Index gave Switzerland a "B" grade.[119] While Swiss law directly ensures the health and wellbeing of pets, it allows the hunting of stray cats year-round, thus, earning it a "B" grade because of its lack of legislation regarding humane animal control methods.[120]

Regardless, animal protection in Switzerland is among the best by granting animals constitutional protection. Animal welfare laws are strictly enforced by holding individuals accountable for animal cruelty inflicted upon any animal.[121] Thus, Switzerland is among the leading countries in the World Animal Protection Index.[122]

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[112] *See* Susan Misicka, *How Well Are Swiss Animals Protected?*, SWISSINFO.CH (Jan. 18, 2020, 3:00 PM), https://www.swissinfo.ch/eng/animal-welfare_how-well-are-swiss-animals-protected-/45489148.

[113] *Id*.

[114] *Animal Protection Index (API) 2020: Swiss Confederation: Ranking B*, WORLD ANIMAL PROT., https://api.worldanimalprotection.org/sites/default/files/api_2020_-_switzerland.pdf (last visited Nov. 16, 2020).

[115] *Methodology*, WORLD ANIMAL PROT., https://api.worldanimalprotection.org/methodology (last visited Nov. 16, 2020).

[116] *Id*.

[117] *Id*.

[118] *Animal Protection Index (API) 2020: Swiss Confederation: Ranking B*, *supra* note 114.

[119] *Id*.

[120] *Id*.

[121] *See* Misicka, *supra* note 112.

[122] *Id*.

V. Regional And International Protection Of Animal Welfare

Currently, no binding international framework that governs animal welfare exists. The international community has, however, tried to further advance international law's reach toward animal welfare, recognizing that animal welfare is deserving of international legal protection because it would greatly benefit animals.[123] In fact, animal rights laws are influenced by the international human rights framework due to similarities in difficulties that are inherent in both bodies of law.[124] Moreover, each jurisdiction currently governs the extent of animal welfare and rights domestically. Because of this, there is a need to provide a more uniform framework. Thus, the move toward an international framework to regulate animal rights has been increasing in popularity.

The Universal Declaration of Animal Welfare, the Convention on Animal Health and Protection, and the International Convention for the Protection of Animals have all been proposed by animal welfare organizations to internationally govern the treatment of animals and to protect them from suffering.[125] The World Organization for Animal Health has supported the development of an international declaration to ensure humane treatment of animals.[126] The Declaration on Animal Welfare, led by the World Animal Protection, has garnered significant attention among individuals, governments, and animal groups.[127] All these possible international frameworks deal with the prevention of cruelty toward animals and to safeguard animals' most basic needs and protect their interests.[128] However, the possibility for international regulation on animal welfare is not yet reality, but is still under discussion.[129] Still,

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[123] Anne Peters, Studies in Global Animal Law 109, 110 (Anne Peters ed., 2020, Springer Open).

[124] *Id*.

[125] *Universal Declaration on Animal Welfare*, *supra* note 31; *UN Convention on Animal Health and Protection*, Global Animal L., https://projects.globalanimallaw.org/assets/Uploads/Folder-UNCAHP.pdf (last visited Nov. 16, 2020); *International Convention for the Protection of Animals*, MSU Animal Legal & Hist. Ctr., https://www.animallaw.info/treaty/international-convention-protection-animals (last visited Nov. 16, 2020).

[126] *Resolution No. XIV, Universal Declaration on Animal Welfare*, OIE, https://www.oie.int/doc/ged/D4079.PDF (last visited Nov. 16, 2020).

[127] *Back a Universal Declaration on Animal Welfare*, World Animal Prot., https://www.worldanimalprotection.org/take-action/back-universal-declaration-animal-welfare (last visited Nov. 16, 2020).

[128] *See, e.g., International Convention for the Protection of Animals*, *supra* note 125.

[129] E. Van Trigt, *International Animal Welfare Law and International Cat Day*, Peace Palace Libr. (Aug. 8, 2019), https://www.peacepalacelibrary.nl/2019/08/

the proposed international frameworks could serve as benchmarks to advance proper animal welfare legislation domestically.[130]

While no international framework currently exists to deal with the protection of animal welfare, a regional treaty, the European Convention for the Protection of Pet Animals, is a binding agreement that prohibits the abandonment or abuse of pet animals.[131] It is currently binding on twenty-four States belonging to the Council of Europe.[132] The treaty makes clear the States' Parties' obligations under the Convention. For example, States' Parties are required to ensure that pet owners are held responsible for the health and welfare of their pet animals.[133] No animals are to be sold to minors under the age of sixteen without the consent of their parents.[134] "Any person who…commercially [breeds] or [boards] pet animals, or [operates] an animal sanctuary" must report such activities to the competent authorities, and may only do so provided that he or she has suitable conditions to maintain such facilities.[135]

Notably, Article 11 of the European Convention prohibits the killing of pet animals, except when required to end an animal's suffering.[136] It outlines in which manner animals may be killed, providing either for immediate death or deep general anesthesia so as to minimize additional suffering.[137] The Convention outright prohibits the use of suffocation, poisonous substances, and electrocution as means to kill an animal.[138]

In the case of strays, the European Convention provides, in exceptional circumstances, the killing of strays where it is absolutely necessary to reduce their numbers. Such killings must be undertaken in accordance with the provisions laid out in the Convention and only where national disease control programmes do not adequately address the problem.[139]

The Convention also requires that States' Parties educate organizations and individuals on broad topics surrounding pet animals, such as the risks involved with maintaining wild animals as pets, and

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international-animal-welfare-law-and-international-cat-day/.

[130] *See* Anne Peters, *supra* note 123, at 112.

[131] European Convention for the Protection of Pet Animals, Nov. 13, 1987, E.T.S. No. 125.

[132] *Chart of Signatures and Ratifications of Treaty 125*, Council of Europe (Feb. 3, 2021), https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/125/signatures?p_auth=2bWEo1bO

[133] European Convention for the Protection of Pet Animals, *supra* note 131, art. 4(1).

[134] *Id*. art. 6.

[135] *Id*. art. 8(1), 8(3)(b).

[136] *Id*. art. 11(1).

[137] *Id*.

[138] *Id*. art. 11(2).

[139] *Id*. art. 12, 13.

the risks associated with irresponsible pet acquisition increasing the population of unwanted and abandoned animals.[140]

While the European Convention is not binding on Kuwait, the country should use it as a benchmark in promulgating and enforcing strict laws dealing with animal welfare issues in all aspects. At the same time, although no international framework exists, Kuwait can still consider to protect domestically the rights provided in the conventions and declarations. Such a commitment by the State of Kuwait will be the first step required to ensure proper treatment of animals within Kuwait.

VI. Recommendations

Kuwait has a long way to go to ensure the welfare of animals. Kuwait must urgently begin rectifying the situation and must take a stance against animal cruelty so as to protect all animals within the country.

First, Kuwait must enforce its current laws, including religious law, regulating animal welfare against all people subject to its jurisdiction. In addition, Kuwait should promulgate more comprehensive laws to further advance the welfare of all animals within the country. In doing so, Kuwait can look to the laws in the United States and Switzerland as benchmarks, as well as the regional framework of the European Convention for the Protection of Pet Animals. In addition, while the international frameworks are not binding as of yet, Kuwait should still use it as a blueprint to implement proper animal welfare legislation domestically. Kuwait must take up the task of enforcement by prosecuting all those who show cruelty toward animals to show its commitment to the health and protection of animals.

More specifically, Kuwait must shut down places like the Friday Market and require that individuals apply for licenses, with strict approval regulations, to engage in the sale and trade of animals. It should also begin to allocate some of its national budget toward animal welfare, specifically for stray animals, to allow them to survive on the streets. Moreover, a government-funded veterinary hospital or regulations requiring 24-hour veterinary care would immensely help animals that are in need of urgent care, as would a government-funded shelter. Finally, the use of rat poison should be banned, and anyone who is found to have engaged in the practice should be prosecuted under adequate animal cruelty laws. More humane animal control methods must be introduced and adhered to.

While Kuwait, unfortunately, is not ranked by the World Animal Protection's Index, Kuwait should consider promulgating its

[140] *Id*. art. 14.

own indicators similar to the Animal Protection Index to ensure that animal welfare issues in the country are brought to the forefront and to periodically measure progress. At the same time, the World Animal Protection should expand its list to include more countries, including Kuwait. Of the 50 countries that it ranks, none of them constitute countries belonging to the Gulf Cooperation Council.[141] In fact, only one country Iran belongs to the Middle East region.[142] Including more countries belonging to the Gulf and/or Middle East region for the next edition will likely provide accountability toward better protection of animal welfare in the country.

For now, the major step that the government must undertake is to ensure compliance with its legal framework governing animal protection in Kuwait. Animals in Kuwait must be viewed, not as property, but as living creatures that feel pain and suffering. Kuwait must put to an end the inhumane practices that have been allowed to flourish for so long.

[141] *Animal Protection Index*, World Animal Prot., https://api.worldanimalprotection.org/ (last visited Nov. 16, 2020).

[142] *Id*.

Canines in the Courtroom: A Witness's Best Friend Without Prejudice

Ashley Englund[1]

Introduction

"The morning of the trial was excruciating for Anna, as it is for every child victim or witness who has to testify. A couple of mini-meltdowns to start the day did not help nor make me optimistic. Anna's mom testified first. As she came out of the courtroom, she and her daughter began weeping in each other's arms as soon as they saw each other. Sharon [the therapy dog] wedged herself between them, trying to comfort someone, somehow."[2]

Up on the witness stand is a sixteen-year-old girl who will testify about the multiple acts of sexual abuse endured by her father.[3] In front of her abuser, her abuser's family, and a jury of strangers staring at her, she will relive and recount these traumatic events that occurred since she was eleven years old and continued for four years.[4] She will testify that the sexual abuse resulted in two pregnancies, which her father arranged for her to undergo abortions.[5] While many children freeze in terror when asked to recount these events during trial, the girl is able to accurately and reliably give clear testimony because she is not alone on the stand. Hidden in the witness box is a golden retriever named Rose, a courtroom canine. A courtroom canine is specially trained to assist child victims testifying in court. Rose will sense the child's increased anxiety and stress as she testifies. In response, Rose will sit up and put her head on the child's lap.[6] Rose will provide the child with a sense of comfort and safety, enabling the child to tell her story to the jury.

The canine's involvement begins during the prosecutor's first interview with the child and continues through the child's testimony

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[1] Ashley Joan Englund is an attorney at the Gunster law firm in Jacksonville, Florida. She was a board member of the Animal Legal Defense Fund Florida State University College of Law Chapter. She is also an executive council member of the Animal Law Section of the Florida Bar. I am thankful for the help of my colleagues, MK King, Alex Purpuro, and Pierce Giboney for their assistance, and for my mother, Melody Englund, for inspiring me to write about this topic.

[2] Chuck Mitchell, *The Rikki Doll*, Fla. Animal L. Sec. Newsl. (Winter) 17 (2020).

[3] People v. Tohom, 109 A.D.3d 253, 255-56 (N.Y. App. Div. 2013).

[4] *Id.* at 256.

[5] *Id.*

[6] *Id.* at 258.

at trial. Courtroom canines are scientifically proven to comfort child victims. Yet, for defendants and many judges, the presence of a courtroom canine is cause for concern. Many defendants argue that the use of a courtroom canine violates their right to a fair and impartial jury.[7] They presume that canines in the courtroom inject sympathy into the jury box. They argue that this sympathy is inherently prejudicial, as it increases the victim's credibility.[8]

Empirical evidence, however, demonstrates that a canine's presence in a courtroom is neither prejudicial to the defendant nor the witness.[9] Courtroom canines compared to traditional courtroom accommodations, such as support persons and comfort objects, are the only accommodation that does not prejudice any party or witness. Courtroom canines are the ideal courtroom accommodation for children.

Part I of this article addresses the trauma a child experiences in the courtroom and the tools currently available to decrease potential harm. Part II discusses the emergence of canines in the courtroom as a modern accommodation. Part III outlines the criticisms of courtroom canines. Part IV discusses developing state and federal precedent grappling with the issue. Part V delves into recent empirical studies, revealing a canine's presence in the courtroom does not affect the jury. Part VI distills various court precedents and empirical studies into a practical guide for attorneys and judges.

I. Trauma of the Courtroom and Tools to Lessen Potential Harm to Children

This Part distills the psychological effects a child experiences when asked to testify about traumatic events. It further discusses why these effects are detrimental to eliciting accurate and clear testimony. Finally, acknowledging the universally accepted science of the effects of trauma on children, it discusses current tools available to help mitigate these effects and their disadvantages.

a. The trauma of testifying

The adversarial judicial system assumes that an aggressive cross-examination is fundamental to discovering the truth.[10] Yet there is no empirical evidence supporting this assumption.[11] In fact, there is

[7] *See infra* Part III(A).

[8] *Id.*

[9] *See infra* Part V.

[10] *See* John H. Wigmore, Select Cases on the Law of Evidence 543 (2d ed. 1913).

[11] Sarah Caprioli & David A. Crenshaw, *The Culture of Silencing Child*

evidence to support the opposite with respect to children. As Judith Herman, a child trauma authority at Harvard Medical School stated, "[i]ndeed, if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law…."[12] Questions that are delivered in an aggressive manner or that challenge the truthfulness of the child witness can cause great distress.[13] The child may suddenly freeze in the middle of testimony and become unable to speak because he or she is experiencing the triggering of trauma memories about the alleged abuse.[14] In other words, children are "frozen in fear, immobilized by the emergency response system of their own bodies, and cognitively shut down, unable to think, remember, or reason all likely sequela of the inordinately stressful condition of child testimony in court."[15]

Bessel van der Kolk, a professor of psychiatry at Boston University Medical School, discovered that when people revisit a traumatic event, the speech centers of the brain shut off, resulting in the inability to put thoughts and feelings into words.[16] His research concludes that "the effects of trauma are not necessarily different from and can overlap with the effects of physical lesions like strokes."[17] In other words, as Sarah Caprioli[18] and David A. Crenshaw[19] stated, "[t]reating anxiety when children face an extremely stressful event, such as testifying in a trial, could be considered equivalent to treating anxiety in the midst of an earthquake."[20]

Research further concludes that children's experiences with the

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Victims of Sexual Abuse: Implication for Child Witnesses in Court, 57 J. Humanistic Psychol. 190, 201-02 (2017).

[12] Judith Lewis Herman, *Justice From the Victim's Perspective*, 11 Violence Against Women 571, 574 (May 2005).

[13] Rachell Zajac et al., *Disorder in the Courtroom? Child Witnesses Under Cross-examination*, 32 Developmental Rev. 81, 182 (2012).

[14] Caprioli & Crenshaw, *supra* note 11, at 203.

[15] *Id.*

[16] Bessel A. van der Kolk, The Body Keeps The Score: Brain, Mind, and Body in the Healing of Trauma 40-44 (2015).

[17] *Id.* at 43.

[18] Caprioli & Crenshaw, *supra* note 11, at 208 (Sarah Caprioli is a licensed mental health counselor at Family Services, Inc., in New York where she "works as part of a certified Courthouse Facility Dog team" and "us[es] service dogs to comfort victims of crime in both clinical and criminal justice settings.").

[19] *Id.* at 209 ("David A. Crenshaw, PhD, ABPP, RPT-S, is the clinical director of the Children's Home of Poughkeepsie, New York, and adjunct visiting assistant professor in the graduate clinical psychology program at Teachers College, Columbia University. He is board-certified clinical psychologist by the American Board of Professional Psychology and Fellow of the American Psychological Association (APA).").

[20] *Id*. at 202.

judicial system have "marked and prolonged negative effects on their education, mental health, and beliefs about re-engaging with the legal process."[21] Many children who are victims of sexual assault were so distressed during the proceedings that they would not report the crime in the future.[22] The parents of the children share this perspective and even advise other parents to avoid the judicial system.[23] The trauma experienced by children is so severe, legal professionals do not want their own children to participate in the legal process.[24]

For that reason, the United States Department of Justice published guidelines regarding child victims and child witnesses for the Attorney General. The guidelines acknowledge the traumatic stress experienced by a child:

> Too often in the past the criminal justice system has not paid sufficient attention to the needs and welfare of child victims and witnesses causing serious consequences. Contact with the system aggravated the trauma that the child had already experienced making it more difficult for the child to participate in the investigation and prosecution of the case and ultimately making it more difficult to prosecute the case.[25]

The guidelines urge department personnel to be aware of the trauma experienced by child victims and witnesses "when they are asked to relive the crime during the investigation and prosecution of a criminal case" and, in particular, at trial.[26] A primary goal of department personnel should be to reduce this trauma.[27] Science has shown that "[c]hildren are more likely to be able to testify in a more productive and complete manner when they are approached in a warm, supportive, and sensitive fashion."[28] Thus, "personnel are *required* to provide age-appropriate support services to these victims."[29]

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[21] Zajac, *supra* note 13, at 182 (citations omitted).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Office of the Att'y Gen., U.S. Dep't of Just., Attorney General Guidelines for Victim and Witness Assistance 55 (2000).

[26] Office of the Att'y Gen., U.S. Dep't of Just., Attorney General Guidelines for Victim and Witness Assistance 15 (Rev. May 2012) [hereinafter AG Guidelines 2012].

[27] *Id.*

[28] Caprioli & Crenshaw, *supra* note 11, at 202 (citing J. Zoe Klemfuss et al., *Attorneys' Questions and Children's Productivity in Child Sexual Abuse Criminal Trials*, 28 Applied Cognitive Psychol. 780 (2014)).

[29] AG Guidelines 2012, *supra* note 26 , at 15 (emphasis added).

b. Courtroom Tools to Assist Children Testifying

Several tools can help to lessen the harm a child may suffer while testifying.[30] These tools also assist the child to testify in a clear and accurate manner.[31] One method is by two-way, closed-circuit television (CCTV) where the child's testimony is transmitted into the courtroom for viewing and hearing by the defendant, judge, and public.[32] CCTV provides the defendant with means of private, contemporaneous communications with his or her attorney.[33] The transmission relays the defendant's image and the voice of the judge into the room in which the child is testifying.[34] CCTV also preserves the constitutional guarantee of the defendant's rights under the confrontation clause, while also minimizing the traumatic effects the child may have endured in the courtroom.[35]

Although CCTV testimony is common, researchers have shown that jurors perceived child witnesses less positively when they testified via CCTV.[36] Jurors perceived children who testified via CCTV, compared to testifying in person, as "less attractive, less intelligent, more likely to be making up a story, and less likely to be basing their testimony on fact versus fantasy."[37] The juror's perception of CCTV testimony led to fewer guilty verdicts when measured against pre-deliberation.[38] Because of the juror's negative biases toward child witnesses when CCTV is used, CCTV testimony should be reserved only for the most extreme circumstances.[39]

An additional tool available is to videotape the child's deposition if there is a judicial finding that a child is likely unable to testify in open

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[30] *See infra* Part I(B) and accompanying footnotes.

[31] *See* Dawn Hathaway Thoman, *Testifying Minors: Pre-Trial Strategies to Reduce Anxiety in Child Witnesses*, 14 Nev. L. J. 236 (2013).

[32] 18 U.S.C. § 3509 (b)(1)(D) (2018).

[33] *Id.*

[34] *Id.*

[35] Katherine M. Grearson, *Proposed Uniform Child Witness Testimony Act: An Impermissible Abridgement of Criminal Defendants' Rights*, 45 B.C. L. Rev. 467, 468-69 (2004).

[36] Gail S. Goodman, *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decision*, 22 L. & Hum. Behav. 165, 199 (1998) ("[C]losed-circuit technology was associated with a negative bias. Children who testified via CCTV were viewed as less believable than children who testified in regular trials despite the fact that children who testified through the use of CCTV were more accurate.").

[37] *Id.* at 199.

[38] *Id.* at 200. (Testifying via CCTV may "limit the impact of children's testimony on juror's initial decision" after deliberation jurors "seemed disinclined to convict a defendant based solely on the word of a child.").

[39] *Id.* at 199.

court.[40] Yet, surveyed attorneys believe this is one of the least effective ways of reducing court-related stress in children.[41] Many surveyed attorneys feel that videotaped testimony of a child victim hurts rather than helps the case.[42]

There are also accommodations for children who testify in the courtroom. For example, support persons (also known as adult attendants) can accompany the testifying child to a judicial proceeding.[43] The court may allow the adult attendant to remain in close physical proximity or contact with the child while the child testifies.[44] This includes the ability for the child to sit on the lap of the adult throughout the entire proceeding.[45] There is no evidence that confirms the presence of a support person increases prejudice towards a defendant.[46] Researchers, however, found that mock jurors view the "child victim [or witness] to be less accurate and trustworthy, and the defendant to be less guilty" when support persons sat next to the child as compared to when they were absent.[47] Mock jurors were more likely to assume that the support person "coached the child" and that the two spent a lot of time together prior to the trial.[48] Therefore, the use of support persons undermines the perceived credibility of a child witness.[49]

Most courts also allow children to bring a comfort object to the stand.[50] A comfort object may be the child's favorite toy, stuffed animal, or small blanket.[51] The presence of a comfort object helps calm

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[40] It must be shown that the child cannot testify because of fear, substantially likelihood established by expert testimony that the child would suffer emotional trauma, suffers from a mental or other infirmity, or conduct by the defendant causing the child to be unable to continue testifying. 18 U.S.C. § 3509 (b)(2)(B) (2018).

[41] Gail S. Goodman et al., *Innovations for Child Witnesses: A National Survey*, 5 Psychol., Pub. Pol'y, & L. 255, 277 (1999).

[42] *Id.*

[43] 18 U.S.C. § 3509(i) (2018).

[44] *Id.*

[45] *Id.*

[46] Jud. Council of Cal., Bench Handbook: The Child Witness 9 (2016) [hereinafter Cal. Bench Handbook]; Bradley D. McAuiliff & Margaret Bull Kovera, *Do Jurors Get What They Expect? Traditional Versus Alternative Forms of Children's Testimony*, 18 Psychol. Crime L. 27, 42 (2012).

[47] Bradley D. McAuliff et al., *Support Person Presence and Child Victim Testimony: Believe it or Not*, 33 Behav. Sci. & L. 508, 508 (2015).

[48] Bradley D. McAuliff et al., *Supporting Children in U.S. Legal Proceedings: Descriptive and Attitudinal Data from a National Survey of Victim/ Witness Assistants*, 19 Psychol. Pub. Pol'y L. 98, 109 (2013).

[49] Cal. Bench Handbook, *supra* note 46, at 9.

[50] Fern L. Kletter, *Propriety of Allowing Witness to Hold Stuffed Animal, Doll, Toy or Other Comfort Item During Testimony*, 82 A.L.R.6th 373, 373 (2013).

[51] Cal. Bench Handbook, *supra* note 46, at 12-13; Task Force on Child Witnesses of the Am. Bar Ass'n Criminal Justice Section, The Child Witness in Criminal Cases 28 (2002) [hereinafter Task Force on Child Witnesses].

testifying children.[52] Whether a comfort item may be used is a case specific inquiry.[53] A court will make this determination by: (i) deciding whether the witness has a compelling need for the item; (ii) balancing the "defendant's due process rights to a fair and impartial trial" against the witness's need for a courtroom environment in which he or she will not be intimidated; and (iii) determining whether the prejudicial effects outweigh the probative value created by the use of a comfort object.[54] As illustrated by the test used, comfort objects may be prejudicial and deprive defendants of a fair trial, as they may make the victim appear more vulnerable and appealing.[55]

As discussed in Parts II and IV, the presence of courtroom canines is emerging throughout the United States as an additional method to assist children in the courtroom. The use of canines to assist children is most analogous to the use of a support person or comfort object. A canine as a courtroom accommodation presents an effective solution to the problems discussed above. A canine's presence not only decreases the trauma experienced by a child and elicits more accurate testimony, but also does not prejudice the defendant or witness.

II. Courtroom Canine: A Modern Accommodation

This section provides much needed clarity in defining different roles a dog plays in helping humans. Since courtroom canines receive specialized training to assist children, numerous studies conclude that their presence reduces a child's stress and facilitates clear and reliable testimony.[56] To that end, some state courts interpret state victim rights' statutes to encompass the use of courtroom canines.[57] Other states have specifically codified the use of a courtroom canine as an accommodation.[58]

a. Legal Terms of Art for Animals Who Help People

Mass confusion exists on the different terms used for animals who help people, the purposes of the animal, and where the animals are allowed to be.[59] Many people interchangeably use the terms service

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[52] *Id.*

[53] *See* Marianne Dellinger, *Using Dogs for Emotional Support of Testifying Victims of Crime*, 14 Animal L. 171, 181-85 (2009) (discussing various appellate courts analysis of use of comfort items).

[54] *Id.* at 185.

[55] *See* Kletter, *supra* note 50.

[56] *See infra* Part IV(B).

[57] *See infra* Part IV(c).

[58] *See infra* note 121 and accompanying text.

[59] *See* Patricia Marx, *Pets Allowed*, New Yorker (Oct. 13, 2014), https://www.newyorker.com/magazine/2014/10/20/pets-allowed (The author registered

animal, emotional support animal, therapy animal, and facility dog.[60] The terms are misused not only in media outlets, but also in the courtroom.[61] Each term, however, has legal significance in defining the purpose of the animal and the training required. Imprecise use of the terms in the courtroom can create confusion and lead to an appeal.[62] In an effort to provide clarity to practitioners and judges, below is a summary of these terms including: the legal definition if applicable, the purpose, training required, and the places the animal is allowed.

One of the terms that is misused is "service animal." Under the American Disabilities Act (ADA), a "service animal" is defined as a dog that has been "individually trained" to do work or perform tasks for an individual with a disability.[63] The tasks performed by the dog

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various animals as an emotional support animal such as a turtle, snake, alpaca, pig, and twenty-six-pound fowl. She took these animals to various public places with hardly any pushback from the public. As Marx stated, "Fortunately for animal-lovers who wish to abuse the law, there is a lot of confusion about just who and what is allowed where.").

[60] Kristy R. Becraft, Experiences with a Prescribed Emotional Support Animal: A Qualitative Inquiry 16, (May 2016) (unpublished Ph.D Dissertation, Capella University) ("The term *emotional support animal* is relatively new and not well understood.…It is often used incorrectly and interchangeably with other terms."); Abigayle L. Grimm, *An Examination of Why Permitting Therapy Dogs to Assist Child-Victims When Testifying During Criminal Trials Should Bot be Permitted*, 16 J. Gender Race & Just. 263, 292 n.44 (2013) ("the terms 'service dog' and 'therapy dog' may be used interchangeably due to the fact that different media outlets refer to them in different ways.").

[61] *See* State v. Devon D., 138 A.3d 849, 861 n.8 (Conn. 2016) (noting that terms are used interchangeably, yet there is a difference. In this case the dog was labeled a service dog by the therapist, but it was not); *see also* Lambeth v. State, 523 S.W.3d 244, 246 (Tex. App. 2017) (using the term "service dog" throughout its opinion when referring to District Attorney's Office canine that is used "to soothe and relax children who have been victims of crimes."); *Courthouse Facility Dogs: Assisting in the Investigation and Prosecution of Crimes*, Or. St. Bar, 77-84 (Apr. 21, 2017), http://www.osbar.org/cle/library/2017/CDG17_Handbook.pdf (further discussing various case law where jury instructions improperly referred to a facility dog as a service dog) [hereinafter *Courthouse Facility Dogs*].

[62] People v. Johnson, 889 N.W.2d 513, 530 n.6 (Mich. Ct. App. 2016) ("[T]he trial court informed the jury that the witnesses would be accompanied by a 'therapy dog from the prosecutor's office.' Defendant takes issue with the trial court's use of the term 'therapy dog.'"). In *Johnson*, the court stated that the preferred term is facility dog. *Id.* But because the trial court indicated the dog was from the prosecutor's office it signaled "to the jury that the dog was not the witnesses' own therapy dog, but rather one provided by the prosecution to assist the witnesses with providing testimony." "No error occurred and any objection to the trial court's use of the term therapy dog would have been meritless." *Id.*

[63] *Service Animals*, U.S. Dept. of Just., https://www.ada.gov/service_animals_2010.htm (last visited Feb. 24, 2020); *Frequently Asked Questions about Service Animals and the ADA*, U.S. Dept. of Just., Civil Rights Div. (July 2015)

"must be directly related to the person's disability."[64] Title II and Title III of the ADA clarify that "the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of [the definition of service animal]."[65]

A service animal is not required to be professionally trained, as persons "with disabilities have the right to train the dog themselves."[66] The provisions that cover the use of a service animal are directly overseen by Title II[67] and Title III of the ADA.[68] This allows service animals in public places,[69] and most of the time, in the workplace .[70]

A second term that is frequently confused is an emotional support or comfort animal. An "emotional support animal" helps a person who is "psychologically disabled, and cannot be without the stability that comes from the presence of the animal, [therefore,] he or she should be allowed to take their pets into otherwise restricted areas."[71] Under the law, emotional support animals do not require any training and are allowed as pets.[72]

Contrary to popular belief, emotional support animals are permitted in two places. First, animals are permitted for people who require them in their homes. Under the Fair Housing Act (FHA), covered housing providers may not charge pet fees and must permit the emotional support animals even if there is a "no pets" policy.[73] Significantly, those who qualify for an emotional support animal must have a disability "that substantially limits one or more major life activities."[74] In other words,

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https://www.ada.gov/regs2010/service_animal_qa.html ("For example, a person with diabetes may have a dog that is trained to alert him when his blood sugar reaches high or low levels. A person with depression may have a dog that is trained to remind her to take her medication. Or, a person who has epilepsy may have a dog that is trained to detect the onset of a seizure and then help the person remain safe during the seizure.") [hereinafter *FAQ's About SA*].

[64] *Service Animals*, *supra* note 63.

[65] 28 C.F.R. § 35.104 (2018); 28 C.F.R. § 36.104 (2018).

[66] *FAQ's About SA*, *supra* note 63.

[67] 28 C.F.R. § 35.104 (2018).

[68] 28 C.F.R. § 36.104 (2018).

[69] *FAQ's About SA*, *supra* note 63.

[70] Rebecca J. Huss, *Canines at the Company, Felines at the Factory: The Risk and Rewards*

of Incorporating Service Animals and Companion Animals into the Workplace, 123

Dick. L. Rev. 363, 374-82 (2019).

[71] Jeffrey N. Younggren et. al., *Examining Emotional Support Animals and Role Conflicts in Professional Psychology*, 47 Prof'l Psychol. Res. Prac. 255, 256 (Vol. 4 2016).

[72] *Id.* at 257.

[73] Jay M. Zitter, *Assistance Animals Qualifying as Reasonable Accommodation Under Fair Housing Act, 42 U.S.C.A. § 3604(f)*, 66 A.L.R. Fed. 2d 209, § 5 (2012).

[74] 24 C.F.R. § 8.3 (2020).

mere "discomfort, attachment to, or just wanting to be with the animal" does not qualify under the FHA.[75] Second, emotional support animals are permitted on airplanes under the Air Carrier Access Act (ACAA).[76] Under the ACAA, the animals "assist the passenger in being able to travel more comfortably due to [the animal's] presence."[77]

Third is "therapy animal." Therapy animals are not defined by federal law[78] and do not fall under the regulations of the ADA, FAA, or ACAA. "Therapy animals are *not* focused on one person like service animals" and emotional support animals.[79] Instead, therapy animals are typically owned by their handler or by a therapy organization.[80] Therapy animals "provide animal contact to numerous people who may or may not have disabilities, such as hospital patients or nursing home residents."[81] Specifically, therapy dogs are often used in Animal Assisted Therapy (AAT) and Animal Assisted Activities (AAA)[82] for numerous mental and physical benefits.[83] There are no training requirements for therapy animals under federal law.[84] Nevertheless, there are certified therapy animals.[85] Many entities, such as hospitals and courthouses, require specific certifications, include a list of approved "animal therapy teams,"[86] and implement specific policies in order for the dog

[75] Younggren et al., *supra* note 71, at 257.

[76] 14 C.F.R. § 382 (2020).

[77] Younggren et al., *supra* note 71, at 257.

[78] Lorie Gerkey, *Legal Beagles, a Silent Minority: Therapeutic Effects of Facility Dogs in the Courtroom*, 1 Int'l J. Therapeutic Juris. 405, 417 (2016).

[79] Allie Phillips & Diane McQuarrie, American human, Therapy Animals Supporting Kids (TASK) Program Manual 8 (Aug. 2016), https://www.americanhumane.org/app/uploads/2016/08/therapy-animals-supporting-kids.pdf.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Animal-Assisted Therapy Research*, UCLA Health, https://www.uclahealth.org/pac/animal-assisted-therapy (last visited Apr. 16, 2020).

[84] Mariko Yamamoto & Lynette A. Hart, *Living with Assistance Dogs and Other Animals: Their Therapeutic Role and Psychosocial Health Effects*, *in* Handbook on Animal-Assisted Therapy: Foundation and Guidelines for Animal assisted Interventions 63, Figure 6.1 (2019) (chart depicting roles, living situations, and legal status for access of companion animals, therapy animals, and assistance dogs); *see also, id*. at 66, fig.6.2 (flow chart to determine what kind of role the dog is in).

[85] Amber Lannon & Pamela Harrison, *Take a Paws: Fostering Student Wellness with a Therapy Dog Program at Your University Library*, 11 Pub. Servs. Q. 13, 20 (2015).

[86] *E.g., Courthouse Therapy Dog Biographies*, Second Circuit Leon County, http://2ndcircuit.leoncountyfl.gov/petTherapyBios.php (last visited Mar. 14, 2020).

to be present.[87] Therapy animals are typically present in children's advocacy centers and child protective service agencies, police stations, hospital or medical facilities, prosecutors' offices, and courthouses and courtrooms.[88]

Last is "facility dogs." Facility dogs, like therapy dogs, are not defined by federal law. The Court House Dogs Act, currently pending in the House of Representatives, defines a certified facility dog as:

> [A] dog that has graduated from an assistance dog organization that is a member of an internationally recognized assistance dog association that has a primary purpose of granting accreditation based on standards of excellence in areas of:
> 1) assistance dog acquisition;
> 2) dog training;
> 3) dog handler training; and
> 4) dog placement.[89]

In other words, a facility dog is one type of assistance animal. The "dog works alongside a professional in a service capacity to assist other people."[90] A facility dog works in the legal system and "can provide a sense of calm, security, and non-judgmental support during investigative and legal proceedings when the professionals have to respond to children in an impartial and reserved manner."[91]

The definition includes accreditation from a specific nonprofit assistance dogs' school Assistance Dogs International (ADI). ADI training has "the highest standards of training for health, welfare, and task work for assistance dogs."[92] Each dog receives two years of training before working in its official capacity and must pass the same public access test that service, hearing, and guide dogs do.[93]

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[87] Heidi DiSalvo et al., *Who Let the Dogs Out? Infection Control Did: Utility of Dogs in Health Care Settings and Infection Control Aspects*, 34 Am. J. Infection Control 301, 303 (2006) ("The handler must successfully complete training that meets the 'Minimum Standards for Training Service Dogs'" set by Assistance Dogs International, Inc."); Second Judicial Circuit of Florida Courtroom Protocols for Use of Animal Therapy Teams in Jury Trials (Mar. 27, 2017), http://2ndcircuit.leoncountyfl.gov/pet/documentation/2nd_Cir_Fl_Animal_Therapy_Courtroom_Protocols_Jury.pdf.

[88] Phillips & McQuarrie, *supra* note 79, at 15.

[89] The Courthouse Dogs Act, H.R. 5403, 116th Cong., 1st Sess. (2019).

[90] *Courthouse Facility Dogs*, *supra* note 61, at 10.

[91] *Id.* at 8-9.

[92] *Id.* at 10.

[93] *Id.*

Because a facility dog is distinct from a service dog (the dog does not assist a specific individual with a disability) a facility dog is not allowed in all public places.[94] Typically, facility dogs are used at children's advocacy centers and are present during forensic interviews, medical exams, therapy sessions, and in court.[95]

Ideally, facility dogs should accompany a testifying individual at all stages of a trial. Best practice is for the dog to be present at the beginning, including the prosecution's investigation.[96] The dog should remain with the individual until the end of the proceedings, particularly when testifying at trial, and the defendant's sentencing stage.[97] Finally, the dog should be present for all stages in between, for example, interviews with the defense attorney and pre-trial motions.[98] The continuing presence of the facility dog is essential for not only establishing a relationship between the witness and the dog, but also for establishing support for the use of a facility dog at trial.[99]

For purposes of this Article, the term "courtroom canines" refers only to therapy dogs and facility dogs owned by third parties.[100] Critically, numerous scholars and courts endorse the use of facility dogs, but conclude that the use of the phrase "therapy dogs" may be prejudicial to the defendant.[101] The term courtroom canine is neutral as it does not imply the victim needs therapy, rather, it encompasses both categories: therapy dogs and facility dogs.[102]

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[94] *Id.*

[95] *Id.* at 10-11

[96] *Id.* at 37.

[97] *Id.* at 37-43.

[98] *Id.*

[99] *See infra* Part VI.

[100] For purposes of simplifying terminology, when referring to both therapy dogs and facility dogs, the term "courtroom canines" is used. *See* People v. Johnson, 889 N.W.2d 513, 530 n.6 (Mich. Ct. App. 2016) (discussing the different terms used by literature and courts, such as, "testimony dogs, courthouse dogs, companion dogs, therapy dogs, service dogs, comfort dogs, therapy assistance dogs, support canines, and therapeutic comfort dogs," because "these terms imply canine functions in providing comfort or reducing anxiety.").

[101] *Id*. ("[W]e agree with defendant that the term 'therapy dog' is not the most appropriate, particularly because the term could imply that the witness was undergoing therapy as a result of the sexual assault. Nonetheless, the trial court also indicated that the dog was from the prosecutor's office, thus signaling to the jury that the dog was not the witnesses' own therapy dog, but rather one provided by the prosecution to assist the witnesses with providing testimony."); s*ee also* Gerkey, *supra* note 78, at 418 ("[T]he term 'therapy dogs' to identify courtroom dogs would be inappropriate."). *But see* Abigayle L. Grimm, *An Examination of Why Permitting Therapy Dogs to Assist Child-Victims When Testifying During Criminal Trials Should Not Be Permitted*, 16 J. Gender Race & Just. 263, 286-87 (2013) ("The [therapy] dog is actually more restrictive of the defendant's confrontation right than the alternatives…because of the inherent and unique prejudice surrounding a dog.").

[102] *See*, *e.g.*, Johnson, 889 N.W.2d at 530, n.6 (explaining that the term

b. The Science Behind Why Courtroom Canines Help Witness Testimony

Courtroom canines are beneficial in two main respects. First, a canine provides comfort and a sense of safety to the testifying witness.[103] Both therapy dogs and facility dogs are specifically trained with trauma-informed and trauma sensitive caregiving.[104] The presence of a dog reduces blood pressure, stress, and anxiety in the child witness.[105] Just petting a courtroom canine will ground the witnesses and "return them to a calm and safe place" while testifying.[106]

The traumatic effects of testifying, unmitigated by accommodations to reduce that trauma, can be devastating.[107] When children are able to "experience a supportive response" during legal proceedings, "many of the short term and long-term effects of the abuse may be mitigated or even eliminated."[108]

Additionally, the use of courtroom canines promotes clearer and more reliable witness testimony. A courtroom canine promotes a better presentation of evidence because the procedures are more "effective for determining the truth."[109] When children are asked to relive a traumatic event, their bodies freeze.[110] Blood flow is cut off to the Broca's area, one of the speech centers of the brain, which disables the child's ability to speak.[111] Because of the canine's ability to reduce stress during testimony, the canine mitigates the effects of the freeze response.[112] The presence of a courtroom canine helps "soothe the dysregulated brain stem and allow higher executive functions, such as speech and memory processes that have been shut down by dissociation, to come back online."[113]

Therefore, allowing the child to engage with a courtroom canine, promotes communication and cognitive function and in turn enhances "information processing, reasoning, and memory."[114] A child's feeling of comfort and safety decreases stress and anxiety, which enables a child "to verbalize and process information including more questions more

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"therapy dog" could be prejudicial and other, more neutral terms should be used to explain the canine's function in the courtroom).

[103] *See Courthouse Facility Dogs*, *supra* note 61, at 8.

[104] Caprioli & Crenshaw, *supra* note 11, at 203.

[105] *Id.*

[106] *Id.*

[107] *See supra* Part V.

[108] Caprioli & Crenshaw, *supra* note 11, at 205.

[109] Fed. R. Evid. 611(a).

[110] *See supra* Part I(A).

[111] van der Kolk, *supra* note 16, at 43.

[112] Caprioli & Crenshaw, *supra* note 11, at 203.

[113] *Id.*

[114] *Id.*

effectively."[115] The result is a better informed legal and judicial system because the child is able to provide clearer, more accurate, and more complete testimony to the court.

c. Emergence of Canines in the Courtroom

Canines in the courtroom have made major headlines.[116] They have been described by their supporters as "the best boys and girls,"[117] "invaluable in the courtroom,"[118] and leading the way for "recovery for hundreds of children, families."[119] Although some argue that the practice is "highly prejudicial, and ought to be banned,"[120] fifteen states codified the use of canines in the courtroom.[121] In addition, courtroom canines are allowed implicitly under victims' rights statutes.[122] As of March 2020,

[115] *Id.* at 201.

[116] *E.g.*, William Glaberson, *By Helping a Girl Testify at a Rape Trial, a Dog Ignites a Legal Debate*, N.Y. Times (Aug. 8, 2011), http://www.nytimes.com/2011/08/09/nyregion/dog-helps-rape-victim-15-testify.html?pagewanted¼all&_r¼0; Joshua Jamerson, *Therapy Dog Helps Woman Testify at Assailant's Sentencing Hearing*, N.Y. Times (Jun. 9, 2015), https://www.nytimes.com/2015/06/10/nyregion/therapy-dog-helps-woman-testify-at-assailants-sentencing-hearing.html; Dave Collins, *For Defenders and Judges, Comfort Dogs in Court Do Opposite*, AP News (Apr. 5, 2018), https://apnews.com/7421898f2d8c400c85ce6f4135807b2d/Comfort-dogs-in-court-do-opposite-for-some-defenders,-judges.

[117] Max McGee, *The Best Boys and Girls: How Therapy Dogs Are Helping Crime Victims Cope*, CBS Baltimore (Feb. 18, 2020), https://baltimore.cbslocal.com/2020/02/18/therapy-dogs-helping-crime-victims-cope/.

[118] Shawna De La Rosa, *Why Dogs are Becoming Invaluable in the Courtroom*, Hill (Dec. 25, 2019), https://thehill.com/changing-america/well-being/mental-health/474914-why-dogs-are-becoming-invaluable-in-the-courtroom.

[119] John Wenzel, *Pella the Courthouse Dog Leads the Way to Recovery for Hundreds of Children, Families*, Denver Post (Aug. 18, 2016), https://www.denverpost.com/2016/08/18/pella-the-courthouse-dog/.

[120] *Lawyers Argue over Comfort dog in Connecticut Court: Emotional Support or Prejudicial to Jury?*, New Haven Register (Feb. 27, 2016), https://www.nhregister.com/lifestyle/article/Lawyers-argue-over-comfort-dog-in-Connecticut-11331357.php (quoting defense attorney Hugh Keefe).

[121] Ala. Code § 12-21-148 (2020) (effective since 2017); Ariz. Rev. Stat. Ann. § 8-422 (2016); Ark. Code Ann. § 16-4301002 (2015); Cal. Penal Code § 868.4 (2020) (effective since 2018) ; Colo. Rev. Stat. § 16-10-404 (2020); Fla. Stat. § 92.55 (2019) (effective since 2017); Haw. Rev. Stat. § 621-30 (2019) (effective since 2016); Idaho Code § 19-3023 (2020) (effective since 2017);; Ill. Comp. Stat. 5/106B-10 (2016); La. Stat. Ann. § 15:284 (2019) (effective since 2018); Mich. Comp. Laws Ann. § 600.2163a (2019); Miss. Code Ann. § 99-43-101(2)(f) (2020) ; Okla. Stat. Ann. tit. § 2611.12 (2020) (effective since 2014); Va. Code Ann. § 18.2-67.9:1 (2019) (effective since 2018); Wash. Rev. Code §10.52.110 (2019).

[122] *E.g.*, State v. Dye, 309 P.3d 1192, 1196-98 (Wash. 2013) (holding the trial court did not abuse its discretion in permitting the use of a courtroom canine during trial, noting that "[n]o controlling authority in Washington decides whether a dog may accompany a witness during testimony."); State v. Devon D., 138 A.3d 849,

courts have established courthouse facility dog programs, including over 238 facility dogs working in forty states.[123] This number does not include states who use therapy dogs in the courtroom.[124] For example, the records of the Second Judicial Circuit of Florida, which partnered with the Tallahassee Memorial Hospital Animal Therapy Program, indicate that since 2007 the program has worked in 155 criminal cases and 325 visits including depositions, pre-trial meetings, and other proceedings.[125] The program currently has thirty-two specially trained teams of dogs and handlers working throughout the circuit.[126]

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864 (Conn. 2016) (holding that the use of a courtroom canine does not fall within the state's criminal procedure code, but reversing the appellate court because the trial court did not abuse its discretion in allowing the canine to sit at the witness's feet during trial under the trial court's inherent discretionary authority.); Lambeth v. State, 523 S.W.3d 244, 246 (Tex. App. 2017) (using the state's criminal procedure code for use of a comfort item to include use of a courtroom canine); State v. Welch, 600 S.W.3d 796 (Mo. Ct. App. 2020) , *reh'g and/or transfer denied* (Mar. 16, 2020), transfer denied (June 30, 2020) (affirming the trial judge's interpretation that allowing the use of the courtroom canine falls within the spirit of the state's Child Witness Protection Act); State v. Reyes, 505 S.W.3d 890 (Tenn. Crim. App. 2016) (permitting the use of a courtroom canine); People v. Tohom, 109 A.D.3d 253, 261 (N.Y. App. Div. 2013) ("[T] here is no New York statute which *specifically* states that comfort dogs are permissible in a trial setting." The court concluded the purpose of the Legislature in adding the "fair treatment of child victims as witnesses" provided support for statutory authority to permit the use of a therapy assistance animal to accompany a trial witness); State v. Hasenyager, 67 N.E.3d 132, 134-35 (Ohio Ct. App. 2016) (Holding that the state's rule of evidence 611(a) "authorizes trial courts to permit an alleged victim to testify with a companion dog under particular circumstances"); State v. Reyes, 505 S.W.3d 890, 896 (Tenn. Crim. App. 2016).

[123] *Courthouse Facility Dogs in the United States*, Courthouse Dogs Foundation, https://courthousedogs.org/dogs/where/where-united-states/ (last visited Mar. 14, 2020).

[124] *See* s*upra* Part II(A) (discussing the difference between therapy dogs and facility dogs); *see also* Joshua Jamerson, *Therapy Dog Helps Woman Testify at Assailant's Sentencing Hearing*, N.Y. Times (June 9, 2015), https://www.nytimes.com/2015/06/10/nyregion/therapy-dog-helps-woman-testify-at-assailants-sentencing-hearing.html.

[125] Jim Ash, *Animal Law Section Partnership Uses Therapy Dogs to Help Child Victims Navigate Criminal and Dependency Proceedings*, Fla. Bar (Mar. 4, 2020), https://www.floridabar.org/the-florida-bar-news/animal-law-section-partnership-uses-therapy-dogs-to-help-child-victims-navigate-criminal-and-dependency-proceedings/; *Courthouse Therapy Dogs*, Second Judicial Circuit of Florida, http://2ndcircuit.leoncountyfl.gov/petTherapy.php (last visited Mar. 14, 2020) (The animal therapy program provides "free animal therapy services to children and vulnerable adults testifying in criminal and dependency court matters. The Courthouse Animal Therapy program offers support to these children and adults when giving statements and testimony in court that would otherwise be difficult or impossible for them to provide.") [hereinafter *Courthouse Therapy Dogs*].

[126] Ash, *supra* note 125; *Courthouse Therapy Dogs*, *supra* note 125.

Currently, there is no legislation or precedent permitting the use of courtroom canines in federal court.[127] There is, however, a new bill before Congress: the Courthouse Dogs Act, which passed the Senate in late December of 2019.[128] The Act would amend Chapter 223 of the Federal Rules of Criminal Procedure regarding witnesses and evidence to include the use of a facility dog.[129] Yet, even absent expressed federal authorization of courtroom canines during trial, federal courts are utilizing the dogs in other ways.[130]

III. The Canine Critics

Despite the overwhelming benefits of courtroom canines, their use is not without objection. This Part proceeds in two sections. The first section addresses issues frequently raised by defendants. The second reviews common concerns from a judge's perspective.

a. The Defendant's Dilemma

Arguments raised by defendants against the use of a courtroom canines are not new. The challenges are identical to objections raised regarding the use of support persons and comfort objects.[131] In fact, state courts use precedent regarding support persons and comfort objects to determine whether the use of a courtroom canine is permissible.[132]

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[127] *See* United States v. Neuhard, No. 15-cr-20425, 2017 U.S. Dist. LEXIS 36029 at *3 (E.D. Mich. Mar. 14, 2017) ("Section 3509 does not provide for a support animal to accompany a child in addition to the adult attendant. The Government has not provided any precedent where another federal court has allowed a support animal to accompany a witness at trial.").

[128] Claire Kowalick, *Cornyn's Courthouse Dogs Act Passes in Senate*, Times Rec. News (Dec. 31, 2019), https://www.timesrecordnews.com/story/news/local/2019/12/31/cornyns-courthouse-dogs-act-passes-senate/2778159001/.

[129] *See* The Courthouse Dogs Act, *supra* note 89.

[130] *See infra* Part IV(B).; *Therapy Dogs Support Victims of Crime and Prosecutors,* U.S. Att'ys Office C.D. of Cal., U.S. Dept. Of Just. (Aug. 17. 2018), https://www.justice.gov/usao-cdca/blog/therapy-dogs-support-victims-crime-and-prosecutors ("the Office instituted a program to utilize therapy dogs to provide support and comfort to child and adult crime victims using the services of the non-profit Pet Prescription Team.").

[131] *See supra* Part II(B).

[132] People v. Chenault, 227 Cal. App. 4th 1503, 1515 (Cal. Ct. App. 2014) (citing precedent that support persons are not inherently prejudicial, and thus support dogs are not inherently prejudicial); State v. Nuss, 446 P.3d 458, 461 (Idaho Ct. App. 2019), *reh'g denied* (Aug. 26, 2019) (citing statutory language and precedent regarding support persons in applying the same legal standard to allows a facility dog); People v. Gilbertson, No. 06CR1591, 2017 WL 6027233, at *8 (Colo. Dist. Ct. July 28, 2017) ("Although a living being, the presence of a facility dog at a witness's feet would

Defendants argue that the use of a courtroom canine violates their due process right to a fair trial and their right to a fair and impartial jury.[133] Defendants routinely raise three main arguments in support of their claims. First, defendants argue courtroom canines are presumptively prejudicial. Second, even if the canine is not inherently prejudicial, the trial court failed to mitigate the potential for prejudice. Finally, the resulting prejudice outweighs the probative value of a canine's presence aiding a child's testimony. All three claims are generally unsuccessful and have no merit when there are adequate courtroom procedures established.

Defendants first contend that the use of a courtroom canine is presumptively or inherently prejudicial.[134] The assertion suggests that mere presence of the canine will cast the witness in an "even more sympathetic light."[135] In other words, if the jurors see or know about the canine, they will immediately "experience very warm, loving, good feelings about the dog, and they're going to translate those feelings to the child that's testifying."[136] The presence of a canine will make the victim appear "more vulnerable" and in turn bolster the witness's testimony with "more credence and emotionality."[137]

Similarly, the signal sent to the jury by using the canine, defendants aver, is that the child is so traumatized by the alleged event that the child cannot testify without the dog.[138] The increased sympathy and the subliminal message that the child is so traumatized that a dog

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be more analogous to the presence of a favorite stuffed animal in a child's lap than the presence of a sibling or other support person at the witness's side.").

[133] *E.g.*, People v. Tohom, 109 A.D.3d 253, 268 (N.Y. App. Div. 2013).

[134] State v. Millis, 391 P.3d 1225, 1234 (Ariz. Ct. App. 2017) (arguing that a "dog accompanying a victim is 'presumptively prejudicial' so as to jeopardize a fair trial in every case…"); *Chenault*, 227 Cal. App. 4th at 1514; *Tohom*, 109 A.D.3dat 268.

[135] People v. Spence, 212 Cal. App. 4th 478, 511 (Cal. Ct. App. 2012).

[136] *Chenault*, 227 Cal. App. 4th at 1511–12 (the defendant further argued that "the one [-]sided deployment of a universally beloved animal distracts the jury from a dispassionate review of the evidence and unfairly bolsters the prosecution's case by aligning witnesses with a powerful symbol of trustworthiness and vouching for their credibility as victims.").

[137] State v. Nuss, 446 P.3d 458, 459 (Idaho Ct. App. 2019), *reh'g denied* (Aug. 26, 2019) (quoting the Defendant's objections); *Courthouse Facility Dogs*, *supra* note 61, at 40.

[138] Lambeth v. State, 523 S.W.3d 244, 248 (Tex. App. 2017) ("[T]he jury would have necessarily concluded that [the Defendant] had inflicted a significant psychological injury on the complaining witness given the witness's need for the dog.); *Chenault*, 227 Cal. App. 4th at 1515; State v. Welch, 600 S.W.3d 796, 815 (Mo. Ct. App. Feb. 11, 2020), *transfer denied* (June 30, 2020); Collins, *supra* note 116 (finding that when a jury sees a dog accompany a witness onto the stand that it "tends to imply or infer that there has been some victimization. It tends to engender sympathy. It's highly prejudicial.").

is required in order for the child to speak will cause the jury to perceive the victim as more credible.[139] Therefore, according to defendants, the presence of a courtroom canine would jeopardize a "fair trial in every case," and it "present[s] a non evidentiary message" to the jury that the witness is an innocent victim.[140]

Defense attorneys also argue that the use of a courtroom canine "distracts the jurors from what their job is, which is to determine the truthfulness of the testimony."[141] The jurors will have a difficult time separating the presence of the canine from "looking at the child critically and analytically and trying to decide if the child is telling the truth."[142] Ultimately, defense attorneys conclude that the use of a canine is unnecessary when there are other tools available.[143]

Second, even assuming that the use of a canine is not inherently prejudicial, on appeal, defendants argue that the trial court failed to mitigate prejudice resulting from the canine's presence.[144] Despite measures undertaken to limit the canine's exposure to the jury, the canine may still make noises distracting the jury.[145] Defense attorneys insist that even with jury instructions on the canine and limiting the jury's interaction with the canine, the mere presence of a canine would prejudice a jury against their client.

On appeal, defendants claim that because the preventative measures taken to mitigate the possibility of prejudice from the use of the canine are unsuccessful, the resulting prejudice outweighs the need for a courtroom canine.[146] Often, the assertion is that the trial court abused its discretion in allowing a courtroom canine because it failed to show that the canine's presence would likely help the child "provide complete and reliable testimony."[147] Even if the proponent of the canine presents testimony that the canine is useful, the opponent argues the canines use and more accurate testimony do not outweigh the possibility of prejudice to the defendant.

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[139] *Lambeth*, 523 S.W.3d at 248 (concluding that because of the courtroom canine, "the jury would have been overly sympathetic with the complaining witness given the witness's need for the dog, and that the sympathy would have impaired the jury's ability to fairly evaluate the complaining witness's testimony"); *Chenault*, 227 Cal. App. 4th at 1515.

[140] State v. Millis, 391 P.3d 1225, 1234 (Ariz. Ct. App. 2017) (quoting the defendant).

[141] Collins, *supra* note 116.

[142] *Chenault*, 227 Cal. App. 4th at 1511–12.

[143] *Id.*

[144] State v. Nuss, 446 P.3d 458, 460 (Idaho Ct. App. 2019), *reh'g denied* (Aug. 26, 2019).

[145] Lambeth v. State, 523 S.W.3d 244, 247-48 (Tex. App. 2017).

[146] *Nuss*, 446 P.3d at 460.

[147] State v. Devon D., 138 A.3d 849, 161 (Conn. 2016); State v. Millis, 391 P.3d 1225, 1234 (Ariz. Ct. App. 2017).

b. The Judge's Dilemma

Judges face two major dilemmas when deciding whether to grant a motion for the use of a canine in a legal proceeding. First, the general implications of having a dog in the courtroom. Indeed, court systems are "steeped in centuries of tradition and slow to change."[148] Thus, a judge that introduced a dog into the courtroom would appear to reject the level of decorum traditionally maintained in a courtroom.[149] These implications include stereotypes perceived by allowing a dog. As one judge noted, dogs are "gimmicky."[150]

But, judges are also concerned about members of the jury who may be allergic to dogs,[151] fear dogs,[152] or have cultural biases against dogs.[153] In order to eliminate bias from the jury, counsel on *voir dire* would have to adduce the panel's attitudes about dogs, which would be more time-consuming.[154] There is also a concern that permitting a courtroom canine maybe be a reversible error.[155]

IV. Evolving Precedent Concerning Courtroom Canines

In 2008, judges called for clearer guidelines to help the judiciary decide whether to allow canines as courtroom accommodations.[156] Since then, a robust body of precedent in state courts has provided guidance. Typically, state appellate courts conclude that a trial court does not abuse its discretion in permitting the use of a courtroom canine to assist a witness.[157]

In contrast, federal courts have rarely considered the issue. In the few cases that have addressed it, federal courts have denied the use of

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[148] Caprioli & Crenshaw, *supra* note 11, at 205.

[149] *Courthouse Facility Dogs*, *supra* note 61 at 39; Dellinger, *supra* note 53, at 187 (discussing the "potential for diminished respect for the courts if these are perceived as a place where dogs are taken for purposes that some may argue to be questionable.").

[150] Dellinger, *supra* note 53, at 188.

[151] Gerkey, *supra* note 78, at 428. ("[D]og allergens are everywhere in public spaces because they are on clothes of pet owners")(citing Gallagher & Roberts 2011).

[152] *Courthouse Facility Dogs*, *supra* note 61, at 95.

[153] *Id.* at 29. ("In some cultures, notably some Islamic groups, dogs are considered unclean animals and children should not have contact with them.").

[154] Dellinger, *supra* note 53, at 190.

[155] *Courthouse Facility Dogs*, *supra* note 61, at 44; Dellinger, *supra* note 53, at 187 (discussing a judge's concern that the unintended signal by a courtroom canine may sway the jurors and "the backlash this may create in the form of an issue for appeal.").

[156] Dellinger, *supra* note 53, at 188.

[157] *See infra* note 122 and accompanying text.

courtroom canines under flawed analyses. Federal courts are neglecting to utilize their authority under Federal Rules of Evidence 611(a).

a. State Courts

A Golden Retriever named Rose sparked a legal battle in New York courts.[158] In *People v. Tohom*, an 11-year-old girl was sexually assaulted several times by her father over the course of four years.[159] She twice became pregnant and on both occasions her father arranged for her to undergo an abortion.[160] She was unable to communicate with professionals about the events and was subsequently diagnosed with post-traumatic stress disorder.[161] As a result, the professionals introduced Rose, a therapy dog, into the sessions.[162] Rose allowed the child to become "a lot more verbal."[163] A social worker who had worked with the child testified that when Rose placed "her head on [the girl's] lap, and [the girl] began to pet her, [the child] was better able to talk about how she felt and how she would feel safer if the therapy dog was present with her in the courtroom."[164]

In the social worker's expert opinion, the therapy dog's presence would "have a soothing impact" on the child, would facilitate the ability for the girl to "better express herself verbally," and would "decrease her level of physiological stress."[165] The decrease in stress levels would make it easier for the girl to "maintain her composure."[166] Rose was "trained since the age of eight weeks 'to sense stress and anxiety and act in such a way to help reduce that' by raising herself up and offering herself to the person to be petted."[167]

The county court determined the canine's presence was essential in the courtroom.[168] Without Rose by her side, the child would look at her therapist while testifying, which the jury could interpret as the girl seeking permission from her therapist to provide a response to a question, that the therapist was influencing the child's testimony, or both.[169] In other words, the court concluded that the potential for the

[158] People v. Tohom, 109 A.D.3d 253, 255 (N.Y. App. Div. 2013); Glaberson, *supra* note 116.

[159] *Tohom*, 109 A.D.3d at 255.

[160] *Id.*

[161] *Id.* at 257.

[162] *Id.* at 257-58.

[163] *Id.* at 256.

[164] *Id.* at 257.

[165] *Id.* at 257-58.

[166] *Id.* at 258.

[167] *Id.* (quoting the People's support to grant the motion).

[168] *See id.* at 258.

[169] *Id.*

jury's misinterpretation of a child's glance for comfort for searching for a coached response would be eliminated with a dog present because dogs "who can't speak" cannot influence a child's testimony.[170] The defendant appealed, arguing that the dog's presence was unwarranted under the law, violated his due process right to a fair trial, and impaired his right to confront witnesses against him.[171]

The New York Intermediate Appellate Court was asked a question of first impression: whether a court should permit a therapeutic "comfort dog" in the trial setting.[172] The court acknowledged that there was no case law or statute specifically allowing a dog to accompany a child on the stand.[173] Nevertheless, the court rejected all three of the defendant's arguments and held that the use of the dog was permitted by state law.[174] The court also held that there were no overt signs of prejudice and that any possibility of prejudice was cured by the court's jury instruction.[175] Finally, the court held that the defendant's ability to cross-examine the victim was not hindered because the dog did not physically impede the jury's ability to observe the child.[176]

Other state jurisdictions have allowed the use of courtroom canines even when there are no statutes specifically permitting their use.[177] Further, state courts consistently hold that the use of an assistance animal is not inherently prejudicial.[178] To the extent a court finds the possibility of prejudice, appellate courts will uphold the judge's determination: that the benefits of the canine's presence in reducing anxiety and eliciting testimony outweigh any resulting prejudice to the defendant's right to

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[170] *Id.*

[171] *Id.* at 260.

[172] *Id.* at 255.

[173] *Id.* at 261.

[174] *Id.* at 264-65, 68 (stating "we perceive no rational reason why, as per the broad dictate of [state law], a court's exercise of sensitivity should not be extended to allow the use of a comfort dog where it has been shown that such animal can ameliorate the psychological and emotional stress of the testifying child witness," acknowledging that while Rose may have engendered sympathy from the jury, there was "no proof that such sympathy was significantly greater than the normal human response to a child's testimony about his or her sexual abuse at the hands of an adult," and determining that any potential sympathy elicited by the dog could be cured by a limiting instruction to the jury.).

[175] *See id.* at 268 ("It is beyond dispute that a dog does not have the ability to discern truth from falsehood and, thus, cannot communicate such a distinction to a jury.").

[176] *Id.* at 271-72.

[177] *See generally* Caprioli & Crenshaw, *supra* note 11.

[178] State v. Millis, 391 P.3d 1225, 1234 (Ariz. Ct. App. 2017); People v. Chenault, 227 Cal. App. 4th 1503, 1515 (Cal. Ct. App. 2014) ("We do not believe the presence of a support dog is inherently more prejudicial than the presence of a support person.").

a fair trial.[179] Lastly, as was the case in *Tohom*, trial courts will mitigate potential prejudice, either by issuing a limiting instruction to the jury or by enacting procedures to limit the jury's interaction with the dog.[180]

b. Federal Courts

To date, federal courts have not allowed courtroom canines to be present during trials, despite having acknowledged the benefits of having a canine present.[181] For instance, in *United States v. Neuhard*, a Michigan district court denied the use of a courthouse canine during trial.[182] The court reasoned that it was prohibited from allowing a dog in the courtroom because section 3509 of the Federal Rules of Criminal Procedure (FRCP) does not contain express language permitting the use of courtroom canine.[183] Yet, this reasoning is flawed.

Federal courts routinely allow for the use of comfort objects under the Federal Rules of Evidence (FRE) based on FRE 611(a), despite the absence of express language to permit the presence and use of comfort objects in courtrooms in the FRCP.[184] The court's decision in *Neuhard*

[179] State v. Dye, 309 P.3d 1192, 1200-01 (Wash. 2013) ("While the possibility that a facility dog may incur undue sympathy calls for caution and a conscientious balancing of the benefits and the prejudice involved, the trial court balanced the competing factors appropriately."); State v. Devon D., 138 A.3d 849, 867 (Conn. 2016) (holding the court should balance the extent which "the dog's presence will permit the witness to testify truthfully, completely and reliably, and the extent to which the dog's presence will obviate the need for more drastic measures to secure the witness' testimony" against the "potential prejudice to the defendant and the availability of measures to mitigate any prejudice.").

[180] *Dye*, 309 P.3d at 1200; *Devon D.*, 138 A.3d at 867 ("the jurors never saw [the dog] because the court excused the jury prior to [the child's] testimony so that [the dog] would be on the witness stand, out of view, before the jury returned. This procedure eliminated the possibility that the jurors might be swayed by the presence of '[a] cute little kid with her cute dog,' as the defendant feared"); *Millis*, 391 P.3d at 1235 (affirming the trial court's finding that if the dog were to with the adult victim in the gallery, it would not unfairly prejudice the defendant "because the animal would have been less visible and prominent to the jury in the gallery than it would have at the witness stand.").

[181] *See* United States v. Gardner, No. 16-cr-20135, 2016 U.S. Dist. LEXIS 132882, at *20-21 (E.D. Mich. Sept. 28, 2016) ("The Court does not dispute that the medical and academic literature supports a finding that a person can enjoy a myriad of physical and psychological benefits from interacting with a friendly dog, particularly in times of stress."); *see also* United States v. Neuhard, No. 15-cr-20425, 2017 U.S. Dist. LEXIS 36029 at *3 (E.D. Mich. Mar. 14, 2017) ("This Court has previously analyzed this issue in the context of an adult witness and noted the strong support in state courts for allowing a support animal.").

[182] *Neuhard*, No. 15-cr-20425 at *3-4.

[183] *Id.* at *3.

[184] United States v. Counts, No. 3:18-cr-00141, 2020 WL 598526, at *4

is therefore erroneous: it relied on the absence of express language in the FRCP that would permit courtroom canines to support its finding that canines are never allowed in a federal courtroom. Yet, *Neuhard* overlooks the fact that while the FRCP does not specifically allow the use of comfort objects for child victims and child witnesses, courts generally use their authority under FRE 611(a) to permit the presence and use of such comfort objects. Federal courts, therefore, do not apply their own logic consistently: they refuse to grant the presence and use of a canine under FRE 611(a) because the FRCP does not specifically allow the use of courtroom canines, but grant the presence and use of comfort objects FRE 611(a) because the FRCP does not specifically allow it.

The *Neuhard* court also stated that even if it was able to use its discretion in admitting the dog to assist the witnesses during the trial, the government had failed to show that the witnesses were dependent on the presence of a therapy dog to testify.[185] Accordingly, there is still an opportunity for use of a courtroom canine, but only if the proponent of the canine can prove that the use of the canine is effective in facilitating more accurate testimony.

Although the *Neuhard* court did not allow the dog to be present during trial testimony in front of the jury, the court did permit the canine "into the building to assist the witnesses before their testimony, during breaks, and after their testimony [had] concluded," and stated, "[t]he canine may be present in the hallway outside of the courtroom or in the attorney conference room being used by the Government."[186] Therefore, even though federal courts do not permit canines in the courtroom, the canines are allowed in the courthouse.

(D.N.D. Feb. 7, 2020) (permitting the use of comfort objects during children testimony in front of a jury citing Federal Rules of Evidence 611(a) as it "confers broad discretion on this Court in controlling 'the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.'" And further the court held that, "'As long as the defendant's constitutional rights are safeguarded in a criminal proceeding, a judge is afforded wide discretion in fashioning procedures and modifying standard trial practices…. One such accommodation is allowing the [child] witness to testify while holding a doll, stuffed animal, toy, or other comforting or stress-relieving item.'" (citation omitted). Notably, the use of comfort objects is absent in section 3509 but *Counts* used FRE 611 as a hook for its use).

[185] *Neuhard*, No. 15-cr-20425 at *3-4.

[186] *Id.* at *4; *see also Gardner*, No. 16-cr-20135 at *21 ("The Court grants permission for [the canine] to be present outside the courtroom in the lobby area or in the attorney conference rooms so that [the adult victim] can seek support from him before and after her testimony, and during breaks from testifying.").

V. Psychological Studies on the Effects on the Jury

The assertion that courtroom canines are not inherently prejudicial to the defendant is grounded in empirical evidence: Kayla A. Burd and Dawn E. McQuiston conducted two studies using mock trials that assessed whether courtroom accommodations (facility dog vs. teddy bear vs. no accommodation) impacted the judgement of jurors.[187] In the first experiment, teddy bears were prejudicial to the defendant and facility dogs were not.[188] But in the second experiment, neither the teddy bear nor the facility dog were prejudicial to the defendant.[189]

a. Experiment 1: Victim vs. Bystander

The purpose of the first study was to determine whether "the presence of a facility dog or comfort toy accompanying a child witness is prejudicial against a defendant."[190] There were two different witness types: victims and bystander witnesses.[191]

i. Participants, Procedures, and Measures

The study consisted of 307 participants who were recruited through Amazon's Mechanical Turk to serve as mock jurors.[192] All participants were from the United States.[193] The participants were given a fictitious child molestation trial transcript.[194] The transcript differed slightly depending on whether the witness was a victim or bystander.[195] The transcript stated that the grandfather was accused of molesting his six-year-old grandchild.[196] The bystander witness was the victim's seven-year-old sister, who had seen the abuse.[197] When the courtroom canine was present, instructions were given to the mock juror that a facility dog accompanied the child to reduce anxiety and that facility dogs were "available to any witness who *requires* one."[198] Similarly, the use of the teddy bear was accompanied by an instruction that the

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[187] Kayla A. Burd & Dawn E. McQuiston, *Facility Dogs in the Courtroom: Comfort Without Prejudice?*, 44 Crim. Justice Rev. 515, 518 (2019).

[188] *Id.* at 524-25.

[189] *Id.* at 523.

[190] *Id.* at 518.

[191] *Id.* at 519.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id. at 520.*

[197] *Id.*

[198] *Id.*

teddy bear was present to reduce anxiety.[199] In the control group without accommodation, jurors were not given additional instructions.[200]

The presence or absence of one of the accommodations was manipulated through photographs.[201] The participants viewed a series of three photographs that were placed within the body of the text of the child's testimony, depicting either the presence of a facility dog, the presence of a teddy bear, or no accommodation.[202] After viewing the transcript and photographs, the participants were asked a series of questions about witness credibility, jury empathy, verdict, and sentencing.[203] The mock jurors were asked to rate each question on a scale of one to nine, with one indicating 'not credible/not accurate' and nine indicating 'very credible/very accurate'.[204]

ii. Results

The presence of a facility dog did not increase the perceived victimization of the child.[205] Neither did it affect the defendant's verdict or punishment.[206] Instead, the study showed that the teddy bear might prejudice defendants.[207] In fact, participant disgust and anger increased when the witness used the teddy bear, and, this in turn increased the likelihood of conviction.[208] There was no effect on the sentencing regardless of what accommodation was used.[209] The experiment further revealed no effect on rating of witness credibility.[210] The type of witness (victim or bystander) did not influence the jurors' perceptions of the child's credibility either.[211] Thus, contrary to defendants' assertions, this study reveals that the "presence of a facility dog decreased participant disgust, which decreased the likelihood that the defendant would be convicted."[212]

A teddy bear might prejudice a jury and by extension, its verdict, because comfort items such as teddy bears, "may portray something highly personal about the child and may make the alleged victim appear

199 *Id.*
200 *Id.*
201 *Id.*
202 *Id.*
203 *Id.* at 520-21.
204 *See id.*
205 *Id.* at 524.
206 *Id.*
207 *Id.* at 524-25.
208 *Id*. at 525.
209 *Id.*
210 *Id.*
211 *Id.*
212 *Id.*

extremely vulnerable and childlike."[213] Presumably, the jury believes the teddy bear belongs to this child.[214] While courtroom canines "neutralize anger and disgust…because jurors are aware that…[the canine] does not belong to the testifying witness."[215]

b. Experiment 2: Severity of Crime

In the second experiment, Burd and McQuiston "investigated mock jurors' judgments of child witnesses and defendants in two cases of differing severity."[216] In the first scenario, participants faced an identical child molestation case as participants from the first study.[217] In the second scenario, participants were presented with a strong-armed robbery scenario.[218] The judges gave jurors the same instructions regarding the use of an accommodation or no accommodation as in the first experiment.[219]

i. Participants, Procedures, and Measures

The study chose 210 participants from a liberal arts college.[220] Mock jurors received a detailed summary and a partial trial transcript with the same series of photographs.[221] The jurors were given limiting instructions in both scenarios.[222] The same questions regarding verdict, sentencing, confidence that a crime occurred, perceptions of the child witness, empathy and sympathy for the child witness, and perceptions of the defendant were rated on the same one to nine scale used previously.[223]

ii. Results

The study revealed that courtroom canines "are not prejudicial against the defendant" or favorable to the witness.[224] The nine questions

[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.* at 525-26.
[217] *Id.* at 527.
[218] *Id.*
[219] *Id.*
[220] *Id.* at 526.
[221] *Id.* at 527.
[222] *Id.* ("The Judge commented on the use of the accommodation and explained that jurors should not take the accommodation into consideration when deciding the case.").
[223] *See id.* at 528-30.
[224] *Id.* at 530-31 ("Facility dogs were not found to be biasing in favor of young, vulnerable witnesses, or against defendants across two very different classes of crime").

asked showed no evidence for differences based on the accommodation.[225] Only the severity of the crime led to a statistically significant difference.[226]

The more severe the crime, the greater likelihood a mock juror would find the defendant guilty.[227] In the case of child molestation, the jurors felt more anger and disgust toward the defendant, and they perceived the defendant to be less credible compared to the defendant in the robbery case.[228] Critically, the child was deemed equally credible across crime severity and accommodation type.[229] Therefore, courtroom canines do not affect the credibility of either the victim or the defendant.

c. Implications and Conclusions

The use of a courtroom canine in both experiments did not alter the jury's perception of a child witness.[230] This result is in direct contrast to other accommodations for children discussed earlier, such as CCTV and support persons. The use of these other methods influenced the juror to believe the child was less credible.[231] Based on empirical evidence detailed above, a courtroom canine has shown to be one of the best accommodations available. The use of a courtroom canine has no prejudicial effect on neither the defendant nor the child witness, while simultaneously providing psychological benefits and clarity to the child's testimony.[232]

But there are internal limitations of these experiments. First, they use a series of photographs that do not show the dynamic interaction between the courtroom canine and the testifying witness. This is not necessarily a unique issue, however, because a cold record presented to appellate courts also lacks this dynamic.[233] Second, the child was not cross-examined. Cross-examination is typically the most traumatic part of testifying for a child.[234] Third, there was no jury deliberation. It is unclear how the presence of these elements would change the results.

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[225] *Id.* at 531.

[226] *Id.*

[227] *Id.* (In this study, mock jurors were more likely to convict on a child molestation charge than an armed robbery charge.).

[228] *Id.*

[229] *Id.* at 532.

[230] *Id.*

[231] *See supra* Part II(B).

[232] *Id.*

[233] *E.g.*, Lambeth v. State, 523 S.W.3d 244, 248 (Tex. App. 2017) (defendant argued that the sounds the dog made during the child's testimony were prejudicial against him. The Court responded that, "[f]rom the cold record before us in the appeal, we are unable to determine what sounds the dog might have made in the courtroom that the jury might have heard. We are not persuaded that the service dog's presence created any harm.").

[234] *See supra* Part I(A).

Lastly, even though the experiments gave instructions that the dog was required by the witness and presumably the canine did not belong to the child, the experiments did not contemplate many of the procedural safeguards that courts are currently practicing. For instance, each photograph presented to the mock juror depicted a child accompanied by a mock facility dog. However, in many courts that permit the use of a courtroom canine, the canine is not visible to the jury as the dog sits in the witness box by the witness's feet.[235] Also, some courts require that the witness and canine enter and leave the courtroom when the jury is in recess.[236] This may demonstrate that with even less visibility, the possibility of prejudice is essentially eliminated.

Further studies may be helpful in determining what procedural safeguards are effective in minimizing potential prejudice. It would also be useful to directly compare the use of support persons against the use of courtroom canines. Many courts rely on common law to permit the use of support persons as support for the use of a canine.[237] Although other studies have shown support persons prejudice the witness using the accommodation,[238] an experiment utilizing similar methodology would be more accurate in making this comparison.

VI. A Practical Guide for Attorneys and Judges

In an effort to distill emerging case law and empirical studies regarding the use of courtroom canines, a practical guide for both attorneys and judges is useful.

a. Best Practices for Attorneys

For state proceedings, when an attorney files a motion for the use of a courtroom canine it should include the following portions. First, the motion should include evidence that the canine is well-trained. The benefits of having a well-qualified canine will increase the likelihood the judge will grant the initial motion.[239] But more importantly, a well-

[235] *E.g.*, *Lambeth*, 523 S.W.3d at 247 ("before the jury entered the courtroom, the trial court noted that '[t]he dog is at [the witness's] feet in the witness box, which is not visible the dog is not visible in any way by the jury.'").

[236] *Id.*

[237] *See supra* notes 114-15 and accompanying text.

[238] *See supra* Part I(B).

[239] *See e.g.*, People v. Spence, 212 Cal. App. 4th 478, 512 (Cal. Ct. App. 2012) ("The court explained to counsel that this particular therapy dog had been in the same courtroom before, 'and she's almost unnoticeable once everybody takes their seat on the stand. She's very well-behaved and does nothing but simply sit there.'"); People v. Chenault, 227 Cal. App. 4th 1503, 1518 (Cal. Ct. App. 2014) ("the trained service canine sought to be used in this case has been providing support for victims

behaved and trained canine ensures proper courtroom decorum and minimal disruptions. If these criteria are met, judges will likely continue to grant such a motion in the future.

Second, to prevail on a motion (and also on appeal), it is critical to present evidence that a courtroom canine will assist the child's testimony. In other words, for the court to rule that the benefits of a child accompanied by a courtroom canine outweigh the potential prejudice towards the defendant, it must be shown that the dog will assist the witness in testifying "truthfully, completely, and reliably."[240] A motion that shows the child's beneficial use of a canine in prior proceedings will increase the likelihood of success.[241] Establishing this history, however, is not always necessary.[242] Third, the motion should cite to the statutory authority permitting the use of the courtroom canine. Similarly, a proposed order may help state circuits "consider, give additional guidance or expand the use of the facility dogs or therapy animals."[243]

If the court grants the motion, lawyers or judges should engage in a robust *voir dire* to eliminate any potential bias that may arise.[244] In the event the defendant appeals because of a courtroom canine, it is important to make a detailed record of the canine's location and behavior.[245]

As mentioned in Part IV, federal courts have yet to permit the use of a courtroom canine by a child witness. Therefore, in addition to the guidance above for state courts, practitioners in federal court should cite to FRE 611(a) in support of their motion.[246]

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and witnesses in San Diego County for the last several years.").

[240] *E.g.*, State v. Devon D., 138 A.3d 849, 867 (Conn. 2016).

241 United States v. Neuhard, No. 15-cr-20425, 2017 U.S. Dist. LEXIS 36029 (E.D. Mich. Mar. 14, 2017).

[242] State v. Welch, No. ED106820, 2020 WL 624300 at *38-39 (Mo. Ct. App. Feb. 11, 2020), *reh'g and/or transfer denied* (Mar. 16, 2020) (affirming the district court's use of a courtroom canine, even though the children were deposed without the canine). *But cf. Neuhard,* No. 15-cr-20425 at *2-3 (denying the motion for use of canine during testimony because the children were able to testify in a courtroom during preliminary examination without assistance. The government did not plead facts to indicate the children were unable to testify in absence of a support animal.).

[243] Email from Alan Abramowtiz, Executive Director of the Florida Statewide Guardian Ad Litem Office, to author (Feb. 25, 2021, 9:49 EST) (on file with author with Model Order Attachment).

[244] Dellinger, *supra* note 53, at 190; *see supra* Part IV(B).

[245] *See e.g.*, *Spence*, 212 Cal. App. 4th at 512-13 ("However, if any issues or improper behavior by the therapy dog occurred, it would be removed from the courtroom. The record does not show any such problems arose."); State v. Nuss, 446 P.3d 458, 461 (Idaho Ct. App. 2019), *reh'g denied,* (Aug. 26, 2019) ("There is no indication, however, that the facility dog's presence actually caused this prejudice. For example, there is no record the facility dog was disruptive, distracted either the witness or the jury, or otherwise behaved inappropriately. Absent such a record, we cannot conclude the district court abused its discretion by allowing the facility dog's presence.").

[246] Fed. R. Evid. 611(a) ("The court should exercise reasonable control over

Under Rule 611(a), federal courts routinely allow comfort objects for a child to hold while testifying.[247] The same analysis would apply to a courtroom canine. The Federal District Court of Michigan has routinely denied the use of a courtroom canine reasoning that Section 3509 of the Federal Rules of Criminal Procedure does not specifically allow for a courtroom canine.[248] Yet, the FRCP does not expressly permit comfort objects either.[249] Therefore, it may assist a practitioner to cite analogous precedent where the court has allowed comfort objects under Rule 611(a). Accordingly, because Rule 611(a) will authorize the use of a canine, the passage of the Courthouse Dogs Act is unnecessary. Granted, if the bill passes it will promote uniform procedures across federal courts. The Act as currently written, however, is far too restrictive as it excludes the use of therapy dogs. As discussed throughout this Article, state courts have permitted therapy dogs in the courtrooms for over a decade without reversal.[250] But, as an abundance of caution, a neutral term like courtroom canine should be used.

Nevertheless, if the court ultimately denies the motion, there are other options available. For example, even when federal courts have denied the use of a canine in the courtroom during trial, courts still allow the canine to be present in the courthouse hallways and meeting spaces.[251] In addition, there is another creative option to incorporate a courtroom canine in trial. The Animal Law Section of the Florida Bar paid a toy manufacturer to produce nearly 2,000 plush stuffed animals to resemble "Rikki," a golden retriever therapy dog, who worked in the Tallahassee Memorial Hospital Animal Therapy program.[252] Rikki passed away in 2017, but his work in helping children testify lives on with the "Rikki" doll.[253] Chuck Mitchell, who was Rikki's handler and a volunteer at the program, stated that a young girl testifying at trial "clutched her Rikki doll tightly on the witness stand and occasionally used it to hide her face. [The girl] eventually found the courage to

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the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.").

[247] *E.g.*, United States v. Counts, No. 3:18-cr-00141, 2020 WL 598526 at *4 (D.N.D. Feb. 7, 2020) (permitting the use of comfort objects during children testimony in front of a jury citing Federal Rules of Evidence 611(a)).

[248] *Supra*, Part IV(B).

[249] *See* 18 U.S.C. § 3509 (2018).

[250] *E.g.*, Florida and New York.

[251] United States v. Neuhard, No. 15-cr-20425, 2017 U.S. Dist. LEXIS 36029 at *4 (E.D. Mich. Mar. 14, 2017); United States v. Gardner, No. 16-cr-20135, 2016 U.S. Dist. LEXIS 132882, at *8 (E.D. Mich. Sept. 28, 2016).

[252] Ash, *supra* note 125; *Courthouse Therapy Dogs*, *supra* note 125.

[253] Ash, *supra* note 125.

testify."[254] The jury believed her and convicted. Mitchell further stated, "[b]ut for the doll, I don't think the child would have been able to do it, because the dog couldn't shield the child the way she needed that to happen."[255]

While Florida law explicitly allows for dogs in the courtroom,[256] if a motion for a courtroom canine is denied, a doll that resembles the canine that worked with the child can serve as a substitute. Stuffed animals are commonly used as comfort objects.[257] The use of comfort objects during testimony is generally accepted by state and federal courts.[258] Therefore, a federal or state court that denies a motion to use a courtroom canine, will likely permit the use of a comfort object that resembles the canine at trial. Admittedly, this solution is ironic because, as discussed in Part V, comfort objects prejudice the defendant, while courtroom canines do not. Permitting a courtroom canine during the child's testimony benefits all parties involved; the child's testimony is more reliable, and the canine's presence does not elicit prejudice against the defendant or victim. Accordingly, a comfort object that resembles the canine the child worked with is not the best solution, but a second best alternative to the physical presence of a courtroom canine during a child's testimony.

b. Best Practices for Behind the Bench

In utilizing his or her discretion in permitting courtroom canines, a judge should follow the balancing approach that many state courts have endorsed.[259] This balancing approach requires a record that the courtroom canine is effective in aiding the child's testimony. Courts should require the dog to have specialized training and adopt procedures to minimize the potential impact the presence of the canine may have on jurors. For example, the witness and canine should enter and be seated prior to the jury. Likewise, the jury should be dismissed before the child and canine leave. This minimizes the jury's interaction with the courtroom canine. Of course, it is necessary that in *voir dire* the judge or attorney informs the jury that a courtroom canine will be present during

[254] *Id*.

[255] *Id.*

[256] Fla. Stat. § 92.55 (2019).

[257] Task Force on Child Witnesses, *supra* note 51, at 28.

[258] Kletter, *supra* note 50.

[259] *E.g.*, State v. Devon D., 138 A.3d 849, 867 (Conn. 2016) ("[T]he court must balance the extent to which the accommodation will help the witness to testify reliably and completely against any possible prejudice to the defendant's right to a fair trial."); State v. Millis, 391 P.3d 1225, 1235 (Ariz. Ct. App. 2017). ("However, the record indicates that the court considered factors relevant to its discretionary balancing of potential benefits and potential prejudices from a dog.").

the trial. Otherwise, if an incident does occur, such as the canine making a noise during testimony, it may startle the jury and possibly lead to a mistrial.

Finally, it is critical that a limiting jury instruction be given with the proper terminology for the canine.[260] In the instructions, it must be clear that the dog does not serve in the capacity of a service dog, emotional support animal, or even a therapy dog.[261] As some courts have stated in dicta, the use of the word "therapy" may imply the witness now needs therapy because of the alleged crime.[262] As terms to describe dogs that help people are used interchangeably, a neutral consistent term such as courtroom canine that encompasses both facility dogs and therapy dogs should be used. The use of a neutral term can help mitigate any potential prejudice.

If possible, judges should utilize all the above methods because the standard of review typically applied is abuse of discretion. Finally, in light of these procedural safeguards and the empirical evidence that courtroom canines help child victims without prejudicing the defendant or child witnesses, judges should allow the use of courtroom canines in most circumstances.[263]

Conclusion

"There is no greater agony than bearing an untold story."[264] Children who have suffered immensely from child abuse are forced to relive their trauma in a courtroom. The child must testify about the details of their abuse in front of their abuser, the abuser's family, and a group of strangers. The child is confronted with an aggressive

[260] *E.g.*, State v. Dye, 309 P.3d 1192, 1200 (Wash. 2013) ("Any prejudice that resulted from [the canine's] presence was minor and largely mitigated by the limiting instruction that the trial court gave."); State v. Nuss, 446 P.3d 458, 459–60 (Idaho Ct. App. 2019), *reh'g denied* (Aug. 26, 2019) ("Before trial, the district court instructed the jury about the possible presence of a facility dog and to disregard its presence."); State v. Reyes, 505 S.W.3d 890, 896 (Tenn. Crim. App. 2016) ("[T]he court gave a special jury instruction as to [the courtroom canine]: 'During this trial, a witness was accompanied by [a] courthouse facility dog. The dog is trained, it is not a pet and it does not belong to the witness. The dog is equally available to both the prosecution and the defense. You must not draw any inference regarding the dog's presence. Each witness'[s] testimony should be evaluated upon the instructions that I give you.'").

[261] *Courthouse Facility Dogs*, *supra* note 61, at 45-46.

[262] *Supra* note 55 and accompanying text.

[263] People v. Chenault, 227 Cal. App. 4th 1503, 1518 (Cal. Ct. App. 2014) ("[when] prejudice to the defendant cannot be eliminated, or at least reduced to a level that does not infringe on the defendant's constitutional rights to a fair trial and to confront witnesses, the court generally should exercise its discretion by denying the request for the presence of a support dog.").

[264] Maya Angelou, I Know Why the Caged Bird Sings (1970).

cross-examination on the premise that it uncovers the truth. In practice, however, cross examination triggers the child's trauma.

The trauma is so severe that the child freezes—unable to comprehend questions, answer clearly, or testify reliably. Although there are other courtroom accommodations available to children, such as CCTV, videotaped depositions, adult attendants, and comfort objects, these accommodations all fall short of the benefits provided by courtroom canines. Courtroom canines have empirically shown to mitigate the traumatic effects a child experiences throughout legal proceedings. The presence of a canine calms the child, allowing for clear and reliable testimony, strengthening the legal process.

What elevates courtroom canines above other accommodation methods is that their use does not prejudice the victim or the defendant and does not influence the jury's decision-making process. As an additional safeguard to ensure the finality of the jury verdict, judges and attorneys should ensure that requirements are met for a child to use a courtroom canine and follow special procedures to minimize any potential prejudice.

In short, courtroom canines are the best available courtroom accommodation, as their use facilitates clearer and more accurate testimony, lessens the trauma experienced by a child, and in contrast to traditional accommodations, does not inject prejudice against the defendant or witness. As the use of courtroom canines gains momentum in the judiciary and legislature, it is critical that both practitioners and judges seize this opportunity. In considering the recent empirical evidence, canines in the courtroom should be a generally accepted accommodation in both state and federal courts for children.

Don't Count Your Chickens Before They Hatch: Urban Farming with Backyard Chickens, Local Laws, Neighbors, and Successful Détente?

John R. Dorocak, J.D., LL.M. (Tax), C.P.A.*

Introduction

Even before COVID-19, urban farming appeared to be gaining some popularity. The reasons for the increased interest include sustainable living, keeping up with popular culture, and replication of celebrity trends seen as chic.[1] The difficulty with urban farming arises with both local laws and neighbors.

* John R. Dorocak, Honors A.B., Xavier University, J.D., Case Western Reserve University, LL.M. (Tax), University of Florida, C.P.A., California and Ohio, is a Professor of Accounting at California State University, San Bernardino. Thank you to my wife, Tanya, who constantly inspires me, our new dog Indy, who has taken on the task from the sadly deceased and not forgotten Murphy, to constantly entertain me, and our sons, Jonathan and Garrett, who constantly interest me. Thank you also to Kathi Menard who has taken on the task, from the now retired Marion Wiltjer, of trying to decipher my dictation and handwriting. In addition, I would like to thank participants at the Pacific Southwest Region Academy of Legal Studies in Business Annual Meetings for their insightful comments and questions concerning this and other articles of mine.

[1] *See e.g.*, Barak Y. Orbach & Frances R. Sjoberg, Excessive Speech, Civility Norms, and Clucking Theorem, 44 Conn. L. Rev. 1, 9, 24 (Nov. 2011); Sarah B. Schindler, Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores, 87 Tul. L. Rev. 231, 295 n.328 (Dec. 2012) ("suggesting that pickling, raising chickens, and curing one's own meats, which were popular in the late 1800s, have return to the forefront of popular culture"); Thomas K. Arnold, Who's Going to Clean the Chicken Yard?, San Diego Reader (Aug. 26, 2020) (writing about urban farming and backyard chickens and sustainability: " [t] his is a story about chickens and the ordinary people, like me, who raise them in their backyards. It's a story that is centered around trendy buzzwords such as "sustainable living" and "urban farming"…Country feed store owners, who sell chickens, "attribute the growing popularity of backyard chicken farming to the move toward sustainable living and urban agriculture that began in the mid-2000s and accelerated when celebrities began posting photos of home flocks on social media." Most people raise chickens for their eggs, however, besides issues of sustainability and egg production, Arnold also writes that the backyard chickens for many become pets. "The Mitchells' four-year chicken journey has been a bonding experience, Carrie says. "When we got them, we just looked at them as providers of eggs," she says. "We didn't realize they were going to become pets, but then we named them and, well, they became our pets."); Adrian Higgins, *Hot Chicks: Legal or Not, Chickens Are the Chic New Backyard Addition*, Wash. Post (Mar. 14, 2009), https://www.washingtonpost.com/wp-dyn/content/article/2009/05/13/AR2009051301051.html; Bill Chappell, *We Are*

Imagine the intrepid urban farmer who has expanded her chicken population to twenty-five or more chickens. That number of chickens can give rise to predators, vermin, noise, and odors. Can the urban farm coexist with her neighbors, who may have objections to the attendant negative consequences?[2] What arguments might the neighbors seek to offer to limit the farming, and what defenses might the farmer offer to rebut the attack? The legal strategies may depend on local law. Besides the popular press documenting the growth of urban farmers, law reviews have particularly addressed the issue of chickens in the backyard, often favorably to the urban farmer.[3]

This article will seek to examine a relatively specific hypothetical neighborhood situation, posed above, in light of the law, including county ordinances, zoning, local ordinances, and common law rights, in the hope of illuminating a possible solution to the apparently frequent backyard chickens urban farming problem.

I. Some Previous Law Review Literature: Macro and Micro Views of Backyard Chickens

Conflicts over backyard chickens are more frequent than most people would think. Barak Y. Orbach and Frances R. Sjoberg studied the many disputes over backyard chicken laws in more than one hundred localities between 2007 and 2010 in formulating a "Clucking Theorem".[4] This postulated theorem states that "human nature unnecessarily inflates the costs of processes related to proposed legal changes."[5] Orbach and Sjoberg's article considers the social costs of speech regarding public perception of backyard chickens by stating, "[t]he social costs of the noise and mess associated with 'changes'—that is, legal transitions, and calls this noise and mess [the public concern to legal changes], 'clucking.'"[6]

This article has its genesis and objective, to borrow terms from the economists, not in the macro scale of Orbach's and Sjoberg's work,

Swamped: Coronavirus Propels Interest in Raising Backyard Chickens for Eggs, NPR (Apr. 3, 2020), https://www.npr.org/2020/04/03/826925180/we-are-swamped-coronavirus-propels-interest-in-raising-backyard-chickens-for-egg.

[2] Any similarity between the hypothetical facts and real, historical, or fictional persons (living or dead), places, things, or events is purely coincidental.

[3] *See, e.g.*, Orbach & Sjoberg, *supra* note 1; Schindler, *supra* note 1; Becky Lundberg Witt, *Urban Agriculture and Local Government Law: Promises, Realities, and Solutions*, 16 U. Pa. J. L. & Soc. Change 221 (2013); *see also* Katherine Pohl, *Fruit of the Vine: Understanding Need to Establish Wineries' Rights Under the Right to Farm Law*, 116:1 Penn. St. L. Rev. 223 (2011).

[4] Orbach & Sjoberg, *supra* note 1, at 7.

[5] *Id.* at 9.

[6] *Id.* at 4.

but rather in the micro situation of a hypothetical urban farmer and her neighbors. This article focuses on the micro situation of a hypothetical urban farmer and her neighbors, rather than the macro outlook of backyard chickens referenced in Orbach and Sjoberg's work. As such, this article would disagree with Orbach's and Sjoberg's statement that "[t]he issue at stake—whether and how to permit backyard chickens—is relatively insignificant."[7] Instead, in the context of basic real property law and the peaceful enjoyment of one's home, the issue of permitting backyard chickens is significant to both the urban farmer and their neighbors.

This article will examine, at the level of those competing landowners, how and what coexistence might be reached. Orbach and Sjoberg admit, "[w]e take as a given the need for regulation in society…."[8] It is the hypothesis of this article that the reason Orbach and Sjoberg may have observed so much "clucking" is that solutions to these backyard disputes generally are best achieved at the lowest level possible, such as looking at the customs of the area as opposed to the law. At least two of the previously cited articles, Orbach and Sjoberg's article and the article by Sarah B. Schindler, refer to the Shasta California area cattle ranchers who ignore local law in favor of customary practices in regulating their farming practices among themselves.[9] However, both of the articles, which refer to the Shasta California example in the discussion of backyard chickens, caution that "there is some suggestion that those norms are only persuasive means of coordinating groups of neighbors when people live in small close-knit communities" and "as the gap began to widen among differing social norms within a community, neighbor disputes arose, and individuals turn to the legal system either to preserve norms or reform them."[10] The common law of nuisance likely addresses such disputes regarding issues with urban farming, however, in an effort to relieve the parties of the heavier burden of litigation, the best model may be local level legislation which mimics nuisance law and is enforced by the lowest level of government possible.

Orbach and Sjoberg describe their work as follows.

> This study of clucking is *not* about substantive disagreements; it does *not* propose to hush dissent or silence parties. Rather it examines how parties consciously and unconsciously employ various strategies that inflate the social costs of legal-transition processes, thereby

[7] *Id.* at 11.

[8] *Id.* at 8.

[9] See Orbach & Sjoberg, *supra* note 1, at 16-17; *see also* Schindler, *supra* note 1, at 293-94.

[10] Schindler, *supra* note 1, at 294; Orbach & Sjoberg, *supra* note 1, at 17.

> burdening the pace of progress in posterity. The social costs associated with clucking are significant and include the waste related to unproductive debates and disputes, delayed changes, foregone transitions, compromised reforms, and willingness to tolerate socially undesirable norms.[11]

Orbach and Sjoberg acknowledge their debt to Ronald Coase, whose "Coase Theorem" posits that "the state should strive to minimize transaction costs to improve economic efficiency."[12] Coase had examined several different neighborhood disputes to explain the reciprocal nature of externalities, such as how any resource allocation would result in some loss to one or the other party.[13] Coase did not address backyard chickens, but he did address backyard rabbits, in a grudging reference to his older intellectual rival Arthur Cecil Pigou.[14] In this reference Coase concluded, "'[u]nless courts act very foolishly,' the law of nuisance could govern the rabbits."[15] Orbach and Sjoberg cite Robert C. Ellickson for the proposition that "Coase has implicitly assumed that governments have a monopoly on rule making functions…."[16]

Although Orbach and Sjoberg appear to criticize Coase's implicit assumption of a government monopoly on rule making, it is the hypothesis of this article that, other than in very small homogeneous communities, there will be a resort to government rule making functions likely by the neighbors and/or the urban farmer. The most appropriate government would be the lowest level local government (such as town or city) and the most appropriate rule might be akin to common law nuisance which, as mentioned, Coase himself cited. As indicated, Orbach and Sjoberg admit "We take as a given the need for regulation in society…."[17]

Therefore, this article submits that backyard chicken disputes will become more prevalent but postures that such disputes are not "relatively insignificant," as Orbach and Sjoberg suggest. Rather, these neighborly clashes serve to highlight a landowner's attitudes towards home as a sanctuary and investment. Thus, by exploring a specific backyard chicken hypothetical, this article seeks to illuminate

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[11] Orbach & Sjoberg, *supra* note 1, at 4-5.

[12] *Id.* at 8.

[13] *See id.* at 13 (citing R. H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1 (1960)).

[14] Coase, *supra* note 13, at 36 (responding to Arthur C. Pigou, The Economics of Welfare 185 (1920)).

[15] Orbach & Sjoberg, *supra* note 1, at 14 (citing Coase, *supra* note 13, at 38).

[16] *Id.* at 16.

[17] *Id.* at 8.

what regulations put forth by what tier of government could be most successful.

Given the apparent burgeoning neighborhood disputes extending even beyond backyard chickens, this article may also provide insights regarding other neighborhood disputes.[18] It is precisely the reciprocal externalities involved in neighborhood disputes which may suggest a framework of settling such disputes, even if not to the satisfaction of all, or any, parties. This article will next discuss legislative solutions on several levels to disputes similar to the one described in the hypothetical mentioned in this Section, including county ordinances, zoning, local ordinances, and common law rights, as well as homeowners association (HOA) covenants, conditions and restrictions (CC&Rs). Armed with such legislation, the parties, such as the neighbors and the urban farmer, are likely to resort to the courts.

II. Backyard Chickens and County Regulations

Local health regulations, as the COVID-19 crisis has shown, are often imposed at the county level. The difficulty with regulating at the county level for parties in the midst of a backyard chicken dispute is that such regulation is not close enough to the problem. For example, take San Diego County, California. That county boasts a variety of temperatures and locales, from beaches to mountains to deserts and from rural to suburban to urban. Recently, in a local newspaper appeared the article *Who's Going to Clean the Chicken Yard?*, which reported that the City of San Diego had amended its ordinances to permit five backyard chickens.[19] Apparently local legislation can be more restrictive than county level regulation.

In fact, county regulation of animals often takes place through zoning.[20] As a general principle of zoning law, local zoning by incorporated cities will supersede county level zoning. For example, in California, the

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[18] Orbach & Sjoberg, *supra* note 1, at 143 (citing Coase, *supra* note 13, footnotes omitted): "To explore the reciprocal nature of externalities, Coase examined several sets of disputes among neighbors, such as a polluting factory that harmed nearby landowners; straying cattle that destroyed a neighbor's crops; a confectioner's loud machinery that curtailed a neighboring physician's business expansion; new buildings that obstructed currents of air and hindered the working of windmills; construction of an airport that turned a quiet, peaceful home into a dusty, noisy dwelling; and railway sparks that set fire to adjacent properties."

[19] Arnold, *supra* note 1; *see also* City of San Diego: Urban Farming, https://www.sandiego.gov/urban-farming/bees-and-livestock/chickens (last visited Apr. 26, 2021) ("[i]n January 2012, the City of San Diego amended its Municipal Code to allow residents of single-family homes, community gardens and retail farms to keep and maintain chickens."); *see generally* San Diego Ca. Mun. Code Ch. §42.0709.

[20] *See infra* note 25 and accompanying text.

State Constitution establishes the police power of counties and cities to "regulate the development and use of real property."[21] California charter cities generally control zoning within their borders.[22] Thus, the search for applicable law will likely take the urban farmer and her neighbors to city ordinances on zoning and other specific ordinances, pertaining to matters such as noise, odors, and business licenses.

III. Backyard Chickens and City Ordinances

In terms of neighborhoods, some California coastal towns are as diverse as the counties in the state, ranging similarly from urban to suburban to country estates to rural. Among its various zoning classifications, a city might have an exclusively agricultural zoning area, a country rural estates zoning area, and a residential zoning area in which agricultural use is permitted.[23] In a residential area that is also zoned for agriculture, a city might permit in excess of two dozen chickens.[24] A county zoning code might limit chickens in its animal regulations animal schedule, depending on the designator for the property.[25] Despite this, the violation of a zoning law does not constitute an actionable nuisance. Further, the fact that an activity is permitted by zoning in a certain neighborhood can serve as evidence that a nuisance has not occurred.[26]

Therefore, it appears that the intrepid urban farmer and her neighbors will likely need to resort to statutory and common law nuisance claims as the applicable law governing their relationship and dispute. Both the urban farmer and her neighbors could also look to more specific local ordinances. However, such ordinances, which often concern business licenses and noise, are often highly specific and are unlikely to be helpful. A business license ordinance may be more

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[21] 66 Cal. Jur. 3d Zoning & Other Land Controls § 122.

[22] *Id.* at § 124.

[23] *See, e.g.*, Carlsbad, Ca., Mun. Code ch. 21.07-.09.

[24] *Id.* (the City of Carlsbad Municipal Code caps chicken ownership at 25 in areas zoned E-A and R-E but does not specify a number for areas zoned R-A).

[25] *See, e.g.*, San Diego County Ca., Ordinances § 3100 (limiting flock sizes to 10, 25, and 100 chickens).

[26] *See* 47 Cal. Jur. 3d Nuisances § 33 at n. 1 (citing Stegner v. Bahr & Ledoyen, Inc., 126 Cal. App. 2d 220, 272 P.2d 106 (1st Dist. 1954) (rock quarry in violation of zoning); Smith v. Collison, 119 Cal. App. 180, 6 P.2d 277 (1st Dist. 1931) (proposed store in violation of zoning)). *Id.* at n. 2 (citing Eaton v. Klimm, 217 Cal. 362, 18 P.2d 678 (1933) (street improvement business including asphalt mixing within zoning law); Vowinckel v. N. Clark & Sons, 216 Cal. 156, 13 P.2d 733 (1932) (long-time manufacturing of pipe, tile, pottery, and stoneware within zoning law); Venuto v. Owens-Corning Fiberglas Corp., 22 Cal. App. 3d 116, 99 Cal. Rptr. 350 (1st Dist. 1971) (manufacturing causing air pollution within zoning law)).

directed at raising revenue rather than regulating activity, or may be limited in what activity it regulates.[27] Noise ordinances similarly might be rather specific,[28] although, noise could possibly support a complaint of nuisance either under a city ordinance or at common law.[29] The inability of legislation to effectively regulate backyard chicken disputes might be at the heart of the clucking discovered by Orbach and Sjoberg.

In a county where most of its cities banned the ownership of backyard chickens due to noise, cities have some legislative flexibility and the ability to strike a compromise. One of the legislative compromises a city may reach is to ban backyard chickens altogether, but because of small yard sizes rather than noise.[30] Another city may require the structures housing chickens to be a minimum distance from neighboring residences, and only in mixed residential/agricultural zoned areas.[31] Yet, another city may allow residents of single-family homes to keep and maintain chickens, depending on the size of the lot and zoning, and allow most single-family homes up to a small number of chickens so long as the chicken coop is in the backyard and a minimum distance from side and rear property lines.[32] In such cities, then, the statutory protection afforded to the urban farmer's neighbors may only be able to achieve a relocation of chicken coops away from their homes. Other animals, such as horses, may be more generously permitted even in areas zoned for single family use.[33]

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[27] 11 Cal. Jur.3d Bus. & Occ. Lic. § 6.

[28] *See, e.g.*, Carlsbad Ca. Mun. Code ch. 8.48 (concerning noise, construction hours, and signage).

[29] *See, e.g.*, 47 Cal. Jur.3d Nuisances § 22.

[30] Arnold, *supra* note 1. Today, 17 of the 18 cities within San Diego County allow chickens, with most limiting ownership to hens, since roosters, with their early-morning crowing, tend to trigger noise complaints. The only exception is Coronado, where the city council last addressed the issue in December 2011 by voting to uphold a longstanding ban on chickens and other barnyard creatures, maintaining that lots in the city are too small to make chicken farming practical. "We have to protect people who don't want these critters next to them," Councilman Mike Woiwode said at the meeting. If the ban is lifted, he said, "these people will lose the ability to control their environment."

[31] *See, e.g.*, Carlsbad Cal. Mun. Code ch. 21.08.020, at Note 4 ("[t]he keeping of all domestic animals provided for in this section shall conform to all other provisions of law governing the same, and no fowl or animal, or any pen, coop, stable, or barn, shall be kept or maintained within forty feet of any building used for human habitation located on adjoining property, or within forty feet of any street or public property.").

[32] Arnold, *supra* note 1. …[I]n January of 2012,…the city of San Diego amended its municipal code to allow residents of single-family homes to keep and maintain chickens. The number of fowl allowed varies depending on the size of the lot and zoning, but generally, most single-family homes are allowed up to five chickens, provided the chicken coop is in the backyard, at least five feet from side property lines and thirteen feet from the rear property line.

[33] *See, e.g.*, Carlsbad Ca. Mun. Code ch. 21.10.020, at Note 1 ("[o]n each lot

IV. Backyard Chickens and Nuisance Laws

What the above brief survey of backyard chickens and the potential laws governing them may demonstrate is that an urban farmer and her neighbor may likely have to resort to nuisance law to potentially settle any differences. Although local ordinances directed at nuisances, sometimes having detailed administrative procedures, may seem to provide an alternative to litigation, as demonstrated below, such local legislation may prove unsatisfactory, because of the limited definition of nuisance, or the predilection of the local government to attempt to achieve a resolution of a dispute satisfactory to all residents (and maybe then satisfactory to none). Although Judge Learned Hand is often cited for the undesirability of litigation, and quoted variously to the effect, "I must say that, as a litigant, I should dread a lawsuit beyond almost anything short of sickness and death."[34] There are times where parties can only settle disputes with litigation. For those looking for guidance as to how to effectively resolve a backyard chicken dispute among neighbors, an examination of nuisance law as codified and at common law may prove useful. Local ordinance codification of nuisance law and local procedures for enforcement of such law may not be ultimately satisfying to the urban farmer and her neighbors for defining their relationship. Therefore, although costly, the urban farmer and her neighbors would be best served by resorting to the courts to apply the common law of nuisance to more clearly define their relationship. As mentioned, Ronald Coase thought that regulation was needed to minimize external costs.[35] Some have criticized Coase for assuming that only government regulation can minimize such costs.[36] In the case of backyard chickens

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or combination of adjacent lots under one ownership, there may be kept one horse for each ten thousand square feet in the lot or lots; provided, however, that any such horse may be kept only if it is fenced and stabled so that at no time it is able to graze, stray or roam closer than seventy-five feet to any building used for human habitation, other than buildings on the lot or lots, and as to those buildings, no closer than fifty feet."); *and see* Carlsbad Ca. Mun. Code ch. 7.12.060 ("[n]o apiary shall be kept and located at a distance less than 150 feet from the nearest house or building inhabited as a dwelling, except buildings owned or controlled by the apiary owner; unless the owner of such apiary first procures permission in writing from the occupant or person using such building or house as a dwelling to do so.").

[34] Jerome N. Frank, *Some Reflections on Judge Learned Hand*, 24 U. Chi. L. Rev. 666, 675 (1957) (quoting Learned Hand, *The Deficiency of Trials to Reach the Heart of the Matter*, *in* Lectures on Legal Topics: 1921-1922, at 89, 105 (James N. Rosenberg et. al. eds., 1926)).

[35] *See* note 17 *supra* and accompanying text.

[36] *See* note 16 *supra* and accompanying text. Orbach and Sjoberg cite Robert C. Ellickson for the proposition that "Coase has implicitly assumed that governments have a monopoly on rule making functions…."

and nuisance laws, it will not be government regulation that will prove most effective. Rather, it will be the courts.

Nuisances, as defined by local ordinances, may be as broadly construed as nuisances defined at common law.[37] Administrative procedures for the enforcement of laws against nuisances under local ordinances can be quite detailed.[38] On the other hand, the case law definition of nuisances at common law provides guidance and certainty to the urban farmer and her neighbors about their relationship and respective rights.

However, before moving to a discussion of nuisance at common law, it should be mentioned that owners can be liable for trespass of domestic animals roaming freely.[39] Both at common law and under local ordinance, often an owner of trespassing animals is liable for damages for trespass on the land of another.[40] Of course, with trespassing animals, as with nuisances, the proof of damages is another matter.

The clearest delineation of the rights of neighbors and the urban farmer in a jurisdiction such as California would be a case such as *Gould & Kane, Inc. v. Valterza*.[41] Although the case is clearly favorable to neighbors of the farmer, it also establishes relative property rights, as described hereinafter. After hearing the plaintiffs' testimony, the trial court enjoined the defendant from maintaining a chicken or rabbit keeping-and-raising operation. The plaintiffs alleged that they would suffer great and irreparable damage because the proposed uses of the defendant's operations would have the natural tendency to attract

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[37] *See, e.g.*, Carlsbad Ca. Mun. Code ch. 6.16.010 ("[t]he existence of real property, whether public or private, within the city:

a. In a condition which is adverse or detrimental to public peace, health, safety, the environment, or general welfare; or
b. Any condition caused, maintained, or permitted to exist in violation of any provision of the municipal code or applicable state codes which constitute a public nuisance may be abated by the city pursuant to the procedures set forth in this chapter; or
c. Which is maintained so as to permit the same to become so defective, unsightly, dangerous, or in a condition of deterioration or disrepair so that the same will, or may cause harm to persons, or which will be materially detrimental to property or improvements located in the immediate vicinity of such real property, constitutes a public nuisance.").

[38] *See, e.g.*, Carlsbad Ca. Ord. No. CS-385.

[39] 3 Cal. Jur. 3d Animals § 100 (2021) (citing Hahn v. Garratt, 69 Cal. 146, 10 P. 329 (1886) (defendant's cattle upon the plaintiffs' crops); *see also* Meade v. Watson, 67 Cal. 591, 593 8 P. 311, 312 (1885) ("[a]t the common law no man is bound to fence his lands against the cattle of another, but each owner is bound to restrain them, and is answerable for any trespass they may commit upon the lands of another")).

[40] Cal. Jur. 3d Animals § 103 (citing Spect v. Arnold, 52 Cal. 455 (1877)).

[41] Golulld & Kane, Inc. v. Valterza, 100 P. 2d 335 (Cal. App. 1st Dist. 1940).

> [M]any flies, insects, rats, mice and other rodents and pests and will cause the emission of constant nerve wracking noises of fowl, and will cause stenches and offensive smells to be carried onto the real estate of petitioner, and will cause dust ladened with offensive matter to be carried on to the lots to the extent that a person of ordinary sensibilities will find it intolerable to reside on said premises.[42]

The plaintiffs also alleged that, as a result of the defendant's actions, the sale and rental value of their land "have been greatly impaired."[43] As a result, and despite the fact that the defendant's use was not a nuisance *per se*, the appellate court found sufficient irreparable injury to the plaintiff's property, for which damages would not be an adequate remedy.[44]

Thus, although the case seems to be the outer limit of protection for neighbors against an urban farmer, a litigated situation similar to *Gould & Kane, Inc. v. Valterza* might secure protection for the neighbors. Even treatments in the popular press that are favorable towards the urban farmer have acknowledged the problems of rodents and odor with even small backyard chicken activities.[45]

Some courts have looked to the rather libertarian maxim *sic utere tuo ut alienum, non laedas*, which provides that "no one may make unreasonable use of his own premises to the material injury of his neighbor's property."[46] Courts often invoke this ancient maxim to protect the neighbors of the landowner whose property use is alleged to be a nuisance.[47]

V. Backyard Chickens and Homeowners Associations

Even if local laws permit backyard chickens, homeowners association (HOA) rules may be more restrictive, often prohibiting "livestock" or "farm animals" or such in their Conditions, Covenants,

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[42] *Id*. at 335.

[43] *Id.*

[44] *Id.*

[45] *See, e.g.,* Arnold, *supra* note 1.

[46] McIntosh v. Brimmer, 68 Cal. App. 770, 776 (Cal. Ct. App. 1924).

[47] *Id.* at 774, 775 ("[A]ction to abate a nuisance by enjoining defendants from continuing to conduct their chicken corrals in such a manner that the dust therefrom will injure plaintiff's trees, vines, and grapes, and to recover damages for past injuries…[O]pposite plaintiff's walnut grove and diagonally from his vineyard, defendants are maintaining a chicken ranch on which they have a large number of chickens, estimated by plaintiff to be between six thousand and seven thousand.").

and Restrictions (CC&Rs).[48] HOA's CC&Rs attempt to define rights by agreement, although some may complain CC&R's are imposed.[49] Another alternative would be for the urban farmer and their neighbors to come to some agreement among themselves.

VI. Tax Consequences

It seems inevitable that individuals, in general, and the urban farmer and their neighbors in particular, may ask about tax consequences of an activity.[50] Neither a decline in the value of the real estate of the neighbors, because of the urban farming, as suggested possibly by the case *Gould & Kane, Incorporated v. Valterza*,[51] nor a decline in value of the real estate of the urban farmer, who may not be able to utilize her property as planned, are likely deductible income tax losses. Losses must generally be realized by sale or exchange before such losses are recognized and possibly deductible for income tax purposes.[52]

In general, losses from the sale or exchange of personal use assets, such as a personal residence, are not deductible. Although the Federal Internal Revenue Code (I.R.C.) section 165(a) states "[t]here shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise,"[53] section 165(c) also limits an individual's deductible losses to certain specified losses.[54]

Under the specified deductible personal losses of individuals in I.R.C. section 165(c), it is unlikely that either the neighbors or the urban farmer could qualify for a casualty loss deduction under I.R.C. section 165(h).[55] Although decline in value because of a casualty could support a casualty loss,[56] currently, personal casualty losses must occur in a

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[48] *See* Mick Telkamp, *What Does Your HOA Think of Backyard Chickens?*, HGTV, https://www.hgtv.com/outdoors/gardens/animals-and-wildlife/what-does-your-hoa-think-of-backyard-chickens (last visited Oct. 16, 2020).

[49] Donnie Vanitzian & Stephen Glassman, *Villa Appalling! Destroying the Myth of Affordable Community Living: A Textbook for Understanding Common Interest Developments, Homeowner Associations and Planned Communities* (2012).

[50] A seemingly sometimes repeated admonition, without attribution it appears, concerning tax planning is that one cannot spit on the sidewalk without considering the tax consequences.

[51] *See* Carlsbad Cal. Mun. Code § 6.16.010 (2020); *see also* Carlsbad Ca. Ord. No. CS-385.

[52] I.R.C. § 165(b) (1986).

[53] I.R.C. § 165(a).

[54] I.R.C. § 165(c).

[55] Finkbohner v. United States, 788 F2d 723 (11th Cir. 1986); I.R.C. § 165(h)

[56] *See* I.R.C.§165(h)(3)(B), §165(c)(3) (1986). See also Treas. Reg. §1.165-7(a)(2)(i)(2012), states, "In determining the amount of loss deductible under this

federally declared disaster area under the I.R.C.[57] Even if the requirement that a personal casualty loss occur in a federally declared disaster area were no longer applicable, it would be questionable whether or not either the decline in the value of the real estate of the neighbors, because of use of the adjoining property as an urban farm, or the decline in value of the real estate of the urban farmer, because of prohibition of the farming activity, had occurred from a casualty identified as an "other casualty" in I.R.C. section 165(c)(3).[58] Other casualties are described as "sudden, unexpected, and unusual."[59]

On the other hand, the requirement that a casualty loss occur in a federally declared disaster does not apply to business casualties.[60] The urban farmer may not want their activities to be considered a business and subject to other requirements, such as obtaining a business license.[61]

Finally, a potential decline in value, if provable by sales of comparable properties or by appraisals, could support a request for revaluation for local real property taxes.[62]

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section, the fair market value of the property immediately before and immediately after the casualty shall generally be ascertained by competent appraisal."

[57] *See* I.R.C. §165(h)(5). For 2018 through 2025, the itemized deduction for personal casualty and theft losses is limited to losses attributable to federally declared disasters.

[58] I.R.C. §165(c)(3). *See, e.g.*, Adams v. Comm'r., TCM. 1977-308 (Taxpayers denied a casualty loss deduction for alleged decrease in the fair market value of their home from noise pollution. Decrease in fair market value not proven and noise pollution not a casualty.); Lund v. United States., 2000 USTC 2099, 10-11 (2000) (Taxpayers denied casualty loss deduction for a decline in the fair market value of home because of continuing avalanche risk. Failure to establish that loss in value was permanent change in the property. Restricted use of home during avalanche season and lower appraisal value because of anticipated buyer resistance did not qualify as a loss in market value due to physical damage directly caused by casualty.); Caan v. United States, 1999 USTC 6886, 5-6 (199) (Taxpayers denied casualty loss deduction for alleged decrease in the value of home resulting from murder trial of neighbor. Taxpayers did not prove physical damage to property resulting in loss of value. Permanent "buyer resistance" resulting in a loss in property value was rejected.). *But see*, Finkbohner v. United States, 788 USTC 723, 1, 12-3 (1986). (Loss of value due to permanent buyer resistance after a flood could be claimed as a casualty loss.).

[59] Rev. Rul. 76-134, 1976-1 CB 54.

[60] I.R.C. §165(h)(5) (1986).

[61] *See* 47 Cal. Jur. 3d Nuisances § 33 at n.1.

[62] *See, e.g.*, San Diego County Assessor, *Application for Review of Assessment*, https://arcc.sdcounty.ca.gov/Pages/Assessment-Review.aspx (last visited 03/19/2021).

Conclusion

To clearly define the rights of urban farmers and their neighbors, the parties will likely need to resort to the courts and the common law of nuisances. Absent a clear definition by local statute or HOAs of the rights of the parties, the courts may be the only resort. County and local zoning laws and other local enactments concerning business licenses, noise, and nuisances may not be specific enough to define the relative rights of parties involved in urban farming with backyard chickens. Resort to the courts may be needed, despite the external cost, if the parties hope to clearly define their rights, absent an agreement.

Animal Personhood: The Quest for Recognition

Macarena Montes Franceschini*

Introduction

Courts around the world have discussed nonhuman animal[1] personhood in different types of procedures. This paper examines twenty-seven such cases, most of which are writs of *habeas corpus* (*HCW*) filed on behalf of specific animals incarcerated in a zoo or laboratory in the hope that a court will find that the animal's imprisonment is unlawful and order their transfer or release. To date, there has only been one successful *HCW* case, regarding a chimpanzee named Cecilia in Argentina.[2] Cecilia lived alone in a concrete cage at the notorious Mendoza Zoo for many years, until, following her trial, a court ordered her transfer to Brazil's Great Ape Sanctuary, where Cecilia currently resides with other chimpanzees.[3] The remaining legal cases this paper will discuss are either administrative, criminal, or copyright proceedings in nature, where the topic of an animal's legal personhood has been an issue.

This paper examines the arguments for legal personhood that have been employed in court, teases out the trends that emerge from this historical analysis, and presents the reader with three difficult dilemmas. The first argument pertains to the pros and cons of employing legal or political means; the second argument examines the relative advantages

* Macarena Montes Franceschini is an attorney and a predoctoral researcher at Universitat Pompeu Fabra (Barcelona). She is a member of the UPF-Centre for Animal Ethics, a member of the Editorial Committee of the Chilean Journal of Animal Law, and the treasurer of the Great Ape Project—Spain. She has written several articles on nonhuman animal personhood and animal law and a book titled Animal Law in Chile . The author would like to thank Randy Abate, Paula Casal, Carlos Contreras, Maggie Livingston, and Steve Wise for their valuable help and comments, and the entire editorial team at MSU ANRLR for their hard work on this article.

[1] For the sake of brevity, this paper will refer to nonhuman animals simply as "animals."

[2] Tercer Juzgado de Garantías de Mendoza [J.G.Men.] [Third Criminal Court of Mendoza], 3/11/2016, "Presentación Efectuada Por AFADA Respecto del Chimpancé 'Cecilia' Sujeto No Humano," [Expte. Nro.] P-72.254/15, (Arg.).

[3] Pablo Giuliano, *El Santuario de los Primates de Brasil, la Ventana a la Libertad de Cecilia y Otros Chimpancés Rescatados*, Télam Agencia Nacional de Noticias (Argentina), (Apr. 8, 2017), https://cablera.telam.com.ar/cable/489433/el-santuario-de-los-primates-de-brasil-la-ventana-a-la-libertad-de-cecilia-y-otros-chimpances-rescatados.

of *HCW* versus other legal strategies; and the third argument explores whether legal practitioners should attempt certain cases with a very low probability of success.

This article is organized chronologically, rather than by animal species or country, to shed light on the evolution of courts' treatment of animal legal personhood cases. In the beginning, these cases were mainly dismissed *in limine* and some judges even considered them to be frivolous, but in recent years judges have begun holding hour-long hearings to examine the merits of the case. Interestingly, neither an animal's species nor its genetic closeness to humans are decisive for the success of a case, as one might initially presume. It is true that the *HCW* on behalf of the chimp Cecilia has been the only successful *HCW* case so far, in the sense that a higher court did not reverse it. However, other cases can be considered successful because they have reached higher courts, judges have shown a willingness to hear the merits of such cases, and the cases have received copious amounts of media attention. For example, a lawsuit filed on behalf of Chucho, an Andean bear, reached Colombia's Constitutional Court and the judge presiding over the lawsuit filed in New York on behalf of Happy the elephant "regretted" being unable to recognize her as a legal person. In other lower-profile animal cruelty cases, such as in the case filed on behalf of Poli the dog, judges have declared animals to be nonhuman persons with certain basic rights.[4]

The paper proceeds as follows. Section I explains the very first case, an *HCW* filed on behalf of all imprisoned birds that were sold, used, hunted, or poached in Brazil. Section II details the cases that occurred between 2005 and 2011, which were mainly about chimpanzees and were still so rare that only one per year took place. Section III parses out the period between 2013 and 2015, during which there was a "personhood boom" and such cases became far more common—involving not only chimpanzees, but other species as well. Section IV covers the cases filed between 2016 and 2018, including a deeper discussion of Cecilia's successful case. Section V walks readers through the fascinating case of Chucho, the Andean bear, which reached the Colombian Constitutional Court. Finally, Section VI explores three cases that took place in Uttarakhand, Haryana, and New Delhi in India, as well as one case that took place in Islamabad, Pakistan, which led to the relocation of elephant Kaavan to a Cambodian sanctuary thanks to the help from Free the Wild, Cher's animal protection NGO. The final section offers a systematic conclusion.

[4] Primer Juzgado Correccional de la Ciudad de General San Martín [J.C.Gral.S.M.] [First Criminal Court of General San Martin], 20/4/2015, "F. c/ Sieli Ricci, Mauricio Rafael p/ Maltrato y Crueldad Animal," La Ley [L.L.] 7.363 No. 36.598 (Arg.).

I. The Pioneers: Caged Birds (Brazil, 1972)

In 1972, a Brazilian animal protection association filed a *HCW* on behalf of all imprisoned birds that were sold, used, hunted, or poached in the country.[5] The writ stated that any natural or legal person who prevented a bird from flying without a reasonable justification was in violation of birds' freedom of flight.[6]

The court rejected the *HCW*, holding that such lawsuits could only be filed on behalf of humans.[7] The court also stated that the writ had to be filed on behalf of an identified person, whereas the petitioner had filed it on behalf of all caged birds, adding that the objective of an *HCW* is to protect people against abuses from public authorities rather than private individuals.[8] Finally, the court declared that animals are "things" not subject to any rights.[9]

The animal protection association appealed this ruling. However, the Supreme Federal Court dismissed the appeal and affirmed that the *HCW* only protects human beings whose right to freedom is illegally violated by public authorities. The court added that animals are objects of law, so they cannot stand in a legal relationship as subjects of rights.[10]

Some have interpreted this pioneer case as a metaphor directed against the dictatorship of Humberto de Alencar Castelo Branco, who ruled Brazil between 1964 and 1985, rather than as a genuine attempt to obtain the recognition of legal personhood for animals.[11] This case is noteworthy for two reasons: first, because it was highly progressive for its time, and second, because it set forth the various arguments that could be employed against animal *HCW*s. These arguments focus on the fact that *HCW*s only protect against public authorities and offer no protections or relief from the actions of individuals; reject *HCW*s filed on behalf of a class of animals requiring cases to relate to specific animals; state that birds (and animals generally) are not human, which is not a legal argument *per se*; and finally, that only humans can have legal personhood, which is false: throughout history, the law has granted the status of legal personhood to various non-human entities.[12]

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[5] S.T.F., No. 50.343, Relator: Des. Djaci Falcão, 3/10/1972, Diario Da Justiça [D.J.], 10.11.1972, 807 (Braz.), pg. 808.

[6] *Id*. at 808-09.

[7] *Id*. at 813.

[8] *Id*. at 809-812.

[9] *Id*. at 812.

[10] *Id*. at 814.

[11] Facebook Interview with Daniel Braga Lourenço, Professor of Law & Animal Ethics Expert, Centro Universitário Faculdade Guanambi, (Nov. 22, 2019).

[12] *See generally* 20 Mich. L. Rev. 527 (1921-1922) (ships); *see also* Bryant Smith, *Legal Personality*, 37 Yale L. J. 283 (1928) (idols); *see also* Patrick William Duff, *The Personality of an Idol*, 3 Cambridge. L. J. 42 (1927) (also idols); George F.

II. The First Chimpanzees: 2005-2011

a. Suiça the Chimpanzee (Brazil, 2005)

Suiça lived alone in Getúlio Vargas Zoo in Salvador, Brazil.[13] She had previously lived with a chimpanzee named Geron, who died from cancer on March 19, 2005.[14] Heron de Santana Gordilho and Luciano Santana, public prosecutors, filed a *HCW* on behalf of Suiça to the Ninth Criminal Trial Court on September 19, 2005.[15] The prosecutors argued that Suiça was kept in an unsuitable enclosure that affected her right to movement and that she was kept in cruel and inhumane solitary confinement.[16] The prosecutors requested that the court grant the *HCW* preliminarily because the legal requirements were fulfilled: *fumus boni iuris* and *periculum in mora*.[17] They asked the court to order Suiça's transfer to the Great Ape Sanctuary in Sorocaba, Brazil.[18]

The judge, Edmundo Lucio da Cruz, admitted the writ, but did not grant it immediately due to its complexity.[19] Instead, Judge Cruz granted the respondent, Thelmo Gavazza, Director of the Biodiversity, Environmental and Hydrological Resource Department (the governmental agency responsible for the zoo), 72 hours to present his counter-arguments.[20] Gavazza filed a petition requesting an extension of the deadline by another 72 hours, which Judge Cruz granted.[21]

Deiser, *The Juristic Person - I*, 57 U. Pa. L. Rev. 131 (1908) (corporations); Jeffrey Nesteruk, *Persons, Property, and the Corporation: A Proposal for a New Paradigm*, 39 DePaul L. R. 543 (1990) (also corporations); Randall S. Abate & Jonathan Crowe, *From Inside the Cage to Outside the Box: Natural Resources as a Platform for Nonhuman Animal Personhood in the U.S. and Australia*, 5 Global J. Animal L. 54 (2017) (rivers); Teresa Vicente Giménez, *De la Justicia Climática a la Justicia Ecológica: Los Derechos de la Naturaleza*, 11 Rev. Catalana de Dret Ambiental 1 (2020) (rivers).

[13] *See* Valdelane Azevedo Clayton, *A Habeas Corpus on Behalf of a Chimpanzee*, MSU Animal Legal & Historical Ctr, 1, 2, https://www.animallaw.info/sites/default/files/Habeas Corpus on Behalf of a Chimp Rev2.pdf (last visited Nov. 20, 2019) (based on the English translation of the *HCW* prepared by Valdelane Azevedo).

[14] Heron de Santana Gordilho, *La Teoría Brasileña del Habeas Corpus para los Grandes Primates*, 1(11) Conpedi L.R. 320, 333 (2015).

[15] Clayton, *supra* note 13, at 2.

[16] *Id.* at 3.

[17] *Id.* at 17.

[18] *Id.* at 17.

[19] *See* Carlos de Paula, *Suica - Habeas Corpus*, MSU Animal Legal & Historical Ctr, https://www.animallaw.info/case/suica-habeas-corpus (last visited Nov. 20, 2019) (based on the English translation of the judgment prepared by Carlos de Paula).

[20] *Id.*

[21] *Id.*

Unfortunately, on September 28, 2005, the day the court was supposed to decide the case, the respondent informed the court that Suiça had died the day before in the zoo. As a result, the judge dismissed the case explaining that he had granted the second 72-hour extension because the defendant was a governmental agency rather than the police, the usual defendants in *HCW* cases, and because he believed that the government needed time to gather information as the petitioners had.[22] The judge also added that the news of Suiça's death surprised him, as he had visited her at the zoo the week before and she did not seem ill.[23] Evidence has since emerged indicating that Suiça was poisoned. Her killers were never found.[24]

Even though this case ended tragically, it is notable, because it was the first time that an animal was granted legal standing to claim her right to freedom in a court: Judge Cruz was willing to admit the *HCW* and hear the case, rather than declare it inadmissible on procedural grounds.[25] Upon the conclusion of Suiça's case, Judge Cruz stated:

> I am sure that with the acceptance of the debate, I caught the attention of jurists from all over the country, bringing the matter to discussion. Criminal Procedure Law is not static, rather subject to constant changes, and new decisions have to adapt to new times. I believe that even with "Suiça's" death the matter will continue to be discussed, especially in Law school classes, as many colleagues, attorneys, students and entities have voiced their opinions, wishing to make those prevail.[26]

Suiça's story sparked conversations regarding the rights of animals among legal experts in Brazil. Her case is remembered as the first instance a court recognized an animal as a subject who can claim her rights in court. Suiça's legacy lives on as the debate on legal personhood for animals in Brazil and around the world continues.

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[22] *Id.*

[23] *Id.*

[24] Pedro Pozas Terrados, *Por Parte del Proyecto Gran Simio, se presenta un Habeas Corpus a un Chimpancé en Brasil*, Great Ape Project (Feb. 25, 2010), https://www.projetogap.org.br/es/noticia/por-parte-del-proyecto-gran-simio-se-presenta-un-habeas-corpus-a-un-chimpance-en-brasil/ (last visited Nov. 29, 2019).

[25] Heron de Santana Gordilho, *Animal Standing and the Habeas Corpus Theory for the Great Apes*, 3(4) Rev. Jur. Luso-Bras. 713, 736 (2017).

[26] de Paula, *supra* note 19.

b. Hiasl the Chimpanzee (Austria, 2007)

There has only been one case in Europe where the personhood of an animal has been debated in judicial proceedings: Matthias Hiasl Pan, a chimpanzee. In the article, *Trial on Personhood for Chimp "Hiasl"* co-authors Martin Balluch and Eberhart Theuer, prominent Austrian animal rights activists, document the facts of this case in great detail.[27] Hiasl was born in Sierra Leone in 1981.[28] In 1982, he was abducted by poachers and sold to Dr. Sitter, a wild animal trader, who caught several baby chimps in order to sell them to various people and companies in Austria who wanted to use them for experimentation or exhibition in zoos.[29] In this case, the company Immuno had purchased Hiasl and Rosi, a female baby chimp, for AIDS and hepatitis research.[30]

The baby chimps arrived at the Vienna Airport on April 29, 1982.[31] A day before their arrival, Austria signed the Convention on International Trade in Endangered Species (CITES), meaning the chimps did not have the necessary documents to legally enter Austria.[32] Accordingly, on May 6, 1982, the court seized Hiasl and Rosi, as well as Henry, a baby chimpanzee bought by the zoo dealer Walter Ullrich, and placed all three chimpanzees in the care of a Viennese animal shelter.[33] A caretaker from the shelter raised the chimpanzees at home with his family.[34]

On July 14, 1983, the court ruled that Immuno was not entitled to legal possession of Hiasl and Rosi, because it had breached the CITES regulation.[35] Immuno appealed the decision, which the court rejected on October 10, 1983.[36] As a result, the laboratory took the case to the High Court, which, on April 10, 1984, ruled in favor of Immuno and ordered the animal shelter to release the chimpanzees to Immuno.[37]

On November 20, 1984, the Mayor of Vienna issued an order instructing the animal shelter to comply with the court's ruling and hand the chimpanzees over to Immuno.[38] Agents of Immuno visited the animal shelter on November 29, 1984 to remove the chimps, but their efforts

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[27] Martin Balluch & Eberhart Theuer, *Trial on Personhood for Chimp "Hiasl,"* 24(4) ALTEX, 335 (2007).

[28] *Id.* at 335.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 336.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

were stopped by animal rights activists.[39] As a result, Immuno initiated legal proceedings against the state to request the use of physical force to remove the chimpanzees on July 10, 1985.[40]

On December 10, 1986, the High Court decided in favor of Immuno and ordered the government to enforce the ruling.[41] On March 23, 1987, the government gave the animal shelter fourteen days to hand over the chimpanzees to Immuno, which the animal shelter again refused to comply with. Rather than use force to remove the chimpanzees, the government initiated its own legal proceedings against the animal shelter on June 11, 1987.[42] The Provincial Court of Civil Law in Vienna held a hearing on February 18, 1988, where the shelter argued that it had a legal obligation to protect animals from suffering that it would breach if it gave the chimpanzees to Immuno.[43] The court stated that animals are "things" and have no interests and that only Immuno had an interest in this case as the owner of the chimpanzees.[44] The animal shelter appealed the ruling, as the shelter and animal activists alike feared that Immuno would infect Hiasl and Rosi with the same or similar diseases it had previously infected other Immuno chimpanzees with.

During this time, the Austrian Parliament added Section 285 (a) to the Austrian Civil Code, which states that animals are not things and unless other laws rule differently, are subdued to the rules of property.[45] Despite this favorable legal amendment, on September 27, 1989, the court insisted on its ruling that animals are things, have no value in themselves, and that Immuno should take possession of the chimpanzees.[46]

Immuno was eventually taken over by a different company named Baxter, which decided to stop experiments on chimpanzees in 1999 and donated Hiasl and Rosi to the animal shelter three years later.[47] In 2005, the Austrian Parliament unanimously voted to ban all experimentation on apes.[48] As of January 1, 2006, it is illegal to conduct experiments on great apes and gibbons in Austria.[49]

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[39] *Id.*

[40] *Id.* (on December 16, 1985, Mr. Ullrich, the zoo dealer, sold Henry to the animal shelter. From there, Henry was transferred to the Heidelberg Zoo on December 10, 1986, as the animal shelter lacked the appropriate facilities to house him. Henry died at the zoo).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*; Allgemeines Bürgerliches Gesetzbuch [ABGB] [Civil Code] § 285(a) (Austria) https://www.jusline.at/gesetz/abgb/paragraf/285.

[46] Balluch & Theuer, *supra* note 27, at 336.

[47] *Id.*

[48] *Id.*

[49] *Id.*

According to Balluch and Theuer, the animal shelter underwent a bankruptcy procedure in 2006, as Hiasl and Rosi's care cost around ten thousand euros a month. The bankruptcy placed Hiasl and Rosi in danger of being deported or transferred to a zoo, circus, or laboratory abroad to raise money for the creditors.[50] The President of the Animal Rights Association (ARA), received a large anonymous donation with the condition that he could only use the money if Hiasl were appointed a legal guardian who could receive the money and decide with the President what to do with it.[51]

The ARA initiated legal proceedings to appoint a guardian before the District Court in Mödling on February 6, 2007.[52] Experts such as Stefan Hammer, a civil rights and constitutional law professor at the University of Vienna; Eva-Maria Maier, a philosophy professor at the University of Vienna; Volker Sommer, an anthropology professor at the University of London; and Dr. Signe Preuschoft, a biologist and chimpanzee expert at the University of Zurich; supported the petition.[53] Two hearings took place during this judicial procedure. At the first hearing, the court stressed that Hiasl lacked the necessary documents to prove his identity, which the ARA refuted by presenting witnesses of Hiasl's arrival in Austria and continued identity thereafter.[54] At the second hearing, the ARA and the judge debated the required conditions needed to qualify for a legal guardian.[55] Ultimately, the court found that Hiasl was neither threatened nor intellectually disabled and dismissed the petition.[56]

The ARA appealed, arguing that though Hiasl was not intellectually disabled, he was traumatized and had lived an unnatural life in captivity that required him to have a guardian to protect his interests.[57] The ARA also explained that the bankruptcy proceedings were threatening Hiasl's interests and stressed the fact that Hiasl would lose the donation without a legal guardian to act on his behalf.[58] The court rejected the ARA's appeal on May 9, 2007 after determining that the ARA had no legal standing to appeal and dismissed the case on procedural grounds without ever addressing the fundamental issue of the case: whether Hiasl is a person or not.[59]

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[50] *Id.* at 337.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id*. at 337, 339.

According to Balluch and Theuer, the ARA appealed to the Provincial Court in Wiener Neustadt on May 22, 2007.[60] The court rejected the appeal on September 5, 2007, again on procedural grounds, stating that the law only allowed the legal guardian or person for whom the legal guardian is being appointed to appeal.[61] The ARA appealed this finding to the Austrian Supreme Court for Civil and Criminal Matters on September 26, 2007, where it argued that the lower court had based its dismissal on a law that only applied *after* a legal guardian had been appointed.[62] The ARA further noted that the court had previously allowed close relatives to appeal on behalf of an intellectually disabled person and therefore, Hiasl's close friends should likewise have the ability to appeal on his behalf, as Hiasl had lost all his close relatives when he was abducted.[63] Finally, the ARA argued that it had legal standing because it had an interest in using the donated money, which would only be possible if Hiasl were appointed a legal guardian.[64] The Supreme Court again failed to address the question of whether Hiasl was a person and dismissed the case, citing the ARA's lack of standing.[65]

The case was then taken to the European Court of Human Rights, based on a violation of the right to a fair trial.[66] Paula Stibbe, who had worked with Hiasl in a behavioral enrichment project for many years, presented an additional appeal against the Supreme Court's ruling.[67] However, the European Court of Human Rights dismissed the case on the grounds of its lack of subject matter jurisdiction.[68]

Balluch and Theuer argue that Article 16 of the Civil Code, which states that all humans are persons, also includes chimpanzees.[69] Balluch and Theuer maintain that this language extends to chimpanzees because the meaning of the word "human" must be understood in biological terms, as the law does not recognize instances of artificial intelligence as persons, but does recognize intellectually disabled humans as such.[70] Balluch and Theuer further debate whether Neanderthals, *Homo*

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[60] *Id.* at 339.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 340.

[64] *Id.*

[65] Martin Balluch & Eberhart Theuer, *Hiasl: The Whole Story. Trial on Personhood for Chimpanzee Hiasl*, Verein Gegen Tierfabriken (Jan. 18, 2008), https://vgt.at/en/work-pan.php.

[66] *Id.*

[67] *Id.*

[68] Anne Peters, *Liberté, Égalité, Animalité: Human-Animal Comparisons in Law*, 5(1) Transnat.'l Env.'t L. 25, 44 (2016).

[69] Balluch & Theuer, *supra* note 27, at 337, [ABGB] [Civil Code] § 16 (Austria) https://rdb.manz.at/document/ris.n.NOR12017706.

[70] Balluch & Theuer, *supra* note 27, at 337.

habilis, *Homo erectus*, and *Homo florensis* would be counted as humans according to the language of Article 16 and point out that human rights charters usually accord fundamental rights to members of the human family.[71] They argue that this concept should be interpreted scientifically, according to the Linnaean classification, which states that *homo sapiens* and chimpanzees belong to the same biological family.[72] Even if the word "human" were to be interpreted narrowly, many experts maintain that chimpanzees and bonobos should still be included due to their genetic similarities.[73]

Balluch and Theuer further state that while Article 16 of the Civil Code states that all humans are persons, it differentiates between the concepts of "human" and "person," recognizing that not only humans are persons.[74] Unfortunately, Article 16 does not provide a definition for "person," so the authors resort to the philosophical foundations of the Civil Code.[75] The ability to reason stands out from the enlightenment period and Kant's work.[76] According to Balluch and Theuer, this ability includes abstract thoughts, the ability to think in terms of cause and effect, and the ability to put oneself in another's position, which is also known as "the theory of mind."[77] Chimpanzees have a theory of mind, and in particular Hiasl has passed the mirror test, uses tools, and deceives others.[78] The authors stress that there is practically no ability that is traditionally considered human that chimpanzees lack and conclude that Hiasl qualifies as a human according to the language Article 16 of the Civil Code and as a person according to the philosophical foundations of this law.[79]

Ultimately, none of the Austrian courts analyzed the fundamental question of whether Austrian Civil law recognized Hiasl's personhood; every court involved in Hiasl's case dismissed the matter on procedural grounds. As some of the other cases on nonhuman animal legal personhood will show, this has been an unfortunate trend in courts. However, this was still an unprecedented case that caught the media's attention around the world.[80]

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[71] *Id.*

[72] *Id.*

[73] *Id.* (referring only to the genus *Homo* and discounting *Homo pan*).

[74] *Id.* at 338; § 16 ABGB**,** *supra* note 69.

[75] Balluch & Theuer, *supra* note 27, at 338.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* at 338-39; *see also* [ABGB] [Civil Code] § 16, *supra* note 69.

[80] Deborah Cao, Animals Are Not Things: Animal Law in the West 2 (2007).

c. Lili and Debby Megh, Chimpanzees (Brazil, 2008)

According to the *HCW* filed by Marcia Miyuki Oyama Matsubara, the chimpanzees known as Lili and Debby Megh were born in the Fortaleza Zoo and seized by the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA), because the zoo lacked the necessary environmental permits.[81] The chimpanzees were donated to Rubens Fortes, who transferred them to a sanctuary in Ubatuba.[82] IBAMA questioned the animals' donation, and so Fortes initiated legal proceedings to keep the chimpanzees.[83] There was also a problem with the location of the sanctuary, since it was located within ten kilometers of a state park where constructions are banned.[84]

Fortes built another sanctuary in Ibiúna, São Paulo.[85] The Federal Regional Court of the Third Region later ordered that the chimpanzees be reintroduced into nature.[86] Considering that Brazil is not the natural habitat for chimpanzees and that both Lili and Debby Megh were born in captivity, it is very likely that the enforcement of such a ruling would have led to the chimpanzees' deaths.[87]

Therefore, Fortes filed a *HCW* on behalf of the chimpanzees to the Superior Tribunal Court of Justice of Brasilia where he requested the court protect Lili and Debby Megh's right to life by keeping them in the sanctuary.[88] In September 2008, the *HCW* was suspended by the petition of Herman Benjamin, a judge who wished to study the case in greater detail.[89] However, the chief judge assigned to the case, Rapporteur Castro Meira, dismissed the case in December 2008, reasoning that the Brazilian Constitution clearly states that *HCW* only protects human beings.[90] The chief judge also held that there was no unlawful incarceration in this case, but rather an order to release the animals into nature.[91] In August 2012, Castro Meira accepted Fortes' withdrawal of the writ because the

[81] Heron Santana Gordilho, *Animal Rights in Brazil: Habeas Corpus for Chimpanzees*, 1(3) F. Animal L. Stud. 1, 8 (2010) (Lili was born on May 17, 2004, and Debby was born on October 17, 2005).

[82] Sandro Cavalcanti Rollo, *O Habeas Corpus Para Além da Espécie Humana,* Pontíficia U. Cath. de São Paulo 1, 178 (2016), https://tede2.pucsp.br/handle/handle/7055.

[83] *Id*.

[84] *Id.* at 179.

[85] Marcia Miyuki Oyama Matsubara, *Ordem de Habeas Corpus em Favor das Chimpanzés "Lili" e "Megh,"* 3(4) Revista Brasileira de Direito Animal. 359, 362 (2008).

[86] *Id*. at 363.

[87] Gordilho, *supra* note 81, at 8.

[88] Rollo, *supra* nota 82, at 179.

[89] *Id.* at 181.

[90] *Id*. at 180.

[91] *Id.* at 182.

chimpanzees' situation had been formalized.[92] While Lili and Debby Megh were moved to a sanctuary, it was not because of a *HCW*, but rather because of parallel, administrative procedures that resulted in the zoo's closure.

d. Jimmy the Chimpanzee (Brazil, 2009)

The Roman García Circus brought Jimmy the chimpanzee to Brazil as an infant, he drank from a bottle, used a diaper, and slept on a bed in a trailer.[93] Jimmy worked in this circus for many years, where they forced him to balance on a wire and ride a bicycle around the stage.[94] When this circus closed in 1987, he was sold to the Circus D'Italia, where he was forced to continue working for thirteen years.[95] When this second circus closed in 2000, he was donated to ZOONIT, which was the zoo of Niteroi, a city located in the State of Rio de Janeiro.[96] At the zoo, Jimmy lived alone and became famous because he enjoyed painting.[97]

In 2009, the International and Brazilian divisions of the Great Ape Project filed a *HCW* in Niteroi, arguing that Jimmy had lived alone in a small cage for more than ten years and that the zoo was not in compliance with the minimum conditions to house animals.[98] The Criminal Chamber of the Rio de Janeiro State Court of Justice was supposed to deliver its judgment on December 16, 2010, but one of the judges asked for a revision.[99] On April 19, 2011, the court rejected the *HCW* arguing that Jimmy was not human and that the Superior Federal Court, rather than a State Court, was the proper venue to hear the case.[100]

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[92] *Id.* at 181.

[93] Silvia Rogar, *Como es la Vida del Chimpancé que se Convirtió en Pintor y ha Sido Objeto de una Disputa Judicial para Salir del Zoológico de Niteroi e ir para un Santuario en S. Paulo (Brasil)*, Revista de Diario o Globo (Dec. 19, 2010), https://www.projetogap.org.br/es/noticia/la-historia-del-chimpance-jimmy/.

[94] *Id*.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] Heron de Santana Gordilho, *Habeas Corpus em Favor de Jimmy, Chimpanzé preso no Jardim Zoológico de Niterói - Rio de Janeiro*, 6(5) Revista Brasileira de Direito Animal. 337, 341 (2010) (Jimmy was 26 years old when the writ was filed).

[99] Pedro A. Ynterian, *Habeas Corpus de Jimmy: Postergado el Juicio*, Great Ape Project (Dec. 17, 2010), https://www.projetogap.org.br/es/noticia/habeas-corpus-de-jimmy-postergado-el-juicio/.

[100] Pedro A. Ynterian, *Caso Jimmy: Repercusiones en la Prensa y la Situación Actual*, Great Ape Project (Apr. 27, 2011), https://www.projetogap.org.br/es/noticia/caso-jimmy-repercusiones-en-la-prensa-y-la-situacion-actual/ (the judges debated the case for more than three hours, which was interpreted as a sign of the doubts it caused the judges).

At the same time, the Great Ape Project informed IBAMA about the deplorable conditions of the zoo.[101] IBAMA investigated and found that the zoo mistreated the animals and was not in compliance with the regulations for housing animals.[102] IBAMA further discovered that animals who had been confiscated and given to the zoo by police officers had mysteriously disappeared.[103] Following its investigation, IBAMA filed a petition to the Federal Court which requested the zoo's closure and the confiscation of all the animals.[104] The Federal Court granted the petition and Jimmy was transferred to the Great Ape Sanctuary.[105]

As in the prior case, Jimmy was transferred to the sanctuary due to a parallel administrative procedure initiated against the zoo, which managed to close it despite the judges' denial of *HCW*.[106] This demonstrates that parallel administrative procedures that seek to close the facility where the mistreated animal at issue is confined are useful backups to *HCW*, should the latter procedure fail.

e. Tilikum, Katina, Corky, Kasatka, and Ulises, Orcas (United States, 2011)

In 2012, PETA, in conjunction with some marine mammal experts and former trainers, filed a lawsuit asking a federal court to declare the five orcas that lived in SeaWorld to be slaves and their condition a violation of the Thirteenth Amendment of the United States Constitution.[107] PETA explained that the language of the Thirteenth Amendment, which prohibits slavery, does not refer to any type of person or a specific victim.[108] This case marks the first attempt to obtain the recognition of legal rights for animals on a constitutional basis; although the petition was not a *HCW*, it resembled one in various ways.[109]

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[101] Pedro A. Ynterian, *Las Primeras 48 Horas de Jimmy*, Great Ape Project (Jul. 15, 2011), https://www.projetogap.org.br/es/noticia/las-primeras-48-horas-de-jimmy/.

[102] Ynterian, *supra* note 100.

[103] *Id.*

[104] *Id.*

[105] Pedro Pozas Terrados, *El Chimpancé Jimmy Descansa en el Santuario del Proyecto Gran Simio de Brasil*, Proyecto Gran Simio (Aug. 9, 2011), http://proyectogransimio.blogspot.com/2011/08/el-chimpance-jimmy-descansa-en-el.html.

[106] Ynterian, *supra* note 100.

[107] PETA, *PETA Sues SeaWorld for Violating Orcas' Constitutional Rights* (Oct. 25, 2011), https://www.peta.org/blog/peta-sues-seaworld-violating-orcas-constitutional-rights/; *see also* U.S. Const. amend. XIII.

[108] *Id*.

[109] Greg Miller, *Judge Dismisses PETA's Constitutional Argument to Free SeaWorld Orcas*, Science (Feb. 9, 2012), https://www.sciencemag.org/news/2012/02/judge-dismisses-petas-constitutional-argument-free-seaworld-orcas.

SeaWorld argued that the Thirteenth Amendment applies only to "humans," and Judge Jeffrey Miller dismissed the case on February 8, 2012, ruling that the Thirteenth Amendment only applies to "persons."[110] Steven Wise, president and founder of the NhRP, stated that it has been a mistake to file this lawsuit because its likely failure could be used as a legal precedent against animal personhood in the future.[111] Great care is needed, thus, not to make things worse for animals. Animals generally may be harmed by unsuccessful legal battles through the creation of negative legal precedents. Yet, individual animals may also be greatly harmed by legal proceedings that are likely to succeed, as one way to stop promising cases is to kill the plaintiff, as occurred in Suiça's case.

III. The Personhood Boom: 2013-2015

a. Toti the Chimpanzee (Argentina, 2013)

Toti was born in captivity in Cutini Zoo in Buenos Aires, Argentina on August 29, 1990.[112] In 2008, at the age of eighteen, he was transferred to Córdoba Zoo in Argentina, where he mostly lived alone.[113] In December 2013, when Toti was twenty-three, the Great Ape Project filed a *HCW* on his behalf to the Court of Control No. 4 of Córdoba to request Toti's transfer to the Sorocaba Great Ape Sanctuary in Brazil.[114] The Great Ape Project argued that the zoo was going to transfer Toti to Bubalcó Zoo in the south of Argentina in exchange for a white tiger, which would harm Toti due to the weather and inadequate enclosure[115]

On December 26, 2013, the court rejected the *HCW in limine*, stating that the *HCW*'s function is to protect a persons' right to freedom and that the law refers to human persons.[116] The court further stated that chimpanzees are not human and that animals cannot be persons.[117] Finally, the court added that any discussion related to the legal status of apes required debate and evidence, which exceeded the purpose and

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[110] *Id.*

[111] *See* Steven M. Wise, *PETA'S Slavery Lawsuit: A Setback for Animal Rights*, Nonhuman Rights Blog (Nov. 10, 2011), https://www.nonhumanrights.org/blog/petas-slavery-lawsuit-a-setback-for-animal-rights/.

[112] Pedro A. Ynterian, *Se Desvenda el Misterio: Quién es Toti?*, Great Ape Project (Feb. 18, 2014), https://www.projetogap.org.br/es/noticia/se-desvenda-el-misterio-quien-es-toti/.

[113] Juzgado de Control 4 de Córdoba [J.C.Cor.] [Court of Control No. 4], 26/12/2013, "Hábeas Corpus Presentado por Juárez, María Alejandra—Representante Argentina del Proyecto Gran Simio [PSG]," No. 293 (Arg.).

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

brevity of the *habeas corpus* procedure.[118] The Great Ape Project filed an appeal that was also dismissed, a finding that the Supreme Court of Justice ultimately upheld.[119]

At the end of 2013, Toti was transferred to Bubalcó Zoo, located in Río Negro in Argentinean Patagonia.[120] He was locked up alone in a small cage and lost most of his hair due to severe depression.[121] Therefore, the AFADA (*Asociación de Funcionarios y Abogados por los Derechos de los Animales*, in English, Association of Public Officials and Attorneys for Animal Rights) filed another *HCW* in the Federal Court No. 2 of Corrientes.[122] On January 31, 2014, the Federal Court declared itself incompetent.[123] Jimmy's case was sent to the Investigating Court No. 2 of General Roca, which rejected the case *in limine*.[124] This writ was also declared inadmissible by the Superior Court of Justice.[125]

Toti's case is an example of courts' unwillingness to step away from the humanity argument and deeply analyze legal personhood, which is unfortunately common in many courts around the world. However, the AFADA and Rio Negro's public prosecutor (*Ministerio Público de la Defensa)* filed another *HCW* on Toti's behalf on November 6, 2020 to the Family Court No. 11 of General Roca.[126] Judge Moira Revsin conducted an on-site inspection of Toti and his enclosure on November 18, 2020.[127] The judge was especially interested in learning about

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[118] *Id*.

[119] Héctor Brondo, *Programa de ONU, a Favor del Traslado del Chimpancé Toti a Brasil*, La Voz, (Dec. 18, 2014), https://www.lavoz.com.ar/ciudadanos/programa-de-onu-favor-del-traslado-del-chimpance-toti-brasil.

[120] Héctor Brondo, *Aumenta la Preocupación por la Salud del Chimpancé Toti*, La Voz (Dec. 8, 2014), https://www.lavoz.com.ar/ciudadanos/aumenta-la-preocupacion-por-la-salud-del-chimpance-toti.

[121] *Id*.

[122] Héctor Brondo, *Admiten Apelación del Habeas Corpus por Toti*, La Voz (Feb. 5, 2014), http://www.lavoz.com.ar/ciudadanos/admiten-apelacion-del-habeas-corpus-por-toti-3#comentarios.

[123] Héctor Brondo, *La Corte Suprema Rechazó el Habeas Corpus por el Chimpancé Toti*, La Voz (Oct. 4, 2014), https://www.lavoz.com.ar/ciudadanos/la-corte-suprema-rechazo-el-habeas-corpus-por-el-chimpance-toti.

[124] *STJ Confirma Rechazo de* Habeas Corpus *para un chimpancé*, Agencia Digital de Noticias (Argentina) (Aug. 16, 2014), https://www.adnrionegro.com.ar/2014/08/stj-confirma-rechazo-de-habeas-corpus-para-un-chimpamce/.

[125] Matías Werner, *Un Hábeas Corpus para un Chimpancé Llegó a la Corte y Volvió Enseguida*, Diario Judicial (Oct. 3, 2014), https://www.diariojudicial.com/nota/35168.

[126] *La Jueza Encargada del Caso de Toti Realiza una Visita Sorpresa al Zoo Bubalcó donde se Encuentra Cautivo el Chimpancé Toti*, Great Ape Project (Nov. 19, 2020), https://proyectogransimio.org/noticias/ultimas-noticias/la-jueza-encargada-del-caso-de-toti-realiza-una-visita-sorpresa-al-zoo-bubalco-donde-se-encuentra-cautivo-el-chimpance-toti.

[127] *Habeas Corpus en Favor del Chimpancé Toti*, Ministerio Público Poder

Toti's diet, environmental enrichment, veterinary attention, as well as the exact size of his cage to understand Toti's situation in the zoo.[128] Although the ruling is pending, unlike the past courts that dismissed Toti's *HCW*, Judge Revsin has shown a willingness to hear the case and personally determine what Toti's current condition is at the zoo. Hopefully, determining Toti's condition at the zoo will not confuse the judge to think this case is an animal welfare case when the purpose of the *HCW* is to obtain Toti's recognition as a nonhuman person and his consequent release to a sanctuary.

b. Tommy the Chimpanzee (United States, 2013)

According to the Nonhuman Rights Project (NhRP), Tommy was born in the early 1980s and raised by Dave Sabo, the former owner of Sabo's Chimps, a company that provided chimps for movies.[129] Tommy was used to portray Goliath, a cigarette-smoking chimp, in the 1987 film *Project X*.[130] There were allegations of trainers beating the chimpanzees during the making of this movie.[131] Sabo died in 2008, so the Laverys became Tommy's owners.[132] The NhRP found him caged, alone in a shed on a trailer lot in Gloversville, New York with nothing but a television and a stereo for company.[133]

The NhRP filed a *HCW* in the New York Supreme Court of Fulton County on December 2, 2013, requesting the recognition of Tommy's legal personhood and right to bodily liberty, and his transfer to a sanctuary.[134] On December 3, 2013, the court rejected the *HCW*, but the judge offered his support to the NhRP venture.[135]

On January 10, 2014, the NhRP filed a Notice of Appeal with the New York State Supreme Court, Appellate Division, Third Judicial Department, and filed an appellate brief against the lower court's

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Judicial de Río Negro (Nov. 18, 2020), https://ministeriopublico.jusrionegro.gov.ar/nota/4405/habeas-corpus-en-favor-del-chimpance-toti.html.

[128] *Id.*

[129] *The NhRP's First Client*, Nonhuman Rights Project, https://www.nonhumanrights.org/client-tommy/ (last visited Nov. 25, 2019).

[130] *Id.*

[131] *People in the News*, AP News (May 4, 1987), https://apnews.com/6531233292123c550b0e82eda85c03d9.

[132] *The NhRP's First Client*, *supra* note 129.

[133] Chris Churchill, *Advocate: Rights or Not, Caged Chimp Deserves Better*, Times Union (Dec. 7, 2013), https://www.timesunion.com/local/article/Advocate-Rights-or-not-caged-chimp-deserves-5044847.php.

[134] *The NhRP's First Client*, *supra* note 129.

[135] Transcript of Hearing at 27, Nonhuman Rights Project v. Lavery, No. 2013-02051 (N.Y. Sup. Ct. Fulton County, Dec. 3, 2013), https://www.nonhumanrights.org/content/uploads/Fulton-Cty-hearing-re.-Tommy-12-2-13.pdf.

ruling.[136] During May 2014, the NhRP also renewed its offer to settle the case and help the Laverys transfer Tommy to a sanctuary.[137] In May 2014, the NhRP requested a preliminary injunction to prevent the Laverys from transferring Tommy to another state.[138] The Third Judicial Department granted the NhRP's motion for a preliminary injunction.[139] On October 8, 2014, the Third Judicial Department heard oral arguments and on December 4, 2014 the court ruled that Tommy was not a person protected by the *HCW* because he could not bear duties.[140]

The NhRP filed a motion to appeal to the Court of Appeals, the highest court in New York, which the Third Judicial Department denied, so on February 23, 2015, the NhRP filed its motion directly with the Court of Appeals.[141] Several scholars and legal advocacy organizations filed *amicus curiae* briefs in support of the NhRP's motion to appeal, but on September 1, 2015, the Court of Appeals denied the motion.[142]

On December 4, 2015, the NhRP filed a new *HCW* on behalf of Tommy with the New York State Supreme Court of New York County, which especially focused on the fact that the capacity to bear duties is merely a sufficient condition for legal personhood, rather than a necessary one; and that chimpanzees bear duties within their communities.[143] The court denied this second *HCW* because the Third Judicial Department had already denied it and the petition lacked new allegations. Consequently, the NhRP filed an appeal with the New York Supreme Court, Appellate Division, First Judicial Department.[144] During this time, Tommy was moved from the state of New York.[145] Supporters of the NhRP's motion continued to file *amicus curiae* briefs. However, detractors, such as Professor Richard L. Cupp, Jr., also filed *amicus curiae* briefs against the NhRP, which the NhRP requested leave to file a reply to.[146] However, because there usually are no replies to *amicus curiae* briefs, the First Judicial Department denied the leave.[147] In a joint hearing for Tommy and Kiko held on March 16, 2017, the NhRP argued against the claim that legal personhood requires the capacity to bear duties.[148]

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[136] *The NhRP's First Client*, *supra* note 129.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] Nonhuman Rights Project v. Lavery, No. 518336, at 4 (N.Y. Sup. Ct. Appellate Div. Third Jud. Dep., Dec. 4, 2014), https://www.nonhumanrights.org/content/uploads/Appellate-Decision-in-Tommy-Case-12-4-14.pdf.

[141] *The NhRP's First Client*, *supra* note 129.

[142] *Id.* (such as Laurence H. Tribe and the Center for Constitutional Rights).

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id*.

The NhRP also informed the First Judicial Department about a mistake regarding the definition of "legal person" in Henry Campbell Black's *Law*, the most widely used legal dictionary in the U.S, in March 2017. The source Black cited does not state that a person is a being that the law recognizes as capable of "rights *and* duties," but rather of "rights *or* duties," so the source the Third Judicial Department relied upon in their decision did not support its denial of acknowledging Tommy's legal personhood.[149] The NhRP filed a supplemental motion requesting leave to file the NhRP's letter to Black's *Law* noting the mistake as well as the reply from the editor-in-chief of the dictionary, who stated that they would correct the next edition; however, the First Judicial Department denied the supplemental motion.[150]

On June 8, 2017, the First Judicial Department ruled that the NhRP could not seek a second *HCW*, so the NhRP filed a motion for permission to appeal to the Court of Appeals, which the First Judicial Department denied. The NhRP filed the same motion directly with the Court of Appeals, which the Court of Appeals denied on May 8, 2018, although Judge Eugene M. Fahey issued a concurring opinion that indicated some judges disagreed with the allegation that chimps were mere things, but were not willing to recognize them as persons either:[151]

> In the interval since we first denied leave to the Nonhuman Rights Project, I have struggled with whether this was the right decision. Although I concur in the Court's decision to deny leave to appeal now, I continue to question whether the Court was right to deny leave in the first instance. The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing.

This case triggered a renewed debate on chimpanzee legal personhood around the world, including discussion in major media outlets[152] and in

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[149] John Salmond & Patrick John Fitzgerald, Salmond on Jurisprudence 299 (Patrick John Fitzgerald, ed.,12th ed. 1966).

[150] The NhRP's First Client, *supra* note 129.

[151] *Id.*

[152] *See, eg.* Jon Kelly, *The Battle to Make Tommy the Chimp a Person*, BBC (Oct. 9, 2014), https://www.bbc.com/news/magazine-29542829; Barbara J. King, *Humans, Chimps and Why We Need Personhood for All*, Time (Oct. 27, 2014, 2:23 PM EDT), https://time.com/3541747/humans-chimps-rights-personhood/; Jeff Sebo, *Should Chimpanzees Be Considered 'Persons'?*, N.Y. Times (Apr. 7, 2018), https://www.nytimes.com/2018/04/07/opinion/sunday/chimps-legal-personhood.html; Karin

Chris Hegedus and Donn Alan Pennebaker's documentary *Unlocking the Cage* (2016).[153]

c. Kiko the Chimpanzee (United States, 2013)

The Presti family keep primates, including a male chimpanzee named Kiko, as part of their non-profit Primate Sanctuary in Niagara Falls.[154] Kiko is partially deaf, due to the physical abuse he suffered on *Tarzan in Manhattan*'s (1989) movie set when he was owned by an exotic animal collector and trainer and caged alone. [155]

On December 3, 2013, the NhRP filed a *HCW* in the New York State Supreme Court of Niagara County requesting Kiko's move to a sanctuary, which was rejected on December 9, 2013, by Judge Boniello, who did not want to take this "leap of faith" on what he deemed a legislative rather than a judicial matter.[156] The NhRP appealed, and the Fourth Judicial Department denied the petition, arguing that the *HCW* challenges an illegal confinement, whereas the NhRP requested a change in the conditions of confinement.[157] The NhRP filed a motion seeking permission to appeal, but the Fourth Judicial Department denied it on March 20, 2015. Consequently, the NhRP filed a motion to appeal directly to the Court of Appeals, which also denied it.[158]

The NhRP then filed a second *HCW* in the New York State Supreme Court of New York County.[159] The court denied it, so the petitioner filed an appeal in the New York Supreme Court, Appellate Division, First Judicial Department, on May 26, 2016. After being denied the right to appeal, the First Judicial Department recognized that the NhRP had a right to appeal.[160] Similar to Tommy's case, Kiko's case was supported by scholars and legal advocacy organizations and opposed by others through *amicus curiae* briefs.[161]

Brulliard, *A Judge Just Raised Deep Questions About Chimpanzees' Legal Rights*, Wash. Post (May 9, 2018, 7:02 PM), washingtonpost.com/news/animalia/wp/2018/05/09/a-judge-just-raised-some-deep-questions-about-chimpanzees-legal-rights.

[153] Unlocking the Cage (Pennebaker Hegedus Film & HBO Documentary Films 2016).

[154] *A Former Animal "Actor," Partially Deaf from Past Physical Abuse*, Nonhuman Rights Project, https://www.nonhumanrights.org/client-kiko/ (last visited May 21, 2020).

[155] *Id*.

[156] Transcript of Oral Argument at 15, Nonhuman Rights Project v. Presti, 124 A.D.3d 1334 (2013) (No. 151725).

[157] *A Former Animal "Actor," Partially Deaf from Past Physical Abuse*, *supra* note 154.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

The joint hearing for Tommy and Kiko took place on March 16, 2017.[162] At the hearing, the NhRP argued against the claim that legal personhood requires the capacity to bear duties, explaining that many humans who are considered legal persons are incapable of bearing duties and that chimpanzees bear duties within their communities.[163] The First Judicial Department ruled that the NhRP could not file a second *HCW* on behalf of Tommy and Kiko on June 8, 2017 and denied the motion to appeal.[164]

d. Hercules and Leo, Chimpanzees (United States, 2013)

Hercules and Leo are two male chimpanzees who lived in the New Iberia Research Center (NIRC) at the University of Louisiana, Lafayette.[165] In 2009, when they were one year old, NIRC leased them to Stony Brook University's Department of Anatomical Sciences.[166] There, Hercules and Leo were kept in a basement lab, forced to undergo general anesthesia, and had electrodes inserted into their muscles as part of a research project on how humans evolved into walking upright.[167]

The NhRP filed a *HCW* in New York State Supreme Court of Suffolk County, which requested the recognition of Hercules' and Leo's legal personhood and right to bodily liberty, as well as their transfer to a sanctuary.[168] The court denied the *HCW* without a hearing, so on January 10, 2014 the NhRP filed an appeal with the Appellate Division of New York State Supreme Court, which dismissed it as well.[169]

On March 19, 2015, the NhRP presented the case again in the New York Supreme Court of New York County because the law in New York state allows the writ to be filed more than once.[170] In April, Justice Jaffe issued Hercules and Leo's *HCW* and an order to show cause, which required the New York Attorney General's office to represent Stony Brook in court.[171] The NhRP celebrated this progress because it was the first time in history that a court had granted a hearing to determine the lawfulness of an animal's detainment.[172]

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[162] *Id.*

[163] Transcript of Oral Argument, *supra* note 156.

[164] *A Former Animal "Actor," Partially Deaf from Past Physical Abuse*, *supra* note 154.

[165] *Two Former Research Subjects and the First Nonhuman Animals to Have a Habeas Corpus Hearing*, Nonhuman Rights Project, https://www.nonhumanrights.org/hercules-leo/ (last visited Nov. 25, 2019).

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

The New York Attorney General filed a response to the *HCW,* through a motion to move the case to Suffolk County, and an affidavit from the head of Stony Brook's animal care committee.[173] The hearing took place on May 27, 2015, and the parties debated the substantive issues of the case for two hours.[174] The NhRP considered this hearing a victory, but on July 30, 2015, Justice Jaffe denied the *HCW* because she was bound to follow the Appellate Division of the New York State Supreme Court's decision in Tommy's case.[175] While Justice Jaffe recognized that efforts to extend legal rights to chimpanzees as understandable, she noted the reluctance of courts to embrace change.[176]

The court also recognized that the NhRP had standing to bring an action directly on behalf of a nonhuman animal, without alleging any injury to human interests.[177] As the NhRP explains, lack of standing is the most common reason that courts dismiss animal welfare cases.[178] Justice Jaffe also argued that being a person is a question of public policy and principle, not biology.[179] During 2015, Stony Brook decided it would no longer use Hercules and Leo in research.[180] NIRC returned them to Louisiana, where they remained until they were finally transferred to Project Chimps Sanctuary, two and a half years later.[181]

Though the court eventually dismissed this case, the fact that the judge held a hearing and discussed the substantive issues with both parties was an achievement in itself. Courts often dismiss such cases on procedural grounds to avoid addressing an animal's personhood. Moreover, as in Lili, Debby, and Jimmy's cases, it was external factors (the lab decided to stop using these chimps), not the *HCW*, that secured the rescue.

e. Arturo the Polar Bear (Argentina, 2014)

Arturo was born in 1985, and arrived at Mendoza Zoo in Argentina at the age of eight.[182] Arturo was famously known in the media

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[173] *Id*.

[174] *Id.*

[175] *Id*.

[176] Nonhuman Rights Project v. Stanley, No. 152736/15, slip op. at 15 (N.Y. Sup. Ct., July 30, 2015).

[177] *Id.* at 12.

[178] *A Former Animal "Actor," Partially Deaf from Past Physical Abuse*, *supra* note 154.

[179] *Id*.

[180] *Id.*

[181] *Id*.

[182] Muere Arturo, *el Último oso Polar de Argentina (y 'El Animal Más Triste del Mundo')*, La Vanguardia (July 5, 2016), https://www.lavanguardia.com/natural/20160705/402979840737/muerte-oso-polar-arturo-zoo-mendoza-argentina.html.

as the saddest animal in the world after he became severely depressed when his partner, Pelusa, a female bear from Germany, died.[183] During the summer of 2014, the refrigeration system used to cool Arturo's cage broke, and many visitors witnessed how he desperately rambled around his cage.[184] In 2014, several NGOs asked for his transfer to the Assiniboine Park Zoo in Canada.[185] However, the zoo's veterinary committee decided it was too dangerous for him to travel, due to his advanced age.[186]

The AFADA filed a *HCW* on his behalf in 2014, which was denied by the court *in limine*, because it considered the writ inadmissible on procedural grounds.[187] Arturo died in Mendoza on July 3, 2016, at the age of 30.[188]

This case ended tragically because Arturo suffered greatly until his death, but it triggered a debate regarding the closure of Mendoza Zoo,[189] and led to the zoo's definite closure in early 2017. This was the first bear *HCW*, and the third non-chimp and nonhuman *HCW* (after the birds' and the orcas' cases).

f. Monti the Chimpanzee (Argentina, 2014)

Monti arrived at San Francisco de Asis Zoo in Santiago del Estero after being abandoned by a circus because of his epilepsy.[190] Alone in a small cage for over forty-five years, Monti suffered irreversible physical and psychological damage,[191] but he is nonetheless the chimpanzee who has survived captivity the longest in Argentina.[192]

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[183] *La Muerte de Arturo, un Oso Polar, Desata la Polémica en Argentina*, El Periódico (July 5, 2016), https://www.elperiodico.com/es/extra/20160705/muerte-oso-polar-arturo-desata-polemica-argentina-5248142.

[184] Gustavo Federico de Baggis, *Arturo, Sandra, Poli y Cecilia: Cuatro Casos Paradigmáticos de la Jurisprudencia Argentina*, 8(3) Forum of Animal Law Studies 1, 2 (2017).

[185] Más de 300.000 Personas Quieren Rescatar a "Arturo" del Zoo de Mendoza, La Vanguardia (July 19, 2014), https://www.lavanguardia.com/vida/20140719/54411260564/mas-de-300-000-personas-quieren-rescatar-a-arturo-del-zoo-de-mendoza.html.

[186] de Baggis, *supra* note 184, at 3.

[187] *Id.*

[188] Arturo, *supra* note 182.

[189] de Baggis, *supra* note 184, at 16.

[190] *La Justicia Debate si los Chimpancés Pueden Considerarse "Personas no Humanas"*, Infobae (Sept. 7, 2014), https://www.infobae.com/2014/09/07/1593097-la-justicia-debate-si-los-chimpances-pueden-considerarse-personas-no-humanas/.

[191] *Id*.

[192] *Id*.

In June 2014, the AFADA filed a *HCW* on his behalf.[193] In November 2014, the judge named a commission of experts that included biologists, veterinarians, and a psychiatrist to determine if Monti could travel to the Great Ape Sanctuary in Sorocaba, Brazil.[194] The zoo was in the process of closure.[195] The court took too long to rule and on February 3, 2015, Monti died of cardiac arrest, after five decades of intense suffering.[196]

g. Toto the Chimpanzee (Argentina, 2014)

In 1979, Toto arrived in Argentina and subsequently lived in a small cage in Concordia's *El Arca Enrimir* Zoo.[197] The AFADA filed a *HCW* in the Criminal Court of Concordia on July 7, 2014, requesting the recognition of Toto's personhood and his right to life, freedom and physical and psychological integrity, and his transfer to a sanctuary.[198] The case was dismissed *in limine* on December 23, 2014.[199] On April 13, 2016, after 37 years of suffering alone in a small cage, Toto passed away.[200]

h. Sandra the Orangutan (Argentina, 2014)

Sandra was born on February 14, 1986, at the Rostock Zoo in Germany.[201] Sandra and Max, a male orangutan, were sent to Buenos

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[193] Rollo, *supra* note 82, at 185.

[194] Pedro A. Ynterian, *Monti: en la Antesala de la Libertación*, Great Ape Project (Oct. 29, 2014), https://www.projetogap.org.br/es/noticia/monti-en-la-antesala-de-la-libertacion/.

[195] *Id*.

[196] *Adiós a "Monti": Murió Ayer el Emblemático Mono del Zoológico Municipal*, El Liberal (Feb. 4, 2015, 10:52 AM), https://www.elliberal.com.ar/noticia/170287/adios-monti-murio-ayer-emblematico-mono-zoologico-municipal.

[197] *Tras 37 A*ños de *Cautiverio, Murió el Chimpancé "Toto" en el Zoo de Concordia*, Elonce (Apr. 27, 2016), https://www.elonce.com/secciones/sociedad/459935-tras-37-anos-de-cautiverio-murin-el-chimpancn-quottotoquot-en-el-zoo-de-concordia.htm.

[198] *Inédito Habeas Corpus para Liberar un Chimpancé de Zoo Concordiense*, Uno Entre Ríos (July 8, 2014), https://www.unoentrerios.com.ar/la-provincia/inedito-habeas-corpus-liberar-un-chimpance-zoo-concordiense-n930006.html#fotogaleria-id-873908.

[199] *Triste, Solitario y Final*, Diario Junio (Apr. 28, 2016), https://www.diariojunio.com.ar/noticia.php?noticia=76151.

[200] *Tras 37 Años de Cautiverio, Murió el Chimpancé "Toto" en el Zoo de Concordia, supra* note 197.

[201] *Sandra*, Ctr. Great Apes, https://www.centerforgreatapes.org/meet-apes/orangutans/sandra/ (last visited Feb. 28, 2021).

Aires in 1994.[202] She lived alone in the zoo until she was finally transferred to a Florida sanctuary, the Center for Great Apes, in September 2019,[203] having completed quarantine in the Sedgwick County Zoo in Kansas.[204]

In November 2014, the AFADA filed a *HCW* in Buenos Aires' Investigating Court No. 47, requesting Sandra's transfer to the Great Ape Sanctuary in Sorocaba, Brazil, arguing that her arbitrary incarceration had damaged her physical and mental health.[205] Judge Berdión de Crudo rejected the writ.[206] The AFADA appealed to the Sixth Chamber of the Criminal Court of Appeals, which also rejected it.[207] The AFADA filed a cassation appeal against this ruling, and the Second Chamber of the Federal Criminal Cassation Court stated as an *obiter dictum* that Sandra is a subject of rights through a "dynamic legal interpretation," and ordered the case to be sent to a competent Criminal Court.[208] Argentinian courts always considered animals to be things, not subjects of rights, and this judgment, even if it lacked arguments, set an important precedent.[209] It was the first time a court in Argentina had recognized that a *HCW* could be filed on behalf of an animal.[210]

On March 16, 2015, the AFADA filed a protective action[211] on Sandra's behalf against the government of Buenos Aires and the zoo.[212]

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[202] *Id.*

[203] *Id*.

[204] Fernanda Jara, *La nueva vida de la orangutana Sandra en el santuario de Estados Unidos donde ya está rodeada con animales de su especie*, Infobae (Nov. 7, 2019), https://www.infobae.com/sociedad/2019/11/07/la-nueva-vida-de-la-orangutana-sandra-en-el-santuario-de-estados-unidos-donde-ya-esta-rodeada-con-animales-de-su-especie/.

[205] Gustavo Federico de Baggis, *Solicitud de Hábeas Corpus para la Orangután Sandra. Comentario a Propósito de la Sentencia de la Cámara Federal de Casación Penal de la Ciudad Autónoma de Buenos Aires, de 18 de Diciembre de 2014*, 6(1) Forum of Animal Law Studies 1, 2 (2015).

[206] *Id.*

[207] *Id.*

[208] Cámara Federal de Casación Penal [C.F.C.P.] [Federal Criminal Cassation Court], Second Chamber, 18/12/2014, "Orangutana Sandra s/ Recurso de Casación s/ Habeas Corpus," No 2603/14 (Arg.), http://www.saij.gob.ar/camara-federal-casacion-penal-federal-ciudad-autonoma-buenos-aires-orangutana-sandra-recurso-cadacion-habeas-corpus-fa14261110-2014-12-18/123456789-011-1624-1ots-eupmocsollaf?&o=2&f=Total%7CTipo%20de%20Documento%7CFecha%7CTema%5B5%2C1%5D%7COrganismo%5B5%2C1%5D%7CAutor%5B5%2C1%5D%7CEstado%20de%20Vigencia%5B5%2C1%5D%7CJurisdicci%F3n%5B5%2C1%5D%7CTribunal%5B5%2C1%5D%7CPublicaci%F3n%5B5%2C1%5D%7CColecci%F3n%20tem%E1tica%5B5%2C1%5D&t=954.

[209] de Baggis, *supra* note 205, at 5.

[210] *Id.* at 6.

[211] In Argentina, this is called *acción de amparo*.

[212] Graciela Regina Adre, *El Amparo en la Justicia Argentina. ¿La Vía*

This action sought to protect a person's fundamental rights, except their right to freedom, which is protected by the *HCW*. It might seem strange of the AFADA to file this action instead of pursuing the *HCW*. This decision was likely based on selecting the action that would obtain Sandra's liberation to a sanctuary the fastest. This was the first time that a protective action was filed on behalf of an animal in Argentina.[213]

The AFADA argued that Sandra's rights to freedom, physical and psychological integrity were being violated and requested her release to a sanctuary, arguing that she was a subject of certain fundamental rights that should be protected by this action.[214] Judge Liberatori held several hearings and admitted the participation of experts through Skype hearings and *amicus curiae* briefs during the proceedings.[215] On October 21, 2015, Judge Liberatori granted the action.[216] She stated that Sandra is a nonhuman person, and thus a subject of rights. She also recognized that Sandra has her own rights as a sentient being. However, the court stated that the zoo and the city of Buenos Aires could exercise their rights regarding Sandra, albeit in a non-abusive manner.[217]

This statement in the judgment could have had dangerous consequences for Sandra's well-being because it allowed the zoo and the government to continue exercising their rights over Sandra, which they had already exercised, affecting her physical and mental health negatively. The judgment should have prohibited any conduct or action by the zoo and government that contradicted her recognition as a nonhuman person, and that was not strictly related to protecting and improving Sandra's life while she waited for her transfer to a sanctuary. However, the judge decided that experts should determine what conditions Sandra should live in, because this exceeded the court's mandate. Consequently, she did not order Sandra's immediate transfer to a sanctuary, leaving her fate in the hands of a group of experts: Dr. Miguel Rivolta, Héctor Ferrari, and Dr. Gabriel Aguado. In sum, this

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Idónea para el Reconocimiento de los Derechos de los ANH?, 9(4) Forum of Animal Law Studies 138, 143 (2018).

[213] *Id*. at 138.

[214] *Id.* at 143.

[215] *Id.* at 144.

[216] Juzgado Contencioso Administrativo y Tributario No. 4 de la ciudad de Buenos Aires [J.C.A.T.] [Court for Contentious-Administrative and Tax Proceedings No. 4 of the city of Buenos Aires], 21.10.2015, "Asociación de Funcionarios y Abogados por los Derechos de los Animales y otros c. GBCA sobre amparo," No. A2174-2015/0 (Arg.), 9, MSU Animal Legal & Historical Ctr., https://www.animallaw.info/sites/default/files/Sandra_%E2%80%9CASOCIACION%20DE%20FUNCIONARIOS%20Y%20ABOGADOS%20POR%20LOS%20DERECHOS%20DE%20LOS%20ANIMALES%20Y%20OTROS%20CONTRA%20GCBA%20SOBRE%20AMPARO%E2%80%9D.pdf (last visited Mar. 30, 2021).

[217] *Id*.

ruling did not immediately recognize Sandra's right to freedom by ordering her transfer to a sanctuary, nor did it improve her enclosure or conditions at the zoo.[218]

The zoo and the government appealed, arguing that the AFADA lacked standing and the protective action was an inappropriate course of action to examine Sandra's situation in the zoo.[219] The AFADA also appealed, arguing that the lower court had all the necessary information to decide what conditions Sandra should live in.[220] On June 14, 2016, the higher court confirmed the ruling and ordered the government to carry out improvements in Sandra's cage and daily activities.[221] Most importantly, the court stated that scholars currently disagree on whether animals are subjects of rights, so it revoked this part from the lower court's ruling.[222] The court concluded that Sandra should be adequately treated, and the decision to transfer her to a sanctuary depended on the government, because none of the expert reports had advised that this be done.[223]

Sandra is currently living in the Center for Great Apes in Florida.[224] In 2016, the zoo announced it was going to close and become *Ecoparque*, so the animals were transferred elsewhere.[225] After some struggle between *Ecoparque*, the AFADA, and Judge Liberatori, the judge finally chose Florida's Center for Great Apes over Brazil's Great Ape Sanctuary.[226] Sandra became famous around the world as the first animal to be recognized as a person by a court, even though this recognition was later reversed by a higher court.[227] Moreover, although the Federal Criminal Cassation Court merely stated as an *obiter dictum* that Sandra is a subject of rights, this nonetheless set a positive legal precedent for Poli the dog and Cecilia the chimpanzee.

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[218] Adre, *supra* note 212, at 145.

[219] *Orangutana Sandra-Sentencia de Cámara- Sala I del Fuero Contencioso Administrativo y Tributario CABA*, Animal Legal & Hist. Ctr., 1, 4, https://www.animallaw.info/case/%E2%80%9Casociaci%C3%B3n-de-funcionarios-y-abogados-por-los-derechos-de-los-animales-y-otros-c-gcba-s-amparo (last visited Feb. 20, 2021).

[220] *Id.*

[221] *Id.* at 24.

[222] *Id.* at 25.

[223] *Id*. at 24.

[224] *Sandra*, *supra* note 201.

[225] Enric González, *'Sandra', la Orangutana que se Convirtió en 'Persona,'* El País (June 23, 2019), https://elpais.com/elpais/2019/06/17/eps/1560778649_547496.html.

[226] *Id*.

[227] Orangutana Sandra-Sentencia de Cámara- Sala I del Fuero Contencioso Administrativo y Tributario CABA, *supra* note 219.

i. Poli the Dog (Argentina, 2015)

Poli was a stray dog living in Palmira, Mendoza province, Argentina.[228] On January 4, 2013, a man tied Poli to the rear bumper of his van due to her barking, dragging her along the road at twenty to fifty kilometers per hour.[229] Two witnesses ran after the van and called the police, who took Poli to a veterinarian, identified the man, and arrested him.[230] Poli's four legs and abdominal area were severely injured.

Animal cruelty is a criminal offence in Argentina, so on April 20, 2015, the First Criminal Court of San Martín approved the agreement between the Public Prosecutor, the complainant, Asociación Mendocina de Protección, Ayuda y Refugio del Animal (AMPARA), an animal protection NGO that cared for Poli after the accident, and the defendant. The defendant agreed to six months of conditional imprisonment and the obligation to give the complainant 120 kilograms of dog food.[231]

According to Judge Darío Dal Dosso, because the criminal law protects animals as right holders, dogs are sentient beings, and considering the cognitive and emotional capacities of some animals, dogs are nonhuman persons with fundamental rights, like the right not to be tortured or mistreated.[232]

This case is unique for two reasons: there was no *HCW,* but the judge nonetheless deemed the dog a subject of rights and a nonhuman person; and the case derived from a cruelty offence, but the judge based his verdict on the Federal Criminal Cassation Court in Sandra's case. [233]

j. Naruto the Crested Black Macaque (United States, 2015)

This famous case started in the Tangkoko Reserve, on the island of Sulawesi, Indonesia in 2011, when Naruto, a female crested black macaque (*Macaca nigra*) took several selfies using David Slater's camera, a British wildlife photographer.[234] These selfies started two disputes. The first dispute started when Slater licensed the selfies to an agency which published them in the British media at the start of July 2011. On July 9, 2011, Wikimedia Commons uploaded the selfies, considering them to be public domain, as Naruto could not hold copyright because she is not

[228] de Baggis, *supra* note 184, at 5.

[229] Primer Juzgado Correccional de la Ciudad de General San Martín [J.C.Gral.S.M.] [First Criminal Court of General San Martin], *supra* note 4.

[230] *Id.*

[231] *Id.*

[232] *Id*.

[233] de Baggis, *supra* note 184, at 6.

[234] *See Monkey 'Selfie' Picture Sparks Wikipedia Copyright Row*, ITV (Aug. 6, 2014), https://www.itv.com/news/2014-08-06/wikipedia-refuses-to-delete-photo-as-monkey-owns-it/.

human.[235] Techdirt Blog defended the same position and also posted the photographs.[236] Slater argued that he had a valid copyright claim because he was the one who travelled to Indonesia, earned the macaques' trust, and set up his camera on a tripod in order to obtain a selfie picture.[237] In December 2014, the United States Copyright Office stated that works created by nonhumans are not copyrightable, and gave the examples of photographs taken by monkeys and paintings by elephants.[238]

The second dispute was triggered when Slater included the photographs in his book *Wildlife Personalities*, published by the company Blurb. On September 21, 2015, PETA filed a lawsuit against Slater and Blurb, requesting that the District Court for the Northern District of California assign Naruto copyrights to the pictures and appoint PETA to administer the proceeds from the photos for the benefit of Naruto and other crested black macaques in the Tangkoko Reserve.[239] PETA filed the lawsuit as Naruto's next friend, arguing that she could not bring the action due to inaccessibility and incapacity, and thus needed a representative.[240] Blurb responded that a crested black macaque cannot own a copyright, and that PETA had filed the lawsuit on behalf of the wrong crested black macaque, as PETA was representing a six-year-old male crested black macaque, whereas the pictures were taken by a female macaque.[241] On January 6, 2016, the judge heard oral arguments, and on January 28 the

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[235] *See* Louise Stewart, *Wikimedia Says When a Monkey Takes a Selfie, No One Owns It*, Newsweek (Aug. 21, 2014), https://www.newsweek.com/lawyers-dispute-wikimedias-claims-about-monkey-selfie-copyright-265961.

[236] *See*, Mike Masnick, *Monkey Business: Can A Monkey License Its Copyrights To A News Agency?*, Techdirt (July 7, 2011, 7:32 AM), https://www.techdirt.com/articles/20110706/00200314983/monkey-business-can-monkey-license-its-copyrights-to-news-agency.shtml; *see also* Mike Masnick, *Monkeys Don't Do Fair Use; News Agency Tells Techdirt To Remove Photos*, Techdirt (July 12, 2011, 11:08 AM), https://www.techdirt.com/articles/20110712/01182015052/monkeys-dont-do-fair-use-news-agency-tells-techdirt-to-remove-photos.shtml.

[237] *See Photographer 'Lost £10,000' in Wikipedia Monkey 'Selfie' Row*, BBC, (Aug. 7, 2014), https://www.bbc.com/news/uk-england-gloucestershire-28674167; Chris Cheesman, *Photographer Goes Ape Over Monkey Selfie: Who Owns the Copyright?*, Amateur Photographer, (Aug. 7, 2014), https://www.amateurphotographer.co.uk/latest/photo-news/photographer-goes-ape-over-monkey-selfie-who-owns-the-copyright-5054.

[238] U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 101 (3d ed. 2014), 68, https://www.copyright.gov/comp3/docs/compendium-12-22-14.pdf (last visited May 21, 2020).

[239] Complaint at 2, Naruto v. Slater, No. 15-CV-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2015), https://www.mediapeta.com/peta/PDF/Complaint.pdf.

[240] *Id*. at 3.

[241] David Kravets, *Will The Real Monkey Who Snapped Those Famous Selfies Please Stand Up?*, Ars Technica (Nov. 10, 2015, 8:18 PM), https://arstechnica.com/tech-policy/2015/11/will-the-real-monkey-who-snapped-those-famous-selfies-please-stand-up/.

court dismissed the case, arguing that the Copyright Act does not confer animals standing and that animals cannot own copyrights.[242] The court also stated that the claim on animals' right to own copyrights should be addressed by Congress and the President, not by the courts.[243]

The judge claimed that U.S. courts "have repeatedly referred to 'persons' or 'human beings' when analyzing authorship under the Act."[244] Therefore, the judge did not recognize Naruto as a legal person. In the judge's defense, PETA did not argue that Naruto is a legal person. In fact, PETA only argued that Naruto took the photographs autonomously while operating Slater's camera, and that she understood the relationship between pressing the shutter release, the noise it makes, and the change in her reflection in the camera lens.[245] PETA's reference to Naruto's autonomy calls to mind the argument about practical autonomy that Steven Wise and the NhRP set forth in their *HCW*.[246] However, unlike the NhRP, PETA lacked a strong and explicit argument on behalf of Naruto's legal personhood, at least within the scope of the Copyright Act. This argument would have explained why Naruto is one of those beings that can create works of art and own a copyright, and would have aimed to convince the judge that not only human beings and corporations can own copyright. Unfortunately, even though it seems that PETA wanted the court to recognize Naruto as a legal person within the scope of the Copyright Act, it did not make this argument, nor did it present the necessary evidence; leaving the court with no other option than to dismiss the case.[247]

On March 20, 2016, PETA filed a notice to appeal to the Ninth Circuit Court of Appeals.[248] On July 12, 2017, the court held an oral

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[242] Naruto v. Slater, No. 15-CV-04324-WHO, 2016 WL 362231 at *1 (N.D. Cal. Jan. 28, 2016), *aff'd*, 888 F.3d 418 (9th Cir. 2018).

[243] *Id.* at 6.

[244] *Id.* at 5.

[245] Naruto, et al. v. Slater; (in a press release, Jeff Kerr, PETA's general counsel and part of Naruto's legal team, stated: "Despite this setback, we are celebrating that legal history was made in our unprecedented argument to a federal court that Naruto, a crested macaque monkey, should be the *owner* of property (specifically, the copyright to the famous 'monkey selfie' photos that he undeniably took), rather than a *mere piece of property himself*."); *UPDATE: 'Monkey Selfie' Case Brings Animal Rights Into Focus, PETA* (Jan. 6, 2016), https://www.peta.org/blog/monkey-selfie-case-animal-rights-focus/.

[246] *See* Steven M. Wise, *Nonhuman Rights to Personhood*, 30 Pace Envtl. L. Rev. 1278, 1283 (2013).

[247] *Nonhuman Rights Project Statement on Naruto v. Slater (the "Monkey Selfie" case)*, Nonhuman Rights Blog (Apr. 24, 2018), https://www.nonhumanrights.org/blog/nhrp-statement-monkey-selfie-case/.

[248] Mary Papenfuss, *Captivating Monkey Naruto Who Snapped Viral Selfies Filing Appeal for Right to Photos*, Int'l Bus. Times (Mar. 21, 2016, 06:36 GMT), https://www.ibtimes.co.uk/captivating-monkey-naruto-who-snapped-viral-selfies-filing-appeal-right-photos-1550654.

argument,[249] and on August 4, 2017, all parties informed the court that they were going to settle the case outside the court, and asked the court not to rule on the case.[250] On September 11, 2017, Slater, Blurb, and PETA reached an agreement. Slater agreed to donate twenty-five percent of any future revenue from the crested black macaque selfies to protect crested black macaques.[251] However, the court did not accept the settlement. The parties asked the court to dismiss the appeal and vacate the judgment, and asked for a vacatur.[252] In April 2018, the court denied the motions to vacate the case, and issued its ruling on behalf of Slater, arguing that animals cannot hold copyright claims, nor can animals be represented in court by a next friend. The court questioned whether PETA had any significant relationship to Naruto that would qualify it to act as a next friend.[253]

The judges repeatedly confused the concepts of a "human" and a "person," using these terms as synonyms, and the concurring opinion claimed humans cannot know what animals want, so they cannot be appropriately represented in court by a next friend.[254] The court forgot that many animals have complex cognitive abilities, and some of their interests can be easily presumed, much as we presume the interests of many humans that cannot express what they want due to age or disease, but are still represented in court.[255] The court also considered PETA's lawsuit to be frivolous, because the court considered it easy to conclude that animals do not have copyright ownership according to property law and the Copyright Act.[256]

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[249] United States Court of Appeals for the Ninth Circuit, Calendar for James R. Browning U.S. Courthouse, San Francisco, *Oral Argument Notice* (July 12, 2017), https://www.ca9.uscourts.gov/calendar/view.php?caseno=16-15469 (last visited May 20, 2020).

[250] David Kravets, *Monkey Selfie Animal Rights Brouhaha Devolves into a Settlement*, Ars Technica (Aug. 5, 2017, 2:00 PM), https://arstechnica.com/tech-policy/2017/08/monkey-selfie-animal-rights-brouhaha-devolves-into-a-settlement/.

[251] Jon Fingas, *Monkey Selfie Copyright Battle Ends with a Settlement*, Engadget (Sept. 11, 2017), https://www.engadget.com/2017/09/11/monkey-selfie-rights-battle-ends-with-settlement/?guccounter=1&guce_referrer=aHR0cHM6Ly9lbi53aWtpcGVkaWEub3JnLw&guce_referrer_sig=AQAAAAAYwVCj662Qg7fO0m2l6Vb1kQKWIQGD_qNk35QfVHLdI452BKHkLd2FvxL1QAznu6DriH6FgFlh9Le-CHy9X.

[252] Sophie Duffy & Dori Ann Hanswirth, *Monkey See, Monkey Do… Monkey Own? The Curious Case of Naruto v. Slater*, Lexology (Sept. 20, 2017), https://www.lexology.com/library/detail.aspx?g=5deafb41-a767-4319-bf93-cff2bc5d726a.

[253] Naruto v. Slater, No. 16-15469 at 7 (9th Cir. 2018).

[254] *Nonhuman Rights Project Statement on Naruto v. Slater (the "Monkey Selfie" case)*, *supra* note 247.

[255] *Id*.

[256] *Naruto*, No. 16-15469 at 20.

Finally, the court expressed serious concern about PETA's motivations, which seemed to promote their own interests, rather than to protect Naruto.[257] The court claimed that to prevent a negative precedent against its institutional interests, PETA had filed a motion to dismiss Naruto's appeal and vacate the lower court's adverse judgment, reaching a settlement with the defendants.[258] Naruto, the supposed plaintiff, did not appear as a party to the settlement; rather, PETA appeared to be settling its own claims, even though as a next friend it was not a party to the action.[259]

Even though this case was a defeat for the animal rights movement (especially considering that the court openly criticized PETA's motivations and actions), thanks to the selfies and both disputes, crested black macaques, a critically endangered species,[260] became known worldwide, and animals' right to copyright over their works of art can be considered as another mechanism to argue for animal legal personhood in court.[261]

In sum, between 2013 and 2015, the NhRP became the main legal advocate for animal personhood, which ceased to be associated exclusively with chimps and was extended to macaques, orangutans, bears, and even dogs in Latin America.

IV. The First Success: 2016-2018

a. Cecilia the Chimpanzee (Argentina, 2016)

Cecilia is a 35-year-old chimp, born in captivity.[262] She lived in Mendoza Zoo for more than twenty years, first with Charlie, who died in July 2014, and Xuxa, who died in January 2015, leaving Cecilia alone and depressed—roasting or freezing in a small, unprotected cement cage, without plants or anywhere to hide from visitors.[263]

The AFADA filed her *HCW* in the Third Court of Guarantees in Mendoza in 2016, proving she was living in deplorable conditions,

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[257] *Id.* at 40.

[258] *Id.*

[259] *Id*. at 7 n.3 & 39 n.11.

[260] *See* Jatna Supriatna & Noviar Andayani, *Macaca Nigra*, The IUCN Red List of Threatened Species (2008), https://www.iucnredlist.org/species/12556/3357272 (last visited May 21, 2020).

[261] *See* Ephrat Livni, *A Monkey Lost His Copyright Case–But Made Strides Toward Getting Animals More Legal Rights*, Quartz (Apr. 26, 2018), https://qz.com/1261828/the-monkey-selfie-case-demonstrates-nonhumans-can-make-constitutional-claims/.

[262] Tercer Juzgado de Garantías de Mendoza, *supra* note 2.

[263] *Id.* at 3.

as the judge could see during the judicial proceedings' inspection.[264] The state attorney opposed the *HCW*, arguing that since Cecilia was not human, her incarceration was not illegal.[265] However, during one of the hearings, the parties agreed to send Cecilia to the sanctuary.[266] The judge in charge of this case, María Alejandra Mauricio, granted Cecilia the *HCW* on November 3, 2016.[267] The judge declared that Cecilia is a nonhuman person and the subject of rights,[268] and ordered her transfer before the start of autumn.[269]

The judge argued that Cecilia was owed protection (i) as an environmental collective good,[270] (ii) as Argentinean wildlife, which is also protected by law, [271] (iii) as a zoo animal,[272] (iv) as a sentient being,[273] and (v) as a great ape nonhuman person subject of rights, with the cognitive abilities of a four-year-old child.[274] She also affirmed that the rights such animals might have should be determined by the state, not by judges.[275] Finally, the court stated that the *HCW* is an adequate tool to assess the condition of incarcerated animals, as national and local Argentinean law does not provide other procedural mechanisms.[276] In other words, as the judge was forced to rule on the case, she decided to accept the *HCW*.[277] On April 6, 2017, Cecilia moved to Brazil's Great Ape Sanctuary. [278]

This is one of many cases in which *HCW*s have been supported with environmental considerations, as in Chucho the bear's case, discussed below. This is understandable, but it can leave members of non-threatened species insufficiently protected. Cecilia's case was easier than Sandra's because, despite the state's initial opposition, the parties reached an agreement and Cecilia was soon transferred to a sanctuary.

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[264] *Id*. at 42.
[265] *Id*. at 6.
[266] *Id.* at 9.
[267] *Id.* at 44.
[268] *Id.* at 36.
[269] *Id.* at 45.
[270] *Id.* at 19.
[271] *Id.* at 13.
[272] *Id.* at 19.
[273] *Id.* at 35.
[274] *Id.* at 33.
[275] *Id.* at 37.
[276] *Id.* at 44.
[277] Francisco Capacete González, *Eficacia del Habeas Corpus Para Liberar a Una Chimpancé (Cecilia). Comentario a la Sentencia de 3 de Noviembre de 2016 del Tercer Juzgado de Garantías del Estado de Mendoza (Argentina)*, 7(3) Forum of Animal Law Studies. 1, 5 (2016).
[278] Pedro A. Ynterian, *GAP Brasil: Cecilia ya Está Viniendo*, Great Ape Project (Apr. 4, 2017), https://www.projetogap.org.br/es/noticia/gap-brasil-cecilia-ya-esta-veniendo/.

b. Beulah, Karen, and Minnie, Elephants (United States, 2017)

Beulah and Minnie, Asian elephants, and Karen, an African elephant, were all born in the wild and imported to the United States between 1969 and 1984.[279] Beulah was born in Myanmar in 1967,[280] Karen was born in an unknown country in 1981,[281] and Minnie was born in Thailand in 1969.[282] They were all sold to Commerford Zoo between 1973 and 1984,[283] a zoo that has been cited more than fifty times by the USDA for contravening the Animal Welfare Act.[284]

Since their importation to the U.S., they were used as attractions in petting zoos, circuses, fairs, parties, commercials, and even political gatherings.[285] Beulah suffered from foot problems for many years,[286] and died from blood poisoning caused by a uterine infection at the Big E fair in West Springfield on September 15, 2019.[287] Karen died in March 2019.[288] Commerford Zoo did not announce her death or explain what happened to her.[289] The NhRP has stated that she died of kidney disease.[290] Minnie is still alive and Commerford Zoo still forces her to work, even though she has attacked her handlers several times.[291] On November 13, 2017, the NhRP filed a *HCW* in Connecticut Superior Court, Litchfield County, requesting the recognition of the three elephants' legal personhood, right to bodily liberty, and their release to Paws Ark 2000, a natural habitat sanctuary.[292] On December 26, 2017, Judge James M. Bentivegna dismissed the petition because the NhRP

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[279] *Torn From Their Families and Forced to Perform for Humans for Decades*, Nonhuman Rights Project, https://www.nonhumanrights.org/clients-beulah-karen-minnie/ (last visited Nov. 26, 2019).

[280] *Id.*

[281] *Id.*

[282] *Minnie (Mignon) an Asian elephant at R.W. Commerford and Sons Traveling Petting Zoo (Robert Commerford)*, Elephant Encyclopedia, https://www.elephant.se/database2.php?elephant_id=704 (last visited Feb. 17, 2021).

[283] *Torn From Their Families and Forced to Perform for Humans for Decades*, *supra* note 279.

[284] *Id.*

[285] *Id.*

[286] *Id.*

[287] Courtney Fern, *How Elephants Beulah and Karen Died*, Nonhuman Rights Blog (Feb. 19, 2020), https://www.nonhumanrights.org/blog/how-elephants-beulah-and-karen-died/.

[288] *Torn From Their Families and Forced to Perform for Humans for Decades*, *supra* note 279.

[289] *Id.*

[290] Fern, *supra* note 287.

[291] *Torn From Their Families and Forced to Perform for Humans for Decades*, *supra* note 279.

[292] *Id*.

lacked a relationship with the detainees and it was seen as frivolous in Connecticut, where animal *HCW*s were unknown.[293] As the NhRP argued, the case was novel, not frivolous.[294]

On January 16, 2018, the NhRP filed a motion to reargue, requesting the court to reverse its dismissal.[295] Judge Bentivegna denied the motion and the request to amend the petition on February 27, 2018.[296] The NhRP filed a notice of appeal and a motion for articulation with the Connecticut Appellate Court with the objective of clarifying the legal and factual basis for Judge Bentivegna's decisions.[297] The judge only granted one of the sixteen requests for articulation and insisted that the petition was frivolous.[298] Therefore, the NhRP filed a motion for review and a brief in the Appellate Court of Connecticut, requesting the revision of the lower court's dismissal.[299] Supporters of the NhRP's petition filed *amicus curiae* briefs in the Appellate Court of Connecticut on November 13, 2018.[300] The court scheduled a hearing on April 22.[301] During this hearing, the NhRP argued not only against the decision's lack of standing and frivolity, but also that elephants are legal persons entitled to *HCWs*.[302] The Appellate Court of Connecticut dismissed the case, so the NhRP filed a motion for *en banc* reconsideration, which was denied.[303]

On June 11, 2018, the NhRP filed a second *HCW* in Tolland County.[304] In February 2019, Judge Shaban dismissed the petition, stating that it was the same as the first one.[305] The NhRP argued that the petitions were different, and that the NhRP could bring a second petition since the first petition was not dismissed on its merits.[306] Beulah died in the Big E fair in West Springfield in September, while Karen had already died in March.[307] Thus, the NhRP requested the Connecticut Supreme Court to hear the appeal of the Appellate Court decision and

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[293] Lauren Choplin, *Update: Beulah, Karen, and Minnie Elephant Rights Lawsuit*, Nonhuman Rights Blog (Dec. 28, 2017), https://www.nonhumanrights.org/blog/update-elephant-rights-lawsuit-12-28-17/.

[294] *Id*.

[295] *Torn From Their Families and Forced to Perform for Humans for Decades*, *supra* note 279.

[296] *Id.*

[297] *Id.*

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] *Id.*

[303] *Id*.

[304] *Id.*

[305] *Id.*

[306] *Id.*

[307] *Id.*

grant a temporary injunction to prevent Commerford Zoo from moving Minnie, but the court declined both petitions.[308] Finally, the NhRP filed a supplemental brief on the issue of their standing to sue to the Appellate Court.[309] On January 8, 2020, the court held oral arguments, and the NhRP insisted that the court was wrong to rule against the merits of the case without actually hearing them.[310] The Appellate Court denied Minnie's *HCW*, so the NhRP filed a motion requesting permission to appeal with the Connecticut Supreme Court, who declined the petition.[311] Finally, on December 16, 2020, the NhRP announced that it had decided to end litigation in Connecticut given the courts' unwillingness to hear Minnie's case.[312]

This case is relevant because it was the first elephant *HCW*. There is nothing frivolous about caring for elephants' suffering and exploitation; and yet frivolity was the inappropriate but recurrent argument for dismissing this *HCW*.

c. Martín, Sasha, and Kangoo, Chimpanzees (Argentina, 2017)

Martin, Sasha and Kangoo live in *Ecoparque*, a facility for native wildlife in Buenos Aires, located in the former Buenos Aires Zoo.[313] The AFADA filed a *HCW* on behalf of these three chimpanzees on November 28, 2017.[314] The chimpanzees were forty-nine, twenty and ten years old at the time the *HCW* was filed.[315] The AFADA requested the court recognize these chimpanzees as nonhuman subjects with rights and transfer them to a sanctuary in Brazil.[316]

According to the AFADA's public release, the writ was rejected the same day by the Criminal Court;[317] the AFADA appealed, but the Court of Appeals confirmed the lower court's ruling.[318] The AFADA

[308] *Id.*

[309] *Id.*

[310] *Id.*

[311] Steven Wise, *NhRP Urges CT Appellate Court to Rehear Elephant Rights Case*, Nonhuman Rights Blog (Jan. 10, 2020), https://www.nonhumanrights.org/blog/nhrp-urges-connecticut-appellate-court-to-rehear-elephant-rights-case/.

[312] *Id.*

[313] *Presentaron un H*ábeas *Corpus a Favor de los Chimpancés del Ecoparque*, Infobae (Nov. 29, 2017), https://www.infobae.com/sociedad/2017/11/29/presentaron-un-habeas-corpus-a-favor-de-los-chimpances-del-ecoparque/.

[314] *Rechazan Habeas Corpus de los Chimpancés del Ecoparque—Argentina*, Great Ape Project (Dec. 6, 2017), https://www.projetogap.org.br/es/noticia/rechazan-habeas-corpus-de-los-chimpances-del-ecoparque-argentina/.

[315] *Id.*

[316] *Id.*

[317] *Id.*

[318] *AFADA ONG: Comunicado Sobre los Chimpancés del Ecoparque—Argentina* [AFADA ONG: Statement on the Chimpanzees of the Ecopark], Great

requested constitutional review of the case but the Court of Appeals declared it inadmissible on March 14, 2018.[319] Finally, the AFADA filed a complaint[320] to the Superior Court of Justice,[321] which was also rejected.[322] The zoo explained that Martin was too old to travel, and that the family cannot be broken up by transferring only Sasha and Kangoo because the chimpanzees would become depressed.[323] The family of chimpanzees continued to live together in Buenos Aires' zoo until Martin's death in February 2021 due to cardiorespiratory arrest.[324] Though Martin's death is an unfortunate event, his advanced age can no longer serve as an argument against Sasha and Kangoo's transfer to a sanctuary.

Ape Project (Mar. 29, 2018), https://www.projetogap.org.br/es/noticia/afada-ong-comunicado-sobre-los-chimpances-del-ecoparque-argentina/.

[319] *Id.*

[320] In Argentina, this is referred to as *recurso de queja*. *See id.*

[321] *AFADA ONG, supra* note 318.

[322] Nora Sánchez, *"Personas No Humanas": Qué Pasará con los Chimpancés del Ecoparque ['Non-Human People': What Will Happen to Ecopark Chimpanzees]*, Clarín, (Jan. 4, 2019, 14:11 PM), https://www.clarin.com/ciudades/personas-humanas-pasara-chimpances-ecoparque_0_tnO3jMb2M.html.

[323] *See id.*

[324] *Muere el Chimpancé Martín en el Zoológico de Buenos Aires*, Great Ape Project (Feb. 10, 2021), https://www.projetogap.org.br/es/noticia/muere-el-chimpance-martin-en-el-zoologico-de-buenos-aires/.

Martín, Sasha, and Kangoo's *HCW* was not the latest lawsuit that sought to obtain the recognition of animals as subjects of rights in Argentina. In July 2019, Greenpeace presented a protective action to the Supreme Court, on behalf of all the jaguars (*Panthera oncas*) that live in the Argentinean Gran Chaco area. This is the first case in Argentina where the petitioner has asked the court to recognize a whole species as subjects of rights. There are less than twenty jaguars left in the Gran Chaco area, mainly due to habitat loss. Greenpeace has also requested the court to order and ensure a "zero deforestation" policy in the jaguar's habitat. The Attorney General of the Nation has decided that the case falls within the jurisdiction of the Supreme Court. This case is not included above because it is still pending. *Greenpeace Se Presenta ante la Corte Suprema en Representación del Yaguareté* [Greenpeace appears before the Supreme Court on behalf of the jaguar], Greenpeace (Arg.), (July 19, 2019), https://www.greenpeace.org/argentina/issues/bosques/1954/greenpeace-se-presenta-ante-la-corte-suprema-en-representacion-del-yaguarete/; *see generally* [*Files Protective Action*], Greenpeace (Arg.) http://greenpeace.org.ar/pdf/2020/Amparo.pdf?_ga=2.185089513.193292613.1590163892-1644954814.1590163892 (last visited May 22, 2020); *see also Avanza en la Corte el Amparo para Proteger al Yaguareté* [Amparo to protect the jaguar advances in the Court], Greenpeace (Arg.), (Feb. 28, 2020), https://www.greenpeace.org/argentina/issues/bosques/4095/avanza-en-la-corte-el-amparo-para-proteger-al-yaguarete/. The AFADA has also filed a new HCW on behalf of Toti. *See La Asociación de Abogados AFADA de Argentina, en Colaboración con el Proyecto Gran Simio España, Presentan Habeas Corpus para Liberar al Chimpancé Toti*, Great Ape Project (Nov. 9, 2020), https://proyectogransimio.org/noticias/ultimas-noticias/la-asociacion-de-abogados-afada-de-argentina-en-colaboracion-con-el-proyecto-gran-simio-espana-presentan-habeas-corpus-para-liberar-al-chimpance-toti.

d. Dog (Argentina, 2018)

During July 2018, Judge Elisa Zilli from the Court of Guarantees No. 6 in Paraná, Argentina recognized a dog as a subject of rights in a criminal offense case.[325] A minor was walking his dog when another dog came along, and the animals started to fight.[326] A neighbor stabbed the minor's dog to death.[327] It seems the court declared the dog a subject of rights when the court communicated the judgment without further argumentation.[328] A local NGO association, *Amor Animal Paraná*, decided not to appeal the court's decision to disallow them from being complainants in the case in order to secure the declaration that the dog is a subject of rights.[329]

e. Happy the Elephant (United States, 2018)

Happy is a female Asian elephant born in the wild in 1971, who arrived at Bronx Zoo in 1977 after being relocated from Lion Country Safari, Inc.[330] During the 1980s, the elephants that lived in the zoo were forced to perform tricks.[331] In 2005, Happy became the first elephant to pass the mirror test.[332] In 2006, "the zoo announced [that] it would end its captive elephant program once one or more elephants had died."[333] Since 2006, Happy has lived alone in a 1.15-acre area.[334]

On October 2, 2018, the NhRP filed a *HCW* in the New York Supreme Court, Orleans County, requesting the court to recognize Happy's legal personhood and right to bodily liberty and order her transfer to a sanctuary.[335] The Wildlife Conservation Society filed a Memorandum of Law in opposition to the order to show cause.[336] On

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[325] *Un Fallo Judicial Declaró a los Animales 'Sujetos de Derecho' [A Court Ruling Declared the Animals 'Subjects of Law']*, Paralelo32 (July 20, 2018), https://paralelo32.com.ar/un-fallo-judicial-declaro-a-los-animales-sujetos-de-derecho/.

[326] *Id.*

[327] *Id.*

[328] *Id.*

[329] *Id*.

[330] *Happy an Asian elephant at Bronx Zoo*, Elephant Encyclopedia, https://www.elephant.se/database2.php?elephant_id=2446 (last visited Feb. 17, 2021).

[331] *First Elephant to Pass Mirror Self-recognition Test; Held Alone at the Bronx Zoo*, Nonhuman Rights Project, https://www.nonhumanrights.org/client-happy/ (last visited Nov. 26, 2019).

[332] *See generally* Charles Q. Choi, *Elephant Self-Awareness Mirrors Humans*, Live Science (Oct. 30, 2006), https://www.livescience.com/4272-elephant-awareness-mirrors-humans.html.

[333] *First Elephant to Pass Mirror Self-recognition Test, supra* note 331.

[334] *Id.*

[335] *Id.*

[336] *Id.*

November 16, 2018, Judge Bannister issued an order to show cause, setting a hearing on December 14 to determine Happy's release. The NhRP stressed that this is the first time that a *habeas corpus* order has been issued to an elephant.[337] On December 3, the zoo filed numerous documents opposing the *HCW*.[338] December 14, 2018 was the first time that a US court heard arguments about elephants' legal personhood.[339]

Happy's case was sent to Bronx County.[340] The Supreme Court of Bronx County scheduled a preliminary conference for August 15, 2019.[341] During this conference, the court determined that all motions would be argued before Justice Tuitt.[342] On September 23, 2019, the justice heard arguments for more than four hours, and scheduled a second hearing for October 21 regarding the pending motions and the merits of the *HCW*.[343] Justice Tuitt granted the NhRP a temporary restraining order to prevent the zoo from taking Happy out of New York State before the hearing on October 21.[344] On the day of the hearing, the arguments lasted four hours and focused on Happy's personhood.[345] The judge scheduled another hearing for January 6, 2020, and ordered the zoo to maintain Happy's situation until the court decides on the NhRP's motion for preliminary injunction to keep Happy in the state until the case was decided.[346] On January 6, Justice Tuitt heard the NhRP's arguments for more than three hours.[347] On February 18, 2020, Justice Tuitt issued a decision denying the *HCW*, arguing that she was "regrettably" bound to the appellate courts' decisions on Tommy, Kiko, Leo and Hercules' cases.[348] The NhRP appealed to the New York Supreme Court, Appellate Division, First Department, and after hearing the NhRP's arguments, the First Department denied Happy's *HCW*.[349]

Though the appeal was finally denied, the courts showed readiness to hear the substantive arguments related to Happy's personhood, and the lower court recognized that Happy is not a mere thing, but "an intelligent, autonomous being who should be treated with respect and

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[337] *Id.*

[338] *Id.*

[339] *Id.*

[340] *Id.*

[341] *Id*.

[342] *Id.*

[343] *Id.*

[344] *Id.*

[345] *Id.*

[346] *Id.*

[347] *Id.*

[348] Reply Memorandum in Support of Supplemental Memorandum of Law Upon Transfer at 15, Nonhuman Rights Project, Inc. v. Breheny, 134 N.Y.S.3d 188 (2019) (No. 260441/2019).

[349] *First Elephant to Pass Mirror Self-recognition Test*, *supra* note 331.

dignity, and who may be entitled to liberty."[350] Between 2016 and 2018, there was only one successful case, i.e. Cecilia's, but judges have begun to think that elephants may be persons, and judges have shown a greater willingness to hear arguments and reconsider past practice.

V. Andean Bears in Colombia

a. Chucho the Andean Bear (2017)

Chucho is a 26-year-old Andean bear (*Tremarctos ornatus*), also known as a spectacled bear, living in Barranquilla Zoo in Colombia.[351] Andean bears are the only surviving species of bears native to South America, and the International Union for Conservation of Nature classifies them as vulnerable.[352] Andean bears survive mainly in Venezuela, Colombia, Ecuador, Peru, Bolivia, and Argentina.

Chucho and Clarita, his sister, were born in La Planada Natural Reserve, located in the municipality of Ricaurte, Nariño, Colombia.[353] They lived there for four years, and were then transferred to Manizales' Río Blanco Reserve as part of a conservation program, although they did not reproduce because they were siblings.[354] They lived in semi-captivity.[355] The Manizales Water Company was in charge of managing the reserve and developing the conservation program for both bears.[356] Clarita died from cancer on October 16, 2008.[357] Chucho became very depressed.[358]

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[350] Reply Memorandum in Support of Supplemental Memorandum of Law Upon Transfer, *supra* note 348, at 16.

[351] Laura Andrés Tallardà, ¿Por *Qué el Oso Chucho Está en el Centro del Debate por los Derechos de los Animales?*, La Vanguardia (Aug. 14, 2019), https://www.lavanguardia.com/natural/20190814/464042335609/oso-chucho-debate-derechos-animales-colombia.html.

[352] *See* Ximena Vélez-Liendo & S. Shaenandhoa García-Rangel, The IUCN Red List of Threatened Species, https://www.iucnredlist.org/species/22066/123792952 (last visited May 14, 2020).

[353] Johana Rodríguez, *Ponencia aprobaría derecho a la libertad para el oso Chucho*, RCN Radio (Jan. 17, 2020), https://www.rcnradio.com/judicial/ponencia-aprobaria-derecho-la-libertad-para-el-oso-chucho.

[354] Milena Sarralde Duque, *Chucho, el Oso Que Abrió un Debate Sobre los Animales en Cautiverio*, El Tiempo (Aug. 3, 2019), https://www.eltiempo.com/justicia/cortes/historia-del-oso-chucho-y-el-debate-sobre-derechos-de-los-animales-en-zoologicos-396846.

[355] *Animales no son Sujetos de Derechos: Corte en Caso de Oso Chucho*, El Tiempo (Jan. 23, 2020), https://www.eltiempo.com/justicia/cortes/oso-chucho-corte-determino-que-los-animales-no-tienen-derechos-454718.

[356] Carlos Andrés Contreras López, *Derecho Animal en Colombia a partir de la Ley 1774 de 2016*, 2 Revista General de Derecho Animal y Estudios Interdisciplinarios de Bienestar Animal 1, 28 (2018).

[357] Sarralde, *supra* note 354.

[358] *Id*.

The *Corporación Autónoma Regional de Caldas* (CORPOCALDAS), the environmental authority of that region, decided to transfer him to the zoo on June 14, 2017, after living in Río Blanco for 18 years.[359]

A local lawyer, Luis Domingo Gómez Maldonado, filed a *HCW* on June 16, 2017, and argued: (i) that Chucho had the right to return to his natural habitat, La Planada, a reserve protecting the Andean bear;[360] (ii) that Section 3(a) of the Animal Protection Law 1774/2016 states that the eradication of captivity is one of the principles of animal protection in Colombia;[361] (iii) that environmental regulation in Colombia determines that humans must respect nature and all of its components, animals included;[362] and (iv) that Barranquilla is a coastal Caribbean city, scorching hot and extremely humid all year round, instead Nariño, Chucho's natural habitat, is a high-altitude, cold and rainy mountain range.[363] The petitioner recognized that the Colombian legal system does not provide mechanisms to urgently seek the protection of animals in captivity, hence the *HCW*.[364]

The Civil Family Chamber of the Superior Court of the Judicial District of Manizales denied the petition on June 17, 2017, but the Supreme Court annulled the procedure due to procedural errors.[365] The Superior Court of the Judicial District of Manizales conducted the procedures and decided the case again.[366] The zoo argued that Chucho had always lived in captivity, depended on humans for food and water, and that unlike the zoo, Río Blanco lacked expert veterinary assistance.[367]

CORPOCALDAS presented similar arguments against the *HCW*, stressing that since Clarita's death, Chucho had become sedentary, passive, overweight, stressed, depressed, and had escaped several times from his enclosure, which evidenced a lack of safety and care for the bear.[368] This situation was dangerous for Chucho and the nearby community.[369]

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[359] Tribunal Superior del Distrito Judicial de Manizales [T.S.D.J.Man.] [Superior Court of the Judicial District of Manizales], Sala Civ. Fam. julio 13, 2017, M.S: C. Cruz Valencia, Expediente 17001-22-13-000-2017-00468-00 (p. 132-33) (Colom.).

[360] Gómez Hab. Corp. pg. 9, June 16, 2017.

[361] *Id.* at 3.

[362] *Id.* at 5-9.

[363] *Id.* at 9-11.

[364] *Id.* at 3.

[365] Tribunal Superior del Distrito Judicial de Manizales [T.S.D.J.Man.] [Superior Court of the Judicial District of Manizales], Sala Civ. Fam. junio 17, 2017, M.S: C. Cruz Valencia, Expediente 17001-22-13-000-2017-00468-00 (p. 44), (Colom.).

[366] Tribunal Superior del Distrito Judicial de Manizales [T.S.D.J.Man.] [Superior Court of the Judicial District of Manizales], *supra* note 359 at 130.

[367] *Id.* at 133-34.

[368] *Id.* at 135.

[369] *Id.*

The Civil Family Chamber of the Superior Court of Manizales denied the petition on July 13, 2017.[370] The decision was appealed by the plaintiff to the Civil and Agrarian Cassation Chamber of the Supreme Court of Justice.[371] The reporting judge, Villabona, overruled the judgment and granted the *HCW* on July 26, 2017.[372] He ordered the parties to transfer Chucho within thirty days to a place that better resembles his habitat, stating the Río Blanco Reserve should have priority.[373]

The zoo presented a protective action[374] before the Labor Cassation Chamber of the Supreme Court of Justice. This court granted the action on August 16, 2017, and agreed with the plaintiff that the *HCW* violated fundamental rights, such as the right to due process and the right to defense.[375] CORPOCALDAS argued that they had moved Chucho for his own sake, as he was fed dog food, lived alone, had no specialized veterinary care, and had escaped several times.[376] CORPOCALDAS also argued that they had asked every Colombian environmental authority for a place for Chucho, and that only the zoo had proved to be appropriate.[377]

Luis Domingo Gómez Maldonado challenged this decision before the Criminal Cassation Chamber of the Supreme Court of Justice, which confirmed the decision on October 10, 2017.[378] He argued the violation of his right to defense, on the basis of the court notifying the admission of the protective action on August 15, 2017, and ruling on August 16, 2017.[379] He also claimed that the Labor Cassation Chamber did not recognize the Constitutional Court's opinion in prior jurisprudence against animals being left defenseless.[380]

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[370] *Id.* at 143.

[371] Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civ. julio 26, 2017, M.S: L. Tolosa Villabona, Expediente AHC4806-2017 (p. 4) (Colom.).

[372] *Id.* at 21.

[373] *Id*.

[374] This action is called *tutela* in Colombia: a constitutional action that seeks to protect people against the violation of their fundamental rights.

375 Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Lab. agosto 16, 2017, M.P: F. Castillo Cadena, Expediente STL12651-2017 (No. 47924) (p. 127) (Colom.).

[376] *Id.* at 117.

[377] *Id.* at 118.

[378] Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Cas. Pen. octubre 10, 2017, M.P: F. Bolaños Palacios, Expediente STP16597-2017, (p. 31) (Colom.).

[379] *Id.* at 11-12.

[380] *Id.* at 12.

The Constitutional Court selected the case for revision.[381] This court has the faculty of revising protective action judgments according to Section 33 of Decree 2591/1991, which states that at least two judges can select the judgments that will be revised.[382] Judge Antonio José Lizarazo Ocampo insisted on the selection of the case for its novelty and the opportunity to expand the court's jurisprudence on animal rights on the basis of Section 51 of the Internal Regulation of the Constitutional Court.[383] On January 26, 2018, the Selection Chamber bowed to this insistence and put Judge Diana Fajardo Rivera in charge of the revision.[384] On August 8, 2019, the Constitutional Court held a hearing in which various experts were heard, such as Paula Casal, Carlos Contreras, Anne Peters, and Steven Wise.[385] On January 22, 2020, the Constitutional Court rendered its verdict.[386]

In sum, two different actions were filed in this case.[387] First, a *HCW* that was denied by the lower court and then granted by the higher court.[388] Second, a protective action was filed against the court, which granted the *HCW* based on the violation of certain rights, and which was granted by the lower and higher courts, and was selected for revision

[381] The Colombian Constitutional Court is not the only court in Latin America that has selected an animal rights case for revision. On December 22, 2020, the Ecuadorian Constitutional Court selected a monkey *HCW* for revision. In 2019, a woman filed a *HCW* on behalf of a monkey named Estrellita (*Lagothrix lagotricha*). Estrellita was raised and lived with the woman's family for more than 18 years. The environmental authority confiscated Estrellita on September 11, 2019 and put her in quarantine at the local zoo. The lower court and the Court of Appeals denied the *HCW*. Even though Estrellita died on October 9, the case has continued and has been selected for revision by the Constitutional Court. *See* Corte Constitucional del Ecuador [C.C.E.] [Ecuadorian Constitutional Court], diciembre 22, 2020, J. R. Ávila & J. A. Grijalva, Caso 253-20-JH, (Ecu.).

[382] L. 2591, Noviembre 19, 1991, Diario Oficial [D.O.] pg. 6 (Colom.).

[383] L. 5/1992, Corte Constitucional [Constitutional Court Agreement], octubre 21, 1992, Diario Oficial [D.O.] (Colom.), https://www.ramajudicial.gov.co/web/corte-constitucional/portal/corporacion/corte/reglamento-interno.

[384] Corte Constitucional [C.C.] [Constitutional Court], febrero 8, 2018, Mónica Britto Vergara, T-6480577, (Colom).

[385] The author also participated in the hearing, by giving a presentation on legal personhood with Carlos Contreras. The public hearing can be watched online. *See* Corte Constitucional, Audiencia Pública "Oso Chucho", YouTube (Aug. 8, 2019), https://www.youtube.com/watch?v=_X0BHUJWPwo.

[386] Corte Constitucional [C.C.] [Constitutional Court], enero 23, 2020, M.P: Luis Guillermo Guerrero Pérez, Expediente T-6.480.577, Sentencia SU-016/20, (No. 03, p. 2) (Colom.).

[387] *See* Tribunal Superior del Distrito Judicial de Manizales [T.S.D.J.Man.] *supra* note 359; *see* Corte Suprema de Justicia [C.S.J.] [Supreme Court] *supra* note 375.

[388] *See* Corte Suprema de Justicia [C.S.J.] [Supreme Court] *supra* note 371.

by the Constitutional Court.[389] Therefore, this case has involved two of the highest courts in the country: the Supreme Court of Justice and the Constitutional Court. What follows is an account of the substantive aspects of this case, according to the proceedings followed in each Court.

i. Superior Court of the Judicial District of Manizales, Civil Family Chamber, Judgment on the Habeas Corpus Petition (July 13, 2017):

The Superior Court recognized that animal protection is a constitutional duty according to the Constitutional Court's jurisprudence.[390] In this sense, Colombian case law acknowledges that animals are part of the environment, have dignity, and are objects of care.[391] The court also stated that according to the Constitution, the *HCW* is a fundamental right and constitutional action.[392]

Additionally, the court accepted that simply stating that the *HCW* can only be filed by or on behalf of a human being is insufficient, considering Colombian case law and the social pressure regarding the protection of animals.[393] This argument is commonly used by courts to deny *HCW*s on behalf of animals.[394] However, this argument does not prevent people from filing remedies that seek to protect human rights with the purpose of protecting animal rights.[395]

Finally, the Superior Court concluded that the *HCW* is a fundamental right, and that animals are not recognized as subjects of rights in Colombia.[396] Therefore, they cannot be protected by a right that they are not entitled to. The court added that the adequate action for these cases is the *Acción Popular*, which is similar to American class actions in the sense that it seeks to protect the rights of groups of people affected by a particular damage, such as environmental damages or

[389] Corte Constitucional [C.C.] [Constitutional Court], Sala. Prime. Selec. Tute., enero 22, 2018, A. Rojas Ríos & A. Linares Cantillo, T-6480577, (Colom).

[390] Tribunal Superior del Distrito Judicial de Manizales [T.S.D.J.Man.] [Superior Court of the Judicial District of Manizales], *supra* note 359, at 137.

[391] *Id.* at 138.

[392] *Id.* at 137.

[393] *Id*. at 139.

[394] *See generally* S.T.F., No. 50.343, Relator: Des. Djaci Falcão, *supra* note 5, at 813 (as the pioneer caged birds case in Brazil shows).

[395] *See generally* Azevedo, *supra* note 13 (Though the caged birds case was dismissed, it did not stop other Brazilian attorneys from filing a lawsuit on behalf of Suiça).

[396] Tribunal Superior del Distrito Judicial de Manizales [T.S.D.J.Man.] [Superior Court of the Judicial District of Manizales], *supra* note 359, at 142.

damages caused by defective products,[397] and allows the court to issue interim measures in cases where there is an urgent matter at stake.[398] The court also stated that this type of action is better suited to analyze Chucho's welfare.[399]

In sum, the Superior Court's ruling determined that only persons are entitled to the *HCW*, and adhered to the traditional approach that considers animals to be objects of rights, even though the legal system recognizes them as sentient.[400] In other words, this judgment amounts to arguing that animals in Colombia are "very special things."[401]

ii. Supreme Court of Justice, Civil Chamber, Judgment on the Habeas Corpus Petition (July 26, 2017):

The court granted the *HCW* on the basis of Chucho's sentience, granting him the status of a subject of rights that ought to be protected, particularly in view of the rate at which humans are destroying the environment and native territory of this species.[402] The judge also argued that treating animals as things, rather than as subjects of rights, had clearly produced disastrous consequences, and that, like children, animals do not have to bear duties to be subjects of rights.[403] The judge emphasized Chucho's membership of an endangered and protected species most likely to stress that Chucho deserves some legal protection and that recognizing him as a right-bearer was not that far-fetched.[404]

iii. Supreme Court of Justice, Labor Chamber, Judgment on the Protective Action (August 16, 2017):

The zoo filed a protective action based on the violation of the right to due process, defense and the principles of legality and contradiction against the second instance judgment in the *habeas corpus* proceedings.[405] The court claimed that a *HCW* was not even appropriate

[397] Ángela María Páez-Murcia, Everaldo Lamprea-Montealegre & Catalina, Vallejo-Piedrahita, *Medio Ambiente y Acciones Populares en Colombia: un Estudio Empírico*, 134 Vniversitas 209, 212 (2017).

[398] Tribunal Superior del Distrito Judicial de Manizales [T.S.D.J.Man.] [Superior Court of the Judicial District of Manizales], *supra* note 359, at 142.

[399] *Id.* at 143.

[400] *Id.* at 138.

[401] Contreras, *supra* note 356, at 25.

[402] Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Civ., *supra* note 371, at 11.

[403] *Id.* at 10 -11.

[404] *Id*. at 17-19.

[405] Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Cas. Lab., *supra* note 375, at 117.

for all legal persons, like corporations, so even granting Chucho personhood did not suffice for a *HCW*.[406] In Colombian law, animals are normally considered "sentient beings," an intermediate category between persons and things.[407]

The court acknowledged the current trend to expand legal personhood to animals, but stated that this had not yet happened in Colombia.[408] The court also argued that the *HCW* is based on the *pro homine* principle, according to Section 1 of Law 1095 of 1996.[409] This principle states that judges must choose the interpretation that is more favorable to human dignity.[410] Therefore, the court stated that the *HCW* can only be used to protect humans.[411] Even though granting a *HCW* to an animal does not affect human dignity or human rights in any way, the court chose to stick to the letter of the law.[412]

Finally, the court concluded that the *HCW* is not the appropriate mechanism to seek the protection of animals.[413] This court argued that there are other mechanisms to protect animals such as the *Acción Popular*, or the preventive apprehension mechanism regulated in Section 8 of Law 1774 of 2016.[414] However, the latter is contemplated for domesticated animals rather than wild animals. The court also added that using a petition of liberty for an animal that will live in semi-captivity was an oxymoron.[415]

In this judgment, Judge Clara Cecilia Dueñas Quevedo clarified her vote.[416] She shared the decision and main arguments, but stated that the court had affirmed that in every legal system only human persons are entitled to the *HCW even though* this had not been proven.[417] On the contrary, the petitioner mentioned the case of Sandra the orangutan and the river Atrato in Colombia, in which Sandra was recognized as a subject of rights by a superior court.[418]

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[406] *Id.* at 125.

[407] *Id.* at 124.

[408] *Id.*

[409] L. 1095/06, noviembre 2, 2006, Diario Oficial [D.O.] (Colom.), http://www.secretariasenado.gov.co/senado/basedoc/ley_1095_2006.html (last visited May 20, 2020).

[410] Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Cas. Lab., *supra* note 375, at 124.

[411] *Id.* at 125.

[412] *Id.*

[413] *Id.* at 127-28.

[414] *Id*. at 126.

[415] *Id.* at 125.

[416] *Id*. at 171.

[417] *Id.*

[418] *Id.*

iv. Supreme Court, Criminal Chamber, Judgment on the Protective Action (October 10, 2017):

This court confirmed the decision, arguing that the *HCW* can only be presented by a human person because it is based on the *pro homine* principle.[419] The court added that the fact that animal protection is acknowledged as a constitutional duty does not mean that animals have a fundamental right to welfare, but rather that humans have a duty to protect them.[420] The court referred to Chucho's right to welfare, but the whole case is based on his right to bodily liberty.[421] Talking about welfare is confusing because welfare seeks to avoid the unnecessary suffering of the animals used in different activities, but does not necessarily recognize animals as legal persons. In fact, the zoo argued throughout the procedure that Chucho's welfare was being taken care of, but did not recognize him as a legal person nor as a subject of rights with the right to bodily liberty.[422]

v. Constitutional Court, Revision Proceedings, Judgment on the Protective Action (January 22, 2020):

On January 23, 2020, the Constitutional Court rendered its verdict.[423] The court decided to confirm the protective action judgment; thus, it denied the *HCW*.[424] According to the court's statement, the judges stated that the *HCW* is not the appropriate mechanism to resolve an animal welfare dispute because the writ seeks to protect persons against the illegal deprivation of their right to freedom, and that there are other mechanisms to protect animals, such as popular action.[425] Hence, the judges have taken the term "person" to be a synonym for "human."[426] The judges have also stated that animals are considered sentient beings and therefore, do not qualify for rights.[427] The court designated Judge Luis Guerrero to write the judgment that denied the *HCW* and ordered Chucho to stay in the zoo.[428] The judgment was finally published on March 11, 2021.[429]

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[419] Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Cas. Pen., *supra* note 378, at 10.

[420] *Id*. at 24.

[421] *Id.*

[422] *See* Corte Constitucional, *supra* note 384.

[423] Corte Constitucional, *supra* note 386.

[424] *Id.* at 2.

[425] *Id.* at 2-3.

[426] *Id.* at 6.

[427] *Id*. at 2.

[428] *Id.*

[429] Corte Constitucional [C.C.] [Constitutional Court], enero 23, 2020,

However, Judge Fajardo proposed a ruling that would recognize Chucho as a subject of rights, including the right to freedom, and grant him the *HCW*.[430] She also proposed the appointment of a committee to decide whether Chucho should live in the zoo or in a reserve.[431] If the committee chose the zoo, Chucho's enclosure should be adapted to ensure his right to life.[432] This proposal was supported by only two of the nine judges: Judge Diana Fajardo and Judge Alberto Rojas.[433] By proposing this committee, Judge Fajardo has communicated her dissenting vote.[434] She has stated that animals have intrinsic interests that are relevant to the law and must be protected as rights.[435] She also argued that the *HCW* is an adequate mechanism to solve the dispute, because there is no other mechanism for these types of cases in Colombia.[436] Judge Fajardo's dissent concluded that the Constitutional Court has remained locked in the formalist labyrinth of procedural law without being able to build effective protective mechanisms for animals.[437] Judge Rojas's vote concluded that the court interpreted the concept of person restrictively because it considered "person" and "human" to be synonyms.[438] He also stated that personhood is not a biological concept, but rather a legal fiction used to grant rights and duties to different entities.[439] In sum, he claimed that a sentient animal can be considered a legal person.[440]

Chucho's legal ordeal has been a historic case, not only because a higher court granted a *HCW* to an Andean bear, but also because this debate has elicited contradictory opinions on legal personhood and animal rights from different chambers of the Supreme Court of Justice while also involving the Constitutional Court. Thus, such cases are dismissed at the lower court level, but Chucho's case reached the highest courts in the country.

Even though the Constitutional Court decided to deny the *HCW*, its active and serious role has been unique at a global level.[441] The court had no obligation to review the case, especially considering that it would have to review the judgment of one of the other highest courts

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M.P: Luis Guillermo Guerrero Pérez, Expediente T-6.480.577, Sentencia SU-016/20 (Colom.), https://www.corteconstitucional.gov.co/relatoria/2020/SU016-20.htm.

[430] Corte Constitucional, *supra* note 386, at 3.

[431] *Id.* at 5.

[432] *Id.*

[433] *Id.* at 3-7.

[434] *Id.* at 3.

[435] *Id.*

[436] *Id.* at 4.

[437] *Id.* at 6.

[438] *Id.*

[439] *Id.*

[440] *See id.*

[441] Macarena Montes, *Legal Personhood: The Case of Chucho the Andean Bear*, 11 J. Animal Ethics. 36, 44 (2021).

in the country, i.e. the Supreme Court of Justice.[442] However, the court was more interested in reviewing such a novel case and expanding its jurisprudence on animal rights.[443] Additionally, Judge Fajardo asked for reports from experts in animal law as soon as she received the case in 2018.[444] She then held a hearing and invited many experts, not only from Colombia, but also from other countries, to give their opinions on the matter.[445] She not only accepted presentations in person during the hearing, but was flexible enough to accept videos from the experts who lived abroad.[446] It is important to note that the Constitutional Court is not required to hold a hearing during the review of a protective action, but nonetheless, Judge Fajardo considered expert interventions on animal rights and ethics before deciding the case.[447]

b. Remedios the Andean Bear (2019)

Luis Domingo Gómez Maldonado filed a *HCW* on behalf of Remedios, the Andean bear, with the Superior Court of Medellín.[448] Remedios was born in the wild in Antioquia, but then got lost and separated from her family.[449] A family of farmers rescued her when she was only two months old.[450] On December 23, 2017, a group of biologists and veterinarians from the Metropolitan Area of Valle de Aburrá, experts from CES University, and public officials from *Corporación Autónoma Regional de Antioquia* (Corantioquia), the environmental authority of the region, removed her from the farm.[451] The government agency decided to transfer her to Santa Fe Zoo in Medellín because she was suffering from anemia due to an inappropriate diet.[452] The objective was to correct her eating habits and rehabilitate her natural behavior in order to reintroduce her into her natural habitat. However, almost two years later, she was still in captivity.[453]

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[442] L. 2591, *supra* note 382.

[443] *See* Corte Constitucional [C.C.] [Constitutional Court], *supra* note 389.

[444] Corte Constitucional [C.C.] [Constitutional Court], octubre 4, 2018, M.S. Diana Fajardo Rivera, T-6480577, (Colom).

[445] Corte Constitucional, *supra* note 385.

[446] *Id.*

[447] *See Módulo de Preguntas Frecuentes Realizadas por la Ciudadanía a la Corte Constitucional Historia y Aspectos Generales*, Corte Constitucional, https://www.corteconstitucional.gov.co/preguntasfrecuentes.php (last visited Feb. 26, 2021).

[448] *Futuro del Oso Remedios, en Manos de la Ley*, Semana Sostenible (Aug. 13, 2019), https://sostenibilidad.semana.com/medio-ambiente/articulo/remedios-el-oso-de-anteojos-que-busca-su-libertad-por-habeas-corpus/45358.

[449] *Id.*

[450] *Id.*

[451] *Id.*

[452] *Id.*

[453] *Id*.

The petitioner argued that Remedios's reintroduction was urgent because the longer she stayed at the zoo, the harder it would be for her to return to her natural habitat. The petitioner also argued that Remedios has a right to live in her natural habitat.[454] He added that the Animal Protection Law in Colombia advocates for the eradication of captivity.[455] He explained that the government agency had ignored the expert recommendations for her reintroduction and warned that the zoo was arranging to donate Remedios to a zoo in the United States.[456] The objective of the *HCW* is to free Remedios as soon as possible.[457]

During the proceedings, the Superior Court of Medellín requested the zoo and government agencies to inform it about Remedios's captivity.[458] The court finally denied the *HCW* because it decided that the zoo was not inflicting any suffering on Remedios.[459] On the contrary, it considered the zoo to be taking care of her.[460] The court also argued that the writ is a remedy that can only be used to protect human beings who are illegally incarcerated, not animals, even if animals are considered to be sentient.[461] The petitioner appealed to the Supreme Court of Justice.[462] The Labor Cassation Chamber denied the *HCW*, arguing that it can only be used to protect persons, and that *HCW* derives from human dignity, which animals lack.[463]

In sum, the Labor Cassation Chamber of the Supreme Court of Justice maintains the traditional approach that animals are not persons, which it used to grant the protective action against Chucho's *HCW*.[464]

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[454] *Id.*

[455] *Id.* (referring to the provisions of Law 1774 of January 2016 of the Animal Protection Law).

[456] *Id.*

[457] *See generally id*.

[458] *Piden Liberación Inmediata de "Remedios", una Osita de Anteojos*, El Espectador (Aug. 13, 2019), https://www.elespectador.com/noticias/judicial/piden-liberacion-inmediata-de-remedios-una-osita-de-anteojos/.

[459] *Remedios, el Oso de Anteojos, Continuará en el Zoológico de Medellín*, Semana Sostenible (Aug. 15, 2019), https://sostenibilidad.semana.com/medio-ambiente/articulo/remedios-el-oso-de-anteojos-continuara-en-el-zoologico-de-medellin/45387.

[460] *Id.*

[461] *Id.*

[462] *Corte Suprema Reitera que Habeas Corpus es Para Humanos, No para Animales*, El Espectador (Aug. 23, 2019, 3:29 PM), https://www.elespectador.com/noticias/judicial/corte-suprema-rechaza-pedido-de-liberacion-del-oso-remedios-articulo-877505.

[463] *Id*.

[464] *See* Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Cas. Lab., *supra* note 375.

VI. Animals in South Asia

a. Animals in Uttarakhand (India, 2018)

On July 4, 2018, the Uttarakhand High Court recognized animals as legal persons.[465] Justices Rajiv Sharma and Lokpal Singh recognized the entire animal kingdom as legal persons, with rights and duties, and gave guidelines for preventing cruelty to animals.[466] The Court also declared Uttarakhand's residents to be persons *in loco parentis*, enabling residents to act as guardians of the animals.[467] According to the Telegraph, animals would be considered juridical persons.[468] The Court also argued that Article 21 of the Indian Constitution protects the right to life, which includes other forms of life, such as the animal kingdom.[469] Scholars have considered this interpretation to be revolutionary because it shifts the understanding of Article 21 from anthropocentrism to ecocentrism.[470]

This case started as an animal welfare petition concerning the health of transport animals used on the route from Banbasa Uttarakhand to Nepal.[471] The petitioner requested the court to order the vaccination and medical checkup of the horses before entering Indian territory.[472] The court ordered the State to ensure the medical examination of all animals on their way in or out of India and from or to Nepal.[473] The court also banned the use of spike sticks and harnesses that can harm animals.[474]

This ruling caught the media's attention because it declared all animals to be legal persons.[475] However, it seems like more of a symbolic

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[465] Jayanta Boruah, *Uttarakhand High Court's Decision: "Entire Animal Kingdom as Legal Entity, With Rights, Duties & Liabilities of a Living Person*," 32 Lex Terra 22, 22 (2018), http://www.nluassam.ac.in/docs/lex%20terra/Lex%20Terra%20Issue%2032.pdf.

[466] *Id.* at 22-23.

[467] *Id*. at 23.

[468] *See* Saptarshi Ray, *Animals Accorded Same Rights as Humans in Indian State*, Telegraph (July 5, 2018, 10:00 AM), https://www.telegraph.co.uk/news/2018/07/05/animals-accorded-rights-humans-indian-national-park/.

[469] Boruah, *supra* note 465.

[470] *Id.*

[471] *See generally Order of the Uttarakhand High Court Regarding Protection and Welfare of Animals,* India Envtl. Portal (Apr. 7, 2018), http://www.indiaenvironmentportal.org.in/content/457750/order-of-the-uttarakhand-high-court-regarding-protection-and-welfare-of-animals-04072018/.

[472] *Id.*

[473] *Id.*

[474] *Id*.

[475] *See Uttarakhand HC Declares Animals to be 'Legal Persons'*, Hindu (July 5, 2018), https://www.thehindu.com/news/national/uttarakhand-hc-declares-

declaration than an actual recognition of animal rights because the court was ordering the state to implement and comply with animal welfare legislation.[476] Additionally, the court did not mention what rights or duties animals would be entitled to or how animal legal personhood would be implemented, nor has this been regulated by the State.[477] Furthermore, it is curious that the court stated that animals would also bear duties when this is not a necessary condition for legal personhood.[478]

b. Animals in Haryana (India, 2019)

The High Court of Punjab and Haryana recognized the entire animal kingdom as legal entities having a distinct *persona* with rights, duties, and liabilities in the State of Haryana on May 31, 2019.[479] This case was triggered by an incident involving twenty-nine cows transported in deplorable conditions for more than six hundred kilometers from Uttar Pradesh to Haryana.[480] Following the Uttarakhand ruling, the court declared Haryana's citizens to be persons *in loco parentis* enabling them to act as guardians for animals.[481]

Justice Rajiv Sharma, one of the judges who participated in the Uttarakhand ruling, ruled that animals should be healthy, comfortable, well-nourished, safe, able to express innate behavior and free from pain, fear, and distress—thus referring to the five freedoms, which are basic standards of animal welfare. [482] The judge also added that animals are entitled to justice, and that humans cannot treat them as objects,[483] such as animals used to pull heavy carts, stating that people must respect the maximum load.[484]

Like the Uttarakhand judgment, this ruling is also a symbolic declaration, because it attempted to improve animal welfare in India, rather than recognizing animals as legal persons entitled to basic rights such as bodily liberty.

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animals-to-be-legal-persons/article24335973.ece; Neeraj Santoshi, *Uttarakhand HC Declares Animal Kingdom a Legal Entity With Rights of a 'Living Person'*, Hindustan Times (July 5, 2018), https://www.hindustantimes.com/india-news/animal-kingdom-isn-t-property-has-rights-of-a-living-person-uttarakhand-hc/story-xKH5maDn53kaou4blnaxeP.html.

[476] *See generally Order of the Uttarakhand High Court Regarding Protection and Welfare of Animals*, *supra* note 471.

[477] *See generally id.*

[478] Salmond & Fitzgerald, *supra* note 149.

[479] Karnail Singh and Others v. State of Haryana, AIR 2019 (P&H) 1, 104 (India).

[480] *Id*. at 1-5.

[481] *Id*.

[482] *Id.* at 30.

[483] *Id.* at 97.

[484] *Id.* at 13.

c. Laxmi the Asian Elephant (India, 2020)

At the beginning of January 2020, the Supreme Court dismissed the first *HCW* filed on behalf of an elephant in India.[485] Laxmi had appeared in the news some months before, because the Delhi Police had arrested a mahout called Saddam for allegedly stealing and hiding her.[486] The police found Laxmi and took her to a rehabilitation center.[487] Therefore, Saddam filed a *HCW* asking the court to release Laxmi from her illegal detention at the rehabilitation center.[488] His attorney, Wills Mathews, argued that since animals have a right to life, as the Supreme Court had ruled in 2014,[489] a *HCW* could be filed by a mahout to locate elephant Laxmi.[490] Chief Justice Bobde asked if Laxmi is a citizen of India and how a *HCW* could apply to animals.[491] The Court also claimed that granting the *HCW* would allow villagers to present the writ on behalf of their cattle.[492] Finally, the Court asked the attorney if he had a document to show the legal right of possession of Laxmi.[493] In sum, this case seems to be more of a dispute for Laxmi's custody than a trial for the recognition of her legal personhood and basic rights.

d. Animals in Islamabad's Marghazar Zoo (Pakistan, 2020)

On April 25, 2020, the Higher Court of Islamabad decided a case involving animals living in deplorable conditions at Marghazar Zoo.[494] Justice Minallah referred to animals in zoos as inmates[495] and

[485] Dhananjay Mahapatra, *Is Elephant a Citizen, Asks CJI, Hearing Habeas Corpus Plea*, Times of India (Jan. 10, 2020, 09:25 IST), https://timesofindia.indiatimes.com/city/delhi/tusker-cant-be-rescued-via-habeas-corpus-sc/articleshow/73179887.cms.

[486] Ashish Tripathi, *Mahout's Elephant Custody Bid Via Habeas Corpus Failed*, Deccan Herald (Jan. 9, 2020, 23:17 IST), https://www.deccanherald.com/national/north-and-central/mahouts-elephant-custody-bid-via-habeas-corpus-failed-793006.html.

[487] *Id.*

[488] Press Trust of India, *Lakshimi's Mahout Fails to Get Custody as Apex Court Refuses to Entertain Plea*, Hindu (Jan. 10, 2020, 02:04 IST), https://www.thehindu.com/news/cities/Delhi/lakshmis-mahout-fails-to-get-custody-as-apex-court-refuses-to-entertain-plea/article30528476.ece.

[489] Animal Welfare Board of India v. A. Nagaraja and Ors, (2014), 5 SCJ 1, 37 (India).

[490] Mahapatra, *supra* note 485.

[491] *Id.*

[492] *Id*.

[493] Tripathi, *supra* note 486.

[494] *See* Islamabad Wildlife Management Board v. Metropolitan Corporation Islamabad, etc., (2020) W.P. No. 1155/2019 PLD (ISL) 1, 4 (Pak.).

[495] *Id.* at 12.

claimed that animals are not mere property,[496] but subjects of rights: "Do the animals have legal rights? The answer to this question, without any hesitation, is in the affirmative."[497]

Recognizing that zoos are not appropriate places for elephants and that zoos around the world are phasing them out,[498] Judge Minallah ordered Kaavan, an Asian elephant, to be transferred to a sanctuary.[499] Kaavan had spent more than thirty years chained in a small enclosure at the zoo, with serious health issues and an inadequate diet.[500] He had been kept in isolation for more than eight years since his companion, Saheli, died in 2012, and suffered severe stereotypical behavior and neurological problems due to his captivity.[501] Free the Wild, an organization whose mission is to transfer animals in captivity into sanctuaries or better equipped zoos,[502] filed the legal action on Kaavan's behalf and transferred him to the Cambodia Wildlife Sanctuary.[503]

The court also decided to relocate the rest of the animals kept at the zoo to sanctuaries.[504] The court specifically mentioned two brown bears that had been kept in a small concrete enclosure with no shade, whose health and welfare had been severely neglected.[505] Additionally, the court referred to a marsh crocodile that was ill and kept in a small enclosure where he could barely move.[506] This is the first examined case where a reptile has been considered a subject of legal rights and where an order has been issued to relocate a reptile to a sanctuary.[507] Finally, the judge also mentioned other animals that were suffering at the zoo, such as lions, birds, wolves, and ostriches.[508] The judge ordered that the board constituted under the Wildlife Ordinance 1979 take over management of the zoo until all the animals had been relocated.[509] The court explicitly prohibited the board from keeping any new animals in the zoo until

[496] *Id.* at 57.

[497] *Id.* at 59.

[498] *Id.* at 12.

[499] *Id.* at 62.

[500] *See id.* at 10-11.

[501] *Id.* at 11.

[502] *About Us,* Free the Wild, https://www.freethewild.org/about (last visited Feb. 27, 2021).

[503] *Islamabad High Court Recognized the Rights of Nonhuman Animals*, GlobeNewswire (May 21, 2020, 19:59 ET), https://www.globenewswire.com/news-release/2020/05/21/2037371/0/en/Islamabad-High-Court-Recognizes-the-Rights-of-Nonhuman-Animals.html.

[504] Islamabad Wildlife Management Board v. Metropolitan Corporation Islamabad, *supra* note 494, at 62.

[505] *Id.* at 14.

[506] *Id.*

[507] *Id.* at 14, 15, 59, 62, & 63.

[508] *Id.* at 15-16.

[509] *Id.* at 62.

an international agency specializing in zoological gardens had certified that the zoo can ensure the behavioral, social, and physiological needs of the animals.[510]

Finally, the court ordered the board to inspect other zoos in Islamabad,[511] and recommended that the federal government include teachings on the importance of caring for animals, their welfare, and wellbeing in the Islamic studies curriculum[512] and recommended the media to educate and inform the general public on the treatment of animals.[513]

Conclusion

a. Case Frequency

As this historical account shows, legal personhood for animals has come a long way in recent decades. Initially, there was one case a year at the most, usually regarding a chimpanzee. Now we see several a year, regarding different species. Since 2013 there have been twenty-one cases. The list of animals now includes thirty-three mammals, including one polar bear, one orangutan, one crested black macaque, two dogs, two Andean bears, five elephants, five orcas, and sixteen chimps, as well as, the animals of India, and the animals in Islamabad's Marghazar Zoo, including a crocodile and countless birds.

As the frequency of cases has increased, the attitude of judges has also begun to change. The opinion that these lawsuits are ridiculous and frivolous, as stated in Minnie and Naruto's cases, has been replaced by long deliberations at higher courts, as in the cases of Sandra, Chucho, Uttarakhand, Haryana, and Marghazar Zoo. Moreover, courts have started to recognize that they can no longer simply dismiss a *HCW* because the animal is not human, considering social pressure and the evolution of case law on animal protection, as indicated by Chucho's case.

b. Species Membership

Reflecting on the development of the twenty-seven cases discussed here, only 25.9 percent of these cases were dismissed strictly because the animal was not human, while 51.8 percent of the cases analyzed legal personhood or directly considered the animal to be a legal person or a subject of rights, and 14.8 percent were dismissed on procedural grounds; leaving another 7.4 percent that do not fit into any

[510] *Id.* at 63.
[511] *Id.*
[512] *Id.* at 64.
[513] *Id.*

of these categories. Surprisingly, dismissal strictly based on membership of the human species did not emerge as a major argument.

Additionally, the success of such cases does not depend on the animals' species or genetic closeness to humans or cognitive abilities, but instead on other factors such as strategy, the technical aspects of a *HCW*, and the judge's empathy towards animals, willingness to hear a novel case, and general philosophical outlook on law. If such cases depended strictly on cognitive abilities or genetic closeness, then chimps would be the most successful species in courts, but in fact only one chimp case has been successful. The other *habeas corpus* cases that were granted by a court, but later reversed, involve an orangutan—the great ape that is genetically most distant from humans—and an Andean bear. Beyond *habeas corpus* cases, there have been two successful dog cases (perhaps because everybody knows what dogs are like), two cases in India where all animals were recognized as legal persons to promote and guarantee animal welfare, and a case in Islamabad where all animals mistreated in the zoo were recognized as subjects of rights and are currently waiting to be relocated to sanctuaries. Furthermore, both dog cases might suggest that this species could be a candidate in legal personhood lawsuits, considering their close relationship to humans,[514] which could generate more empathy in judges who share their lives with dogs.

c. Political Strategy

In some of the examined cases—both *HCW*s and other types of lawsuits—judges have argued that a petition to recognize animals as legal persons should be made to Congress and not the judiciary, as occurred in Kiko and Naruto's cases.

As mentioned in Tillikum's case, the objective of these lawsuits is to make things better for animals, not worse. However, there is a dilemma when deciding whether to fight for animal personhood in court. On the one hand, when a certain case has a low chance of success, there is a risk of creating a negative precedent, which can harm the animal plaintiff, as well as other animals in similar conditions. This is especially problematic in common law countries. On the other hand, a case with a high chance of success could lead to the animal in question being killed, as in Suiça's case. The political struggle for a bill on animal personhood does not face this dilemma, because a bill would not target an individual animal, but instead one or more species.

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[514] *See The Truth About Dog People: New Survey and Infographic Tell All*, Rover, https://www.rover.com/blog/the-truth-about-dog-people-infographic/ (last visited May 26, 2020); *Nationwide Survey Reveals Dogs Are More Than "Man's Best Friend"*, Spot On (June 4, 2019), https://spotonfence.com/blogs/events-updates/spoton-survey-reveals-dogs-are-part-of-family.

However, the fact that several animals have died during related lawsuits—such as Suiça, Monti, Beulah, and Karen—or a couple of years after the case ended—such as Arturo, Toto, Tillikum, and Kasatk—shows that these cases are truly urgent. All these animals suffered greatly from physical and psychological illness due to captivity and isolation. Therefore, in most cases, there is no time to start a political process in Congress. Political strategies for animal personhood might be a good option in the long run, but they may not be enough to help animals that are currently suffering the consequences of captivity.

Furthermore, seeking a bill on animal personhood is not only a slow endeavor, but a difficult one, due to all the lobbies that would oppose it. Hence, animal rights advocates are forced to seek help from courts, and mainly do so through *HCW*s. Some might argue that all the judicial defeats prove that this option is even harder than the political endeavor. However, judges have started to accept the *HCW* as an adequate legal action, because there are no other available mechanisms for requesting the animal's freedom, and judges are obliged to solve the case, as demonstrated by Cecilia's case, as well as by Judge Fajardo's dissent in Chucho's case.

d. Legal Strategies

Animal rights advocates must take into account that some courts mistakenly consider the terms "human" and "person" to be synonyms, as Judge Rojas's dissent in Chucho's case highlighted. Additionally, some courts confuse these legal attempts to obtain the recognition of the animal in question as a legal person with animal welfare disputes, as Chucho's case also shows. Moreover, some courts seem to fear the effects that they believe their judgment might cause in other activities that use animals, rather than focusing on the specific animal plaintiff. For example, the judges in Laxmi's case stated that granting the *HCW* would allow villagers to present the writ on behalf of their cattle. Therefore this "judicial fear" affects the animal plaintiff's chances of being recognized as a legal person with certain basic rights.[515]

Even if it were true that the *HCW* presents this peculiar difficulty, it is not the only mechanism to argue for an animal's legal personhood in court. Naruto's case shows that a similar lawsuit could lead to the recognition of personhood in a limited area of the law, such as copyright ownership. Both dog cruelty cases show that criminal court judges are inclined to recognize animal legal personhood on their own motion, to stress how much the animal suffered and the seriousness of the offence. Similarly, the Uttarakhand, Haryana, and Marghazar Zoo cases

[515] *See* Montes, *supra* note 441.

show that breaching animal welfare regulations and keeping animals in deplorable conditions has also led judges to recognize animals as legal persons, or as subjects of rights. In this sense, having different strategies is positive, as there is uncertainty about which approach has more chance of succeeding in a particular country considering its legal system, judicial structure, history and development of animal protection, among other circumstances. Nonetheless, advocates must bear in mind that animals in zoos and labs are physically and psychologically fragile, so any administrative procedure or other type of lawsuit that might take years, as suggested by Chucho's case, could take too long, and the animal could die in the meantime.

There is always a risk of creating a negative precedent when deciding to litigate, particularly in animal rights and legal personhood cases that are generally novel issues for courts, even though these cases are becoming more common. The point of contention is how animal advocates should act in view of certain cases with a very low probability of success. On the one hand, as Steve Wise noted in Tilikum's case, presenting such a case was likely to generate negative precedents, and thus make any eventual success less likely.[516] On the other hand, going ahead despite the low probability of success a case might have, according to some, has had several beneficial consequences. For example:

1) Several animals still relocated to sanctuaries despite the *habeas corpus* failing, such as Lili, Debby Megh, Jimmy, Hercules, and Leo. Sandra also moved to a sanctuary even though a higher court reversed Judge Liberatori's judgment. Hence, even failed cases—legally speaking—have served to pressure governments, zoos, and labs to relocate the animals. If the purpose of these lawsuits is to make things better for animals, then these cases may be rightfully considered as victories.
2) Even fragments of judgments that were inconsequential or unsuccessful can be exported to other cases with a positive effect. For example, *obiter dictum* declarations in judgments can still influence other national or international judgments. In fact, the Federal Criminal Cassation Court's judgment in Sandra's case inspired the judge in Poli's case in Argentina, as well as the judge in the Marghazar Zoo case in Pakistan. Furthermore, overturned rulings are still quoted as exemplary cases around the world,

[516] Wise, *supra* note 111.

like when the Marghazar Zoo judgment mentioned Judge Liberatori's decision that recognized Sandra as a nonhuman person with basic rights. The Marghazar Zoo judgment even mentions cases that have not yet ended as examples of jurisprudence on animal rights, such as Happy's case.

3) Partly as a result of this phenomenon, animal legal personhood has become increasingly supported by judges, well-prepared attorneys, renowned academics and scientists from around the world, showing that these cases are neither ridiculous nor frivolous, which normalizes the topic among the general public.
4) Impact on the media, and the general public's growing familiarity with the possibility of animal personhood, as well as the general public's emotional involvement with specific individuals like Sandra, Tillikum, and Chucho, mobilizes courts and governments to act.

In sum, this account of case law on animal legal personhood allows us to reach several conclusions regarding different aspects of the twenty-seven cases discussed here. First, attempts to accord rights to animals or achieve the recognition of legal personhood have greatly increased in number, in the variety of species and countries involved, and in their ability to reach higher courts. Second, given the fame obtained by the successful chimpanzee *HCW*, one would have expected species membership and genetic closeness to humans to play a crucial role. However, neither of these has emerged as a determining factor in the rulings. In practice, the legal philosophy of those involved and the severity of the animal suffering have played more significant roles than proximity to humans. Third, this analysis reveals the horns of three dilemmas. The first concerns the pros and cons of employing legal or political means, the second concerns the relative advantages of *HCW* versus other legal strategies, and the third concerns whether legal practitioners should attempt certain cases with a very low probability of success.

Humanity Has Beef with the Meat Industry: The Cultural Push to Change the Way Beef is Produced, Harvested, and Consumed Stemming from the Adverse Effects of Beef on the Environment and Human Health

Rachel Tackman*

I. Beef—It's What's for Dinner (and breakfast and lunch…)

Pictures of farms from the past and in children's books compared to the reality of the beef industry today reveal the emergence of a dark and money-hungry business in the United States. Few farms today paint the picture of rolling hills, white picket fences, and a couple happy cows with a caring farmer coming out to greet his livestock and feed them by hand like in children's books. Instead, the beef in the U.S. comes from large, unsanitary, and pollutant industrial factories owned by major corporations.[1] These corporations, called Concentrated Animal Feeding Operations (CAFOs), differ substantially from typical family-owned farms.[2] The Environmental Protection Agency (EPA) defines Animal Feeding Operations (AFOs) as "agricultural enterprises where animals are kept and raised in confined situations" and defines a CAFO as an AFO with "more than one thousand heads of beef cattle."[3]

* Rachel Tackman graduated cum laude from Michigan State University College of Law in May 2021. While in law school, Rachel was the Editor in Chief of the Animal and Natural Resource Law Review, Justice for Phi Alpha Delta Legal Fraternity, Treasurer for the Business and Securities Law Institute, Secretary for the Tax Law Society, and a member of the Animal Welfare Clinic. Rachel will start her career at KPMG in Detroit, MI. She would like to thank her fiancé, Bradley Harrah, and her dogs, Beau and Rory, for their support.

[1] Jacy Reese Anthis, *US Factory Farming Estimates*, Sentience Inst. (Apr. 11, 2019), https://www.sentienceinstitute.org/us-factory-farming-estimates (commenting on how 70.4 percent of our beef comes from CAFOs); *see also* U.S. Envtl. Prot. Agency [EPA], EPA-600/R-04/042, Risk Assessment Evaluation for Concentrated Animal Feeding Operations 7 (2004).

[2] *See Animal Feeding Operations*, Nat. Res. Conservation Serv., U.S. Dep't of Agric. [USDA], https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/plantsanimals/livestock/afo/ (last visited Feb. 13, 2020).

[3] *Id.*

Things have changed for the beef industry; it has gotten bigger.[4] Big beef stands as one of the largest industries in the United States.[5] Over the last fifty years, the U.S. beef production has increased by twenty-five percent.[6] In 2018, Americans consumed 26.767 billion pounds of beef and the United States grossed $8.332 billion from the export of beef.[7] The beef farming industry leaves no doubt that it greatly contributes to the success of the American economy, but at what cost?[8]

Earth finds itself in the middle of a global climate crisis.[9] Rising sea-levels, frequent natural disasters, species extinction, and deforestation have reached an all-time high.[10] The need for substantial change to prevent the ultimate demise of certain aspects of Earth's ecosystem grows by the day.[11] While many countries monitor and limit emissions from cars and airplanes, they fail to recognize one significant man-made pollutant: large-scale cattle farming.[12] The Earth is in danger, and big beef feeds the problem.

Media outlets and government agencies influenced by big beef manufacturers tell the American people that a healthy diet includes beef,[13] but scientific proof shows that a diet heavy in beef has been linked to type 2 diabetes, cardiovascular disease, obesity, and some kinds of cancer.[14] Indeed, the very government agencies tasked with protecting the health of the public are at the forefront of advocacy encouraging

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[4] *ERS Charts of Note: Cattle & Beef*, Econ. Research Serv. [ERS], USDA (Dec. 5, 2019), https://www.ers.usda.gov/data-products/charts-of-note/charts-of-note/?topicId=14842.

[5] *The Beef Industry's Major Contribution to the U.S. Economy*, AGAmerica Lending (May 31, 2019), https://agamerica.com/beef-cattle-industry-highlights-infographic/.

[6] *ERS Charts of Note*, *supra* note 4.

[7] *Industry Statistics*, Nat'l Cattlemen's Beef Ass'n, https://www.ncba.org/beefindustrystatistics.aspx (last visited Dec. 1, 2019).

[8] *The Beef Industry's Major Contribution to the U.S. Economy*, *supra* note 5.

[9] *See* Food & Agric. Org.[FAO], U.N., Livestock's Long Shadow: Environmental Issues and Options 112 (2006).

[10] *Id.* at vi-viii.

[11] *Id.*

[12] *See* Richard Waite et al., *6 Pressing Questions About Beef and Climate Change, Answered*, World Res. Inst. (Apr. 8, 2019), https://www.wri.org/blog/2019/04/6-pressing-questions-about-beef-and-climate-change-answered.

[13] *See Food Gallery—PROTEIN FOODS GROUP*, USDA: ChooseMyPlate, https://www.choosemyplate.gov/eathealthy/food-gallery-protein-foods-group#beef (last visited Feb. 13, 2020); *see also Beef in a Healthy, Sustainable Diet*, Beef. It's What's for Dinner., https://www.beefitswhatsfordinner.com/raising-beef/beef-in-a-sustainable-diet (last visited Feb. 5, 2020).

[14] Harrison Wein, *Risk in Red Meat?*, Nat'l Inst. Health [NIH], U.S. Dep't Health & Human Servs.[HHS] (Mar. 26, 2012), https://www.nih.gov/news-events/nih-research-matters/risk-red-meat.

the public to engage in eating habits that could cost them their lives.[15] Industrialized mass beef production affects the way the American people live their lives by harming their health and their environment.[16] Now that awareness of the harm caused by industrialized mass beef production exists, an enlightened public demands change.[17]

This text gives the background on the environmental and health effects caused by the consumption of beef and specifically CAFOs. Many U.S. government agencies act as puppets and forego their self-declared duties to push initiatives more in line with the desires of the big beef industry.[18] Despite scientific evidence screaming for change, these government agencies are refusing to adapt.[19] While a complete ban on beef and beef farming is not necessary, nor advised, this text shows that there are many benefits in limiting consumption and slowing the production of beef. Government agencies need to change their inadequate policies and implement more rules and regulations to protect the planet, health, and meat.

a. Large-scale Beef Farming Contributes to the Destruction of the Environment.

Scientists from the United Nations define the meat industry as "one of the top two or three most significant contributors to the most serious environmental problems, at every scale from local to global."[20] These scientists have found that the meat industry has led to problems of land degradation, climate change and air pollution, water shortage

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[15] *See* Helena Bottemiller Evich, *Meat Industry Wins Round in War Over Federal Nutrition Advice*, Politico (Jan. 7, 2016), https://www.politico.com/story/2016/01/2015-dietary-guidelines-217438; *see also Nutrients and Health Benefits*, USDA, https://www.choosemyplate.gov/eathealthy/protein-foods/protein-foods-nutrients-health (last visited Mar. 27, 2020) (recommending beef and steak as a necessary part of the daily recommended intake).

[16] *See generally id.*

[17] Best Actor winner Joaquin Phoenix used his acceptance speech to talk about animal rights and going vegan. *See* Joaquin Phoenix, Oscars Speech (Feb. 9, 2020). Ellen Degeneres encouraged her fans to eat less meat citing that it is good for the planet, good for your health, and for the animal's health if you eat less meat. "Hey, be neat, no meat." *See* Jemima Webber, *Ellen Degeneres Urges 77 Million People to Eat Less Meat*, LiveKindly (Sept. 18, 2019).

[18] Evich, *supra* note 15.

[19] *See* Evich, *supra* note 15; *see also Nutrients and Health Benefits*, *supra* note 15 (showing that despite knowing about the adverse effects of beef, the USDA keeps beef as a suggestion in their recommended daily allowance for each meal).

[20] Livestock's Long Shadow, *supra* note 9, at 112; *see also*, FAO, U.N., The State of Food and Agriculture 41 (2016) (stating that while agriculture is not the number one factor, emissions from the energy sector (which is number one) could easily be reduced and when that happens, animal agriculture would be number one and that is a lot more challenging to reduce emissions for).

and water pollution, and loss of biodiversity.[21] Eighteen percent of all greenhouse gas emissions stem from animal agriculture, which exceeds the combined amount attributable to exhaust from all forms of transportation.[22] Of the eighteen percent of all greenhouse gases that stem from animal agriculture, cattle farming consists of forty-one percent and continues to get worse as the demand rises.[23] The United Nations Food and Agriculture Organization (FAO) estimates that the global demand for beef and other ruminant meats (beef, bison, and lamb) could grow by eighty-eight percent from 2010 to 2050.[24] The projected increase in beef production will come at a heavy price for animals, humans, and the environment; including a significant increase in greenhouse gas emissions, deforestation, loss of biodiversity, and diminished access to fresh water.[25]

i. Greenhouse Gas

FAO has found animal agriculture responsible for eighteen percent, or nearly one-fifth, of human-induced greenhouse gas emissions.[26] Ruminant meats (beef and lamb) have the largest greenhouse gas emissions per gram of protein at two hundred and fifty times those of legumes.[27] While laws in place limit the greenhouse gas emissions for vehicles, no laws limit the greenhouse gas emissions for animal agriculture.[28] Yet, the amount of greenhouse gas emissions attributed to animal agriculture far exceeds that of the transportation sector.[29] The emissions attributable to current trends in diet, due largely to the mass consumption of meat, are projected to increase by eighty percent by 2050.[30]

With a projected worldwide population increase to ten billion people by 2050 and with an increase in meat consumption, animal

[21] *See* Livestock's Long Shadow, *supra* note 9, at xx.

[22] *See id.* at 112.

[23] *See* Waite et al., *supra* note 12.

[24] *See id.*

[25] *See id.*

[26] The State of Food and Agriculture, *supra* note 20, at vi.

[27] David Tilman & Michael Clark, *Global Diets Link Environmental Sustainability and Human Health*, 515 Nature 518, 518 (2014).

[28] *Carbon Pollution from Transportation*, EPA, https://www.epa.gov/transportation-air-pollution-and-climate-change/carbon-pollution-transportation (last visited Mar. 23, 2020) (describing the different regulations and standards set out by the EPA to lower emissions from transportation vehicles).

[29] *Global Greenhouse Gas Emissions Data*, EPA, https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data (last visited Mar. 23, 2020) (listing the transportation sector as fourteen percent and Animal Agriculture as more than twenty-five percent of global greenhouse gas emissions).

[30] David Tilman & Michael Clark, *supra* note 27.

agriculture alone could account for a majority of the emissions budgeted for by the Intergovernmental Panel on Climate Change (IPCC) in limiting global warming below 2ºC (or 3.6ºF).[31] While this may not seem like a significant temperature difference to a person individually, the IPCC considers a 2ºC increase to be "an extinction-level event."[32] In fact, with an increase of 2ºC of global warming, coral reefs could decline as much as ninety-nine percent,[33] "sea [levels] will rise by nearly half a meter, rainfall patterns will change, crop yields in the tropics will decrease, and harvests from marine fisheries will decline."[34] The 2ºC is just an overall global estimate, however, and the IPCC stated that the frequency of extreme temperature increases may rise in many regions.[35] For example, in May 2018 in Pakistan, temperatures hit above 110ºF and sixty-five people died in one city alone.[36] In January 2020, Antarctica reached 65ºF, the continent's highest temperature ever recorded.[37] The current state of higher temperatures already causes droughts, crop depletion, iceberg melting, and extreme storms such as hurricanes.[38] Although these events happen already, the increase in climate change would continue to have even more catastrophic impacts in the time to come.[39]

ii. Desolation of Land, Crops, and Water

Industrial animal agriculture uses more than three-quarters of all agricultural land.[40] While animal agricultural production maintains a large majority of land allocated for agriculture, meat and dairy products

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[31] Richard Waite & Daniel Vennard, *Without Changing Diets, Agriculture Alone Could Produce Enough Emissions to Surpass 1.5ºC of Global Warming*, World Res. Inst. (Oct. 17, 2018), https://www.wri.org/blog/2018/10/we-cant-limit-global-warming-15c-without-changing-diets; *see also Why Is 1.5 Degrees the Danger Line for Global Warming?*, Climate Reality Project (Mar. 18, 2019), https://www.climaterealityproject.org/blog/why-15-degrees-danger-line-global-warming.

[32] *Why Is 1.5 Degrees the Danger Line for Global Warming?*, *supra* note 31.

[33] *Id.*

[34] Waite & Vennard, *supra* note 31.

[35] *Why is 1.5 Degrees the Danger Line for Global Warming?*, *supra* note 31.

[36] *Id.*

[37] Matthew Cappucci, *Antarctica Just Hit 65 Degrees, Its Warmest Temperature Ever Recorded*, Wash. Post (Feb. 7, 2020), https://www.washingtonpost.com/weather/2020/02/07/antarctica-just-hit-65-degrees-its-warmest-temperature-ever-recorded/.

[38] Nadja Popovich, *From Heat Waves to Hurricanes*, N.Y. Times (Sept. 15, 2017), https://www.nytimes.com/interactive/2017/09/15/climate/does-climate-change-cause-hurricanes-drought.html.

[39] *See generally* Livestock's Long Shadow, *supra* note 9, at 112.

[40] Emily S. Cassidy et al., *Redefining Agricultural Yields: From Tonnes to People Nourished Per Hectare*, 8(3) Envtl. Research Letters 2 (2013) (defining agricultural land as land used for animal feed production and grazing land).

globally supply only eighteen percent of calories and only thirty-seven percent of protein.[41] Therefore, the eleven million square kilometers used for production of grains and vegetables supply more calories and protein for the global human population than the area (nearly three times larger) used for animal production.[42]

The "land footprint" of a food product is computed by considering the average land necessary to produce one unit of protein by food type.[43] Beef has the largest "land footprint"of all livestock, requiring land use of up to one hundred times more than grains and eight to ten times more than poultry.[44] Beef production projects to grow by more than ninety-two percent between 2006 and 2050, which would require even large[r] land requirements to produce feed.[45] Despite improvements to beef farming efficiency, increased global demand for beef would continue to expand pastureland needed for beef farming to nearly one billion acres, an area of land larger than the size of India, the seventh largest country in the world.[46]

According to the United Nations, the world population increases by approximately eighty-three million people every year.[47] At this rate, the global population far outpaces the beef industry's ability to keep up with global demand for food production.[48] Current levels of environmental destruction will only get worse as beef consumption and population continue to rise.[49] Increasing crop production to account for the growth in population requires a substantial amount of resources, resulting in environmental effects that will continue to damage the planet.[50] Cattle farming alone accounts for eighty percent of deforestation in the Amazon Rainforest.[51] Mass deforestation mainly occurring to accommodate the "surging demand for beef."[52]

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[41] Hannah Ritchie & Max Roser, *Land Use*, Our World in Data (Sept. 2019), https://ourworldindata.org/land-use.

[42] *See generally id.*

[43] *See, e.g.*, *id.*

[44] Michael Clark & David Tilman, *Comparative Analysis of Environmental Impacts of Agricultural Production Systems, Agricultural Input Efficiency, and Food Choice*, 12 Envtl. Research Letters 1, 8 fig.8 (2017).

[45] Tim Searchinger et al., Creating a Sustainable Food Future 4 (2013).

[46] *See* Waite et al., *supra* note 12.

[47] *World Population Projected to Reach 9.8 Billion in 2050, and 11.2 Billion in 2100*, U.N., Dep't of Econ. & Soc. Affs., (June 21, 2017), https://www.un.org/development/desa/en/news/population/world-population-prospects-2017.html.

[48] *See generally id.*

[49] *See generally id.*

[50] *See* Christopher Ingraham, *How Beef Demand is Accelerating the Amazon's Deforestation and Climate Peril*, Wash. Post (Aug. 27, 2019), https://www.washingtonpost.com/business/2019/08/27/how-beef-demand-is-accelerating-amazons-deforestation-climate-peril/.

[51] *Id.*

[52] *Id.*; *see also* J. B. Veiga et al., *Cattle Ranching in the Amazon Rainforest*,

The demand for beef continues to grow all over the world.[53] To accommodate the larger demand, the beef industry clears forests and destroys habitats.[54] Besides the loss of habitat, deforestation causes carbon dioxide emissions,[55] loss of biodiversity, soil degradation, and water pollution; all elements large-scale cattle farming already contributes to.[56] The World Wildlife Fund (WWF) stated that with more people eating diets high in meat, the production of crops to feed the livestock puts a strain on the planet's natural resources and "is a driving force behind wide-scale biodiversity loss."[57] WWF cites the United Kingdom food supply as being solely responsible for the extinction of about thirty-three species.[58]

On the global average, the beef humans consume for protein converts only one percent of gross animal feed energy into food for people.[59] Researchers found that thirty-six percent of the calories from crops are being fed to animals, and when consumed by humans, only twelve percent of those calories contribute to the human diet as meat.[60] This means that humans lose two-thirds of the number of calories by consuming meat as opposed to just consuming the crops directly.[61] The researchers also found that "given the current mix of crop uses, growing food exclusively for direct human consumption could, in principle, increase available food calories by as much as seventy percent, which could feed an additional four billion people (more than the projected billions of people arriving through population growth)."[62] The amount of grain and other foods necessary to feed livestock for eventual human consumption is so significant that if people refrained from eating meat, worldwide hunger would likely be eradicated.[63]

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24 Animal Prod. Austl. 253, 254 (2002).

[53] Ingraham, *supra* note 50 (discussing Brazil's beef exports increasing by twenty-five percent (1.5 million tons) from 2010 to 2017).

[54] *See id.*

[55] Food & Agric. Org. of the United Nations [hereinafter FAO], Livestock Policy Brief: Cattle Ranching and Deforestation 2 (2007) ("Since trees absorb carbon from the atmosphere and convert it to woody tissue, deforestation also contributes to the buildup of greenhouse gases by destroying valuable 'carbon sinks'.").

[56] *See id.*

[57] World Wide Fund for Nature, Appetite for Destruction, 2 (2017).

[58] *Id.*

[59] Searchinger et al., *supra* note 45.

[60] Cassidy et al., *supra* note 40, at 1.

[61] *Id.* Thirty-six percent of the calories from crops are being fed to livestock; so that is about one-third of the amount of calories that livestock receives that humans could consume. If humans ate the crops instead, they would be getting one hundred percent of the calories from crops, so, therefore, they are losing two-thirds by consuming the livestock as opposed to just the crops.

[62] Cassidy et al., *supra* note 40, at 1.

[63] *See generally id.*

Agriculture consumes eighty to ninety percent of the United States' water consumption.[64] According to the Beef Cattle Research Council, just one pound of beef requires about 1,910 gallons of water.[65] One person could save more water by not eating one pound of beef than what could be saved by not showering for six months.[66] The amount of water usage would not be a point of contention if the United States did not already have a shortage of it.[67]

Over the past fifty years, California has spent seventeen of those years experiencing catastrophic drought conditions due to the lack of available fresh water.[68] In the most recent drought, which ended in 2016, many people pointed their fingers at almonds for causing the fresh water shortage.[69] California produces about eighty percent of the world's almonds, and each almond takes about a gallon of water to produce.[70] However, this amount of water does not compare to the 1,910 gallons required for one pound of beef.[71]

Another editorial even goes so far as to blame alfalfa, a vegetable grown in California that consumes a great deal of water and is primarily

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[64] *Irrigation & Water Use*, Econ. Res. Serv. USDA, https://www.ers.usda.gov/topics/farm-practices-management/irrigation-water-use/background.aspx (last updated on Sept. 23, 2019).

[65] *How Much Water is Used to Make A Pound of Beef?*, Beef Cattle Res. Council, http://www.beefresearch.ca/blog/cattle-feed-water-use/ (last updated Feb. 27, 2019).

[66] Steve Boyan, *How Our Food Choices Can Help Save the Environment*, Earth Save, http://www.earthsave.org/environment/foodchoices.htm (last visited Feb. 13, 2020).

[67] *See generally California Droughts Compared*, U.S. Geological Surv., https://ca.water.usgs.gov/california-drought/california-drought-comparisons.html (last accessed Mar. 25, 2020).

[68] *See id.* (considering that the 1976-1977 drought lasted for two years, the 1987-1992 drought lasted for six years, the 2001-2002 drought lasted for two years, the 2007-2009 drought lasted for two years, and the 2012-2016 drought lasted for five years, for a total of seventeen years of droughts in California over the last half-century).

[69] *See* Robin Abcarian, *Almonds, the Demons of Drought?*, L.A. Times (Apr. 16, 2015), https://www.latimes.com/local/abcarian/la-me-0417-abcarian-almonds-demons-20150417-column.html; *see also* Eric Holthaus, *Stop Vilifying Almonds*, Slate (Apr. 17, 2015), https://slate.com/business/2015/04/almonds-in-california-they-use-up-a-lot-of-water-but-they-deserve-a-place-in-californias-future.html; *see also* Tom Philpott & Julia Lurie, *Here's the Real Problem With Almonds*, New Republic (Dec. 31, 2015), https://newrepublic.com/article/125450/heres-real-problem-almonds.

[70] *See* Cal. Almonds, 2013 Almond Almanac 6 (2013); *see also* Erin Brodwin, *One Chart Sums Up the Real Problem in the California Drought—and It Isn't Almonds*, Bus. Insider (Apr. 13, 2015), https://www.businessinsider.com/real-villain-in-the-california-drought-isnt-almonds--its-red-meat-2015-4.

[71] *How Much Water is Used to Make A Pound of Beef*?, *supra* note 64.

used to feed beef cattle.[72] However, production of alfalfa only needs rain water to be grown, while for slaughter, beef cattle require around 132 gallons of water per animal carcass.[73] While people try to point fingers at alfalfa, seventy percent of the alfalfa grown in California goes directly to feeding beef cattle.[74] So the water being used on alfalfa, is actually being used mostly for beef production.[75] Despite the compelling arguments for alfalfa and almonds, they do not compare to the exuberant dent large-scale beef farming creates in the U.S. fresh water supply.[76]

iii. Waste

According to the documentary "Cowspiracy," animals raised for food in the United States produce seven million pounds of excrement every minute.[77] A beef farm with one thousand cattle, which includes every CAFO, produces about twenty-one million pounds of manure per year.[78] To put that amount into perspective, a farm with 2,500 cattle produces a similar waste load to a city of 411,000 people.[79] Nationwide, the amount of animal waste produced per year exceeds that produced by humans, estimated as five tons for every person, by more than 130 times.[80] The government treats human waste in sewer systems and strictly regulates these sewer systems to ensure safe sanitation standards.[81] CAFOs, however, store livestock waste in ponds or pits and use the waste as fertilizer in the fields.[82] These ponds lack durability, mostly being lined with only clay, and the ponds can leak into the groundwater that feeds into rivers, lakes, oceans, and drinking water.[83]

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[72] James Mcwilliams, *Meat Makes the Planet Thirsty*, N.Y. Times (Mar. 7, 2014), https://www.nytimes.com/2014/03/08/opinion/meat-makes-the-planet-thirsty.html.

[73] Dennis Hayes & Gail B. Hayes, Cowed: The Hidden Impact of 93 Million Cows on America's Health, Economy, Politics, Culture, and Environment 38 (2015).

[74] Dennis Silverman, *Beef in California Agriculture*, U.C. Irvine: Energy Blog (Apr. 21, 2015), https://sites.uci.edu/energyobserver/2015/04/21/beef-in-california-agriculture/.

[75] *See id.*

[76] *See id.*

[77] *Facts*, Cowspiracy, https://www.cowspiracy.com/facts (last visited Mar. 25, 2020).

[78] EPA, Risk Assessment Evaluation for Concentrated Animal Feeding Operations 6 (2004).

[79] *Id.* at 7.

[80] *Environment*, PEW Comm'n on Indus. Farm Animal Prod. [PEW], http://www.pcifapia.org/issues/environment/ (last visited Mar. 25, 2020).

[81] *What Happens to Animal Waste?*, Food Print, https://foodprint.org/issues/what-happens-to-animal-waste/ (last visited Dec. 2, 2019).

[82] *See id.*

[83] *See id.*

Using ponds to store the immense quantity of beef cattle waste produced by industrial agricultural operations is unsustainable.[84] Waste from beef cattle threatens surface water by causing dead zones due to the manure runoff from CAFOs.[85] This runoff leads to an overgrowth of algae that consumes all the oxygen needed to support the life of other organisms.[86] In 2015, manure from livestock and agricultural fertilizer caused a dead zone in the Gulf of Mexico that was more than five thousand square miles, equal to the size of Connecticut and Rhode Island combined.[87] The planet's oceans, lakes, and fresh water sources cannot stand to ignore this problem any longer.

b. The Mass Consumption of Beef Leads to Serious and Life-threatening Human Health Issues Due to the Immense Amount of Antibiotics, Carcinogens, Cholesterol, and Saturated Fat in Beef.

From January of 2019 to January of 2020, the USDA reported that commercial beef farms produced about 27.151 billion pounds of beef, surpassing the previous year's amount of 26.767 billion pounds.[88] This is not surprising, since basically every restaurant serves at least one, if not several, menu items containing beef. Even the fries at McDonalds are not free of beef; the fast food giant uses natural beef flavor to cook their fries.[89] From McDonald's cheeseburgers to fancy steaks, Taco Bell tacos to mom's sloppy joes, beef is a staple in American food culture.

The beef industry would like people to believe that mass consumption of beef promotes a healthy and balanced diet, even going so far as to say that consuming beef maintains "a strong and healthy heart" and "lower[s] blood pressure."[90] However, the beef industry fails to recognize the significant amount of red meat consumed by Americans

[84] *See id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Livestock & Meat Domestic Data*, ERS, USDA, https://www.ers.usda.gov/data-products/livestock-meat-domestic-data/ (follow "Historical" under heading "All meat Statistics" then go to the table "Red meat and poultry production"; then add all of the yearly amounts from Jan-2019 through Dec-2019 to get 27.151 billion) (last visited Mar. 15, 2021).

[89] Christina Goyanes, *What's REALLY Inside McDonald's French Fries?*, U.S. Food Safety (Jan. 4, 2017), https://blog.usfoodsafety.com/2017/01/04/whats-really-inside-mcdonalds-french-fries-3/.

[90] *Beef and Health*, Beef. It's What's for Dinner., https://www.beefitswhatsfordinner.com/nutrition/beef-and-health (last visited Feb. 20, 2020); *see also Beef in a Healthy, Sustainable Diet*, Beef. It's What's for Dinner., https://www.beefitswhatsfordinner.com/raising-beef/beef-in-a-sustainable-diet (last visited Feb. 20, 2020).

every day. The National Institute of Health says that eating red meat on a regular basis can diminish life expectancy and can increase the risks of developing type 2 diabetes, cardiovascular disease, and certain cancers.[91] Scientific experts cite additional hazards to health from beef consumption, including the use of unapproved veterinary drugs, pesticides, and other dangerous substances in food commodities.[92] Research cites beef as a major contributor to humans becoming antibiotic resistant; contracting life-threatening diseases such as diabetes, heart disease, cancer, and mad cow disease; and contributing to the obesity epidemic.[93]

The average American, per USDA data, consumed a quantity of beef equivalent to 2.4 burgers per day, or 800 hamburgers total, over the course of the year in 2018.[94] This number is even more extreme when considering that serving sizes for hamburgers in the United States have grown by twenty-three percent in the past twenty years.[95] The 2.4 burgers per day equates to 960 calories, forty-five grams of fat, and ninety-six grams of carbohydrates per day,[96] which equals nearly thirty-seven pounds of fat and 350,400 calories a year.[97] These numbers show the dangers of mass amounts of beef consumption on Americans' health.

i. Agencies and Participants

Americans entrust several market participants and federal agencies with protecting the public's health. Federal laws require manufacturers, distributors, and retailers to ensure their food products

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[91] *Id.*

[92] Jacob E. Gersen et al., Food Law and Policy 178 (2019).

[93] *See* Harrison Wein, *supra* note 14; *see also* Ralph F. Loglisci, *Animals Consume Lion's Share of Antibiotics*, Food Safety News (Dec. 27, 2010), https://www.foodsafetynews.com/2010/12/animals-consume-lions-share-of-antibiotics/#.WIIFx31kvfZ; *see also Bovine Spongiform Encephalopathy (BSE), or Mad Cow Disease*, CDC, https://www.cdc.gov/prions/bse/index.html (last visited Mar. 26, 2020).

[94] Chase Purdy, *The Average American Will Eat the Equivalent of 800 Hamburgers in 2018*, Quartz (Jan. 4, 2018), https://qz.com/1171669/the-average-american-will-eat-the-equivalent-of-800-hamburgers-in-2018/.

[95] John McKenzie, *Food Portion Sizes Have Grown—A Lot*, ABC News (Jan. 21, 2003), https://abcnews.go.com/WN/food-portion-sizes-grown-lot/story?id=129685.

[96] *FoodData Central: Cheeseburger*, USDA (Oct. 5, 2018), https://fdc.nal.usda.gov/fdc-app.html#/food-details/525802/nutrients (multiplying 400 calories, 19g of fat, and 40g of carbohydrates by 2.4 equals 960, 45, and 96, respectively).

[97] *See* Chase Purdy, *supra* note 94; *see also FoodData Central: Cheeseburger*, *supra* note 96 (multiplying 960 calories per day by 365 days, and 45 grams of fat by 365 days = 16,644, considering 454 grams of fat equals one pound of fat, equals 36.66 pounds).

are wholesome, safe, and handled under sanitary conditions.[98] These laws intend to hold the supply chain accountable for food unfit for human consumption or that causes foodborne illnesses. The supply chain members are held to strict liability standards and can be held liable if the food is not "reasonably fit for human consumption."[99]

The USDA and the Federal Food and Drug Administration (FDA) handle a majority of food and food safety regulations. The USDA Food Safety and Inspection Service (FSIS) carries the responsibility for the regulation of most meat and poultry.[100] FSIS is tasked with implementing and enforcing the Federal Meat Inspection Act.[101] The Federal Meat Inspection Act (FMIA) of 1906, as amended, requires the USDA to inspect all cattle, sheep, swine, goats, horses, mules, and other equines slaughtered and processed for human consumption to ensure that they comply with all of the strictly regulated sanitary conditions.[102] Despite the inspections depending on FSIS inspectors, recent changes to the inspection systems reduce the number of these inspectors by about forty percent.[103] To make up for the lack of federal inspectors, the USDA has put the slaughterhouses' own employees in charge of inspecting the meat.[104] Inspectors are not always able to check the food itself, often checking paperwork prepared by the slaughterhouses before giving the meat a stamp of approval.[105] In one survey of federal inspectors, nearly seventy percent admitted to not taking action when they became aware of contamination in meat such as feces, vomit, and metal shards.[106] Nearly seventy percent of these inspectors said that this kind of contamination occurs daily or weekly.[107]

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[98] Renée Jonson, The Federal Food Safety System: A Primer 1 (2016).

[99] William Marler, *Legal Issues for Food Safety*, Food Safety & Quality Mag. 6, 6 (Aug. 31, 2009).

[100] Renée Jonson, *supra* note 98.

[101] *See generally Federal Meat Inspection Act*, Food Safety & Inspection Serv. [FSIS], USDA (Jan. 21, 2016), https://www.fsis.usda.gov/wps/portal/fsis/topics/rulemaking/federal-meat-inspection-act.

[102] *See* Federal Meat Inspection Act, 21 U.S.C. §§601-695 (2005).

[103] *See* Darcey Rakestraw, *Confirmed: USDA Now Pursuing Privatized Beef Inspections*, Food & Water Watch (June 10, 2019), https://www.foodandwaterwatch.org/news/confirmed-usda-now-pursuing-privatized-beef-inspections; Kimberly Kindy, *Pork Industry Soon Will Have More Power Over Meat Inspections*, Wash. Post (Apr. 3, 2019), https://www.washingtonpost.com/business/economy/pork-industry-soon-will-have-more-power-over-meat-inspections/2019/04/03/12921fea-4f30-11e9-8d28-f5149e5a2fda_story.html.

[104] Kimberly Kindy, *supra* note 103.

[105] *See* Robin Eisner, *Report: USDA Meat Inspection System Poor*, ABC News (Jan. 6, 2006, 8:51 AM), https://abcnews.go.com/Health/story?id=117992&page=1.

[106] *See id.*

[107] *See id.*

USDA's Animal and Plant Health Inspection Service (APHIS) helps protect and promote the health of U.S. agriculture, regulate engineered organisms, administer the Animal Welfare Act, and work to manage wildlife damage.[108] In overseeing animal and plant health, APHIS prevents foreign diseases and pests and works to eradicate and contain such problems domestically (including those that threaten public health).[109] APHIS also indirectly protects the nation's food supply through programs that protect plant and animal resources from domestic and foreign pests and diseases, such as bovine spongiform encephalopathy (BSE, or "mad cow" disease).[110] While all of the responsibilities of APHIS are important, APHIS fails in protecting agriculture because it fails to protect what happens to livestock.[111] The Animal Welfare Act limits the animals that APHIS can protect by explicitly leaving out animals used for agriculture purposes or animals used for the production of food or fiber.[112]

The role of the Centers for Disease Control and Prevention (CDC) is "[d]etecting and responding to new and emerging health threats[,] tackling the biggest health problems causing death and disability for Americans[,]…[and p]romoting healthy and safe behaviors, communities and environment[.]"[113] The CDC has acknowledged that eating patterns that have a lower intake of meat have been shown to produce a lower risk of obesity, cardiovascular disease, type 2 diabetes, and some cancer.[114] Since the CDC has commented on the health threats and the risk of death or diseases that arise from eating beef, the assumption would be that the CDC would promote alternative options to the consumption of beef or warn about the dangers of beef. Yet, despite the mass amounts of research that beef causes serious health problems, the CDC's reporting has not significantly impacted the consumption nor the production of beef.[115]

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[108] *About APHIS*, Animal & Plant Health Inspection Serv. [APHIS], USDA, https://www.aphis.usda.gov/aphis/banner/aboutaphis (last modified Jan. 25, 2021).

[109] *See generally* Animal Health Protection Act, 7 U.S.C. §§8301-8322 (2002).

[110] Renée Jonson, *supra* note 98, at 8.

[111] *See* Animal Welfare Act, 7 U.S.C. §2132(g) (2014).

[112] *See id.*

[113] *About CDC 24-7*, Ctrs. for Disease Control & Prevention [hereinafter CDC], https://www.cdc.gov/about/organization/mission.htm.

[114] Health & Human Servs. & U.S. Dep't Agric., Dietary Guidelines 2015-2020 at 25 (2015).

[115] This is true, considering Americans are consuming, on average as of 2018, 2.4 hamburgers a day. *See* Purdy, *supra* note 94.

ii. Antibiotic Resistance

The CDC acknowledged that antibiotic resistance poses "a major global public health threat."[116] According to the analysts of Research and Development Corporation, a U.S. nonprofit global organization, "a worst-case scenario may evolve in the coming future where the world might be left without any potent antimicrobial agent to treat bacterial infections."[117] While the CDC does a lot of work to prevent the spread of foodborne infections caused by antibiotic-resistant bacteria, CAFOs continue the same practices that feed the epidemic.[118]

Beef in the United States comes from a factory where the cows do not eat out of troughs or from the hands of a farmer, but rather off a floor covered in feces, urine, dead animals, and whatever other chemicals and substances find themselves on the factory floor.[119] People fail to realize that humans eat what their meat eats.[120] Antibiotic resistance occurs when the use of an antibiotic that used to be able to kill germs and viruses fails to its essential purpose, and the germs and viruses survive despite the use of an antibiotic.[121] People get antibiotic resistance from meat when the animal was given a certain antibiotic, and the resistant bacteria in the animal's intestines continues to survive and grow after the animal was slaughtered and processed.[122] If a person becomes resistant to antibiotics because of meat they have eaten it can lead to hospitalization or even death since the body can no longer fight off the virus or bacteria.[123] Antibiotic Resistant bacteria does not only affect the person that consumed the meat, but it can spread to other people as well.[124] If a person has developed antibiotic resistant bacteria by taking antibiotics, the resistant bacteria can spread to anyone that comes in contact with that bacteria.[125]

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[116] *Antibiotic Resistance and NARMS Surveillance*, CDC, https://www.cdc.gov/narms/faq.html (last visited Mar. 25, 2020).

[117] Bilal Aslam et al., *Antibiotic Resistance: A Rundown of A Global Crisis*, 11 Infection & Drug Resistance 1647 (2018).

[118] *Antibiotic Resistance and NARMS Surveillance*, *supra* note 116.

[119] *See Animal Feeding Operations*, Nat. Res. Conservation Serv., USDA, https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/plantsanimals/livestock/afo/ (last visited Feb. 13, 2020); PEW, Putting Meat on the Table: Industrial Farm Animal Production in America 16 (2008); Christine Ball-Blakely, *CAFOs: Plaguing North Carolina Communities of Color*, 18(1) Sustainable Dev. L. & Policy 4, 4 (2017).

[120] *See generally Antibiotic Resistance and NARMS Surveillance*, *supra* note 116.

[121] *Id.*

[122] *Id.*

[123] *See id.*

[124] *See id.*

[125] *See id.*

The pharmaceutical industry sells eighty percent of all antibiotics made in the United States for use in animal agriculture.[126] These antibiotics are not only being used to treat diseases, but also as a method for maximizing profits.[127] Before 2007, the FDA allowed beef and livestock producers to administer antibiotics to their livestock through their food and water to increase their growing speed in an attempt to maximize profits and minimize costs.[128] In 2009, the FDA released a report depicting the amount of antibiotics sold and distributed for use on livestock raised for food: 34.3 million pounds.[129] The amount sold to people totaled only 7.7 million pounds.[130] The amount of antibiotics being pumped and fed into the meat Americans consume consists of four times the amount that Americans take themselves.[131]

iii. Leading to diseases

A study that followed over 27,000 men and 53,000 women for seven years found that individuals that consumed a larger amount of red meat also had higher mortality rates over the course of an eight year period.[132] In addition, an increase of just half a serving of red meat each day led to a ten percent higher risk of mortality.[133] The large amount of beef the United States consumes rapidly degrades not only the health of Americans, but their lifespan as well.[134]

1. Type 2 Diabetes

The CDC credits type 2 diabetes as one of the leading causes of death in the United States.[135] In 2014, there were 422 million people suffering from diabetes.[136] In 2016, the World Health Organization

[126] Ralph F. Loglisci, *supra* note 93.

[127] *See id.*

[128] *Id.*

[129] Maryn Mckenna, *After Years of Debate, the FDA Finally Curtails Antibiotic Use in Livestock*, Newsweek (Jan. 13, 2017, 11:45 AM), https://www.newsweek.com/after-years-debate-fda-curtails-antibiotic-use-livestock-542428.

[130] *Id.*

[131] *Id.* The amount taken by humans is 7.7 and the amount given to livestock is 34.3. When you divide 34.3 by 7.7, you get 4.45, which is over 4 times the amount of antibiotics used.

[132] Yan Zheng et al., Association of Changes in Red Meat Consumption With Total and Cause Specific Mortality Amoung US Women and Men 1,1 (2019).

[133] *Id.*

[134] *See id.*

[135] *Diabetes: Quick Facts*, CDC, https://www.cdc.gov/diabetes/basics/quick-facts.html (last visited Mar. 25, 2020).

[136] *Diabetes*, World Health Org. (Oct. 30, 2018), https://www.who.int/news-room/fact-sheets/detail/diabetes.

(WHO) estimated that around 1.6 million people died as a result of having diabetes.[137] More than eleven percent of American adults aged twenty or older suffer from diabetes, and ninety to ninety-five percent of those with diabetes suffer from type 2 diabetes.[138]

The World Health Organization defines diabetes as:

> [A] chronic disease that occurs either when the pancreas does not produce enough insulin or when the body cannot effectively use the insulin [a hormone that regulates blood sugar] it produces… . Hyperglycemia, or raised blood sugar, is a common effect of uncontrolled diabetes and over time leads to serious damage to many of the body's systems, especially the nerves and blood vessels.[139]

Type 1 diabetes, also known as juvenile or childhood onset diabetes, cannot be prevented and the cause is unknown.[140] A person develops type 2 diabetes when the body's cells do not respond normally to insulin.[141] So the pancreas makes more insulin in an attempt to get the cells to respond, but the pancreas eventually cannot keep up.[142] This leads to high blood sugar, which causes other serious health ailments such as heart disease, vision loss, and kidney disease.[143] While people cannot prevent type 1 diabetes, they can prevent type 2.[144]

Dietary factors, along with obesity and physical inactivity, strongly contribute to the development of type 2 diabetes.[145] Studies show that the consumption of red meat leads to type 2 diabetes.[146] These studies show that saturated fat, a fat highly prevalent in beef, leads to the development of type 2 diabetes.[147] According to a study conducted on red meat and its relation to type 2 diabetes, one additional serving of red meat per day led to a twelve to fourteen percent increase in risk

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[137] *Id.*

[138] An Pan et al., *Red Meat Consumption and Risk of Type 2 Diabetes*, American J. Clinical Nutrition 1,1 (2011).

[139] *Diabetes*, *supra* note 136.

[140] *Id.*

[141] *Diabetes: Type 2*, CDC, https://www.cdc.gov/diabetes/basics/type2.html (last visited Dec. 2, 2019).

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *See Diabetes*, *supra* note 136.

[146] *See generally* Renata Micha et al., *Unprocessed Red and Processed Meats and Risk of Coronary Artery Disease and Type 2 Diabetes*, 14(6) Current Atherosclerosis Reps. 8 (2012).

[147] *Diabetes*, *supra* note 136.

for developing type 2 diabetes.[148] Scientists suggest that one of the best ways to prevent and possibly reverse type 2 diabetes involves changing diets away from saturated fats, beef, and processed foods towards a more whole foods, plant-based diet.[149]

2. Cardiovascular—Heart Disease

Scientists find that people who have a diet high in red meat have higher rates of heart disease.[150] According to the American Heart Association (AHA), red meat, such as beef, has more saturated fat than chicken, fish, and beans.[151] The AHA claims that eating high amounts of saturated fat, which they define as "bad fat," raises blood cholesterol levels and leads to an increase in risk for heart disease.[152] The AHA suggests people choose more lean meats, such as chicken, fish, or beans, instead of red meats, such as beef.[153] The more interesting studies in the area of heart disease and diet use lifestyle interventions, such as cutting beef from one's diet, to slow and even reverse the progression of disease--and some to prevent the disease entirely.[154]

3. Cancer

Despite voluminous data reported in scholarly journals about the link between red meat consumption and various forms of cancer, federal agencies responsible for nutritional guidelines fail to accurately report and update these guidelines.[155] For example, research has shown

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[148] An Pan et al., *supra* note 138, at 3.

[149] *See* Dietary Guidelines 2015-2020, *supra* note 114, at 17; *see also* Michelle McMacken & Sapana Shah, *A Plant-Based Diet for the Prevention and Treatment of Type 2 Diabetes*, 14 J. Geriatric Cardiology 342, 343 (2017); Ginger Vieira, *A Plant-Based Diet Can Reduce Your Risk for Type 2 Diabetes, If You Do It Correctly*, Healthline (July 23, 2019), https://www.healthline.com/health-news/the-right-plant-based-diet-can-lower-your-risk-for-type-2-diabetes.

[150] NIH, *Eating Red Meat Daily Triples Heart Disease-Related Chemical*, NIH Research Matters (Jan. 8, 2019), https://www.nih.gov/news-events/nih-research-matters/eating-red-meat-daily-triples-heart-disease-related-chemical.

[151] *Meat, Poultry, and Fish: Picking Healthy Proteins*, American Heart Ass'n (Mar. 26, 2017), https://www.heart.org/en/healthy-living/healthy-eating/eat-smart/nutrition-basics/meat-poultry-and-fish-picking-healthy-proteins.

[152] *Id.*

[153] *Id.*

[154] *See, e.g.*, Francesca L. Crowe et al., *Risk of Hospitalization or Death from Ischemic Heart Disease Among British Vegetarians and Non-Vegetarians*, 97 American J. Clinical Nutrition 597, 597 (2013) (discussing the lower risk of cardiovascular disease in vegetarians).

[155] *See* Anahad O'Connor, *Meat is Linked to Higher Cancer Risk, W.H.O. Report Finds*, N.Y. Times (Oct. 26, 2015), https://www.nytimes.com/2015/10/27/health/

that individuals who eat higher amounts of red meat are more likely to develop colorectal cancer.[156] Scientists have also found that high intakes of red and processed meat, such as beef, led to a thirty percent increased risk of developing advanced prostate cancer.[157] In addition, one study found that a higher consumption of red meat directly related to the development of invasive breast cancer in women.[158]

While stating that certain lifestyle choices correlate to an increased risk in developing cancer may not be as motivating to change one's diet, the risk becomes less abstract when considering the fact that cancer kills a projected 1,660 Americans every day.[159] According to the World Health Organization, diets high in red meat could be responsible for as many as fifty thousand cancer deaths per year.[160] The number of deaths directly linked to red meat consumption likely exceeds this number, considering a diet high in red meat can lead to the most prevalent cancers in men and women: prostate and breast cancer.[161] The estimated numbers in 2019 of all new cancer cases in the United States project twenty percent of the cancers in men to be in their prostate and thirty percent of cancers in women to be in their breasts.[162] Research has undeniably demonstrated the direct relationship between the high consumption of red meat and two of the most prevalent cancers for both men and women in America.[163] It is time that government agencies acknowledge the facts and start treating the mass consumption of beef as a national epidemic.

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report-links-some-types-of-cancer-with-processed-or-red-meat.html (commenting on the influence that these results should have on federal agencies); *see generally* Scientific Committee on Veterinary Measures Relating to Public Health (EC), Opinion on the Assessment of Potential Risks to Human Health from Hormone Residues in Bovine Meat and Meat Products XXIV/B3/SC4, 16-22 (1999).

[156] Jennifer Berry, *Is Red Meat Bad for Your Health?*, Medical News Today (Aug. 27, 2019), https://www.medicalnewstoday.com/articles/326156.php#red-meat-and-health.

[157] Erin L. Richman et al., *Egg, Red Meat, and Poultry Intake and Risk of Lethal Prostate Cancer in the Prostate Specific Antigen-Era*, 4 Cancer Prevention Res. 2110, 2110 (2011).

[158] Jamie J. Lo et al., *Association Between Meat Consumption and Risk of Breast Cancer*, Int'l J. Cancer 2156, 2157 (2019).

[159] American Cancer Soc'y, Cancer Facts & Figures 2019 1, 1 (2019).

[160] *Cancer: Carcinogenicity of the Consumption of Red Meat and Processed Meat,* World Health Org. (Oct. 26, 2015), https://www.who.int/news-room/q-a-detail/q-a-on-the-carcinogenicity-of-the-consumption-of-red-meat-and-processed-meat.

[161] American Cancer Soc'y, *supra* note 159, at 10 fig.3.

[162] *Id.*

[163] *See* Yan Zheng, *supra* note 132 at 1.

4. Mad Cow Disease

The CDC defines Bovine Spongiform Encephalopathy (BSE), or mad cow disease, as "a progressive neurological disorder of cattle that results from infection by an unusual transmissible agent called a prion."[164] Researchers have found that the first cases of mad cow disease occurred in cows in the 1970s in the United Kingdom.[165] During that time, it was common to feed young calves meat and bone meal, a beef formula produced by the rendering industry.[166] Researchers attribute the origin of mad cow disease to this practice because the bovine meat and bone meal contained prion, the agent which creates the infection associated with mad cow disease.[167] People in the United Kingdom continued to eat this beef despite the fact that the cows were infected with the disease.[168]

In 1996, the UK experienced an outbreak of the human prion disease called Variant Creutzfeldt-Jakob disease (vCJD).[169] The CDC defines vCJD (the human form of mad cow disease) as an invariable, fatal brain disease with an incubation period spanning several years.[170] Many of the people who consumed the contaminated meat did not realize they were infected with the disorder until several years later.[171] While a human contracting mad cow disease is rare, the result is always fatal.[172] Mad cow disease results in total mental deterioration that occurs within a duration of twelve to fourteen months of showing initial signs.[173] As the disease progresses, those infected may lapse into a coma or experience heart failure, respiratory failure, pneumonia, or other infections that lead to their eventual death.[174]

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[164] *Bovine Spongiform Encephalopathy*, *supra* note 93.

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Variant Creutzfeldt-Jakob Disease (vCJD)*, CDC, https://www.cdc.gov/prions/vcjd/about.html (last modified Oct. 24, 2019).

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Creutzfeldt-Jakob Disease*, Mayo Clinic (Oct. 4, 2018), https://www.mayoclinic.org/diseases-conditions/creutzfeldt-jakob-disease/symptoms-causes/syc-20371226.

[174] *Id.*

5. Obesity and the Overconsumption of Protein

Obesity has become a global epidemic, and an especially dangerous epidemic in the United States.[175] According to the National Institute of Diabetes and Digestive and Kidney Diseases, more than one in three adults in the United States were considered obese in the years 2013-2014.[176] The U.S. Department of Health and Human Services lists obesity as a risk factor for a number of other serious chronic illnesses.[177] Cardiovascular disease, diabetes, and certain types of cancer all cite obesity as a leading factor.[178]

Studies show that consuming beef is an inefficient way of ingesting the edible calories and protein that the human body needs.[179] The International Recommended Dietary Allowance (RDA) for intake of protein per day for adult men and women suggests consuming about 0.8 grams of protein per kilogram of bodyweight.[180] This would mean that a woman who weighs about seventy kilograms, or 150 pounds, should consume fifty-six grams of protein per day.[181] However, the average person consumes about sixty-eight grams of protein per day, which outweighs the average daily adult requirement by more than one-third.[182] While not necessarily dangerous for human health, maintaining a healthy diet does not require above-average protein consumption.[183] A meat-heavy diet has been shown as a prevalent cause in developing

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[175] *See Controlling the Global Obesity Epidemic*, World Health Inst., https://www.who.int/nutrition/topics/obesity/en/ (last visited Mar. 28, 2020).

[176] *Overweight and Obesity Statistics*, Nat'l Inst. Diabetes & Digestive & Kidney Diseases, HHS, https://www.niddk.nih.gov/health-information/health-statistics/overweight-obesity?dkrd=hispt0880 (last visited Dec. 2, 2019).

[177] *Id.*

[178] *Id.*; *see also Obesity and Cancer*, Nat'l Cancer Inst., https://www.cancer.gov/about-cancer/causes-prevention/risk/obesity/obesity-fact-sheet (last visited Mar. 26, 2020).

[179] *See generally* Searchinger et al., *supra* note 45.

[180] *See* Marta Lonnie et al., *Protein for Life: Review of Optimal Protein Intake, Sustainable Dietary Sources and the Effect on Appetite in Ageing Adults*, 10(3) Nutrients 360, 362 (2018); Food & Nutrition Board of the Inst. of Med., Dietary Reference Intakes for Energy, Carbohydrate, Fiber, Fat, Fatty Acids, Cholesterol, Protein and Amino Acids 9 (2005).

[181] Taking 0.8 (the amount of protein per day per kilogram of body weight) and multiplying it by 70 kilograms will give the recommended daily intake of 56 grams of protein per day. *Protein Requirements Calculator,* Global RPh, https://globalrph.com/medcalcs/protein-requirements-daily/ (last visited Mar. 15, 2021).

[182] *People Are Eating More Protein Than They Need—Especially in Wealthy Regions*, World Res. Inst. (Apr. 2016), https://www.wri.org/resources/charts-graphs/people-eating-more-protein-wealthy-regions.

[183] *See generally id.*

obesity; in contrast, vegetarian or vegan diets have been shown to prevent obesity.[184]

II. What To Do—Suggestions for Legal Change to Save Public Health and the Environment

While it would be nearly impossible to bring a complete end to beef consumption in the near future, many realistic and necessary changes should be made now to protect not only cattle, but also human health and the environment. Thankfully, the current societal views on beef consumption have changed substantially over the course of this past decade alone.[185] Meat substitutes have exploded in popularity for both meat eaters and non-meat eaters; society has shifted its perspective on veganism and largely accepted and normalized it as a legitimate style of eating.[186] According to Forbes, the number of U.S. consumers that identified as being vegan grew from one percent to six percent between 2014 and 2017, a 600 percent increase.[187]

Americans are starting to realize the implications that eating beef has on their health.[188] With direct correlations between beef consumption, high rates of diabetes, cancer, and cardiovascular disease, it is no surprise that the American public is choosing to forgo beef with greater regularity.[189] Companies such as Beyond Meat and Impossible

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[184] *See, e.g.*, Y. Wang & M. A. Beydown, *Meat Consumption is Associated with Obesity and Central Obesity Among US Adults*, 33 Int'l J. Obesity 621, 621 (2009) (examining the association between meat consumption and obesity); Timothy Key et al., *Health Effects of Vegetarian and Vegan Diets*, 65 Proc. Nutrition Soc'y 37 (2006).

[185] *See* Melanie Joy, *Eating Meat Will Be Considered Unthinkable to Many 50 Years from Now*, Vox (Apr. 3, 2019), https://www.vox.com/2019/3/27/18174374/eating-meat-veganism-vegetarianism.

[186] *See id.*

[187] Janet Forgrieve, *The Growing Acceptance of Veganism*, Forbes (Nov. 2, 2018), https://www.forbes.com/sites/janetforgrieve/2018/11/02/picturing-a-kindler-gentler-world-vegan-month/#5ae1a9172f2b.

[188] *See* Alexandra Kelley, *1 in 4 Americans Are Eating Less Meat. Here's Why.*, The Hill (Jan. 27, 2020), https://thehill.com/changing-america/sustainability/environment/480049-fewer-americans-are-eating-less-meat-heres-why (noting that "[a]pproximately 9 out of 10 respondents say health is a major or minor reason for scaling back meat intake.").

[189] Wein, *supra* note 14; *see also* Y. Wang & M. A. Beydown, *supra* note 184, at 627 ("our analysis on the basis of recent nationally representative data shows a consistent positive association between MC [meat consumption] and adiposity measures among US adults. This along with the findings of adverse effect of MC on the risk of other chronic diseases revealed by other recent large cohort studies as well as the environmental impact of meat production argue against adopting a high-meat diet for long-term healthy weight management.")

Foods have created hamburger substitutes that have been popping up in several popular restaurant establishments, including Burger King.[190] Burger King's 'Impossible Whopper' takes the credit for a significant gain of ten percent in sales across all Burger King locations, which brought the fast food giant to its "best quarter in four years."[191] Burger King executives recognize that meat alternatives are not just a niche product, but a business that grows bigger by the day.[192] As more fast food joints and chain restaurants follow Burger King's lead in adding plant-based meat alternatives to their menus, avoiding beef has become easier. Companies realize that there is a booming market and a growing desire for beef substitutes.

a. The Influence of the Beef Industry Means That the Public Has to Hold Agencies Accountable

Government agencies such as the USDA, the FDA, and the CDC are tasked with maintaining strict food safety guidelines and protecting the public's health, yet they turn their backs on important scientific evidence that shows that the beef Americans eat harms the public health and environment.[193] Eating beef has been shown to cause several health and environmental issues, yet the government has done little to limit its consumption and production.[194] By failing to act, government agencies

[190] Nathaniel Popper, *Behold the Beefless 'Impossible Whopper'*, N.Y. Times (Apr. 1, 2019), https://www.nytimes.com/2019/04/01/technology/burger-king-impossible-whopper.html.

[191] *See* Paul R. La Monica, *Impossible Whoppers Are A Huge Hit at Burger King, Fueling Its Best Quarter in Four Years*, CNN: Bus. (Oct. 28, 2019), https://www.cnn.com/2019/10/28/investing/restaurant-brands-earnings-burger-king-popeyes/index.htm; *see also* Thomas Franck, *The Impossible Whopper is Driving Steady Traffic to Burger King, Data Shows*, CNBC (Oct. 17, 2019), https://www.cnbc.com/2019/10/16/the-impossible-whopper-is-driving-steady-traffic-to-burger-king-data-shows.html.

[192] Popper, *supra* note 190.

[193] *What We Do*, FDA, https://www.fda.gov/about-fda/what-we-do (last visited Mar. 25, 2020) (noting that "The Food and Drug Administration is responsible for protecting the public health by ensuring the safety, efficacy, and security of human and veterinary drugs…and by ensuring the safety of our nation's food supply…."); *CDC Organization*, CDC, https://www.cdc.gov/about/organization/cio.htm (last visited Mar. 25, 2020) (noting that the "CDC works 24/7 to protect America from health, safety and security threats, both foreign and in the U.S. Whether diseases start at home or abroad, are chronic or acute, curable or preventable, human error or deliberate attack, CDC fights disease and supports communities and citizens to do the same."); *see About the U.S. Department of Agriculture*, USDA, https://www.usda.gov/our-agency/about-usda (last visited Mar. 25, 2020) (describing the functions of the agency including "providing leadership on food, agriculture,…nutrition…related issues based on public policy, the best available science, and effective management.").

[194] Livestock's Long Shadow, *supra* note 9, at 112. *See* Wein, *supra* note 14;

have signalled that the needs of the people are secondary to the political and economic power gained from assisting the growth of the beef industry.[195]

Regulatory capture occurs when agencies come to be controlled by the very industries that the agencies are charged with regulating, thus becoming advocates for these industries.[196] Agencies tasked with regulating these CAFOs have allowed the power of the industry to surpass the needs of public interest.[197] As in many aspects of politics, agencies are being influenced by outside corporations that lobby for their own political agenda.[198] Agencies listen to these outside corporations and rule on their behalf, to the point where it has led to the detriment of the American people.[199]

i. The United States Department of Agriculture Works for Big Beef

The USDA represents the strongest example of an agency captured by the beef industry's agenda. According to author Philip Mattera,

> [t]hanks to its political influence, Big Agribusiness has been able to pack USDA with appointees who have a background of working in the industry, lobbying for it, or performing research or other functions on its behalf. These appointees have helped to implement policies that undermine the regulatory mission of USDA in favor of the bottom-line interests of agribusiness. In other words, public health and livelihoods are at stake.[200]

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see also Allison Aubrey & Maria Godoy, *New Dietary Guidelines Crack Down On Sugar. But Red Meat Gets a Pass.*, NPR (Jan. 7, 2016, 7:00 AM), https://www.npr.org/sections/thesalt/2016/01/07/462160303/new-dietary-guidelines-crack-down-on-sugar-but-red-meat-gets-a-pass.

[195] Philip Mattera, USDA Inc.: How Agribusiness Has Hijacked Regulatory Policy at the U.S. Department of Agriculture 6 (2004) (noting that "There is no longer any balance between USDA's traditional dual roles of promoting the agriculture industry and protecting food safety and the livelihood of family farmers. USDA Inc. now appears to slavishly follow the wishes of Big Agribusiness.").

[196] Will Kenton, *Regulatory Capture*, Investopedia (Oct. 23, 2019), https://www.investopedia.com/terms/r/regulatory-capture.asp.

[197] *See* Philip Mattera, *supra* note 195, at 4 ("Today it [the USDA] is, in effect, the 'Agribusiness Industry's Department,' since its policies on issues such as food safety and fair market competition have been shaped to serve the interests of the giant corporations that now dominate food production, processing and distribution.").

[198] *Id.* at 10.

[199] *Id.*

[200] *Id.*

1. Big Beef in Charge of Their Own Inspections?

Poultry and pork slaughterhouses soon will conduct most of their own inspections and beef CAFOs want to be next.[201] The American people have entrusted FSIS to be responsible for the inspection of meat to make sure it adheres to the guidelines for safe human consumption.[202] If beef CAFOs were in charge of their own inspections, the results could be devastating for consumer's health and well-being.[203] In addition, companies have a choice in recalling contaminated meat, and research has shown that this voluntary method is ineffective at getting contaminated meat off of store shelves.[204] Companies want to get products out the door as quickly as possible and their employees will work to make their supervisors happy.[205] FSIS inspectors, on the other hand, want to make sure tainted meat does not make it out onto Americans' plates.[206] A former USDA veterinarian stated: "factory workers without adequate training might miss critical signs of disease, drug injections or bacterial contamination—and remove the evidence before USDA inspectors can examine the carcasses."[207] Big beef cites the need to increase production speed and larger profits as justifications for its desire to weaken the inspection standards.[208] Despite the health risks, the USDA cannot trust a business to be honest about its product if it could possibly hurt its profits; the conflict of interest is simply too great. Therefore, the USDA needs to keep FSIS in charge of all meat inspections, make meat recalls mandatory, and expand the inspection requirements to better be able to locate disease or unwanted particles on meat.

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[201] Suzy Khimm, *Tyson Wants Fewer Government Inspectors in One of Its Beef Plants. Food Safety Advocates are Raising Alarms.*, NBC News (Aug. 14, 2019), https://www.nbcnews.com/politics/white-house/tyson-wants-fewer-government-inspectors-one-its-beef-plants-food-n1041966.

[202] *See generally* Federal Meat Inspection Act, *supra* note 102.

[203] *See generally* Khimm, *supra* note 201 (referencing prior incidents that led to an E. Coli outbreak when federal inspectors were not more careful).

[204] Eric Schlosser, *The Cow Jumped Over the USDA*, N.Y. Times (Jan. 2, 2004), http://www.nytimes.com/2004/01/02/opinion/the-cow-jumped-over-the-usda.html.

[205] Eric Katz, *Federal Pork Inspectors Are Sounding the Alarm Over USDA's Plan to Give Industry More Control*, Gov't Executive (Mar. 6, 2020), https://www.govexec.com/management/2020/03/federal-pork-inspectors-are-sounding-alarm-over-usdas-plan-give-industry-more-control/163527/.

[206] *Id.*

[207] Khimm, *supra* note 201.

[208] *See* Khimm, *supra* note 201; Julia Conley, *'Dangerous': With Foodborne Illness on the Rise, USDA Seeking Privatization of Food Safety Inspection at Beef Plant*s, Common Dreams (June 10, 2019), https://www.commondreams.org/news/2019/06/10/dangerous-foodborne-illness-rise-usda-seeking-privatization-food-safety-inspection.

2. Mad Cow Disease

Alisa Harrison, spokeswoman for Agriculture Secretary Ann M. Veneman, is a prime example of the USDA's capture by the big beef industry.[209] Before joining the USDA, Alisa Harrison "was director of public relations for the National Cattlemen's Beef Association, the beef industry's largest trade group."[210] While at the National Cattlemen's Beef Association, she fought against government food safety efforts, scrutinized Oprah Winfrey for relying on scientific evidence in raising health concerns about hamburgers in America, and produced press releases claiming that mad cow disease was not a problem in America.[211] Despite her new position within the USDA, she did not change her ultimate goal of protecting the beef industry.[212] She continued to reassure the world that "American meat is safe," while guiding news coverage, issuing statements, and managing press conferences about mad cow disease.[213]

By continuing to encourage people to consume beef that could be infected with the deathly mad cow disease, Ms. Harrison's practices go against the very purpose of the USDA, who describes its mission as "[p]rotecting the public's health by ensuring the safety of meat… products."[214] Lying out of consideration for the beef industry creates public distrust in the U.S. government agencies' ability to do their jobs. These agencies should not prioritize the commerce and success of big beef industries at the expense of food safety. The U.S. government, and especially the USDA, must promote honesty and transparency to ensure that U.S. beef is safe for consumption, rather than promoting the needs of the beef industry.

3. USDA Works Against America's Nutrition

Every five years, the USDA and the Department of Health and Human Services release a Scientific Report of the Dietary Guidelines Advisory Committee.[215] The goal of these guidelines is to determine the current composition and quality of the American diet and areas of public health concern; trends in the Nation's leading diet and lifestyle-

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[209] Schlosser, *supra* note 204.

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *About FSIS*, USDA (Dec. 12, 2019), https://www.fsis.usda.gov/wps/portal/informational/aboutfsis.

[215] *USDA and HHS Just Released the Dietary Guidelines for Americans, 2020-2025*, ODPHP (Dec. 29, 2020), https://health.gov/news/202012/usda-and-hhs-just-released-dietary-guidelines-americans-2020.

related health problems; the established, measurable impact of overall dietary patterns and physical activity on short and long-term health outcomes; the most effective methods of improving dietary patterns and physical activity to achieve favorable health outcomes in Americans two years and older; and sound strategies to help promote a healthy, safe, affordable, and sustainable food supply.[216]

The agencies use these guidelines to form government-sanctioned nutritional and dietary guidelines, such as the food pyramid.[217] In the latest report from 2015, experts found that more than two-thirds of adults and one-third of children in the U.S. suffer from obesity.[218] In addition, 117 million adults, or nearly half the adults in America, have one or more preventable chronic diseases such as cardiovascular disease, hypertension, type 2 diabetes, and diet-related cancers due to their lack of exercise and an insufficient diet.[219] The report urges the USDA to recommend a diet heavier in vegetables and fruit, and limited saturated fat and high-caloric foods.[220] Since beef contains high amounts of saturated fat, the recommendations include beef in the group of foods that the Dietary Guidelines suggest Americans should consume less of.[221]

In a book titled "Food Politics: How the Food Industry Influences Nutrition and Health," author Marion Nestle argues that both the USDA and Congress are so controlled by the interests of the meat industry that they are forced to sacrifice public health.[222] This notion was confirmed when she began working to manage the production of the Surgeon General's Report on Nutrition and Health.[223] Nestle states, "[m]y first day on the job, I was given the rules: No matter what the research indicated, the report could not recommend 'eat less meat' as a way to reduce intake of saturated fat."[224] When the 2015 Dietary Guidelines were released, there was a huge backlash from big beef.[225] Big beef argued that the findings were not sufficient because it failed to include the amount of

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[216] HHS & USDA, Scientific Report of the 2015 Dietary Guidelines Advisory Committee ii (2015).

[217] *See* HHS, *The Dietary Guidelines for Americans: What It Is, What It Is Not*, https://health.gov/our-work/food-nutrition/2015-2020-dietary-guidelines/guidelines/introduction/dietary-guidelines-for-americans/ (last visited Mar. 28, 2020).

[218] Scientific Report of the 2015 Dietary Guidelines Advisory Committee, *supra* note 216, at iii.

[219] *Id.*

[220] *See id.*

[221] *See id.*

[222] Marion Nestle, Food Politics: How the Food Industry Influences Nutrition and Health, 47-48 (2002).

[223] *Id.* at 3.

[224] *Id.*

[225] *See* Erica Shaffer, *Meat Industry Reacts to Dietary Guidelines Advisory Report*, Meat + Poultry (Feb. 19, 2015), https://www.meatpoultry.com/articles/12432-meat-industry-reacts-to-dietary-guidelines-advisory-report.

protein beef contained as opposed to the lean meats and vegetables that the 2015 Dietary Guidelines recommended.[226] Therefore, despite the findings of the 2015 Dietary Guidelines, the USDA will be unlikely to follow the expert's recommendations of decreasing the amount of beef in the American diet due to the strong influence and fear of backlash from big beef.

In January 2020, the USDA proposed a change to the rules for the Food and Nutrition Service that would allow schools to cut back on the amount of fruits and vegetables that were required in meals for students.[227] This change would encourage the schools to go back to providing children with more unhealthy and cheap options such as burgers and fries.[228] Around two-thirds of the children who eat the provided school meals qualify as low-income, and low-income children are disproportionately affected by obesity.[229] Since low-income children are less likely to be fed healthy meals at home, it is imperative that these children be provided with nutritious and healthy options while at school.[230] The USDA allowed this change despite its awareness regarding the negative health impacts of beef.[231] On the other hand, people in the beef industry strongly supported this proposal and believed it allowed for flexibility.[232] By allowing this proposal, the USDA turned its back on not only the health of adults, but also the health of children.

ii. Food and Drug Administration Needs to Control the Use of Antibiotics

Despite being a serious epidemic, the FDA fails to implement regulations or guidelines strict enough to substantially curve the effects of antibiotic resistance.[233] As of 2017, antibiotics may no longer be used

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[226] *Id.*

[227] *See* Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs, 85 Fed. Reg 4094 (proposed Jan. 23, 2020) (to be codified at 7 C.F.R. pts. 210, 215, 220, 226, and 235) https://www.govinfo.gov/content/pkg/FR-2020-03-23/pdf/2020-05979.pdf.

[228] *See* Laura Reiley, *More Pizza, Fewer Vegetables: Trump Administration Further Undercuts Obama School-lunch Rules*, Wash. Post (Jan. 17, 2020), https://www.washingtonpost.com/business/2020/01/17/usda-proposes-changing-school-menus-allow-more-fries-pizza-fewer-vegetables-fruits-reversing-michelle-obama-effort/.

[229] *See id.*

[230] *See id.*

[231] *See generally* Scientific Report of the 2015 Dietary Guidelines Advisory Committee, *supra* note 216, at iii.

[232] Amanda Radke, *Trump Brings Flexibility Back to School Lunches*, Beef Magazine (Jan. 21, 2020), https://www.beefmagazine.com/beef/trump-brings-flexibility-back-school-lunches.

[233] *Antimicrobial Resistance Information from FDA*, FDA, https://www.

by beef and livestock farmers as a means of increasing the speed of growth or feed efficiency.[234] The issue with this regulation focuses on the realization that the FDA allowed Americans to consume an unknown amount of antibiotics that were unnecessary for the health or life of livestock for the purposes of increasing profits for CAFOs and pharmaceutical companies.[235] After the FDA realized the serious health repercussions of these practices, it made a formal statement in 2013 recommending that producers give up the practice of using antibiotics as a growth supplement.[236] While the FDA issued guidance, the guidelines were voluntary.[237] Making these guidelines voluntary did not produce the desired result of decreasing antibiotic use, so the FDA banned the use of antibiotics as growth supplements altogether in 2017.[238]

While the 2017 ban was a step in the right direction, the FDA did not ban all antibiotic use for livestock animals.[239] Although farmers can no longer purchase antibiotics at feed stores or over the internet, the public worries that the ban may contain too many loopholes.[240] One loophole in particular was found after the European Union (EU) banned antibiotics for use as a growth supplement in 2006.[241] Despite the ban, the amount of antibiotic use in several countries in the EU did not change.[242] Instead, the antibiotics were just being relabeled from "growth promoter" to "preventative."[243]

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fda.gov/emergency-preparedness-and-response/mcm-issues/antimicrobial-resistance-information-fda (last visited Mar. 15, 2021) (The FDA states that "[T]he 2019 Summary Report on Antimicrobials Sold or Distributed for Use in Food-Producing Animals… shows that domestic sales and distribution of medically important antimicrobials approved for use in food producing animals increased by three percent between 2018 and 2019. The trend over time indicates that ongoing efforts to support antimicrobial impact are having an impact: sales and distribution are down 25% since 2010 and down 36% since 2015, which was the peak year of sales." While this may be true, their programs allow for drug sponsors to "voluntarily make changes." I am arguing that this is not effective because the FDA says that "each year in the United States at least 2.8 million antibiotic-resistant infections occur, and more than 35,000 people die as a result." Therefore, I do not believe their efforts of allowing drug companies to "voluntarily" take action are strict enough to combat the amount of American deaths.).

[234] *Antibiotic/Antimicrobial Resistance*, Food & Food Animals, CDC, https://www.cdc.gov/drugresistance/food.html (last reviewed Nov. 19, 2020).

[235] *See generally id.*

[236] *Phasing Out Certain Antibiotic Use in Farm Animals*, FDA (Dec. 11, 2013), https://www.fda.gov/consumers/consumer-updates/phasing-out-certain-antibiotic-use-farm-animals.

[237] *Id.*

[238] Mckenna, *supra* note 129.

[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] *Id.*

[243] *Id.*

Even preventative antibiotics can be a cause for concern. The highly resistant superbug, MCR-1, was caused by the use of preventative antibiotics.[244] This resistance gene makes the antibiotic colistin, which acts as the last-line of defense for serious sickness in humans because of its toxic side effects, useless.[245] Even though doctors and hospitals do not use colistin because of the toxic side effects, the agriculture industry does.[246] As a result, MCR-1 has been found in more than thirty countries, including the United States.[247] Preventative antibiotics continue to be pushed by pharmaceutical companies for farmers to give to healthy livestock, but this practice only makes the antibiotic resistance epidemic worse.[248]

The amount of antibiotics sales for beef cattle has risen by eight percent since 2017, which shows that the ban did nothing to decrease the mass use of antibiotics.[249] While the 2017 ban and further regulatory control might not be popular with pharmaceutical companies and beef CAFOs for profit concerns, the FDA needs to prevent further damage to the nation's health.[250] The continuing threat of antibiotic resistance urges the FDA to either get rid of the use of antibiotics for livestock animals altogether, or monitor their administration even closer.[251] Whether labeled for preventative purposes or as a growth promoter, antibiotics in livestock leads to irreparable damage to the immune systems of humans and livestock alike.[252] The FDA must take immediate action if it wishes to preserve any semblance of its legitimacy as a regulatory agency.

iii. The CDC Needs to Be More Involved with the Health Concerns Arising Out of Public Meat Consumption

The CDC should be informing the public about the dangers that arise from a high red meat diet.[253] Although the CDC does not deal with

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[244] *Id.*

[245] Jim Wappes, *Highly Resistant MCR-1 'Superbug' Found in US for the First Time*, Ctr. for Infectious Disease Res. & Policy (May 26, 2016), http://www.cidrap.umn.edu/news-perspective/2016/05/highly-resistant-mcr-1-superbug-found-us-first-time.

[246] *See id.*

[247] Mckenna, *supra* note 129.

[248] Danny Hakim & Matt Richtel, *Warning of 'Pig Zero': One Drugmaker's Push to Sell More Antibiotics*, N.Y. Times (June 7, 2019), https://www.nytimes.com/2019/06/07/health/drug-companies-antibiotics-resistance.html.

[249] Chris Dall, *FDA Details Rising Sales of Antibiotics for Meat Production*, Ctr. for Infectious Disease Res. & Policy (Dec. 11, 2019), http://www.cidrap.umn.edu/news-perspective/2019/12/fda-details-rising-sales-antibiotics-meat-production.

[250] Hakim & Richtel, *supra* note 248.

[251] *See generally id.*

[252] *Id.*

[253] *See What's the Beef With Red Meat?*, Harv. Health Publ'g (Feb. 2020),

agriculture necessarily, it recognizes the harm of prolific antibiotic use in animals and should work with fellow government agencies to make sure pertinent health information regarding the importance of limiting consumption of beef reaches the general public.[254] The CDC is supposed to be working to stop the spread of disease and encouraging the public to avoid a habit that causes disease absolutely aligns with its mission.[255] The CDC works to promote safe and healthy lifestyles for both humans and the environment, so promoting a diet low in beef would satisfy this goal.[256] Big beef has immense influence on government agencies, but with the help of willing parties and agencies the public will know the truth.[257]

iv. The Solution to Regulatory Capture is the Power of Journalism

The four largest CAFOs control eighty-two percent of the beef packing industry and these CAFOs hold a significant amount of influence over our economy and politicians.[258] Many news outlets have already reported on the same scientific findings discussed in this paper; however, the headlines and the overall conclusions are vastly different.[259] These news outlets had the same scientific evidence, yet the strong influence of CAFOs, outside industries, and societal norms caused journalists to twist the evidence and publish headlines that assert "beef is not that bad for you."[260] Some newspapers claim that "beef is not that bad for the environment" despite including the same evidence that the amount of greenhouse gases CAFOs emit significantly exceeds that of automobiles.[261]

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https://www.health.harvard.edu/staying-healthy/whats-the-beef-with-red-meat (discussing the dangers of eating red and processed meats).

[254] *See Antibiotic/Antimicrobial Resistance (AR/AMR): Food and Food Animals*, CDC, https://www.cdc.gov/drugresistance/food.html (last reviewed Nov. 19, 2020) (referencing that humans get antibiotic resistance from eating meat contaminated with the resistant bacteria).

[255] *About CDC 24-7*, *supra* note 113.

[256] *Id.*

[257] Mattera, *supra* note 195.

[258] *See* Mary Hendrickson & William Heffernan, *Concentration of Agricultural Markets* (Feb. 2005), http://www.foodcircles.missouri.edu/07contable.pdf; *see also* Zoe Willingham & Andy Green, *A Fair Deal for Farmers*, Ctr. for American Progress (May 7, 2019), https://www.americanprogress.org/issues/economy/reports/2019/05/07/469385/fair-deal-farmers/.

[259] *See* Gina Kolata, *Eat Less Red Meat, Scientists Said. Now Some Believe That Was Bad Advice*, N.Y. Times (Sept. 30, 2019), https://www.nytimes.com/2019/09/30/health/red-meat-heart-cancer.html; *see also* Will Coggin, *Let Them Eat Steak*, USA Today (Nov. 3, 2019), https://www.usatoday.com/story/opinion/2019/11/02/red-meat-flawed-health-climate-claims-new-research-column/4112887002/.

[260] *See* Coggin, *supra* note 259.

[261] *See id.*

Journalism has power because society depends on it as a means of public communication; it helps to shape the social forces that wish to understand what is going on in the world.[262] Americans need more journalists willing to tell the truth without regard for and in spite of the repercussions that may arise from going against big beef and government agencies. The more journalists that are willing to take a stand against big beef and inform the public of the truth about beef, the more people and ecosystems could be saved. Information has power. Even with the evidence right before their eyes, people still believe the words written by journalists.[263] For change to happen, these agencies need to be held accountable. To hold them accountable, Americans need journalists to spread the word about the danger this regulatory capture has had on public health and the environment.

b. The Planet Already Has Enough Food to Feed the World, So Why is There Still World Hunger?

Inadequate allocation of crops, poor production methods, overconsumption, and waste all contribute and stand in the way of eliminating global hunger.[264] In order to feed and save the planet, world leaders must change the way people consume, and agriculture produces, food.[265] People consume more than the required amount of protein per day.[266] If everyone reduced the amount of animal proteins they consumed to match nutritional standards, the land required for animal agriculture would decline by thirteen percent, or an area 1.5 times the size of the European Union.[267]

Organizations and government agencies such as the USDA should be implementing new strategies to reallocate and optimize crop production to reduce the amount of crops and crop land used solely for animal agriculture. If the USDA reduced the amount of feed that could be provided for beef farming, it would discourage over-feeding and possibly lower beef production. By not using all of these resources solely for the production of beef, farms would be able to feed more people in the form of grains and vegetables. The planet desperately needs a more environmentally friendly option as well as a change to the way current crop production is allocated to different sources.

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[262] *See* Hanitzsch et al., *Modeling Perceived Influences On Journalism*, 87(1) J. & Mass Comm. Quarterly 5 (2010).

[263] *See id.*

[264] World Wide Fund for Nature, *supra* note 57, at 12.

[265] *Id.*

[266] *People Are Eating More Protein Than They Need*, *supra* note 182.

[267] World Wide Fund for Nature, *supra* note 57, at 12.

c. A Limit on Beef Production Could Limit the Disastrous Effects on the Environment

Red meat production generates nearly half of all direct agricultural emissions.[268] The EPA must implement stricter regulations on the greenhouse gas emissions caused by large-scale beef factories as well as crack down on leaks of beef cattle excrement into lakes, oceans, and community water sources. CAFOs contribute too much to global emissions to continue to go unregulated. Examples of possible regulations to lower global emissions would include limiting the number of cattle held by each CAFO and limiting the amount of production. If the USDA limited beef production, the amount of emissions, use of freshwater, and abundance of waste would decrease.[269]

The United Nations suggests eliminating certain policies that encourage deforestation, such as "tax policies and subsidies intended to support expansion of beef production and exports as a way to accelerate economic growth and strengthen trade and foreign exchange balances."[270] A director for the National Wildlife Federation cited better land management policies as an option for preventing mass deforestation.[271] Options such as discouraging road construction into forested areas, establishing and enforcing protected land areas, increasing certain land taxes to discourage deforestation, and prohibiting subsidies that encourage deforestation used for cattle farming purposes can all contribute to solving the deforestation problem.[272]

d. We Eat What Our Food Eats, So No Beef with Feces for the United States Please

The FDA and the USDA need to crack down on what slaughterhouses are feeding to the animals that produce American

[268] See Waite et al., *supra* note 12 ("A 2013 study by the U.N. Food and Agriculture Organization (FAO) estimated that total annual emissions from animal agriculture (production emissions plus land-use change) were about 14.5 percent of all human emissions, of which beef contributed 41 percent.").

[269] If there were fewer cattle going through production, CAFOs would not need as much water to produce the meat, nor would there be as much waste since there would not be as many cattle to produce it. *See* Carrie Hribar, Understanding Concentrated Animal Feeding Operations and Their Impact on Communities 2-7 (Mark Schultz, ed., 2010) (discussing issues surrounding CAFOs such as manure runoff, groundwater issues, and emissions); *see also Why Are CAFOs Bad?*, Sierra Club, https://www.sierraclub.org/michigan/why-are-cafos-bad (last visited Jan. 26, 2021) (describing the type of waste and pollutants CAFOs disperse into the water supply and air).

[270] Livestock Policy Brief, *supra* note 55, at 4.

[271] Ingraham, *supra* note 50.

[272] Livestock Policy Brief, *supra* note 55, at 5.

meat. The agencies should implement a requirement for feed to consist of nutrient rich foodstuffs that are not contaminated with feces, dead animals, antibiotics, or other harmful substances that should not be in the food of livestock. In 1997, the FDA banned the practice of feeding cattle meat and other beef byproducts.[273] Yet, more than a quarter of the feed manufacturers in Colorado remained unaware of the ban four years after its introduction.[274] The current ban still allows the feeding of cattle blood to young calves.[275] Cattle are herbivores, which means that their bodies were not designed to be able to digest meat, so they do not need meat to survive or even to thrive.[276]

By monitoring the food provided to the cattle, the government could prevent food-borne illnesses such as mad cow disease from infecting cows and the public. In addition to preventing mad cow disease, a change in diet could lessen the effects of global warming by lowering the amount of methane gas that beef cattle produce. Methane levels can be reduced by feeding the cattle forages (such as flax and alfalfa seeds), more fats, certain proteins, tannins, nutrient-laden salt licks, fish oils, and "burpless grass."[277] Scientists have even found that feeding beef cattle the herb oregano brought down methane emissions by forty percent.[278]

e. APHIS Needs to Implement Sanitation Requirements for Livestock

Testing shows that ninety percent of ground beef sampled by the FDA was contaminated with fecal bacteria.[279] Sanitation should be a priority for not only the health of the cattle, but also for the health of the public who will be consuming the cattle. Cattle need to be living in sanitary conditions to help prevent the spread of disease.

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[273] *Feed Ban Enhancement*, FDA, https://www.fda.gov/animal-veterinary/bovine-spongiform-encephalopathy/feed-ban-enhancement-implementation-questions-and-answers (last reviewed Apr.. 27, 2020) ("FDA added a new section 589.2001 to the regulations which prohibits the use of high-risk cattle material in feed for all animal species. This section builds on the 1997 BSE feed regulation at 589.2000, which remains in effect but which applies only to feed for cattle and other ruminants.").

[274] Schlosser, *supra* note 204 (Colorado is one of the top beef-producing states).

[275] *Id.*

[276] Kathy McCune, *Are Cows Herbivores?*, Family Farm Livestock, https://familyfarmlivestock.com/are-cattle-herbivoresan-easy-way-to-tell-applies-to-all-animals/ (last visited Mar. 26, 2020).

[277] Hayes & Hayes, *supra* note 73, at 35.

[278] *Id.*

[279] HHS et al., 2010 Retail Meat Report 18 (2010).

While the Animal Welfare Act and APHIS do not currently protect the rights of livestock, an increase in protections for livestock would help more than just beef cattle.[280] APHIS needs to follow their mission of "protect[ing] the health and value of American Agriculture and Natural Resources"[281] by conducting strict investigations into the conditions of beef cattle in these CAFOs. If APHIS increased the rights of beef cattle, such as increasing space requirements, the living conditions required under law would be more sanitary and would result in safer meat for the public.

f. Where Will People Get Their Protein?

Patrick Baboumian holds a Guinness World Record for being one of the world's strongest men and holds the record for carrying a yoke weighing 1,224 pounds over ten meters.[282] He was named "Germany's Strongest Man" in 2011, and he does not eat meat.[283] When asked about his diet he said, "[s]omeone asked me how you can get as strong as an ox without eating any meat? My answer was, have you ever seen an ox eating meat?"[284] While beef contains a considerable amount of protein due to the vegetables that beef cattle consume, the world consumes more meat than necessary and many individuals consume an amount of meat that reaches unhealthy levels.[285] People do not need to eat beef to get the adequate amount of protein necessary to maintain a healthy lifestyle.[286] In fact, consuming meat as a source of protein as opposed to vegetables uses resources in an immensely inefficient way.[287] Switching to more plant-based alternatives will ensure that the world moves towards a more sustainable food future.

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[280] *See* Animal Welfare Act, *supra* note 111.

[281] *About APHIS*, *supra* note 108.

282 *Heaviest Yoke Carry Travelling 10 m*, Guinness World Records, https://www.guinnessworldrecords.com/world-records/110923-heaviest-yoke-carry-travelling-10-m/ (last visited Mar. 26, 2020).

[283] Susie East, *'Vegan Badass' Muscle Man Pumps Iron, Smashes Stereotypes*, CNN (July 6, 2016), https://www.cnn.com/2016/07/06/health/vegan-strongman-patrik-baboumian-germany-diet/index.html.

[284] *See* The Game Changers (ReFuel Productions 2019).

[285] *See* Heidi Mitchell, *How Can Vegetarians Get Enough Protein?*, Wall St. J. (Feb. 1, 2016), https://www.wsj.com/articles/how-can-vegetarians-get-enough-protein-1454350903 (stating that too much protein can stress the kidney, or leach calcium from the bones over time); *and see* Jessica Brown, *We Don't Need Nearly as Much Protein as We Consume*, BBC: Future (May 8, 2018), https://www.bbc.com/future/article/20180522-we-dont-need-nearly-as-much-protein-as-we-consume.

[286] *See* Mitchell, *supra* note 285.

[287] *See Animal-Based Foods are More Resource-Intensive than Plant-Based Foods*, World Res. Inst. (Apr. 2016), https://www.wri.org/resources/charts-graphs/animal-based-foods-are-more-resource-intensive-plant-based-foods.

g. Consumerism Provides an Answer

For change to happen within an industry, consumers must actively demand it. Big beef grew to be massively successful because consumers supported the industry by buying beef. The most influential and important thing consumers must do to elicit change within the beef industry is to stop buying so much beef. If people stop buying beef, or even reduce their beef consumption, the law of supply and demand says that big beef will eventually stop producing as much beef to account for the lack of demand.[288] If beef cattle production decreases, animal feed will not be needed in such large quantities. If the need for animal feed diminishes, then the land and soil used for that feed could be used for other purposes, such as the cultivation of more nutritious and fulfilling grains and vegetables, which can be used for human consumption. If the number of cattle dwindles, the landmass required for grazing will shrink, which means less deforestation and destruction of habitats will occur.

Conclusion

The views of society demonstrate changes regarding the rights of animals and the effect of the meat industry on the environment and individual health. More people are adopting vegan or vegetarian diets now than ever before. People have become educated on the effects of beef farming and display readiness for real legal change. They have seen what eating large amounts of beef has done to America's health. Heart disease, cancer, type 2 diabetes, antibiotic resistance, and obesity have led to millions and millions of unnecessary deaths in the U.S. every single day with no end in sight.[289] The mass consumption of beef undeniably contributes to and exacerbates this very real problem.[290] Doctors and medical organizations around the world urge people to consume less beef. However, government agencies are often persuaded against stating the facts about the dangers of red meat to public health due to the adverse effect the facts would have on the meat industry.

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[288] If demand decreases, then beef manufacturers will have to sell their beef at a lower price to get rid of inventory. Going forward, the manufacturers will purchase less beef cattle to account for the decline in demand so they can ensure they are still selling meat at a desirable price to make a profit. *See* Jim Chappelow, *Law of Supply and Demand*, Investopedia (Sept. 29, 2019), https://www.investopedia.com/terms/l/law-of-supply-demand.asp.

[289] *See* Wein, *supra* note 14.

[290] *Id.*

Humans would be healthier if they decreased their beef consumption.[291] Better, more nutrient-rich sources of protein exist to satisfy the dietary need for protein. One study found that when tracked over a twenty-five year period, people who did not consume meat and followed either a vegetarian or vegan diet had an eighteen percent to twenty-five percent lower risk of all-causes of mortality, and a thirty-one to thirty-two percent lower risk of cardiovascular mortality.[292] This change in diet would also help protect the environment from deteriorating at a faster rate from global warming.[293] Americans do not need beef to maintain a healthy lifestyle.[294] The time has come for the American people to stand up against government agencies and the big beef industry and declare their refusal to die so that big beef can maintain its profit margins. An exhausted United States no longer wants to watch the environment fall apart because of the pollutant consequences of the big beef industry. The people have had enough: they demand to be heard.

[291] *See* Jon Johnson, *What is the Difference Between Animal and Plant Proteins?*, Med. News Today (Aug. 21, 2018), https://www.medicalnewstoday.com/articles/322827.php#plant-vs-animal-protein.

[292] Hyunju Kim et al., *Plant-Based Diets, CVD, and Mortality*, 8(16) J. Am. Heart Ass'n 1, 6 (2019).

[293] *See* Roger Harrabin, *Plant-Based Diet Can Fight Climate Change*, BBC News (Aug. 8, 2019), https://www.bbc.com/news/science-environment-49238749.

[294] *See Animal-Based Foods are More Resource-Intensive than Plant-Based Foods*, *supra* note 287.

Persistent Environmental Pollutants and Water Utilities: The Argument for CERCLA Exemptions in Polyfluoroalkyl Substances (PFAS) Cleanup

Alec D. Tyra*

Introduction

Outside many towns and cities creeps an invisible but ever-present threat, Per- and Polyfluoroalkyl Substances (PFAS). PFAS are the emerging pollution problem of the 21st century. Exposure, through drinking water, leads to a host of adverse health effects, including endocrine disruption and cancer. PFAS are a broad class of compounds that have been used since the 1940s to impart stain, water, and grease resistance or other "non-stick" properties to consumer products and food packaging.[1] In particular, the PFAS chemical compounds, Perfluorooctanesulfonate (PFOS) and Perfluorooctanoic acid (PFOA), initially were ubiquitous in a variety of consumer products. However, major manufacturers phased out both PFOS and PFOA in the United States during the last decade due to an increasing number of laboratory health assessments demonstrating their toxicity.[2] The PFAS compounds that came to replace PFOS and PFOA are now under similar scrutiny after studies have determined that they present similar health risks.[3] The

* Incoming Associate, Freeman Mathis & Gary; J.D. 2021, Sandra Day O'Connor College of Law, Arizona State University, Cum Laude; B.S. 2017, Chemistry, Emphasis in Environmental Chemistry, Highest Honors, University of California, Davis. The author would like to thank Meghan Grabel, Adam Schwartz, and Professor Rhett Larson as well as all colleagues at ASU Law for their support of this work.

[1] *Basic Information on PFAS: What Are PFAS?*, EPA, https://www.epa.gov/pfas/basic-information-pfas (last visited Nov. 5, 2020).

[2] *Fact Sheet: 2010/2015 PFOA Stewardship Program*, EPA, https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/fact-sheet-20102015-pfoa-stewardship-program#launch (last visited Nov. 5, 2020) ("EPA launched the PFOA Stewardship Program in January 2006 because of concerns about the impact of PFOA and long-chain PFASs on human health and the environment, including concerns about their persistence, presence in the environment and in the blood of the general U.S. population, long half-life in people, and developmental and other adverse effects in laboratory animals.").

[3] *Technical Fact Sheet—Perfluorooctane Sulfonate (PFOS) and Perfluorooctanoic Acid (PFOA)*, EPA 2 (2017) https://www.epa.gov/sites/production/files/2017-12/documents/ffrrofactsheet_contaminants_pfos_pfoa_11-20-17_508_0.pdf (hereinafter "2017 EPA Technical Fact Sheet") ("By 2002, the primary U.S.

result of decades of use is a proliferation of PFAS contamination in groundwater that either is used directly for drinking water supplies or indirectly contaminates drinking water tables.[4]

This class of toxic chemicals has traveled through groundwater aquifers into the drinking water of millions of Americans.[5] In one contaminated area, outside of the south side of Tucson, Arizona—north of Air National Guard Base and the Tucson International Airport—PFAS concentrations in monitoring wells topped 13,850 parts per trillion (or 13,850 nanograms per liter).[6] The contamination is likely a result of the nearby airfields' use of fire suppressant foam containing PFAS chemical surfactants. Five other wells in the Tucson area tested at concentrations between 2,250 and 12,370 parts per trillion.[7] The United States Environmental Protection Agency's (EPA) health advisory recommendation for PFAS concentration is seventy parts per trillion.[8] That means, at the highest levels, monitoring wells

manufacturer of PFOS voluntarily phased out production of PFOS."); Lena Vierke et al., *Perfluorooctanoic Acid (PFOA) — Main Concerns and Regulatory Developments in Europe from an Environmental Point of View*, 24 Envtl. Sci. Eur. 1 (2012) ("PFOS has recently been identified as a persistent organic pollutant (POP) and was included into Annex B of the Stockholm Convention on Persistent Organic Pollutants."); PFOA was phased out in the United States starting in 2006 under the EPA's PFOA Stewardship program. 2017 EPA Technical Fact Sheet, at 2; In addition, there is a growing concern about the chemicals that have come to replace PFOS and PFOA. *See* Katherine E. Pelch et al., *PFAS Health Effects Database: Protocol for a Systematic Evidence Map*, 130 Envtl. Int'l 1, 2 (2019) ("While there is less toxicity data on shorter-chain and other alternative PFAS replacing long-chain PFAS, evidence is growing quickly that indicates they collectively pose similar threats to human health and the environment; which, combined with similar concerns over the environmental fate and persistence, have led independent scientists and other professionals from around the globe to express concern about the continued and increasing production and release of PFAS.").

[4] *See PFAS Contamination in the U.S. (July 20, 2020)*, EWG, https://www.ewg.org/interactive-maps/pfas_contamination/map/ (Hereinafter "PFAS contamination map") (This map shows active groundwater and surface water contamination sites.).

[5] Xindi C. Hu et al., *Detection of Poly- and Perfluoroalkyl Substances (PFASs) in U.S. Drinking Water Linked to Industrial Sites, Military Fire Training Areas, and Wastewater Treatment Plants*, 3 Envtl. Sci. & Tech. Letters 344, 345-46 (2016) ("PFAS were detected at or above the MRLs in 194 of 4864 public water supplies, serving 16.5 million residents in 33 different states, three American territories (American Samoa, Northern Mariana Islands, and Guam), and the Salt River Pima-Maricopa Indian Community. Drinking water from 13 states accounted for 75% of detections, including, by order of frequency of detection, California, New Jersey, North Carolina, Alabama, Florida, Pennsylvania, Ohio, New York, Georgia, Minnesota, Arizona, Massachusetts, and Illinois.").

[6] Tony Davis, *Toxic PFAS Levels Spike in South-side Tucson Well-testing Area*, Ariz. Daily Star (Dec. 2, 2019).

[7] *Id*.

[8] The EPA has issued health advisories for PFOS and PFOA but not for other PFAS chemicals. *Drinking Water Health Advisories for PFOS and PFOA*, EPA, https://

are reporting contamination at a magnitude of two hundred times the regulatory recommendations.

While municipal drinking water supplies have not been contaminated in the south side of Tucson, PFAS are starting to affect private groundwater in the area.[9] However, PFAS are not a stationary plume of pollution. PFAS chemical compounds migrate and move through groundwater aquifers, posing an imminent threat to water utilities and their customers who rely on safe drinking water.[10]

The PFAS contamination in Tucson is not a novel or isolated incident. In 2004, Minnesota residences were alerted to the fact that their drinking water contained high levels of PFAS chemicals.[11] The main source of the pollution in the Minnesota drinking water supplies came from the decades-long disposal of PFAS by the manufacturing company, 3M.[12] In response to the accumulated PFAS pollution, Minnesota sued 3M to recover the costs of the environmental cleanup in state court.[13] The lawsuit alleged that, in total, the 3M pollution sites contributed to a groundwater pollution area of over one hundred square miles and contaminated the drinking water of nearly 125,000 residents.[14] In the end, 3M and Minnesota agreed to cleanup measures and settled related litigation for $850 million.[15] Over the last few years, given the increased scrutiny on PFAS contamination, there has been a dramatic increase in litigation in an attempt to recover costs for environmental remediation and the costs associated with PFAS exposure.[16]

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www.epa.gov/ground-water-and-drinking-water/drinking-water-health-advisories-pfoa-and-pfos (last visited Nov. 6, 2020); 81 Fed. Reg. 33250 (May 25, 2016).

[9] *See* Davis, *supra* note 6.

[10] *See* Daniel J. Goode & Lisa A. Senior, *Groundwater Withdrawals and Regional Flow Paths at and near Willow Grove and Warminster, Pennsylvania—Data Compilation and Preliminary Simulations for Conditions in 1999, 2010, 2013, 2016, and 2017*, U.S. Geological Survey Open-File Rep. 2019–1137 (2020) ("The simulated groundwater-flow paths from possible PFAS source locations on the bases represent paths along which groundwater containing dissolved PFAS may have migrated.").

[11] *PFAS Investigation and Clean Up*, Minn. Pollution Control Agency, https://www.pca.state.mn.us/waste/pfas-investigation-and-clean (last visited Nov. 7, 2020).

[12] *Id.*

[13] Amended Complaint at p. 27, State ex rel. Swanson v. 3M, Co., No. 27-CV-10-28862 (Minn. D. Ct. Jan. 28, 2011).

[14] *Id.* at 9.

[15] *PFAS Investigation and Clean Up*, *supra* note 11.

[16] *See, e.g.* Kyle E. Bjornlund & Elizabeth S. Dillon, *Percolating PFAS*, 67 Fed. L. 11, 12 (2020) ("Since 2010, an increasing number of states, including New Hampshire, North Carolina, New Jersey, New Mexico, New York, Ohio, and Vermont, have sued manufacturers of PFAS containing products for statewide water contamination."); s*ee generally* James P. Ray, *PFAS Litigation: Just Getting Started?*, Am. Bar Ass'n (Mar. 1, 2019), https://www.americanbar.org/groups/litigation/committees/environmental-energy/articles/2019/winter2019-pfas-litigation-just-getting-started/.

PFAS contamination constitutes a national and environmental crisis existing beyond just Minnesota and Arizona. One map, prepared by an environmental activist group,[17] shows contamination sites in forty-nine of the fifty states—Hawaii being the only exception.[18] Over thirty states have at least one contamination site tested in public drinking water with numerous states having dozens of drinking water contamination sites.[19] The map shows contamination sites in or near major population centers, posing a threat to millions of Americans.[20] Not all sites have contamination levels equivalent to the Tucson area or even above the regulatory advisory recommendation.[21] Nevertheless, the toxicity and widespread contamination of PFAS is of national importance.

The growing and spreading accumulation of PFAS requires state and federal intervention to curb the contamination issue facing many communities throughout the country. The EPA is considering regulations to set safe drinking water standards under the Safe Drinking Water Act (SDWA),[22] and Congress is considering listing PFAS as a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[23] The dual impact of complying with EPA's potential SDWA regulations and CERCLA liability has water utilities worried about the cost of improving treatment facilities[24]

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[17] Environmental Working Group (EWG) prepared the map in coordination with Social Science Environmental Health Research Institute (SSEHRI) at Northwestern University. Bill Walker, *Mapping the PFAS Contamination Crisis*, EWG (May 6, 2019), https://www.ewg.org/news-and-analysis/2019/04/mapping-pfas-contamination-crisis-new-data-show-610-sites-43-states.

[18] *See* PFAS Contamination Map, *supra* note 4.

[19] *Id.*

[20] *Id.*

[21] *See id.*

[22] Hannah Levine, *Zombie Chemicals - Learning from Our Past to Prevent Haunting in the Future: Why the EPA Should Regulate PFAS Chemical Compounds*, 21 Vt. J. Envtl. L. 177, 181, 186, 191 (2019) ("The key actions relevant to PFAS drinking water contamination include: (1) the EPA moving forward with setting a legally enforceable MCL through the process described in the SDWA; (footnote omitted) (2) establishing a nationwide drinking water monitoring program to help improve the frequency and concentration of PFAS in drinking water; and (3) expanding scientific research to improve detection, measurement, and a general understanding of PFAS in the environment and drinking water. (footnote omitted)").

[23] *Id.* at 192; *Compare* PFAS Action Act of 2019, H.R. 535, 116th Cong. (2019) (The House of Representatives passed a bill that would mandate the EPA list PFAS as hazardous substances under CERCLA, set a safe drinking water standard, and list PFAS as hazardous air pollutants under the Clean Air Act. The bill is now passed by the Senate), *with* PFAS Release Disclosure and Protection Act of 2019, S.1507, 116th Cong. (2019) (The Senate introduced a competing bill in the same year requiring less action by the EPA).

[24] *See* Robert Raucher & John Cromwell, *Safe Drinking Water Act: Costs of Compliance* (Mercatus Center George Mason Uni., Working Paper No. 35, 2004) (The cost of compliance under the SDWA for PFAS is in addition to the billions of dollars

and environmental remediation costs.[25]

Water utilities have responded by opposing PFAS regulations and lobbying Congress for a CERCLA exemption[26] to avoid what could be billions of dollars in costs.[27] Water utilities should not have to bear the costs of both improving water treatment and environmental remediation. Water utilities did not manufacture PFAS or distribute products containing PFAS; in fact, their only involvement with PFAS is having to remove and dispose of PFAS treatment residues in either a private waste site or municipal landfill.[28] Requiring water utilities to participate in remediation of designated cleanup sites (known as superfund sites) would run counter to the spirit of CERCLA, which seeks to hold the truly responsible parties accountable for environmental contamination and remediation costs.[29]

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in capital investment and annual costs associated with removing other contaminants like arsenic and nitrates drinking water); Mark Letcher & Chuck Huckleberry, Water Quality Technical Paper 1, 10 (2009), https://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/Wastewater%20Reclamation/Water%20Resources/WISP/091709-Quality.pdf (The annual cost of compliance for the Tucson Water Department alone can amount to over one million dollars).

[25] John Dunbar & Christina Brady, *PFAS Cleanup Backers Face Unexpected Foe: Water Utilities*, Bloomberg L. (June 9, 2020, 6:00 AM), https://news.bloomberglaw.com/environment-and-energy/pfas-cleanup-backers-face-unexpected-foe-water-utilities.

[26] *See, e.g.*, Letter from American Water Works Association et al., to Representative, AMWA (Jan. 8, 2020), https://www.amwa.net/letter/letter-opposition-hr-535-pfas-action-act; *see also* Letter from American Water Works Association et al., to Hon. James M. Inhofe, Chair S. Comm. on Armed Servs., & Hon. Adam Smith, Chair H. Comm. on Armed Servs., AMWA (Aug. 8, 2019), https://www.amwa.net/letter/letter-house-and-senate-armed-services-committee-leaders-pfas-provisions-defense.

[27] *PFAS Management to Drive US $12.1B in Water Utility Spend Over Next Decade*, Water World (June 10, 2020); *see also* Congressional Budget Office, S.1507 PFAS Release Disclosure and Protection Act of 2019, 7 (2019) (The Congressional Budget Office determined the costs of complying with new regulations would exceed billions of dollars after reviewing a PFAS bill proposed in the Senate. "CBO expects that the capital and operating costs for monitoring, treating, and removing PFAS from drinking water could exceed several billion dollars in the first five years the mandate would be in effect.").

[28] Sylvia Carigan, *PFAS Found in Landfills; No Clear Path on What to Do About It*, Bloomberg L. (Mar. 25, 2020, 3:00 AM), https://news.bloomberglaw.com/environment-and-energy/pfas-found-in-landfills-no-clear-path-on-what-to-do-about-it.

[29] Robert Lutolf, *Public Policy v. Property Rights in Hazardous Waste Law: Is CERCLA Unconstitutional*—Reardon v. U.S., 16 Environs: Envtl L. & Pol'y J. 65, 65 (1992) ("CERCLA is based on two fundamental principles. First, those responsible for the contamination should pay for remediation. Second, the federal government should be able to quickly and effectively protect public health from the dangers of inactive hazardous waste sites.").

Part I of this paper examines the background of PFAS including its chemical makeup, past industrial use, and adverse health effects. Part II will discuss federal and state regulatory efforts and present PFAS toxic tort litigation. Lastly, Part III will discuss why water utilities should be exempt from CERCLA based on comparisons to other CERCLA exemptions and defenses.

I. How the PFAS Problem Came to Be

While the scope of this paper is not a discussion of the scientific literature on PFAS, a brief overview of their chemical properties is useful to understanding their extensive use over the past decades and the harmful health effects on individuals and communities associated with PFAS exposure. PFAS are a class of synthetic chemical compounds that have widespread industrial use for their ability to waterproof, greaseproof, and create non-stick surfaces.[30]

Characteristics of these chemical compounds are an alkyl chain,[31] which is a chain of carbon atoms connected via a single covalent bond[32] with at least one carbon atom that is fully fluorinated, which means it is covalently bonded with fluorine atoms rather than Hydrogen atoms (as is typical in less complex hydrocarbon compounds).[33] Understanding the basic chemical structure of the PFAS class helps illustrate the myriad of compounds that make up the class. It is not hard to imagine a multitude of compounds of various lengths of alkyl chains or degrees of fluorination. In addition, numerous other functional groups can be present in the compounds, further increasing the available combination of PFAS chemical compounds.[34] Such variability in a single class of chemical compounds, tied together by their common characteristics, allows for application in an equally broad class of industrial and consumer products.

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[30] Vierke et al., *supra* note 3 ("Due to their outstanding properties—they provide water, oil, and grease repellency and are very stable—certain [PFAS] have been used in a variety of consumer products.").

[31] *See generally* Linus Pauling, General Chemistry 241 (Dover Publications 3d ed. 1988); An alkyl chain is a chain of carbon atoms that are bonded by a single bond.

[32] A covalent bond is a bond in which two atoms "share" a pair of electrons rather than an ionic bond in which there is an election. *See e.g.,* Pauling, *supra* note 31, at 152.

[33] Hydrocarbon meaning carbon bonded with hydrogen. Methane CH_4 is the simplest hydrocarbon with one carbon atom bonded to four hydrogen atoms.

[34] Vierke et al., *supra* note 3, at 1-2 ("They are characterized by a fully (per-) or partly (poly-) fluorinated carbon chain in connection with different functional groups.").

a. Ubiquity of PFAS in the Marketplace

PFAS have been on the market for decades. 3M was the first company to manufacture the compounds in the 1940s, and Dupont and other companies later followed suit.[35] Because of their chemical structure—containing long carbon alkyl chains with highly electronegative[36] functional groups—PFAS displayed both hydrophobic[37] and lipophobic[38] characteristics. By being both hydrophobic and lipophobic, PFAS made excellent coatings to create "non-stick" surfaces on both consumer products and industrial components. This unique and highly useful property made PFAS ubiquitous on the market, and it is likely why PFAS remains heavily used throughout the world.

b. PFAS in a variety of well-known Consumer Products

PFAS compounds' unique qualities meant PFAS was a mainstay component in many well-known consumer products.[39] One of the most common uses of PFAS in consumer products is in the form of non-stick cookware.[40] As an example, Teflon, Dupont's trademark name for Polytetrafluoroethylene (PTFE), is a PFAS compound used for creating non-stick kitchen cookware.[41] Another example of a well-

[35] *See* Levine, *supra* note 22, at 182 ("PFAS were developed in the 1940s and were integrated into a wide array

of industries such as aerospace, automotive, construction, electronic, pharmaceutical, oil, and gas…. The two most common forms of PFAS are known as PFOA-initially manufactured by 3M and DuPont and used to make Teflon-and PFOS-manufactured by 3M and used to make Scotchgard.").

[36] Electronegativity is defined as an atom's power of attracting electrons in a covalent bond. When there is a large difference between the electronegativity of the bonded atoms (as is the case for fluorine and carbon) the character of the bond is more polar—repelling nonpolar substances like oil. When there is a smaller or difference between the bonded elements (as is the case between hydrogen and carbon) then the bond has a nonpolar character—repelling polar substances like water. When there is an even greater difference of electronegativity between the bonded elements (as is the case between sodium and chlorine in common table salt) the bond has an ionic character—meaning that the electrons are not shared, and positive and negative ions are formed. For additional information *see* Pauling, *supra* note 31, at 181-182, 239, 247, 533, 544, 624).

[37] Meaning "water fearing." Repels polar molecules like water.

[38] Meaning "fat fearing." Repels nonpolar molecules like oil.

[39] Leticia M. Diaz & Margaret R. Stewart, *'Forever Chemicals': Forever Altering the Legal Landscape*, 7 Belmont L. Rev. 308, 309 (2019) ("PFAS has worked its way into most everyday products used by the average American.").

[40] *Id.* at 311.

[41] *Id.* ("PFAS has been found in both industrial and consumer products such as electronics, automotive supplies, food packaging, non-stick cookware (Teflon), stain- and water-resistant coatings, firefighting foams, and in waxes and cleaners.").

known consumer product containing PFAS is Scotchgard, providing stain resistance to furniture.[42] PFAS are also components in a variety of other consumer products including food packaging, stain or waterproof fabrics, and a variety of waxes, polishes, and paints.[43] These consumer products eventually reach landfill sites creating a concentrated area of environmental pollutants.[44]

Teflon and Scotchgard are formed from processes that use known toxic compounds like PFOS and PFOA.[45] While the end consumer product might only contain trace amounts of the toxic product and likely does not pose a significant health risk, the manufacturing process and subsequent disposal or release of PFAS is a significant source of contamination.[46] After the EPA's voluntary phase out program of PFOS and PFOA (which will be discussed more in the next section), manufacturers replaced the compounds with chemically similar substances.[47] New health assessments suggest that these substituted compounds, like Ammonium (2,3,3,3-tetrafluoro-2-(heptafluoropropoxy)propanoate) ('GenX')[48] and Perfluorobutanesulfonic Acid ('PFBS'),[49] do not substantially differ from the original PFOS and PFOA in the health risk posed to humans and the environment.

Well-known consumer products are likely the most familiar source of PFAS, but a significant source of groundwater pollution

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[42] Levine, *supra* note 22, at 182.

[43] *Basic Information on PFAS: What are PFAS?*, *supra* note 1.

[44] *See* Carigan, *supra* note 28.

[45] *Id.* ("The two most common forms of PFAS are known as PFOA-initially manufactured by 3M and DuPont and used to make Teflon-and PFOS-manufactured by 3M and used to make Scotchgard.").

[46] Pelch et al., *supra* note 3, at 1 ("Widespread use of PFAS has resulted in the ubiquitous presence of these chemicals in the environment including in rivers, soil, air, house dust, food and drinking water from surface water and groundwater sources.").

[47] *See id.* at 2.

[48] Cheryl Hogue, *The Hunt is on for GenX Chemicals in People*, Chem. & Eng'g News (Apr. 7, 2019), https://cen.acs.org/environment/persistent-pollutants/hunt-GenX-chemicals-people/97/i14 ("GenX was introduced in 2009. Its inventor, DuPont, called it a 'sustainable replacement' for the persistent, bioaccumulative, and toxic chemical perfluorooctanoic acid (PFOA), which the company formerly used as a fluoropolymer processing aid. . .. A growing body of studies suggests that [GenX], like the well-studied PFOA, is linked to harmful effects in the liver and reproductive problems").

[49] *See* Fengje Chen et al., *Internal Concentrations of Perfluorobutane Sulfonate (PFBS) Comparable to*

Those of Perfluorooctane Sulfonate (PFOS) Induce Reproductive Toxicity in Caenorhabditis Elegans, 158 Ecotoxicology & Envtl. Safety 223, 227-28 (2018) ("PFBS has been used as a substitute for PFOS, but its toxicity should be characterized.…PFBS at high concentrations may result in internal concentrations similar to PFOS concentrations, and may therefore induce similar toxicity.").

actually comes from firefighting foam, which contains PFAS compounds.[50] Fluorocarbon surfactants, like PFAS generally and PFOS specifically, are a main component surfactant in Aqueous Film Forming Foam (AFFF), a common fire suppressant.[51] In AFFFs, the fluorocarbon surfactants lower the surface tension of water, enabling the formation of a coverage film of water over hydrocarbons.[52] While effective as a fire suppressant, AFFFs are the cause of significant groundwater pollution on and near military and civilian airfields, like the groundwater pollution plume near the Tucson International Airport.[53] Moreover, evidence shows PFAS groundwater contamination does not stay localized in the area immediately surrounding sites like airfields or disposal areas.[54] Instead, the groundwater contamination plums migrate, threatening water supplies in areas adjacent to the contamination sites.[55]

All current AFFFs use some type of fluorocarbon surfactants, with military specifications directly calling for the use of suppressants containing fluorocarbon surfactants.[56] The processes for making fluorocarbon surfactants in AFFFs produce a diverse multitude of PFAS compounds in the AFFF.[57] While data is available on the adverse health impacts for several PFAS, the number and complexity of the compounds,

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[50] U.S. Envtl. Prot. Agency, EPA 823R18004, EPA's Per- and Poly-fluoroalkyl Substances (PFAS) Action Plan 11-12 (Feb. 2019) [hereinafter "PFAS Action Plan"].

[51] Anant R. Sontake & Sameer M. Wagh, *The Phase-out of Perfluorooctane Sulfonate (PFOS) and the Global Future of Aqueous Film Forming Foam (AFFF), Innovations in Fire Fighting Foam*, 2 Chem. Eng'g & Sci. 11, 11 (2014).

[52] Nat'l Acads. of Scis., Eng'g, & Med., Use and Potential Impacts of AFFF Containing PFASs at Airports B-5 (2017) ("What gives these fluorine-based foams their function and properties are the fluorocarbon surfactants. Fluorocarbon surfactants are not naturally occurring; rather, they are man-made chemicals that are used in firefighting due to their ability to reduce surface tension and form a film on top of lighter fuel.").

[53] *See supra* notes 5-6 and accompanying text.

[54] Goode & Senior, *supra* note 10.

[55] *Id.*

[56] *See* United States Military Specification (MIL-SPEC): MIL-F-24385; Nat'l Acads. of Scis., Eng'g, & Med., *supra* note 52, at 1B-6 ("At the procurement stage, U.S. and Canadian airports are required to purchase firefighting foam that meets jurisdictional specifications MIL-F-24385 (MIL-SPEC) and CAN/ULC-S560-06, respectively. As a result, alternatives to AFFF containing PFASs are limited."…"Only fluorotelomer-based AFFF foam agents extinguished gasoline and heptane fires in less than 30 seconds, passing the test to qualify for the MIL-SPEC specification.").

[57] *See Aqueous Film Forming Foam (AFFF)*, Div. Spill Prevention & Response, https://dec.alaska.gov/spar/csp/pfas/firefighting-foam/ (last visited May 5, 2021) ("PFOA is not an intended ingredient in AFFF, but is a side product created during the manufacturing process. Many AFFF formulations contain other unintended PFAS side products that have similar health and environmental concerns.").

both in AFFFs and in general, means that individual and cumulative impacts of PFAS in the environment are still relatively unknown.

c. Harmful health effects

While PFAS, in particular PFOS and PFOA, have been ubiquitous in consumer and industrial uses for decades, recent health studies have demonstrated their potential for adverse health effects.[58] In addition, PFAS compounds designed to replace PFOS and PFOA after the 2006 voluntary phase out program, like GenX and PFBS, have also demonstrated similar adverse health effects as the original constituents.[59] The chemical properties that make PFAS a useful consumer product (resistant to water, oil, and fire) make the chemicals equally as hard to biodegrade once released into the environment.[60] As a result, the PFAS compounds linger in the environment and bioaccumulate in organisms, including humans.[61]

Based on the environmental persistence and large-scale use and production of PFAS in the United States, most Americans have detectable levels of PFAS in their blood.[62] For example, the average blood concentration of PFOA is near four nanograms/ml.[63] PFOS is also detectable in the blood samples of nearly every American adult likely due to exposure from drinking water.[64] Because the compounds exhibit both lipophobic and hydrophobic properties, these compounds are not absorbed into fatty tissues or cleared through the renal system.[65] Instead,

[58] *See* Pelch et al., *supra* note 3, at 2.

[59] *See* Justin M. Conley et al., *Adverse Maternal, Fetal, and Postnatal Effects of Hexafluoropropylene Oxide Dimer Acid (GenX) from Oral Gestational Exposure in Sprague-Dawley Rats*, 127 Envtl. Health Perspectives 037008-1, 037008-1 (2019) ("HFPO-DA exposure produced multiple effects that were similar to prior toxicity evaluations on PFAS, such as perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA)."); Chen et al., *supra* note 49, at 228.

[60] *See generally* R.C. Buck et al., *Perfluoroalkyl and Polyfluoroalkyl Substances in the Environment: Terminology, Classification, and Origins*, 7 Integrated Envtl. Assessment & mgmt. 513 (2011).

[61] *Id.*

[62] *See* Emanuela Corsini et al., *Perfluorinated Compounds: Emerging POPs with Potential Immunotoxicity*, 230 Toxicology Letters 263, 263-64 (2014); *see also* Pelch et al., *supra* note 3, at 2 ("Virtually all Americans have multiple PFAS at detectable levels in the blood serum.").

[63] *See id.* at 264 ("Blood samples of occupationally exposed individuals and the general human population in various countries were found to contain PFOS and PFOA at measurable levels. In the United States, the mean serum concentration in the general population was reported as 20.7 ng/ml for PFOS and as 3.7 ng/ml for PFOA.").

[64] *Id.* at 263. ("Food intake appears to be the major factor contributing to background PFC levels in human sera, while exposure to contaminated water and soils results in elevated levels in both human and wildlife populations.").

[65] Francisca Perez et al., *Accumulation of Perfluoroalkyl Substances in Human*

PFOA, PFOS, and related PFAS compounds bind with the proteins in the blood and are stored mainly in several internal organs and bones.[66] As a result, PFOS and PFOA exhibit a half-life of between one to three years in the human system.[67]

Laboratory risk assessments demonstrate that increased accumulation and chorionic exposure to PFAS can cause a host of negative health effects in humans and other organisms.[68] In animal studies, PFOS and PFOA exposures are linked to enlarged livers, reduced body weight, and signs of endocrine disruption.[69] Disruption of the endocrine system results in an impaired thyroid, which correlates with animal assessments showing hypothyroidism associated with increased exposure to PFAS chemicals.[70]

In addition, human exposure to PFOS and PFOA has been linked to a variety of cancers. Some studies show a correlation between high blood serum PFAS concentration and kidney cancer for workers in PFAS manufacturing facilities.[71] Another epidemiological study of

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Tissues, 59 Env't Int'l. 354, 355 (2013) ("In the human body, the polar hydrophobic nature of fluorine-containing compounds can lead to increased affinity for proteins. A number of PFASs have been detected in human serum, cord blood and breast milk. As other bioacumulative [sic] halogenated…PFASs can have long persistence in the body. However, they do not tend to accumulate in fat tissue. According to outcomes of animal studies, PFOS and PFOA are mostly excreted through the urine, but limited observations in humans suggest that only one-fifth of the total body clearance is renal. The elimination half-life of PFOA in humans was roughly estimated to be 3.5 years, while that of PFOS was approximately 4.8 years…recently reviewed studies reporting the elimination half-life values between 2.3 and 3.3 years, following an exposure to contaminated drinking water.").

[66] *Id.*

[67] Yiyi Xu et al., *Serum Half-Lives for Short- and Long-Chain Perfluoroalkyl Acids after Ceasing Exposure from Drinking Water Contaminated by Firefighting Foam*, 128 Envtl. Health Perspectives 077004-1, 077004-1 (2020) ("PFBS showed the shortest half-life {average 44 d [95% confidence interval (CI): 37, 55 d]}, followed by PFHpA [62 d (95% CI: 51, 80 d)]. PFPeS and PFHpS showed average half-lives as 0.63 and 1.46 y, respectively. Branched PFOS isomers had average half-lives ranging from 1.05 to 1.26 y for different isomers. PFOA, PFHxS, and linear PFOS isomers showed average half-lives of 1.77, 2.87, and 2.93 y, respectively.").

[68] *See* Pelch et al., *supra* note 3, at 2 ("The scientific literature on PFAS has increased exponentially in the last decade, which has resulted in a greater understanding of the potential adverse health effects associated with PFOS and PFOA exposure.").

[69] Bevin E. Blake et al., *Associations Between Longitudinal Serum Perfluoroalkyl Substance (PFAS) Levels and Measures of Thyroid Hormone, Kidney Function, and Body Mass Index in the Fernald Community Cohort*, 242 Envtl. Pollution 894, 901 (2018) ("PFAS are suspected to be endocrine disruptors that target the thyroid and alter thyroid hormones.").

[70] *Id.*

[71] Wendee Nicole, *PFOA and Cancer in a Highly Exposed Community: New Findings from the C8 Science Panel*, 121 Envtl. Health Perspectives A 340, A 340 (2013). ("Past laboratory research has associated perfluorooctanoic acid (PFOA) with liver,

people living near a PFAS manufacturing facility showed a probable connection between PFOA exposure and kidney and testicular cancer.[72] Overall, the majority of human studies lack significant statistical power[73] with PFOS and PFOA being the most studied constituents in the PFAS class.[74] While further studies are required for compounds other than PFOS and PFOA, the general consensus is that PFAS exposure can lead to adverse health effects, demonstrating a need for regulation.

II. Regulatory Effort at the Federal and State Level

a. Current Federal Regulatory Regime

The SDWA was originally passed in 1974 to protect the American population from exposure to cancer causing or toxic contaminants in public water systems.[75] Under the SDWA, the EPA is required to promulgate regulations that are designed to protect public drinking water systems by setting standards for contaminant levels in the public drinking water systems.[76] The National Primary Drinking Water Regulation (NPDWR) sets the Maximum Contaminant Level (MCL) for listed constituents.[77] The EPA determines if a contaminant should be regulated using a three-factor test laid out in the statute:

1) the contaminant may have an adverse effect on the health of persons;
2) the contaminant is known to occur or there is a substantial likelihood that the contaminant will occur in public water systems with a frequency and at levels of public health concern; and
3) in the sole judgment of the Administrator, regulation of such contaminant presents a meaningful opportunity for health risk reduction for persons served by public water systems.[78]

testicular, and pancreatic cancers in rodents. Human studies of PFOA have lacked statistical power, although one study did find a significant association between kidney cancer deaths and serum levels of PFOA in chemical plant workers. Now a major epidemiological study published in EHP reports an association between PFOA exposure and kidney and testicular cancers in individuals who lived near and worked at a plant that produced the chemical.").

[72] *Id.*

[73] *Id.*

[74] *See* Pelch et al., *supra* note 3, at 2.

[75] *See* Levine, *supra* note 22, at 186.

[76] Mary Tiemann, Cong. Research Serv., RL31243, Safe Drinking Water Act (SDWA): A Summary of the Act and its Major Requirements 5 (2017) (Summarizing the requirements for the EPA to promulgate rules under the statute.).

[77] 42 U.S.C. § 300g-l(b)(1)(A) (2018).

[78] 42 U.S.C. § 300g-l(b)(l)(A)(i) -(iii) (2018).

Even if a contaminant is not actively regulated, the EPA tracks it in public drinking water systems if it potentially could be regulated based on the statutory criteria.[79] The EPA started examining PFAS in public drinking water supplies in 2012 under the Unregulated Contaminant Monitoring Rule (UCMR) to determine if an MCL should be issued. However, the EPA to date has not yet promulgated a SDWA regulation for PFAS.[80] The EPA, instead, issued a non-binding health advisory for PFOS and PFOA with a recommended MCL of seventy parts per trillion.[81] The EPA has not addressed other PFAS chemicals with either a formal regulation or nonbinding health advisory. The EPA admits that the health advisory offers only marginal protection from PFAS contamination and only serves as informal guidance for state and local officials.[82] Additionally, the EPA has not addressed other PFAS chemicals with either a formal regulation or nonbinding health advisory.[83]

If the EPA wished to provide more protection than a health advisory, but more flexibility than a formal regulation, it could issue an interim NPDWR under either the Urgent Threat provision or Emergency Powers provision of the SDWA. The Urgent Threat provision allows the EPA to regulate a contaminant without considering the third statutory factor of whether regulation provides a meaningful opportunity to reduce health risks.[84] The Emergency Powers provision provides the EPA broad authority to prevent and eliminate potential threats from

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[79] *Basic Information on the CCL and Regulatory Determination*, EPA, https://www.epa.gov/ccl/basic-information-ccl-and-regulatory-determination (last visited Nov. 9, 2020).

[80] Jeff B. Kray & Sarah J. Wightman, *Contaminants of Emerging Concern: A New Frontier for Hazardous Waste and Drinking Water Regulation*, 32 Nat. Res. & Env't 36, 36 (2018).

[81] *Lifetime Health Advisories and Health Effects Support Documents for Perfluorooctanoic Acid and Perfluorooctane Sulfonate*, 81 Fed. Reg. 33250 (proposed May 25, 2016) ("EPA's HAs, which identify the concentration of PFOS and PFOA in drinking water at or below which adverse health effects are not anticipated to occur over a lifetime of exposure, are: 0.07 parts per billion (70 parts per trillion) for PFOS and PFOA. HAs are non-regulatory and reflect EPA's assessment of the best available peer-reviewed science.").

[82] *Id.* ("EPA developed the HAs to assist federal, state, tribal and local officials, and managers of drinking water systems in protecting public health when these chemicals are present in drinking water."); *Drinking Water Health Advisories for PFOS and PFOA*, EPA, https://www.epa.gov/ground-waterand-drinking-water/drinking-water-health-advisories-pfoa-and-pfos (last visited Nov. 7, 2020) ("EPA's health advisory level for PFOS and PFOA offers a margin of protection for all Americans throughout their life from adverse health effects resulting from exposure to PFOS and PFOA in drinking water.").

[83] *See generally PFOA, PFOS, and Other PFASs: EPA Actions to Address PFAS*, EPA, https://www.epa.gov/pfas/epa-actions-address-pfas (last visited Nov. 7, 2020) (describing the actions taken to address PFAS contamination).

[84] 42 U.S.C. § 300g-1 (b)(D) (2018) (outlining EPA's authority under the urgent threat provision).

entering public drinking water systems.[85] The EPA to date has not used its authority under either provision to regulate the potential threat of PFAS contamination entering drinking water supplies.[86]

Under CERCLA, the EPA currently designates PFOS and PFOA as contaminates but not hazardous substances.[87] For a substance to be "hazardous," the EPA must determine that the contaminates poses "imminent and substantial danger" to public health.[88] The distinction between "contaminate" and "hazardous substance" for PFOS and PFOA limits the agency's authority to impose notice requirements or designate superfund sites and impose remediation costs.[89] The PFAS action plan indicates that the EPA is considering designating PFOS and PFOA as hazardous substances.[90]

Despite the health threats posed by PFAS and a clear statutory authority to regulate PFAS pollution, the EPA has not acted in regulating the chemical compounds under any environmental statute, including the SDWA and CERCLA. While the EPA has not set formal regulations for PFAS, they have created non-binding measures to limit the spread of contamination.[91] In 2006, the EPA created the PFOA Stewardship program.[92] The Stewardship program aimed to have the eight leading manufacturers of PFOA agree to two reduction goals: (1) reducing PFOA or other PFAS that broke down to PFOA by ninety-five percent by 2010, using 2000 emission levels as a baseline; and (2) total elimination of PFOA emissions by 2015.[93] The 2010/2015 Stewardship Program was

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[85] *See* 42 U.S.C. §§ 300g-l(b)(1)(D), 300i(a) (2018) (outlining EPA's authority under the emergency provision).

[86] *See* Levine, *supra* note 22 at 195-97.

[87] *See* PFAS law and Regulations, EPA, https://www.epa.gov/pfas/pfas-laws-and-regulations#:~:text=PFAS%2C%20including%20PFOA%20and%20PFOS,as%20CERCLA%20pollutants%20or%20contaminants.&text=CERCLA%20requires%20that%20remedies%20also%20be%20protective%20of%20the%20environment (last visited May 5, 2021) ("PFAS, including PFOA and PFOS, are not listed as CERCLA hazardous substances, but in some circumstances could be responded to as CERCLA pollutants or contaminants.").

[88] 42 U.S.C. § 9604 (2018) ("Whenever…there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act.").

[89] Diaz & Stewart *supra* note 40 at 333.

[90] *PFAS Action Plan supra* note 50, at 15.

[91] *See Fact Sheet: 2010/2015 PFOA Stewardship Program*, EPA https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/fact-sheet-20102015-pfoa-stewardship-program (last visited Nov. 7, 2020) [hereinafter Stewardship Factsheet]; *see also* Levine *supra* note 22 at 190 ("The PFAS health advisory is not the only 'non-regulatory' measure the EPA initiated regarding PFAS.").

[92] *Id*.

[93] *Id*. ("EPA asked the eight major companies in the PFASs industry to commit to reducing PFOA from facility emissions and product content by 95 percent

a success. All eight companies agreed to and met emission reductions by the specified dates.[94] However, given that the Stewardship Program was voluntary, other companies were still free to keep using PFOA or PFOA derivative-containing products and importing them into the United States.[95]

In 2019, the EPA created its comprehensive PFAS Action Plan, which addresses both drinking water standards and the importation loophole.[96] The action plan sets out short and long-term goals with a focus on setting an enforceable drinking water standard and strengthening cleanup efforts by potentially listing PFAS as hazardous substances under CERCLA. [97] As a part of implanting its PFAS Action Plan, the EPA published its preliminary determination to regulate PFOS and PFOA in drinking water systems in early 2020.[98] This renewed focus on PFAS includes closing importation of products containing PFAS chemicals into the United States and extending the phase-out of the PFAS-containing products originally set in the 2010/2015 Stewardship

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no later than 2010, and to work toward eliminating PFOA from emissions and product content no later than 2015.").

[94] *See Letters Committing to Participation in the PFOA Stewardship Program*, EPA https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/letters-commiting-participation-pfoa-stewardship-program (last visited Nov. 7, 2020); *2010/2015 PFOA Stewardship Program - 2014 Annual Progress Reports*, EPA, https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/20102015-pfoa-stewardship-program-2014-annual-progress (last visited Nov. 7, 2020).

[95] *Fact Sheet: 2010/2015 PFOA Stewardship Program*, *supra* note 91 ("The manufacture and import of PFOA has also been phased out in [the] United States as part of the PFOA Stewardship program. Existing stocks of PFOA might still be used and there might be PFOA in some imported articles.").

[96] *See EPA Continues to Act on PFAS, Proposes to Close Import Loophole and Protect American Consumers*, EPA (Feb. 20, 2020), https://www.epa.gov/newsreleases/epa-continues-act-pfas-proposes-close-import-loophole-and-protect-american-consumers.

[97] *PFAS Action Plan*, *supra* note 50, at 15, 21 ("Consistent with CERCLA, the Agency for Toxic Substances and Disease Registry (ATSDR) recently released draft toxicological profiles for multiple PFAS, which included Minimal Risk Levels (MRLs). ATSDR's MRLs for four PFAS substances (i.e., PFOA, PFOS, PFHxS, and PFNA), when finalized, are intended to serve as screening tools to help public health professionals to determine areas and populations potentially at risk for exposure and can be used as a mechanism to identify hazardous waste sites that are not expected to cause adverse health effects (ATSR 2018a). The EPA will continue to partner with ATSDR to better understand and communicate risks to human health from PFAS.").

[98] Announcement of Preliminary Regulatory Determinations for Contaminants on the Fourth Drinking Water Contaminant Candidate List, 85 Fed. Reg. 14098 (Mar. 10, 2020) (to be codified at 40 C.F.R. pt. 141) ("This notice presents the preliminary regulatory determinations and supporting rationale for the following eight of the 109 contaminants listed on CCL 4: Perfluorooctanesulfonic acid (PFOS), perfluorooctanoic acid (PFOA)…. The Agency is making preliminary determinations to regulate two contaminants (i.e., PFOS and PFOA).").

Program.[99] While the PFAS Action Plan takes steps to mitigate PFAS contamination, some critics believe that the EPA is moving too slowly in addressing the issue.[100]

In response to the slow-moving regulatory process, Congress created a task force to "put the pressure on the EPA" to accelerate the process for addressing PFAS regulation.[101] In early 2020, the House passed the PFAS Action Act which would, in part, require the Administrator of the EPA to create drinking water standards and list PFOS and PFOA as hazardous substances under CERCLA.[102] The Senate passed a competing piece of legislation, the PFAS Release Disclosure and Protection Act of 2019, with less stringent measures addressing PFAS contamination.[103] Moreover, there have been a host of other pieces of legislation that address PFAS contamination introduced in both Houses of Congress that have not yet passed.[104] However, because of

[99] *EPA Continues to Act on PFAS*, *supra* note 96 (EPA Administrator Andrew Wheeler stated that "[t]oday's action would close a loophole that currently allows new uses of products that include certain PFAS chemicals as part of surface coatings that have been phased out in the United States to be imported into our country.").

[100] *See* Jon Hurdle & Susan Phillips, *EPA Says It Plans to Limit Toxic PFAS Chemicals, But Not Soon Enough for Critics*, NPR (Feb. 14, 2019, 3:10 PM), https://www.npr.org/2019/02/14/694660716/epa-says-itwill-regulate-toxic-pfas-chemicals-but-not-soon-enough-for-critics (quoting lawmakers dissatisfied with the speed of the regulatory process).

[101] Justine McDaniel & Laura McCrystal, *Members of Congress Will 'Put Pressure on the EPA' to Address PFAS-Contaminated Water*, Phila. Inquirer (Jan. 23, 2019), https://www.inquirer.com/news/pfoa-pfos-pfas-water-contanination-congress-task-force -bucks-montgomery-20190123.html.

[102] PFAS Action Act of 2019, H.R. 535, 116th Cong. (2019) Sec. 2 of the proposed act reads:

> a. Designation.—Not later than 1 year after the date of enactment of this Act, the Administrator of the Environmental Protection Agency shall designate perfluorooctanoic acid and its salts, and perfluoroactanesulfonic acid and its salts, as hazardous substances under section 102(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9602(a)).
>
> b. Deadline for Additional Determinations.—Not later than 5 years after the date of enactment of this Act, the Administrator of the Environmental Protection Agency shall determine whether to designate all perfluoroalkyl and polyfluoroalkyl substances, other than those perfluoroalkyl and polyfluoroalkyl substances designated pursuant to subsection (a), as hazardous substances under section 102(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9602(a)) individually or in groups.

[103] *See generally* PFAS Release Disclosure and Protection Act of 2019, S. 1507, 116th Cong. (2019) (the Senate bill does not mandate a safe drinking water standard, nor does it designate PFAS as a hazardous substance under CERCLA).

[104] *See PFAS Federal Legislation*, NYU L. St. Energy & Envtl. Impact

the potentially slow response at the federal level, (both at the regulatory and the legislative level) some states have moved forward with creating their own enforceable drinking water standards.

b. Recent Development of State Regulatory Standards

Absent a formal federal standard, several states have moved ahead with creating their own enforceable drinking water standards.[105] The states that have adopted rules about acceptable MCL standards have come to no general consensus on the topic.[106] California has adopted more restrictive standards than the federal health advisory by imposing a notification level for PFOS and PFOA at 5.1 and 6.5 parts per trillion and a response level at ten and forty parts per trillion.[107] California is not even the strictest; Michigan has the most comprehensive and restrictive regulations. Michigan set regulation levels for PFOS and PFOA at eight and sixteen parts per trillion while also setting standards for five other PFAS chemicals, including PFBS and GenX.[108] In total, ten states have adopted some form of regulation ranging from North Carolina's health advisory for GenX chemicals, to Connecticut and Massachusetts' MCL for the sum total of a variety of PFAS chemicals.[109] The general trend among the states that have passed drinking water standards is to create more restrictive regulations than the federal health advisory.[110] Experts expect even more states to adopt regulatory standards for PFAS as the problem persists.[111]

Ctr., https://www.law.nyu.edu/centers/state-impact/press-publications/research/pfas-federal-legislation (last visited Oct. 15, 2020) (Giving a comprehensive list of different pieces of introduced legislation that address PFAS contamination at some level).

[105] Michael Traynham, *In the Absence of Federal Standards, States Step in to Regulate PFAS*, JD Supra (Aug. 6, 2020), https://www.jdsupra.com/legalnews/in-the-absence-of-federal-standards-58710/ ("New York state joined the growing ranks of state and local governments directly regulating PFAS.").

[106] *PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS)*, ASDWA, https://www.asdwa.org/pfas/ (last visited Nov. 7, 2020) (The Association of State Drinking Water Administrators (ASDWA) has compiled a list of state regulations in a table to compare various approaches across the country, "States are having to make tough decisions about whether or how to implement HAs and address PFAS in drinking water in the absence of federal standards. The table below shows the states that have proposed or established PFAS standards or guidelines that are lower or different than EPA's HAs. These numbers demonstrate the variation in health risk goals and risk reductions among states in the absence of federal standards and are creating public confusion about what levels of PFAS are safe in drinking water.").

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *See id*.

[111] *See* Dunbar & Brady *supra* note 25 ("Meanwhile, nearly half the states

With the rise of state regulations for PFAS, along with additional federal standards and the accompanying CERCLA listing likely in the near future, water utilities face potentially overwhelming costs.[112] These new costs are in addition to the millions of dollars that utilities already spend to remove other environmental pollutants, like nitrates.[113] In states without the ability to provide grant funding to improve infrastructure to private and municipal water utilities, the costs will likely either be felt by ratepayers or utilities will have to recover costs through litigation against PFAS manufacturers or users.[114] To assist water utilities in the eventual cleanup costs, Congress should exempt water utilities from bearing the costs associated with PFAS pollution removed from public drinking water systems. To impose the cost of environmental remediation

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are writing their own guidance, regulations, or legislation on PFAS chemicals, with some running into opposition from utilities."); *Gerald B. Silverman, Analysis of State-by-State Differences in PFAS Regulation,* Northeastern Univ. (Oct. 8, 2018), https://pfasproject.com/2018/10/02/analysis-of-state-by-state-differences-in-pfas-regulation/ (listing several states that are considering regulations); *PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS)*, *supra* note 106 (noting that other States on the list have passed regulations as seen in the table prepared by the ASDWA).

[112] *PFAS Management to Drive US $12.1B in Water Utility Spend Over Next Decade*, *supra* note 27; John Gardella, *PFAS Water Cleanup…Have You Bought Yourself a Multi-Million Dollar Superfund Issue?*, 10 Nat. L. Rev. 1, 2 (Nov. 9, 2020) ("Water utilities in particular must pay special attention to PFAS developments under CERCLA. Proactive planning is needed to determine alternate means of disposing of or eliminating PFAS from water sources. Failure to enact forward-thinking strategies may very well end up costing water utility companies tens of millions in unexpected and unwanted costs if they fail to do so.").

[113] *See* V.B. Jensen et al.*, Technical Report 6: Drinking Water Treatment for Nitrate 47*, Univ. CA. Davis (2012) http://groundwaternitrate.ucdavis.edu/files/139107.pdf (estimating the capital investment costs and operational costs in millions of dollars).

[114] *See USEPA Announces Major Actions to Address PFAS; California Water Utility Files Landmark PFAS Lawsuit in Federal District Court*, Downey Brand (Jan. 23, 2020), https://www.downeybrand.com/legal-alerts/usepa-announces-major-actions-to-address-pfas-california-water-utility-files-landmark-pfas-lawsuit-in-federal-district-court/ ("[O]n January 21, 2020, California-American Water Company filed a lawsuit against the federal government for costs related to a water treatment system installed to clean-up a well allegedly contaminated with PFOS and PFOA from the use of fire retardant foam containing PFAS at the former Mather Air Force Base near Rancho Cordova. According to the complaint that was filed in the United States District Court for the Eastern District of California, one of the plaintiff's drinking water supply wells was contaminated as a result of either the leaching of PFOS and PFOA into groundwater at the base and migration of those compounds to the well, and/or the government's practice of reinjecting contaminated groundwater after treating the water for other pollutants. The plaintiff seeks damages of over $1.3 million.…[T]his is one of the first actions filed in the State of California seeking to recoup PFAS clean-up costs and may be an early sign of a new wave of PFAS litigation throughout California.").

on utilities would impose an unfair dual cost of complying with federal and state drinking water standards and CERCLA liability.[115]

III. Water Utilities' Role in PFAS Clean Up under Safe Drinking Water Act and CERCLA

The costs associated with PFAS regulation and CERCLA liability will not affect water utilities equally. Only larger, private and municipal utilities with enough capital to withstand increased costs will be able to cover costs. This leaves smaller and rural water utilities disproportionately disadvantaged in bearing PFAS regulation costs. Even if water utilities are able to recoup the cost of cleanup through rate increases, the ratepayers and general public would bear the burden for contamination for which they were not responsible.

In general, water utilities can be categorized into two groups: private water utilities, and municipal water utilities. Private water utilities range from large, investor-owned water companies like EPCOR Utilities that operate in a number of states, including Arizona, and smaller water companies that service rural communities in Arizona.[116] Typically, state public utility commissions, such as the Arizona Corporation Commission or California's Public Utility Commission, regulate these private water companies.[117] While larger private water utilities have the resources to address PFAS contamination, smaller private utilities will likely be forced to push costs on to the ratepayers.

Municipal water companies "are authorized under municipal codes and [are] managed under [municipal] regulations", such as cities.[118] The City of Phoenix, for example, operates a water utility to service residents within the city boundaries.[119] The local municipality

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[115] Letter from American Water Works Association et al., *supra* note 26 ("Failure to protect water utilities from this liability would victimize the public twice: once when they are forced to pay to remove PFAS from their water, and again when they are forced to pay to clean up PFAS elsewhere.").

[116] *See* Nathaniel Logar, James Salzman & Cara Horowitz, *Ensuring Safe Drinking Water in Los Angeles County's Small Water Systems*, 32 Tul. Envtl. L. J. 205, 210 (2019) ("Private systems range from large investor-owned utilities to smaller systems that provide water as an ancillary service, such as a mobile home park's residential water system."); s*ee also* Arizona Corp. Comm'n, (Nov. 25, 2020) https://azcc.gov/utilities/water (showing a map of water companies in the state of Arizona.).

[117] Logar, *supra* note 116 ("The California Public Utilities Commission (CPUC) regulates private water systems.").

[118] *Id*. at 210.

[119] Caitrin Chappelle, *Ensuring Water Equity and Utility Solvency: Lessons from Phoenix*, PPIC (Oct. 12, 2020), https://www.ppic.org/blog/ensuring-water-equity-and-utility-solvency-lessons-from-phoenix/ (discussing Phoenix Water Services' efforts to keep water rates affordable.).

regulates the water utility rates, rather than the state public utility commission. Special districts are another form of public utility, which are created by specific government action and governed under a statutory scheme.[120] Types of special districts include irrigation districts that are common in unincorporated areas.[121] Smaller municipal and rural districts again will bear disproportionate costs in addressing PFAS contamination due to their limited resources.

While the governance and regulation of water utilities can differ from one another, they all share a common role in servicing the public.[122] Any dramatic increase in operational costs from regulation will likely result in higher rates to water customers, and failing to raise rates in light of new costs may bankrupt utilities.[123]

a. Cost of complying with Safe drinking water standards and CERCLA Remediation

Water utilities are facing enormous costs as a result of PFAS contamination. In order to comply with the imminent federal standards along with recent state standards, water utilities must significantly invest in improving water treatment infrastructure above the millions of dollars already spent to be in compliance with federal and state environmental laws.[124] One research group projects improving water treatment facilities

[120] Logar, *supra* note 116 at 211.

[121] *Id*.

[122] Cynthia Barnett, *Hey America: It's Time to Talk about the Price of Water*, ENSIA (Oct. 6, 2014), https://ensia.com/features/hey-america-its-time-to-talk-about-the-price-of-water/ (Water Utilities are already forced to play catch up in raising rates prices after years of providing abundantly cheap water for pennies on the gallon. However, the rising cost of maintenance is out pacing efforts to raise rates. An increase in costs both to improving infrastructure and paying for environmental remediation will be difficult. "In recent years, municipalities have begun raising rates to play catch-up….Even so, the water sector reports it is not enough to pay for an estimated $1 trillion in anticipated repair costs for buried water pipes and growth-related infrastructure costs over the next 25 years.").

[123] Daniel Vock, *Utilities Worry Water's Becoming Unaffordable*, Governing (Dec. 4, 2014), https://www.governing.com/archive/gov-water-utilities-worry-about-high-costs-for-low-income-customers.html (discussing Detroit's water utility struggling to provide water during the bankruptcy of the city.); Theodore Kury*, Many Electric Utilities Are Struggling—Will More Go Bankrupt?*, GreenBiz (May 16, 2019) https://www.greenbiz.com/article/many-electric-utilities-are-struggling-will-more-go-bankrupt (The rising liability of PFAS could bankrupt Utilities in the same way that electric utilities are under strain due to increased wildfire risks.).

[124] *PFAS Management to Drive US $12.1B in Water Utility Spend Over Next Decade*, *supra* note 27 (This cost is on top of the trillions of dollars needed to upgrade aging infrastructure to meet the needs of growing populations); Barnett, *supra* note 122 (water utilities expect to "pay for an estimated $1 trillion in anticipated repair

(for PFAS alone) will cost water utilities over twelve billion dollars over the next ten years in order to meet current and future regulatory standards.[125] Tucson Water, the municipal water utility servicing the City of Tucson, has already spent millions of dollars to address the PFAS groundwater contamination discussed earlier.[126]

Water utilities have limited access to technology that removes PFAS chemicals from drinking water and remain in compliance with new and expected drinking water standards.[127] The inefficiencies associated with existing technology and infrastructure that deal with PFAS contamination has spurred research to develop alternative, more effective forms of removing PFAS from water systems.[128] Currently, water utilities extract PFAS either through a liquid medium, as is the case for reverse osmosis processes, or through a solid medium, as is the case for ion exchange resins or granular activated carbon traps.[129] These technologies present imperfect solutions to PFAS treatment.[130] In the cases stated above, the extraction methods were not primarily designed to capture PFAS. Therefore, such methods do not remove all PFAS molecules, especially smaller variants, such as short chain PFAS.[131]

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costs for buried water pipes and growth-related infrastructure costs over the next 25 years.").

[125] *PFAS Management to Drive US $12.1B in Water Utility Spend Over Next Decade*, *supra* note 27.

[126] Tony Davis, *Cost to Build Water Treatment Plants to Protect Against PFAS Hazards Will Be 'Substantial'*, Ariz. Daily Star (Jan. 8, 2020), https://tucson.com/news/local/cost-to-build-water-treatment-plants-to-protect-against-pfas-hazards-will-be-substantial/article_006c8114-5870-5689-a19b-8a57ef59afcf.html ("At this time, Tucson Water can't estimate the price tag for designing and building treatment systems for this pollution, except to say the cost will be substantial, in the tens of millions of dollars…"); s*ee also* Hu *supra* note 5; s*ee also* Davis, *supra* note 6 and accompanying text.

[127] *See* Kerri Jansen, *'Forever Chemicals' No More? These Technologies Aim to Destroy PFAS in Water*, C&EN (Mar. 25, 2019), https://cen.acs.org/environment/persistent-pollutants/Forever-chemicals-technologies-aim-destroy/97/i12 ("At the Sweeney Water Treatment Plant in North Carolina, engineers are finalizing designs for a new system aimed at removing a mix of persistent industrial chemicals from their drinking water. These molecules are troublemakers—wily foes that have evaded capture by traditional water treatment methods. They're known collectively as PFAS, the family of non polymer per- and polyfluoroalkyl substances nicknamed 'forever chemicals.'").

[128] *Id*.

[129] *Id*.

[130] *Id.* ("But the best on the market still leaves room for improvement. Reverse osmosis, ion-exchange resins, and granular activated carbon, though capable of trapping PFAS, were not designed to specifically bind these newly scrutinized and little-understood pollutants.).

[131] *Id.* ("These technologies can also allow smaller PFAS molecules to slip through and are vulnerable to fouling from other substances in the water, causing them to lose efficiency. Plus, they create a concentrated waste stream.").

The treatment processes used by water utilities to comply with safe drinking water standards can create CERCLA liability.[132] The treatment processes described above—reverse osmosis, ion-exchange resins, and granular activated carbon—produce contaminated water or solids that the water utilities then have to dispose of.[133] For example, if a disposal site is designated as a superfund site, the water utility company could face significant environmental remediation costs. The cost of complying with present and future drinking water regulations, paired with the potential cost of CERCLA liability is likely a multi-million dollar burden if PFOS and PFOA are listed as hazardous substances.[134] This potential cost is likely too much for utilities to bear, leading to vocal opposition to new regulations from water service companies.

Most water utility associations oppose PFAS regulation without some protection provided to their industry.[135] They argue that recent legislation, which provides CERCLA liability protection to airports that were required to use PFAS containing AFFF under FAA regulations, is unfair when water utilities would also be required under the SDWA to remove PFAS from public drinking water systems.[136] The group of water

[132] *See* Gardella, *supra* note 112; Letter from American Water Works Association et al*., supra* note 26 ("Designating PFAS as a CERCLA ("Superfund") hazardous substance would help communities that have a known responsible party with financial means to pay for cleanup. However, it could also create liability for communities that encounter PFAS in their water treatment activities. Once PFAS is removed from water, it then must be disposed of. A water utility that properly disposes of residuals containing PFAS, in a manner consistent with applicable laws, must not be held liable under CERCLA for future costs associated with PFAS cleanup.").

[133] Jansen, *supra* note 127.

[134] *See* Gardella, *supra* note 112 "[W]ater utilities are under increasing pressure to filter out PFAS from drinking water. These PFAS are typically deposited in landfills. Out of sight, out of mind? Not exactly, when it comes to PFAS. As the quantity of PFAS accumulates in landfills, if the EPA makes a determination that PFAS are "hazardous" substances under CERCLA, the EPA could immediately designate landfills full of PFAS as Superfund sites and take action to pursue parties to pay for the cleanup. Water utilities could therefore be at significant risk of having to pay for Superfund site cleanup.".

[135] *See* Letter from American Water Works Association et al., to Representative, *supra* note 26 "[Water utilities] share the goal of keeping the nation's waters free of PFAS and holding accountable those entities that are responsible for environmental contamination. But because H.R. 535 would leave water system customers unprotected against liability for environmental cleanup of PFAS, we have no choice but to oppose the legislation in its current form.".

[136] *Id*. "It is particularly disappointing that the manager's amendment proposed for H.R. 535 would offer a CERCLA liability shield to airports that are required to use firefighting foam containing PFAS, but fails to extend that same protection to water and wastewater systems who may be required to remove and dispose of PFAS. As receivers of PFAS, water utilities should be afforded the same liability protections

utility associations requested that, like airports, water utility services should be exempt from CERCLA liability because the additional liability would "victimize the public twice."[137] According to this logic, the public would bear two costs: first, the cost of complying with the drinking water standards, and second, the liability from disposing of PFAS treatment residue. Ultimately, the cost of upgrading infrastructure to comply with EPA's SDWA regulations, coupled with CERCLA remediation costs could disproportionately affect low income and minority customers. By imposing a disproportionately greater cost on smaller utilities, new CERCLA liability will likely affect already-marginalized communities who cannot afford increased water rates.[138] Therefore, imposing costs of CERCLA liability on water utilities would not promote equitable outcomes in environmental remediation if the potential double costs of PFAS cleanup justify water utilities lobbying against imposing CERCLA similarly for PFAS cleanup.[139] Within CERCLA, there is an existing exemption to liability that provides Congress the rationale for exempting water utilities from PFAS liability.

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that airports are being awarded in the legislation." *See also* H.R. 535, § 2(C) "IN GENERAL.—No sponsor, including a sponsor of the civilian portion of a joint-use airport or a shared-use airport (as such terms are defined in section 139.5 of title 14, Code of Federal Regulations (or a successor regulation)), shall be liable under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) for the costs of responding to, or damages resulting from, a release to the environment of a perfluoroalkyl or polyfluoroalkyl substance designated as a hazardous substance under section 102(a) of such Act that resulted from the use of aqueous film forming foam agent, if such use was— (A) required by the Federal Aviation Administration for compliance with part 139 of title 14, Code of Federal Regulations; and (B) carried out in accordance with Federal Aviation Administration standards and guidance on the use of such substance.

[137] *See* Letter from American Water Works Association et al., to Representative*, supra* note 26.

[138] *See* Vock, *supra* note 123 ("Water utilities—many of them government agencies—increasingly are worried that their services will become unaffordable to low-income customers.").

[139] While there is a federal subsidy program that provides assistance to low-income households for electric utility services, there is not a similar program to provide assistance for water utility services. Michele Nellenbach et al., *Evaluating Proposals for a Federal Water Bill Assistance Program*, Bipartisan Pol'y Ctr. 1, 2 (2020) ("To assist affordability-challenged communities and low-income consumers—particularly those served by small systems with high compliance costs—EPA's National Drinking Water Advisory Council recommended in 2003 and reiterated in 2009 that a federal water bill assistance program be adopted. Though NDWAC's recommendation has surfaced in various pieces of federal legislation, a federal water bill assistance program has not been enacted.").

b. Existing Statutory and Policy Rationale in Favor of Exempting Water Utilities: The Oil and Gas Industry Exemptions

Water utilities would not be the first industry to benefit from a CERCLA exemption. CERCLA imposes a strict, cradle-to-grave liability standard for environmental remediation costs.[140] By imposing this standard, CERCLA achieves its broad policy goal: holding parties responsible for past environmental contamination.[141] Congress enacted CERCLA in 1980, in response to the energy insecurity during the OPEC oil embargo in the late 1970s.[142] At a time when foreign energy dependence was contributing to an economic recession in the U.S., Congress recognized that increasing environmental regulation posed a threat to domestic oil and gas production.[143] Therefore, Congress protected the oil and gas industry from liability by exempting petroleum wastes from CERCLA's definition of hazardous substances.[144]

Hazardous substances are defined broadly in CERCLA to include pollutants regulated under other environmental statutes, such as the Resource Conservation and Recovery Act (RCRA), as well as other

[140] *See generally* 42 U.S.C. §§ 9601 et seq. (2018).

[141] David M. Bearden, *Comprehensive Environmental Response, Compensation, and Liability Act: A Summary of Superfund Cleanup Authorities and Related Provisions of the Act*, Congressional Research Service (2012) ("CERCLA established a broad liability scheme that holds past and current owners and operators of facilities from which a release occurs financially responsible for cleanup costs, natural resource damages, and the costs of federal public health studies.").

[142] Daniel L. McKay, *RCRA's Oil Field Wastes Exemption and CERCLA's Petroleum Exclusion: Are They Justified*, 15 J. Energy Nat. Resources & Envtl. L. 41 (1995) (quoting C. John Miller president of the IPAA: "It is beyond rational comprehension that Congress could approve and the President sign a massive tax on the U.S. oil industry at a time when our domestic and foreign policies are held hostage to our dependence on foreign oil. . .. Most importantly, though, this bill deprives producers of the means to expand domestic exploration to the level which can free us from our crippling dependence on foreign oil. This is the most tragic and senseless aspect of the Pyrrhic victory President Carter wins today.").

[143] *See id*.

[144] *See* Michael M. Gibson & David P. Young, *Oil and Gas Exemptions Under RCRA and CERCLA Are They Still "Safe Harbors" Eleven Years Later?*, 32 S. Tex. L. Rev. 361, 364-65 (1991) "As environmental regulation of the American economy matured during the 1970's, Congress recognized that…certain industries generated wastes that may pose little or no public health hazard and that the economic cost of requiring those industries to meet national uniform abatement and remediation standards far exceeds any environmental benefit that could be gained. Congress also recognized that if environmental regulation of these industries is necessary, state regulatory schemes should handle this regulation. Accordingly, Congress created two such exemptions for the oil and gas industry in 1980: The drilling fluids exemption in RCRA and the petroleum exclusion of CERCLA.".

imminently hazardous chemicals or mixtures.[145] However, Congress explicitly excluded "petroleum, including crude oil or any fraction thereof" from the definition of hazardous substances.[146] Congress did not define the term petroleum in the statute and there is little legislative history defining the scope or purpose of the petroleum exemption.[147] Further, the general purpose and scope of the petroleum exclusion is not readily apparent from the sparse legislative history or from the statutory language.[148] Due to the ambiguous nature of the scope of the exemption from the statute, the EPA has interpreted the exemption to exclude:

1) crude oil and crude oil fractions;
2) hazardous substances indigenous to petroleum such as benzene; and
3) indigenous, refinery-added hazardous substances which are normally mixed with or added to crude oil or crude oil fractions during the refining process.[149]

While the general purpose of the petroleum exclusion is difficult to determine, the RCRA contains a similar provision that protects the oil and gas industry by excluding oil field wastes from RCRA liability. The Bevill-Bentsen Amendments of 1980 added the oil field waste exclusions to RCRA pending a study by the EPA to determine if RCRA liability should extend to oil field wastes. In developing their regulatory response, the EPA developed a three-prong analysis considering the adverse health effects of oil field wastes, the current regulatory regime, and the economic impact of regulating the oil industry under RCRA.[150] Despite the potential negative health effects associated with oil field wastes, the EPA found that the existing state and federal regulatory frameworks sufficiently protected human health such that there was no need to impose RCRA liability on the oil and gas industry. The EPA concluded that imposing RCRA liability would be an unnecessary and expensive additional layer of regulation, and that the cost of complying with RCRA would have imposed billions of dollars in liability to the oil and gas industry without the exclusion.[151] The EPA, in its regulatory determination, did not recommend lifting the exclusions

[145] 42 U.S.C. § 9601(14) (2018).

[146] *Id.*

[147] *Id.*

[148] Wilshire Westwood Assocs. v. Atlantic Richfield Corp., 881 F.2d 801, 805 (9th Cir. 1989) ("There is virtually no legislative history contemporaneous with the enactment of CERCLA directly relevant to the scope of the petroleum exclusion.").

[149] Gibson & Young, *supra* note 144, at 388.

[150] Environmental Protection Agency, 53 Fed. Reg. 25, 447 (July 6, 1988).

[151] *Id*.

based on, at least in part, the excessive economic burdens it would place on the oil and gas industry.

The more developed legislative history of RCRA and its amendments can provide context when analyzing CERCLA's otherwise sparse legislative history. Given the connection between RCRA and CERCLA, the three-prong analysis - especially the economic factor - used to justify the Bevill-Bentsen amendments and the oil field exemption, can be used to justify CERCLA's similar petroleum exemption.[152] The two statues were passed only four years apart and RCRA was amended to include the oil field wastes exclusion in the same year Congress passed CERCLA.[153]

CERCLA complements RCRA's prospective cradle-to-grave liability on newly generated solid and hazardous wastes by imposing liability on past, negligently disposed of hazardous substances.[154] Therefore, the petroleum exclusion found in CERCLA was likely based on the same assumptions; mainly, that sufficient regulation of the petroleum industry was already in place under other environmental statutes.[155] Similar to the oil field waste exclusion, the EPA determined that or the petroleum exclusion, would amount to imposing an additional, expensive layer of regulation for certain wastes that would have offered only marginal environmental benefits, while overly burdening an economically important industry.[156]

The economic justification for excluding certain industries is also supported by the fact that the exclusion has been interpreted as including only the substances normally found in crude oil or that are normally added to oil in the refining process. The exclusion's focus on the normal components signifies that the exclusion was meant to benefit the ordinary processes of crude oil use and refinement,[157] and

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[152] *See* McKay, *supra* note 142, at 52 ("The agency focused on the following three factors in its July 6, 1988 regulatory determination: (1) the effects of oil and gas wastes on human health and the environment; (2) the adequacy of existing state and federal regulations to control oil field wastes; and (3) the economic impacts of regulating oil field wastes under Subtitle C.").

[153] *See Special Wastes*, EPA (Apr. 8, 2021), https://www.epa.gov/hw/special-wastes.

[154] McKay, *supra* note 142 ("CERCLA is a 'Logical complement to RCRA.'").

[155] Comprehensive Environmental Response, Compensation, and Liability Act, Pub. L. No. 96-510, 94 Stat. 2767 (1980).

[156] *See* 53 Fed. Reg. 25, 446 (July 6, 1988) (finding that "Subtitle C contains an unusually large number of highly detailed statutory requirements," some of which are not only extremely costly, but also are unnecessary for the safe management of oil and gas wastes).

[157] Memorandum from Francis S. Blake, EPA General Counsel, to J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response, *Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2)* (July 31,

not irregular practices or uses. Accordingly, the petroleum exclusion does not cover PCB-containing oil commonly used in transformers or oil that has been contaminated with other hazardous substances.[158] The EPA interprets the petroleum exclusion as not including waste oils to which hazardous substances are added into the oil, either intentionally or through the normal use of the product. The EPA's interpretation states that the exclusion applies to "materials such as crude oil, petroleum feedstocks, and refined petroleum products, even if a specifically listed or designated hazardous substance is present in such products. However, EPA does not consider materials such as waste oil to which listed CERCLA substances have been added to be within the petroleum exclusion."[159]

By interpreting the exclusion to apply only to the usable, unrefined petroleum products and not used waste oils, the EPA implicitly supported Congress's creation of the exclusion for the economic benefit of the oil-producing industry at a time in American history where the continued success of the domestic oil industry was seen as vitally important.[160] This narrow interpretation also aligns with cases during that same time period where courts draw the distinction between usable petroleum products and non-useable, contaminated petroleum wastes.[161]

The petroleum exclusion benefits domestic oil production, an industry that Congress likely deemed to be economically important. The exclusion only covers usable (or economically valuable) petroleum products while still imposing liability on oil wastes that have been contaminated with other hazardous substances.[162] In addition, the EPA

1987) "First, we interpret this provision to exclude from CERCLA response and liability crude oil and fractions of crude oil, including the hazardous substances, such as benzene, which are indigenous in those petroleum substances. Because these hazardous substances are found naturally in all crude oil and its fractions, they must be included in the term "petroleum," for that provision to have any meaning. Secondly, "petroleum" under CERCLA a1so includes hazardous substances which are normally mixed with or added to crude oil or crude oil fractions during the refining process. This includes hazardous substances the levels of which are increased during refining. These substances are also part of "petroleum" since their addition is part of the normal oil separation and processing operations at a refinery in order to produce the product commonly understood to be "petroleum.".

[158] *Id*.

[159] *Id*.

[160] *See* Gibson & Young, *supra* note 144, at 364-65.

[161] *See e.g.* Cose v. Getty Oil Co., 4 F.3d 700 (9th Cir. 1993) (holding leaded tank bottoms were not excluded while crude oil tank bottoms were excluded); United States v. Alcan Aluminum Corp., 964 F.2d 252, 267 (3d Cir. 1992) (holding waste oil contaminated through use was not covered by the exclusion); United States v. Western Processing Co., 761 F. Supp. 713 (W.D. Wash. 1991) (holding that waste sludge from oil drums were not covered by the exclusion). *See also* McKay, *supra* note 142.

[162] *See* McKay, supra note 142. ("The *Cose* opinion properly relies on the

concluded that existing federal and state regulation on oil field wastes were regulated sufficiently under other environmental statutes to justify granting an exemption to RCRA. These justifications in existing CERCLA exemptions are directly applicable to water utilities and a CERCLA exemption for PFAS cleanup.

c. Water Utilities and the Justification for CERCLA Exemption for PFAS Cleanup

Congress and the EPA should rely on the same analysis used to justify the oil and gas industry's oil field exemption under RCRA and the petroleum exemption in CERCLA to justify an exemption for water utility services.[163] Under the three-prong analysis the EPA puts forth to support the Bevill-Bentsen amendments, water utilities should be exempt from CERCLA liability for PFAS extracted from public water systems. Both the current regulatory structures and the economic impact associated with regulating water utilities support this proposed exemption.

Water utilities services have equal, if not greater, economic importance as the domestic oil and gas industry. The economic importance of the domestic oil and gas industry justified the oil and gas exemptions under RCRA and CERCLA. In the same way that energy independence was an important factor to Congress in the late 1970's, the continued viability of water utilities is important in any time frame. Access to clean, reliable, and affordable sources of water is of paramount importance for every American. Even though economically important industries need to be regulated to ensure protections against harmful chemicals like PFAS, regulating water utilities under CERCLA would offer limited, additional protections at an enormous cost to water utilities.

Further, while the adverse effects of PFAS contamination is a real threat, existing and pending environmental regulations are sufficient to protect the population's health and the environment. Rather than hold water utilities responsible for contamination they did not create and force them to bear the burden of removing it from public water systems, PFAS manufacturers should be the responsible party. Holding PFAS manufacturers liable under the statute would fully achieve CERCLA's broad policy goals of holding parties responsible for past environmental contamination without exposing water utilities to an additional layer of regulation.

Western Processing Court's distinction between useful and non-useful petroleum products, holding that the crude oil tank bottoms at issue were non useful waste materials" not covered under the exemption.).

[163] *See supra* note 142-44 and accompanying text.

Existing state and federal regulations on water utilities are sufficient to address PFAS contamination. As discussed in section III, water utilities are regulated at the state and local level through public utility commissions. Water utilities are already addressing PFAS cleanup under state drinking water standards and a federal standard is imminent. Water utilities are meeting their obligations in PFAS cleanup under the SDWA and state laws. Therefore, regulating PFAS treatment residues from drinking water treatment facilities would only serve to punish utilities unnecessarily by adding an expensive burden on them.

The economic impact that regulating water utilities would be the imposition of millions of dollars in liability on water providers whose only role in PFAS contamination was extracting and disposing PFAS chemicals from public water systems. In the same way that the oil and gas industry escaped additional regulations that would impose billions of dollars in liability for marginal benefits, water utilities should not be forced to bear the burdensome environmental remediation costs when CERCLA's policy is achieved by holding PFAS manufacturers liable, and when water utilities are already effectively regulated under other laws.

Parties are already seeking to hold manufacturers responsible for their part in PFAS contamination: industry-wide litigation has resulted in a number of cases against manufacturers like 3M and Dupont.[164] In addition, as discussed, states like Minnesota have already successfully brought the manufacturer 3M to court for their part in PFAS contamination at several waste sites.[165]

Imposing additional costs on water utilities would be unfair: the true responsible parties are PFAS manufacturers. Unfortunately, it is likely that water utilities will face billions of dollars in costs to comply with the current and impending drinking water standards, which will ultimately burden American consumers through higher water bills. Imposing PFAS cleanup costs on innocent parties such as like water utilities and, by extension, their ratepayers, runs counter to CERCLA's policy goals in holding bad actors accountable.

Conclusion

Congress should provide a CERCLA liability exemption to water utilities in future PFAS cleanup efforts. PFAS are a ubiquitous and environmentally persistent class of compounds that were used for decades in a variety of industrial and consumer products. However, health assessments show that PFAS exposure leads to a variety of adverse health

[164] *See Will the Wave of PFAS Litigation Sweep Through California?* JD Supra (July 26, 2019), https://www.jdsupra.com/legalnews/will-the-wave-of-pfas-litigation-sweep-84759/.

[165] *See PFAS Investigation and Clean Up*, *supra* note 11.

effects. PFAS regulation under CERCLA is necessary to address the environmental accumulation of harmful chemicals. Imposing liability on responsible parties for remediation costs will help the cleanup effort, yet, water utilities should not be subject to CERCLA liability. The oil and gas industry's CERCLA exemption shows existing policy and rationale for exempting water utilities from CERCLA liability; similarly, the continued viability of water utilities is an important economic concern justifying Congress exempting the industry.

CERCLA's broad policy goals would still be achieved by imposing liability on PFAS manufacturers for environmental remediation costs. Water utilities will already face enormous costs in improving water treatment facilities to comply with current state and federal drinking water standards. They should not face additional costs for an environmental problem they did not create.

A comprehensive environmental policy could see an acceleration on PFAS regulation from the EPA and put pressure on Congress to pass legislation that addresses the issue. A potential acceleration of federal regulation places more urgency on providing protections to water utilities and American consumers than ever before: it is time to cement those protections and ensure that only responsible parties are held accountable.

Restoring Justice for Animal Victims

Brittany Hill*

"[W]hen a crime is committed, our principal question should not be: what should be done with the offender? Rather, it should be: what should be done for the victim?"[1]

Introduction

The way the United States' criminal legal system responds to animal cruelty has not been seriously evaluated. Intervention largely takes the form of an adversarial process, where the goal is to punish those who commit animal cruelty.[2] Currently, the most widely used intervention for animal cruelty is prosecution. However, prosecution alone may be unable to target root causes of animal cruelty, teach empathy towards animals, or provide meaningful opportunities for animals to be recognized and treated as victims. With pushes to alleviate the criminal justice system's reliance on the carceral state, reform advocates are seeking alternative interventions that hold perpetrators of animal cruelty accountable that do not rely on punishment or vengeance. Restorative justice is one such intervention. There are several reasons why intervention is necessary in cruelty cases. First, animal cruelty often involves violence. Second, animal cruelty is frequently a sign of deviant behavior[3] that is likely not occurring in a vacuum. Third, animal

* Brittany Hill is a Criminal Justice Program Fellow at the Animal Legal Defense Fund. There, Brittany largely focuses on exploring innovative ways to incorporate criminal justice reform into animal law. Brittany received her JD from Lewis & Clark Law School and her BA from Santa Clara University. Thank you to Conor Lamkin (Lewis & Clark Law School JD '21) for her terrific assistance, especially in the early stages of this article. And thank you Adam, Teddy, and Lucy for your unwavering support and love. All opinions expressed in this article are personal and do not necessarily reflect opinions of the Animal Legal Defense Fund.

[1] Gerry Johnstone, Restorative Justice: Ideas, Values, Debates 11 (Taylor & Francis 2d ed. 2011).

[2] *See Animals and Society Institute*, Animal Welfare Courts, https://www.animalsandsociety.org/helping-animals-and-people/animal-welfare-courts (last visited May 28, 2021) (discussing jurisdictions that utilize specialty courts, such as the Animal Welfare Court in Pima County, Arizona and the Pre-Adjudication Animal Welfare Court (PAW) in Bernalillo County, New Mexico that are adversarial in nature, but also encourage treatment and diversion for offenders).

[3] *See* Robert F. Meier, *Deviance*, Wiley (2014), https://doi.org/10.1002/9781118517390.wbetc174 ("Deviance is defined as behavior that violates a norm beyond the tolerance of a group such that a sanction could be applied to the violator.").

victims deserve recognition. Because animal cruelty cases are complex, utilizing restorative justice is likely to have positive benefits for people who commit animal cruelty, communities, and most importantly animal victims.

Opponents of restorative justice may cite animals' lack of ability to speak as a reason to not utilize restorative justice. However, access to restorative justice should not be conditioned upon the ability to advocate for oneself. There is significant data that shows animals—especially those who rely on humans, such as companion animals—expect to be treated fairly.[4] This is not to say that the onus of forgiving is placed on animal victims; rather, this data reflects the intricate emotional and cognitive abilities of animals and their expectation that they are treated fairly by humans. Further, this data shows that animals are likely to understand parts of the restorative justice process, particularly how the harm they experienced is repaired.[5] This research, coupled with the fact that we can—and do—advocate on animals' behalf, leads one to conclude that there is space for restorative justice in animal cruelty cases.

Currently, prosecution plays an integral role in intervention, as the most common way to adjudicate a case in the criminal justice system is for a prosecutor to bring charges, although a small minority of states allow private citizens to commence a suit as well.[6] Some of the goals of prosecution, including promoting justice and ensuring safe communities, have become synonymous with punitive sentences.[7] Punitive sentences are meant to punish people for the crimes they commit and often take a retributive tone.[8] Anything less than punishment is often seen as "condoning the transgression."[9] Criminal justice reformists are

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[4] Julia Mosquera, *Are Nonhuman Animals Owed Compensation for the Wrongs Committed to Them? in* Intervention or Protest: Acting for Nonhuman Animals, 213, 224 (Gabriel Garmendia da Trindade & Andrew Woodhall eds., 2016) (citing recent research on animal cognition and behavior that shows "that non-human animals are expected to be treated fairly.").

[5] *Id.*

[6] *See*, *e.g.*, Wash. Dist. Ct. R. CrRLJ 2.1(c).

[7] American Prosecutors Research Inst., Prosecution in the 21st Century: Goals, Objectives, and Performance Measures, 5 (Feb. 2004), https://nacrj.org/index.php?option=com_easyfolderlistingpro&view=download&format=raw&data=eNpNj8FOwzAMhl8l8glOS0c1wD2hneA08QJTlrqrpSapEmdsQrw7absKTrb_5Pv922BV4XfCHUIXhpZcIjQJ6wqBnTlT2kRKIUdbujGfBrabfXAue5ab-shJ2NIEFA_IieJikWYJQa9P50xJ_uyfEY7HWZumlwX1xs1WGmEqu0XlFhpGvUCRhtFI_-9XYTseaGXrGuEQQ1wim4WDV12ISnpS2yqJ2pOXHG_q4e3w-a62WtePE_OEQFe5d2Pb3QPSdeRy-7q9KguNiLG9KzbQnGb1tRCRLkxfy2EltDfClxLm5xeiRG5G.

[8] Marty Price, *Crime and Punishment*, Mediate.com, https://www.mediate.com/articles/crimea.cfm (last visited May 28, 2021) ("Our criminal justice system is a system of retributive justice.").

[9] Joseph Heffner & Oriel Feldman Hall, *Why We Don't Always Punish:*

re-thinking punitive sentences and whether there are alternative ways to hold people accountable that focus less on retribution and more on rehabilitation. Effective interventions do not have to equate to punitive sentences and restorative justice is proof of that.

However, restorative justice may not be appropriate in every animal cruelty case or for every person who commits animal cruelty. While restorative justice can have positive impacts on both victims and offenders,[10] not every offender will be willing to participate in the process. Clearly, in those cases, restorative justice would not be a fruitful endeavor. In addition, no two animal cruelty cases are the same, and what may have worked in one case might not work in another case. Because of this, it is wise to seek—and explore the use of—different interventions. Further, restorative justice does not always eliminate the need for incarceration; sometimes it is used "in conjunction with, or parallel to, prison sentences."[11] Nevertheless, restorative justice is not typically associated with incarceration; in fact, it is viewed as a way to alleviate incarceration.[12] This article will not focus on the validity of incarceration in existing animal cruelty cases; rather, the focus will remain on the core elements of restorative justice—victim recognition, accountability, and healing—and their potential role in animal cruelty cases.

I. What is Restorative Justice?

a. Definition of Restorative Justice

Defining restorative justice can be difficult because often the context in which it is used dictates the nuances of the various existing definitions. However, no matter how the concept is defined, three common elements of restorative justice remain constant:

1) an emphasis on the role and experience of victims in the criminal justice process;
2) involvement of all relevant parties, including the victim, offender,[13] and their supporters, to discuss

Preferences for Non-punitive Responses to Moral Violations, Sci. Rep., 2 (2019) https://www.nature.com/articles/s41598-019-49680-2.pdf.

[10] The benefits of restorative justice for both offenders and victims include greater satisfaction than a traditional proceeding in the criminal justice system and a reduction in repeat offending. *See generally* Adriann Lanni, *Taking Restorative Justice Seriously*, Buffalo L. Rev., (forthcoming 2021) (manuscript at 1, on file with author).

[11] Howard Zehr, The Little Book of Restorative Justice Revised and Updated (Justice and Peacebuilding) 20 (2015).

[12] Lanni, *supra* note 10.

[13] *See* Lynn Branham, *Eradicating the Label "Offender" from the Lexicon of*

the offense, its impact, and what should be done to "repair the harm;"[14] and
3) decision making carried out by both lay and legal actors.[15]

In writing this article, the following definition of restorative justice was used: "Restorative justice is a process where offenders take responsibility for their actions, understand the harm they have caused, and, as much as possible, restore the well-being of the victim. This is all done while centering the victim's experiences and pain."[16] This definition is sufficiently specific to convey the important aspects of restorative justice yet remains general enough so that it can be adapted to different situations.

Restorative justice is a flexible process that is typically designed to meet the needs of all involved parties.[17] It assumes that most people who have hurt others have the capacity to address what they and others may need to heal.[18] A truly restorative approach starts with acknowledging that there are two parties: an offender, who caused harm, and a victim, who has been harmed and is seeking restoration or healing.[19] While

Restorative Practices and Criminal Justice, 9 Wake Forest L. Rev. Online 53, (2019) (discussing the Washington Department of Corrections' policy to discard terms such as "offender" and "felon" in describing formerly incarcerated people). In spite of the growing scholarship that suggests the term "offender" may be harmful to those labeled "offenders," this article uses the terms "victim" and "offender" to remain consistent with contemporary restorative justice scholarship. However, this article acknowledges that the term is reductive, has negative impacts, and strays from person-centered language, which is much-needed when discussing the intricacies of the criminal legal system. Restorative justice advocates suggest the use of the phrase "the person who caused the harm" instead of "offender."

[14] Kathleen Daly, *Restorative Justice: The Real Story*, 4 Punishment & Soc'y 55, 58 (2002).

[15] *Id.*

[16] Zehr, *supra* note 11 at 48, 102 (inspiring this article's definition of restorative justice with the following two definitions: "[r]estorative justice is a process whereby all parties with a stake in a specific offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future" and "[r]estorative justice is an approach to achieving justice that involves, to the extent possible, those who have a stake in a specific offense or harm to collectively identify and address harms, needs, and obligations in order to heal and put things as right as possible.").

[17] Tanya Rugge, The Impact of Restorative Justice Practices on Participants 2 (July 2006) (unpublished Ph.D dissertation, Carleton University) (on file with Library and Archives Canada).

[18] Lorenn Walker & Leslie Hayashi, *Pono Kaulike: Reducing Violence with Restorative Justice and Solution-Focused Approaches*, 73 Fed. Prob., 3 (2009).

[19] Mark Obbie, *They Knew It Was The Right Thing to Do*, Slate (Dec. 29, 2015), https://slate.com/news-and-politics/2015/12/restorative-justice-its-rise-and-fall-

the focus is not on punishment, there may be some instances where punishment is part of restorative justice.[20]

b. Why Restorative Justice?

Rehabilitation is often an after-thought of the criminal justice system, which typically seeks to ensure that offenders get what they *deserve,* not what they *need*.[21] In addition, the criminal justice system does not truly hold people accountable because "accountability" takes the form of retribution, incarceration, and/or labeling people with criminal convictions, often for the rest of their lives.[22] True accountability cannot occur in a system that does not encourage offenders to apologize or actively participate.[23]

Punishment and accountability cannot live in the same space; while punishment is passive, taking accountability is not. Accountability requires an offender to take responsibility for his actions, reckon with the harm he has caused, and put in effort to rectify that harm.[24] When

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in-rural-upstate-new-york-county.html.

[20] U.N. Off. of Drugs & Crime, Handbook on Restorative Justice Programmes, at 11, U.N. Sales No. E.06.V.15 (2006).

[21] Zehr, *supra* note 11, at 27.

[22] Emily Cureton, Former Prosecutor Brings Message Of DA Changes To Bend, OPB (Apr. 25, 2019, 8:00 AM), https://www.opb.org/news/article/adam-foss-bend-deschutes-county-mass-incarceration-prosecution/. While it is possible for people to expunge convictions from their criminal records, there are often impediments—including costs, such as filing fees and waiting periods—that can make it difficult. Moreover, every state's expungement eligibilities differ, and some crimes are not eligible to be expunged. *See generally* Barbara Brosher, *Scrubbing The Past To Give Those With A Criminal Record A Second Chance*, NPR (Feb. 19, 2019, 4:58 AM), https://www.npr.org/2019/02/19/692322738/scrubbing-the-past-to-give-those-with-a-criminal-record-a-second-chance.

[23] *See* Rugge, *supra* note 17, at 24 ("[T]he traditional criminal justice system emphasizes that the offender remain quiet where the focus is not on the discovery of truth but whether there is enough evidence to convict."); *see* Josie Duffy Rice et al., *What Does Accountability Look Like Without Punishment?*, Yes! (May 25, 2021), https://www.yesmagazine.org/opinion/2021/05/25/abolition-accountability-without-punishment ("Accountability is an active process through which people have to make a decision that they recognize the harms that are occurring, they want to try to redress them, and they're thinking about the harms through the lens of what's been done to others but also what's been done to them. That's really challenging because everything in our culture is about coercion; dangling the idea of punishment is meant to keep you on the 'right path.' Within the culture we have, there's very little incentive to take accountability for anything.").

[24] Howard Zehr, Changing Lenses: Restorative Justice For Our Times 47 (25th Anniversary ed. 2015) ("Accountability also involves taking responsibility for the results of one's behavior. Offenders must be allowed and encouraged to help decide what will happen to make things right, then to take steps to repair the damage.").

a person is punished, he is not required to take responsibility, because the punishment is simply something that is happening to him.[25] With the exception of paying restitution, punishment does not require an offender to participate in rectifying the harm he caused.[26] In short, very little work is associated with punishment.[27] Moreover, when one is punished, he is not required to apologize for the harm he committed.[28] In fact, apologies—and admitting guilt—in the criminal justice system come with legal consequences.[29] Howard Zehr sums up the difference between accountability and punishment quite strikingly, "[P]unishment is not real accountability. …[A]ccountability involves facing up to what one has done. It means encouraging those who have caused harm to understand the impact of their behavior—the harms they have done—and urging them to take steps to put things as right as possible."[30]

The carceral system is not known for its rehabilitative efforts. In fact, the "tough on crime" practices of the 1970s and 1980s have made prisons—and the criminal justice system—the antithesis of rehabilitation.[31] However, rehabilitation is extremely important in

[25] Legally, someone may plea, but that rarely has anything to do with taking responsibility (often it is to receive a reduction in sentence).

[26] *See* Zehr, *supra* note 24, at 48 (discussing restitution as a method courts use to make a victim whole again, while also acknowledging its limitations: "[restitution] is usually an imposed sanction and thus does not encourage offenders' ownership in the outcome. Usually the offender does not participate in the restitution decision and has little or no understanding of the victim's losses.").

[27] Danielle Sered, Until We Reckon: Violence, Mass Incarceration, And A Road To Repair 91 (The New Press 2019) (illustrating the passive nature of punishments: "[punishment] is passive. All one has to do to be punished is not to escape. It requires neither agency nor dignity, nor does it require work." This is not meant to minimize punishment and the sentences people receive. People are still required to complete those sentences, which often include paying money, serving incarceration, and being on parole and this is not always easy, especially if people lack resources and support).

[28] *See* Zehr, *supra* note 11, at 24. "The criminal justice system is concerned about holding offenders accountable, but accountability in that system means making sure those who cause harm get the punishment they deserve. Little in the process encourages them to understand the consequences of their actions or to empathize with those they have harmed. On the contrary, the adversarial game requires them to look out for themselves. Those who have offended are discouraged from acknowledging their responsibility and are given little opportunity to act on this responsibility in concrete ways."

[29] *See* Scot Dignan, *Apology As A Function of Criminal Justice*, 3 Strathclyde L. Rev. 118, 127 (2017) ("[W]e must create a greater (and safer) space for apology within the traditional criminal justice system.").

[30] Zehr, *supra* note 11, at 24.

[31] *See* Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 L. & Soc'y Rev. 33 (2011) ("In place of rehabilitation, deterrence and incapacitation became the explicit goals

restorative justice. The focus throughout restorative justice is on identifying and addressing the needs of all involved parties, including victims *and* offenders.[32] Restorative justice relies on an open dialogue rather than an adversarial process and requires offenders to engage with the process, the victim, and their communities. Rehabilitation requires offenders to commit to being mindful and intentional, and in restorative justice, that becomes much more likely to occur.

c. Current Uses of Restorative Justice

Although the concept of restorative justice has existed for many years, it has not been meaningfully implemented in the U.S. criminal justice system.[33] Most often, restorative justice is used in the juvenile justice system[34] or as an alternative to incarceration and prosecution.[35] In cases where restorative justice is utilized as an alternative to incarceration or prosecution, the case is diverted from entering or progressing through the criminal justice system—instead, the case is settled outside of the criminal justice system entirely. When used like this, restorative justice aims to hold offenders accountable and attempts to break the cycle of mass incarceration.[36] While restorative justice is

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of prison in political discourse. This shift has alternatively been called the 'new punitiveness,' 'culture of control,' or 'new penology,' but in all of its many forms, scholars have argued that the contemporary criminal justice system has become more punitive and less oriented towards rehabilitation.").

[32] Zehr, *supra* note 11, at 25.

[33] Steve Mulligan, *From Retribution to Repair: Juvenile Justice and The History of Restorative Justice*, 31 U. La Verne L. Rev. 139, 142-43 (2009) ("[E]arly [] nomadic tribes responded to inter-clan transgressions through a form of restorative justice called 'restitution negotiations.'...Still, in many cultures such as "Australian aboriginals, Egyptian Bedouin, and many Native American societies, restorative justice continues to be the dominant form of conflict resolution.").

[34] U.S. Dep't of Just., Office of Juv. Just. & Delinq. Prevention, *Balanced and Restorative Justice: Program Summary* 1, (1994) (discussing how the criminal justice system currently uses balanced and restorative justice principles in the juvenile justice system, which focus on fostering offender accountability, competency development, and community safety).

[35] *See* Rebecca Beitsch*, States Consider Restorative Justice as Alternative to Mass Incarceration*, PBS (July 20, 2016), https://www.pbs.org/newshour/nation/states-consider-restorative-justice-alternative-mass-incarceration [hereinafter *States*] (detailing different paths—through the current criminal justice system and through restorative justice—for two defendants facing similar charges); Vanessa Hernandez, *Restorative Justice Offers A Powerful Alternative to Prisons and Jails*, ACLU-WA (Oct. 24, 2016), https://www.aclu-wa.org/story/restorative-justice-offers-powerful-alternative-prisons-and-jails; *See* Zehr, *supra* note 11, at 66.

[36] Hernandez, *supra* note 35 ("Restorative justice provides an alternative that can help break the cycle of over-incarceration for many offenses. Restorative practices focus on repairing the harm that has been done, rather than simply punishing someone

often cited as an *alternative* to the criminal justice system, it can and should be used *in conjunction* with the criminal justice system. This is most often seen in prisons when restorative justice is used after a case has been adjudicated.[37] Restorative justice programs available to offenders while they are in prison usually do not have any bearing on their sentence; rather, such programs are designed to heal participants and provide closure.[38]

Typically, the offenders who choose to participate in restorative justice programs while in prison do so for personal reasons, including finding ways to atone for their actions.[39] Not all of these programs involve direct encounters between victims and offenders from the same incident.[40] For example, when either the victim or offender is not ready to participate, surrogate parties are used; victims meet with offenders who have caused similar harm and offenders meet with victims who have experienced similar harm.[41] Some restorative justice programs aim to provide incarcerated offenders with transitional resources that they can use after their release from prison.[42] Such programs are designed around victim harm and offender accountability and are intended to assist both victims and offenders, especially offenders who plan to return to their communities.[43]

d. Restorative Justice Models

Although similar in basic outline, the models of restorative justice can differ in the number, category of participants, and facilitation styles.[44] Regardless of the model used, nearly all develop a plan that

who has committed an offense by locking them up.").

[37] *States*, *supra* note 35 ("In Colorado, for instance, judges in some jurisdictions can order that adults be considered for restorative justice if they are sentenced to probation rather than prison."); Insight Prison Project, http://www.insightprisonproject.org/ (last visited May 26, 2021) ("Restorative justice attempts to draw on the strengths of both prisoners and victims, rather than dwelling on their deficits.").

[38] *See* Zehr, *supra* note 11, at 67.

[39] Daniel W. Van Ness, *Prisons and Restorative Justice*, *in* Handbook of Restorative Justice 314 (Gerry Johnstone & Daniel Van Ness eds., 2011) ("Finally, some prisons offer restorative interventions as an opportunity for personal transformation of their prisoner participants.").

[40] Zehr, *supra* note 11, at 67.

[41] U.N. Off. of Drugs & Crime, *supra* note 20, at 61. There are often many concerns about whether or not a victim is ready to participate in the process, so surrogate victims have become commonplace in those instances. It is especially imperative that a victim, who has been harmed, is not re-victimized. Surrogate victims participate instead of the actual victim.

[42] *See* Zehr, *supra* note 11, at 68.

[43] *Id.*

[44] *Id.* at 60.

include methods of repairing harm and focus on rehabilitation while seeking to prevent recidivism.[45] The three models that are frequently used and will be discussed below are:

1) victim offender conferences;
2) family group conferences; and
3) talking circles.[46]

Some restorative justice programs use only one type of model, whereas other programs combine aspects from several different models, depending on the case and the needs of the participants.[47] The beauty of restorative justice is that it is flexible and can be adapted to "meet the needs of participants."[48] While there is no prescribed model for specific crimes, the seriousness of the crime usually mandates a lengthier restorative justice process.[49]

Restorative justice practitioners often describe victim-offender conferences as a "direct form of restorative justice."[50] Such conferences typically involve three parties: the victim, the offender, and a restorative justice facilitator.[51] According to restorative justice practitioners, "[t]he [restorative justice] facilitator is not expected to participate or lead the substance of the discussion," but rather is present to ensure that

[45] *See* Rugge, *supra* note 17, at 24.

[46] Zehr, *supra* note 11, at 60-66.

[47] Rugge, *supra* note 17, at 6.

[48] *Id.* at 7 ("Models continue to adapt, in an attempt to meet the needs of participants. Research in the area of restorative justice is still in its infancy, so an exploration of what methods best meet the needs of the offenders, the victims, and the community, is essential.").

[49] *Id.* at 20 ("Typically, more serious crimes, with more damaging consequences, take a longer period of time to go through a restorative justice process (suggesting a higher level of intervention). The seriousness of the crime is usually an indication of a lengthy restorative justice process, but not always.").

[50] Lawrence W. Sherman & Heather Strang, Smith Inst., Restorative Justice: The Evidence, 13 (2007).

[51] Zehr, *supra* note 11, at 60 (acknowledging that on occasion family or community members participate or take on a supporting role); Sherman & Strang, *supra* note 50, at 33 (discussing the state criteria that must be met in order to become a restorative justice facilitator. For example, in Colorado, "all facilitators shall receive restorative justice training in order to declare themselves a restorative justice facilitator."); Colo. Coalition of Restorative Just. Directors, Restorative Just. Facilitator Code of Conduct & Standards of Training & Prac., 5-6 (rev. Aug. 2015) (providing that training includes, but is not limited to: a working knowledge of restorative justice principles and values; an understanding of the three key stakeholders of restorative justice practices (victim, offender, and community); an understanding that all restorative justice practices must be voluntary and why; and cultural awareness.).

the victim and offender "stay focused on the process."[52] During victim-offender dialogues, parties discuss in detail the harm that the offender caused, the pain the victim experienced and may continue to experience, what motivated the offender to commit the crime, what the victim needs in order to heal, and identify the offender's obligations in making sure that the victim is healed.[53] The process relies on commitment, honesty, and engagement from both offenders and victims.

Family group conferences expand the circle of primary participants to include family members and/or other individuals significant to the victim and offender.[54] Family group conferences are most often utilized in juvenile cases.[55] Usually, the families meet with the facilitator to share information regarding the incident and the problem(s) surrounding the violence.[56] Then, the families confer with one another to develop a plan, which frequently includes rehabilitation.[57] The intention behind such a rehabilitation plan is that everyone is in agreement; however, the victim and offender must be satisfied with the plan before it can be adopted.[58]

Talking circles are exactly what they sound like: participants arrange themselves in a circle and pass a talking piece around the circle, ensuring that each person speaks.[59] One or two people serve as facilitators.[60] The circle is composed of the offender, the victim, their family members, community members, and sometimes members of the criminal justice system.[61] Because community members are involved, discussions within the circle are often more far-reaching than in other restorative justice models.[62] In these circles, victims and offenders have the chance, again, to address the harm caused and experienced, the reason(s) for committing the crime, what the victim needs in order to heal, and the offender's obligations in making sure that the victim is healed.[63] However, with community members present, there is an opportunity to address systemic issues that may be prevalent in communities, such as a lack of resources. In addition, community members involved in the talking circle may act as a support network for offenders and victims during the talk and certainly afterwards.

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[52] Sherman & Strang, *supra* note 50, at 33.
[53] *See* Zehr, *supra* note 11, at 33-34.
[54] *Id*. at 60.
[55] *See id.*
[56] Sherman & Strang, *supra* note 50, at 52.
[57] Zehr, *supra* note 11, at 63.
[58] *Id.*
[59] *Id.* at 64.
[60] *Id.*
[61] *Id.* at 64-65.
[62] *Id.* at 65.
[63] *Id.*

II. Does Restorative Justice Work?

Research shows that restorative justice not only has the potential to work, but that it *does* work. Interestingly, evidence suggests that restorative justice may be most effective when crimes are more serious, especially for crimes involving victims rather than property crimes.[64] There seems to be power in putting a "face" to a crime. Further, the process of engaging with a crime victim, having a dialogue, and making amends to that victim has far-reaching, beneficial effects. For minor crimes, research shows that restorative justice is not much better than the criminal justice system in reducing repeat offending.[65] When it comes to major crimes, restorative justice has succeeded better than the criminal justice system in reducing repeat offending among defendants in New York City.[66] Further, there is more satisfaction overall among participants with a restorative justice process.

a. Victims

Crime victims and advocates have fought hard to secure rights to participate in criminal justice proceedings. Rights afforded to victims include "the right to information; to notice of an opportunity to be heard at important criminal justice proceedings; to compensation; to protection, and privacy."[67] While these rights are meaningful, they do not provide the victim with a chance to have a dialogue with the offender,[68] to discover why the offender committed a crime against them, or to receive an apology.

While not all victims want to interact with the offender, some do. Some victims want to hear directly from the offender, have a meaningful opportunity to respond and receive an apology. Core to restorative justice principles is the understanding that it is a victim-centered process. Restorative justice has the potential to "empower victims by providing them with the opportunity to actively participate in the resolution of their case."[69] Even in restorative justice programs, victims may not be totally satisfied; in fact, victims still may report dissatisfaction in the cases when offenders refuse to accept responsibility, if offenders fail

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[64] Sherman & Strang, *supra* note 50, at 21.

[65] *Id.* (This study showed there was no significant recidivism among shoplifters, drunk drivers, and teenage property offenders).

[66] *Id.*

[67] Nat'l Crime Victim Law Inst., *History of Victim's Rights* (2011) https://law.lclark.edu/centers/national_crime_victim_law_institute/about_ncvli/history_of_victims_rights/.

[68] Meredith Rossner, *Restorative Justice, Anger, and the Transformative Energy of Forgiveness*, Int'l J. Restorative Just., Vol. 2(3), 382 (2019).

[69] Rugge, *supra* note 17, at 28.

to appear at a conference as agreed, or when offenders fail to complete outcome agreements.[70] However, many victims who attend restorative justice programs, overall, report that they are glad they participated and the benefits they describe include "less fear of the offender, less anger at the offender, and greater ability to move on with their lives."[71] In fact, studies indicate that "victims' satisfaction rates vary between seventy-five to ninety-eight percent."[72] Restorative justice has also been shown to help victims recover from traumatic experiences, "providing much needed opportunities for validation, connection, and enhanced feelings of safety."[73]

b. Offenders

One concern of the criminal justice system is that there is a lack of trauma informed care. While often not a popular opinion, offenders need healing too. Studies show that many offenders have been victimized or traumatized in significant ways.[74] Even when they have not been directly victimized, many offenders view themselves as victims.[75] These actual harms, and perceptions of harms, can be important contributing causes of crime.[76] The perception of being victimized does not absolve one from responsibility and may not even be valid, but it is important to address, particularly to break cycles of recidivism.[77] If people continue to view themselves as victims, they may believe they are owed something or that their actions were "right." This can prevent them from taking accountability and responsibility for their actions and, in turn, hinder any chances of rehabilitation. Restorative justice provides offenders a space to reconcile their status as victims and work through trauma while still holding them accountable for the harm they caused. Accountability in and of itself can be a step toward change and healing.[78]

One goal of every restorative justice intervention is to reduce recidivism among offenders. Studies have shown that rates of recidivism are lower in both juvenile and adult offenders who have participated in

[70] Sherman & Strang, *supra* note 50, at 22.

[71] *Id.* at 23.

[72] Lode Walgrave, *Investigating the Potentials of Restorative Justice Practice*, Wash. U. J. L. & Pol'y 91, 107 (2011).

[73] Catherine Bargen et al., *Crime Victims' Experiences of Restorative Justice: A Listening Project*, Dep't. Just. Can. 8 (May, 2019), https://www.justice.gc.ca/eng/rp-pr/jr/cverj-vvpcj/cverj-vvpcj.pdf.

[74] Zehr, *supra* note 11, at 41.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] Zehr, *supra* note 24, at 190.

restorative justice compared with other justice interventions.[79] Further, it is suggested that "through engaging in restorative activities," offenders can come to "re-define themselves as a law-abider and subsequently no longer engage in criminal activity."[80]

c. Communities

Communities play a pivotal role in crimes—they are affected by crimes, but rarely have the chance to participate in meaningful and productive conversations about crime. With the surge of media attention on criminal activity, crimes are often portrayed in ways that incite reactions from the public.[81] When a crime is committed, communities typically do one of two things: "draw together defensively, against the perpetrator or 'the enemy,'" or draw away from one another, "becoming distrustful of others."[82] This can also be exacerbated by the criminal justice system, which tends to "otherize" defendants by labeling them and reducing them to the worst acts they have committed. However, restorative justice can chip away at this paradigm by acknowledging that community members may want a say in how *their* community responds to crime and recognizing that most offenders—and victims—return to their communities. Thus, it can be incredibly beneficial for community members to challenge, discuss, and engage in—often difficult—conversations about how offenders are generally viewed, what resources offenders may need in order to be successful upon re-entry, and what role they can play in the offender's rehabilitation.

d. Bringing More Crimes to Justice

Restorative justice has the potential to bring more crimes to justice. "The concept of diversion from prosecution is often misunderstood to imply that prosecution would otherwise occur in 100% of cases."[83] However, this is not true. Prosecutorial discretion allows prosecutors to choose whether to charge a case and they do not have to provide

[79] Alex Lloyd & Jo Borrill, *Examining the Effectiveness of Restorative Justice in Reducing Victims' Post-Traumatic Stress*, 13 Psych. Inj. & L. 77, 77-78 (2020) ("The effectiveness of [restorative justice] has been demonstrated in a meta-analysis, which found reoffending rates to be lower in [restorative justice] compared with other justice interventions. Further, [restorative justice] is effective at reducing recidivism in both adult and adolescent offenders.").

[80] *Id.* at 77.

[81] *See* Angela Davis, Are Prisons Obsolete*?* 6, 39 (2003).

[82] Zehr, *supra* note 24, at 64.

[83] Sherman & Strang, *supra* note 50, at 82.

their reasons for not pursuing charges.[84] Thus, prosecutorial discretion is an incredibly powerful tool. However, if only one type of intervention is available—and not utilized—then there may not be a significant conclusion to that case. This is true especially if the parties involved could benefit from a meaningful intervention other than prosecution.

Many people fear the criminal justice system. Victims and witnesses are often reluctant to be involved in many—if not all facets—of the criminal justice system out of fear of retaliation or a general distrust of the system.[85] This aversion is especially prevalent in communities of color.[86] As a result, many may not feel comfortable seeking assistance from police, investigators, or prosecutors; all of whom are big players in the adversarial justice system that victims *must* interact with. On the other hand, victims are at the helm of restorative justice. They have incredible say over whether they participate, how they participate, and who participates with them. Because of this, victims may be more comfortable with the process and, in turn, the process and outcome is likely to be more successful.[87] With that, more people would be encouraged to come forward and participate.[88] Undoubtedly, this change in perception of the criminal justice system would be significant.

[84] District Attorneys may have policies that require them to issue a memorandum when they decline to charge which may include their reasons. This may be shared with investigators and animal cruelty officers, in cases involving animal cruelty. However, District Attorneys are not required to issue statements to the public and/or their constituents on why they declined to pursue criminal charges in a case.

[85] Sherman & Strang, *supra* note 50, at 78 ("The major barrier to bringing offences to justice is victim and witness reluctance to risk retaliation or—more important—their time, from involvement with legal formalities. They may also distrust or fear the system itself, in terms of imposing excessive or inappropriate punishments on their loved ones.").

[86] *See* The Sentencing Project, Reducing Racial Disparity in the Criminal Justice System A Manual for Practitioners and Policymakers, 1, https://www.sentencingproject.org/wp-content/uploads/2016/01/Reducing-Racial-Disparity-in-the-Criminal-Justice-System-A-Manual-for-Practitioners-and-Policymakers.pdf (2d ed. 2008).

[87] Sherman & Strang, *supra* note 50, at 63 ("When victims were asked whether they were satisfied with the way their case was dealt with by the justice system, there was a statistically significant difference between the court-assigned and the RJ-assigned victims (46% vs 60%). Significantly more of those who actually experienced an RJ conference were satisfied, compared with those whose cases were dealt with in court (70% vs 42%). There was no different here between property and violence victims.").

[88] *Id.* at 78 ("[Restorative justice] could change all of that. If it worked widely and well, it would logically encourage more people to come forward to participate in a process that would be more predictable and convenient than going to court.").

III. Restorative Justice and Crimes Against Animals

Applying the principals of restorative justice to animal cruelty will not be without its challenges, though, it is not impossible. Currently, prosecution plays a role in getting animal cruelty cases "into a system where intervention is mandated and results are tracked,"[89] which are both important in protecting animal victims. However, creative sentencing and alternative interventions are still valuable in complex cases, such as animal cruelty,[90] particularly in cases where offenders have underlying trauma and mental health disorders that lead to animal cruelty.[91] Designing, evaluating, and borrowing from appropriate diversion programs, counseling models, and restorative justice models can be invaluable; especially when it comes to building empathy and teaching that "power gained at the expense of the pain and suffering of others," including animals, "will have consequences."[92]

This article suggests that restorative justice can be beneficial in animal cruelty cases for three reasons. First, restorative justice positions animals as victims because their harm is at the center of the process; it is the animal's harm that needs to be addressed, atoned for, and healed.[93] Second, restorative justice targets and addresses underlying reasons for animal maltreatment more effectively.[94] Third, restorative justice engages communities, which is imperative for animal cruelty offenders, who are all inevitably released back into their communities after their cases have been adjudicated.[95]

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[89] Randall Lockwood, *Animal Cruelty and Violence Against Humans: Making the Connection*, 5 Animal L. 81, 86 (1999).

[90] *Id.*

[91] *See* Ashley Kunz, *Skinning the Cat: How Mandatory Psychiatric Evaluations for Animal Cruelty Offenders Can Prevent Future Violence*, 21 Scholar 167, 170 nn.18-20, 172 n.26 (2019).

[92] Lockwood, *supra* note 89, at 87.

[93] Zehr, *supra* note 11, at 21.

[94] *See* Melanie Randall & Lori Haskell, *Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping*, Dalhousie L. J. 531 (Jan., 2013) ("Given restorative justice's insistence on involvement of all parties affected by wrongdoing, victims, offenders, and their immediate and broader communities, it is an approach to constructing richer, more complete, and expansive narratives about the creation, causes and impacts of wrongdoing and the associated harms, as well as about the possibilities for repair and resolution. A deeper recognition of trauma responses, and insights from the now significantly expanded and refined knowledge in this area, can only assist in the construction of richer narratives about traumatic events, their effects and their resolution.").

[95] Zehr, *supra* note 11, at 26; *See generally* Jennifer Kabbany, *Probation Typical in Animal Cruelty Convictions*, San Diego Union-Trib. (Feb. 21, 2009), https://www.sandiegouniontribune.com/sdut-region-probation-typical-in-animal-cruelty-2009feb21-story.html.

a. Treating Animals as Victims

Unfortunately, animals are considered property under the law.[96] All fifty states have cruelty laws, but, unfortunately, usually animal owners[97] are considered victims as opposed to the animals themselves.[98] This is problematic because owners are capable of perpetrating animal cruelty. Moreover, animals directly suffer from cruel acts and this pain deserves to be recognized. Legal and societal efforts are being made to shift the paradigm and treat animals as crime victims,[99] but there is still a lot of work to be done.

Evidence shows that restorative justice is more successful with victims of crimes than with property crimes.[100] This is promising for animal cruelty cases because animals *are* victims. While the context has largely been on *human* victims, there is nothing preventing restorative justice from being used for animal victims. Restorative justice views victims as the one who has experienced harm.[101] Undoubtedly, an animal experiences harm when she is abused, neglected, or otherwise maltreated. Therefore, animals are victims within restorative justice and offenders would be required to recognize them as such. In turn, this will provide them with an opportunity to learn about animal sentience and recognize how their cruel actions negatively impact animals and other community members.

b. Targeting Underlying Reasons for Animal Cruelty

There are many underlying motivations for animal cruelty.[102]

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[96] *Animals' Legal Status,* Animal Legal Def. Fund, https://aldf.org/issue/animals-legal-status/ (last visited May 28, 2021).

[97] The term "owner" will be used because this article discusses animals' legal status as property and why that status affords certain rights to whomever has a property interest in that animal.

[98] *How Animals Differ from Other Types of "Property" Under the Law,* Animal Legal Def. Fund, https://aldf.org/article/how-animals-are-treated-differently-from-other-types-of-property-under-the-law/ (last visited May 28, 2021). However, there is a push for recognizing animals as crime victims. In fact, two states, Oregon and Colorado, have held that animals are victims for sentencing purposes. *See* State v. Nix, 355 Or. 777, 334 P.3d 437 (2014), *vacated on procedural grounds*, 356 Or. 768, 345 P.3d 416 (2015); *reasoning adopted in* State v. Hess, 237 Or. App. 26, 359 P.3d 288 (2015), *review denied*, 358 Or. 529, 367 P.3d 529 (2016); *See* People v. Harris, 405 P.3d 361 (Colo. App. 2016).

[99] *Animals' Legal Status*, *supra* note 96.

[100] Sherman & Strang, *supra* note 50, at 8. ("[Restorative justice] works better with crimes involving personal victims than for crimes without them."). Property crimes mean crimes without a victim.

[101] Obbie, *supra* note 19.

[102] Eleonara Gullone, *Conceptualizing Animal Abuse with an Antisocial*

Numerous studies show that animal abuse may be a strong "indicator of concurrent interpersonal violence," especially within families, encompassing links to child, elder, and intimate partner abuse.[103] Decades of research shows that the likelihood of engaging in animal cruelty increases when one is exposed to other trauma, particularly for children.[104] Animal abuse is prevalent in families with substantiated child physical abuse.[105] Additionally, children who commit animal cruelty may have witnessed a parental figure perpetrating animal cruelty.[106]

Behaviour Framework, Animals 144, 146-47 (Jan. 16 2011), https://aldf.org/wp-content/uploads/2020/07/Conceptualising-Animal-Abuse-with-an-Antisocial-Behaviour-Framework.pdfl-Behaviour-Framework.pdf (aldf.org) ([Researchers] have proposed nine categories of motivations for animal cruelty, including: 1) attempts to control an animal (e.g., hitting a dog to stop [him] from barking); 2) retaliation (e.g., use of extreme punishment for a perceived transgression on the part of the animal such as throwing a cat against a wall for vomiting in the house); 3) acting out of prejudice against a particular species or breed; 4) the expression of aggression through an animal (e.g., organi[z]ing dog fights); 5) acting out of the motivation to enhance one's own aggression (e.g., using animals for target practice or to impress others); 6) to shock people for amusement; 7) to retaliate against another person or as revenge (e.g., killing or maiming the companion animal of a disliked neighbor); 8) displacement of aggression from a person to an animal; and 9) non-specific sadism which refers to the desire to inflict suffering, injury or death in the absence of any particular or hostile feelings towards an animal).

[103] Sharon Nelson, *The Connection Between Animal Abuse and Family Violence: A Selected Annotated Bibliography*, 17 Animal L. 369, 370 (2011).

[104] *See Animal Cruelty's Link to Other Forms of Violence*, Animal Legal Def. Fund (July 30, 2018), https://aldf.org/wp-content/uploads/2018/07/The-Link-2018.pdf (Collectively, this research refers to and builds upon The Link, a well-documented body of research that shows that animal abuse often coincides with interpersonal violence.); Lacey Levitt, *Animal Maltreatment: Implications for Behavioral Science Professionals,* 36 Behav. Sci. & L. 766, 774 (2018) (One study showed that approximately 60% of individuals who witnessed or perpetuated animal abuse also experienced family violence. In another study, "the likelihood of engaging in animal cruelty was more than three to five times higher for youth who experienced physical abuse or neglect, sexual abuse, household violence, or lived with someone who was mentally ill.").

[105] Levitt, *supra* note 104, at 174 ("Existing records of animal abuse were found in 88% of families with substantiated child physical abuse, compared with 34% of families with either child sexual abuse or neglect.").

[106] Fiona S. McEwen, Terrie E. Moffitt & Louise Arseneault, *Is Childhood Cruelty to Animals a Marker for Physical Maltreatment in a Prospective Cohort Study of Children?,* 38 Child Abuse & Neglect 3, 533 (2014) (finding that children who exhibit cruelty toward animals are more than twice as likely to have suffered abuse themselves); *see also* Sarah DeGue & David DiLillo, *Is Animal Cruelty a "Red Flag" for Family Violence?: Investigating Co-Occurring Violence Toward Children, Partners, and Pets,* 24 J. Interpersonal Violence 1036, 1040 (2008) (citing a study that found youth who abused animals were more likely to have witnessed animal cruelty committed by their peers or parents and reported more exposure to parental violence).

An adult might harm an animal in front of a child—or even force the child to partake in the animal abuse—in order to terrorize or control the child.[107] In such cases, the animal cruelty serves as a threat or warning, that unless the child complies, the adult will perpetrate the same harm to the child. Animal abuse performed in front of a child is also a form of psychological and emotional abuse; children in homes where domestic violence occurs can form strong bonds with their companion animals who provide comfort.[108]

Addressing underlying trauma is not a strength of the criminal justice system, especially transgenerational trauma,[109] which many juvenile animal cruelty offenders experience.[110] There has been a push to infuse trauma-informed care throughout the criminal justice system, especially in courts.[111] While organizations have provided resources to criminal courts that encourage trauma-informed care,[112] proper, trauma-informed procedures are still lacking in the criminal justice system.[113] Restorative justice can help with this.[114] At its core, restorative justice requires offenders to reflect, address the harm they caused, and take accountability all while addressing any underlying issues they may have.[115] Cruelty offenders may have a difficult time with this process,

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[107] Shelby Elaine McDonald et al., *Children's Experiences of Companion Animal Maltreatment in Households Characterized by Intimate Partner Violence*, 50 Child Abuse & Neglect 116, 123 (2015) ("Children's reports of threats to and harm of animals as a tactic of coercion in response to their own actions may reflect a generalized use of coercive control by their mother's partners. Thus, animal-directed violence may function as a concurrent form of emotional abuse in the home where it is used by abusive partners to control, intimidate, and/or distress children.").

[108] Betty Jo Barrett et al., *Animal Maltreatment as a Risk Marker of More Frequent and Severe Forms of Intimate Partner Violence,* 26-1 J. Interpersonal Violence, 1 (2017).

[109] Leah Sottile, *Abuser and Survivor, Face to Face*, Atlantic (Oct. 5, 2015), https://www.theatlantic.com/health/archive/2015/10/domestic-violence-restorative-justice/408820/ ("Transgenerational trauma isn't fixed by jail time.").

[110] Kunz, *supra* note 91, at 185 nn.107-9.

[111] *See* Nicole C. McKenna & Kristy Holtfreter, *Trauma-Informed Courts: A Review and Integration of Justice Perspectives and Gender Responsiveness*, J. Aggression, Maltreatment & Trauma (2020).

[112] *See generally Trauma Training for Criminal Justice Professionals,* Substance Abuse & Mental Health Servs. Admin., https://www.samhsa.gov/gains-center/trauma-training-criminal-justice-professionals (last visited May 17, 2021).

[113] *See generally Creating a Trauma-Informed Criminal Justice System for Women: Why and How*, Substance Abuse & Mental Health Servs. Admin., https://www.nasmhpd.org/sites/default/files/Women%20in%20Corrections%20TIC%20SR(2).pdf (last visited May 17, 2021) (examining the need for a trauma-informed criminal justice system for women).

[114] *See* Randall & Haskell, *supra* note 94.

[115] *See id.* at 526 (Discussing how a trauma-informed model of restorative justice can identify underlying issues offenders may have and assist in providing a

especially if they have experienced trauma themselves.[116] But, providing cruelty offenders with the opportunity to heal themselves while acknowledging that they have caused pain to others and holding them accountable in a non-adversarial setting can be impactful.[117] Having the proper coalition in place to provide the offender with resources, tools, and knowledge to reflect and work through their underlying issues needs to be developed further.[118] Currently, there is a lack of treatment options available to animal cruelty offenders.[119] However, the hope is that additional programming and resources for cruelty offenders will become available as more people acknowledge that cruelty offenders are often saddled with underlying and co-existing issues that can be the impetus for animal cruelty.[120]

c. Engaging Communities

When most animal cruelty offenders are convicted, they are not serving long sentences.[121] The majority are given probation and

tailored, nuanced response to what offenders need in order to take responsibility for their actions).

[116] *See generally* Zehr, *supra* note 11, at 42 ("Studies show that many of those who offend have indeed been victimized or traumatized in significant ways."); Levitt, *supra* note 104.

[117] *See* Randall & Haskell, *supra* note 94, at 525 ("Without threat of traditional criminal punishment and loss of connection to others, perpetrators of crime have a better chance of developing empathy… .").

[118] See *generally Building a Safe and Humane Community*, Can. Veterinary Med. Ass'n., https://www.canadianveterinarians.net/policy-advocacy/abuse-building-safe-community (last visited May 17, 2021).

[119] *Intervention Programs*, Animals & Soc'y Inst. (Aug., 2016), https://www.animalsandsociety.org/wp-content/uploads/2016/08/Jail-Diversion-Programs-for-Animal-Abuse.pdf ("There are few alternatives to hold perpetrators accountable and reduce the likelihood that they will repeat the behavior. Most people who have abused/neglected animals receive nothing more than a small fine. The result is a gap in meaningful alternatives for animal cruelty cases.") (emphasis omitted).

[120] *See* Maya Gupta et al., *Interventions with Animal Abuse Offenders in* Palgrave International Handbook of Animal Abuse Studies 15 (Palgrave Macmillan UK 2017) ("[I]ncreasing justice system awareness of animal abuse interventions may be the appropriate next step—though hopefully in concurrence with greater progress in developing more empirically supported interventions to which the justice system may refer offenders and in increasing the number of practitioners willing to provide them.").

[121] Debra L. Muller-Harris, *Animal Violence Court: A Therapeutic Jurisprudence-Based Problem-Solving Court for the Adjudication of Animal Cruelty Cases Involving Juvenile Offenders and Animal Hoarders*, 17 Animal L. 313, 315 (2011) ("The criminal justice system's current method of dealing with cases involving acts of violence against animals is to use the traditional criminal court proceedings. These proceedings make use of existing state animal cruelty laws, for which the

immediately returned to their communities with little to no other opportunities for meaningful programming.[122] Accordingly, many cruelty offenders are not receiving resources, tools, or skills that allow them to address the reasons for their cruelty before returning to their communities.[123] Through engaging communities, restorative justice can help target societal issues related to animal cruelty, including providing education and resources.[124] Moreover, restorative justice can help with re-acclimating offenders back into their communities, particularly with a support network which could be extremely beneficial in reducing recidivism.[125] In addition, during the restorative justice process, animal cruelty offenders will learn how their cruel treatment of animals affects the community as a whole.[126] Certainly, the animal victim's experiences are of utmost importance, but offenders must learn that animal cruelty has societal implications, such as links with other forms of interpersonal violence and affecting the mental health of witnesses of animal abuse, especially children.[127]

IV. What Could Restorative Justice Look Like in Animal Cruelty Cases?

This article will apply three existing models to animal cruelty and adapt them accordingly. It is worth reiterating that restorative justice will not be applicable to all cruelty cases or offenders. However, exploring the possibilities can still be incredibly valuable.

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resulting punishments are often very short jail sentences, usually with time served, or nominal fines.").

[122] *See id.*; *See generally* Kabbany, *supra* note 95.

[123] *See Intervention Programs*, *supra* note 119.

[124] *See* Leena Kurki, *Incorporating Restorative and Community Justice Into American Sentencing and Corrections*, U.S. Dep't Just.: Sentencing & Corrections 2 (Sept., 1999), https://www.ojp.gov/pdffiles1/nij/175723.pdf ("Most advocates of restorative justice agree that it involves five basic principles [which includes]: case disposition should be based primarily on the victim's and the community's needs….").

[125] Rebecca Beitsch, *Can Restorative Justice Help Offenders Reintegrate Into Society?*, PBS (July 22, 2016), https://www.pbs.org/newshour/nation/can-restorative-justice-help-offenders-reintegrate-society (discussing how restorative justice practices have helped offenders re-enter society by not only holding them accountable, but also providing opportunities for offenders to connect with community members and create a new support system).

[126] *See* Allie Phillips & Randall Lockwood, *Investigating & Prosecuting Animal Abuse*, Nat'l Dist. Att'ys Ass'n 27 (2013), https://www.sheriffs.org/publications/NDAA-Link-Monograph.pdf (discussing the impact hoarding has on communities, such as costs and the amount of assistance from many organizations that is required).

[127] *See* McDonald, *supra* note 107.

a. Victim-Offender Dialogues

Victim-offender dialogues can be used in animal cruelty cases, even if animals communicate in ways we cannot understand.[128] In cases involving animal victims, surrogate victims will participate in the process.[129] This is not unique to animal cruelty crimes; in fact, surrogate victims have been used in other types of cases, including "homicide or crimes against legal persons like a company or a school."[130] "[T]he flexibility that the restorative justice approach offers" allows for it to be adapted to many situations.[131] Likely, the surrogate victim will be an animal's owner, if the owner was not the offender. Otherwise, veterinarians will likely represent the animal victim.[132] Veterinarians are in an ideal position to represent animal victims because they can speak to animal physiology, impacts of violence and neglect on an animal, and best care practices for animals.

Arguably, animal victims may not gain what human victims gain from restorative justice due to the nature of the process, but it can still be valuable, particularly for offenders because they can learn a great deal and, in turn, this can protect future animal victims.[133]Animals may

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[128] Carrie Packwood Freeman et al., *Giving Voice to the "Voiceless:" Incorporating Nonhuman Animal Perspectives as Journalistic Sources*, 12 Journalism Studies, 2 (2011) ("Empirical research has clearly shown that other animals have interests, desires, and cognitive, emotional, and moral intelligences.").

[129] Surrogate victims are used when crimes do not have victims who have a voice in the "traditional" sense. While this has not been applied to crimes against animals, nothing is preventing it. *See* Hon. Brian J. Preston, *The Use of Restorative Justice for Environmental Crime*, 35 Crim. L.J., 14-15 (2011) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1831822. ("In practice, natural objects, such as rivers and trees, have been represented successfully by a surrogate victim in restorative justice conferences.").

[130] U.N. Off. of Drugs & Crime, *supra* note 20 at 61.

[131] Chaitanya Motupalli, *Intergenerational Justice, Environmental Law, and Restorative Justice*, 8 Wash. J. of Entl. L. & Pol'y, 333, 343 (2018).

[132] Typically, a surrogate victim is someone who can convey and represent the victim's interests. U.N. Off. of Drugs & Crime, *supra* note 20 at 61.

[133] *See generally* Jeff Bouffard, et al., *The Effectiveness of Various Restorative Justice Interventions on Recidivism Outcomes Among Juvenile Offenders*, 15 Youth Violence & Juv. Just., 465 (2016) (discussing the effectiveness of a number of restorative justice programs in youth offenders); *see* Sherman & Strang, *supra* note 50, at 70 (discussing the results of several experiments comparing offenders who completed restorative justice programming with those who did not, which showed that restorative justice worked most consistently to reduce repeat offending with violent crime.). There is no research supporting the effectiveness of restorative justice programs specifically for animal cruelty offenders. However, using available research examining the effectiveness of restorative justice programs on recidivism generally, an argument can be made that a restorative justice program for animal cruelty offenders could reduce recidivism and curtail future animal cruelty.

still gain something from this process, such as being the beneficiary of a trust that is set up for the animal's ongoing care, or being removed from harmful environments.

Animal victims should not be placed in physical, emotional, or mental danger, so animal victims—or any animal—should not be forced to interact with the people who committed violence against them.[134] Using surrogate victims in animal cruelty cases allows cruelty offenders to hear, firsthand, the pain, harm, and suffering they caused to the animal victim.[135] Surrogate victims can articulate the physiological pain animals experience and the post-traumatic stress disorder they suffer after being harmed.[136] It is important to note that animal pain physiology, though differing in certain ways from that of humans, operates in largely the same way as human pain physiology.[137] While this may be obvious to some, for others, it is not.[138] Teaching offenders—particularly those who have committed offenses like neglect because of a lack of understanding what animals need—can be incredibly powerful and make a difference.[139]

Research on animal behavior and cognition shows that animals

[134] Gupta et al., *supra* note 120, at 28 (noting the ethical and safety reasons interventions for animal cruelty offenders usually do not recommend contact with the animal victim). It is imperative that animal victims are not re-victimized. However, there may be instances where an intervention using an animal is "carefully structured [in a] supervised setting" that poses little risk to the animal and this may be valuable for both the animal victim, who can view the offender making amends, and the offender, who can potentially develop a positive relationship and view of animals. *Id.*

[135] *See* U.N. Off. of Drugs & Crime, *supra* note 20, at 61 (The surrogate victim will communicate the animal victim's physical, emotional, and mental pain to the offender).

[136] *See* Levitt, *supra* note 104, at 769 ("PTSD-like symptoms have been found in a variety of species including chimpanzees, elephants, parrots, mice, and dogs.").

[137] *See* Bernard E. Rollin, *The Unheeded Cry: Animal Consciousness*, Animal Pain & Sci., 107-201 (1989); s*ee also* Andrew Rowan, *Of Mice, Models and Men: A Critical Evaluation of Animal Research*, 77-79 (1984).

[138] *See* Dustin A. Richardson, *Veterinarians and Their Perception of the Treatment of Animal Abuse Cases in the Criminal Justice System*, 41 (2017) available at https://ir.library.illinoisstate.edu/cgi/viewcontent.cgi?article=1705&context=etd ("[Dr. Faulk] stated that some people believe animals do not feel pain or they believe animals possess an extremely high tolerance for pain and, as such, fail to provide proper care for their pets, thus neglecting them.").

[139] *See Benchmark Animal Rehabilitative Curriculum, Endorsements & Testimonials*, B.A.R.C. http://barceducation.org/referring-agencies/endorsements-testimonials (last visited June 23, 2021) (providing testimonials from law enforcement and prosecutors who discuss the importance of providing resources and education to animal cruelty offenders. "During my 30-plus years as a prosecutor, I reviewed and prosecuted thousands of animal cruelty cases. The majority of defendants in those cases would have greatly benefitted from a program…Educating people about the humane treatment of animals can often be much more effective, and have longer-lasting effects, than incarceration, fines, or community service.")

expect to be treated fairly.[140] Certain animal species "possess some sort of proto-morality" and "develop something similar to our sense of justice through prolonged relations with humans."[141] Arguably, this shows that animals not only suffer physically, but suffer emotionally when "their needs and desires are unjustly not met."[142] "Furthermore, a considerable number of non-human animals can rebuild trust from a compensatory arrangement."[143] This is especially true for companion animals who interact frequently with humans.[144] Data also indicates that animals with higher cognitive abilities are able to rebuild "trust after a wrong is committed against them if the wrongdoer modifies his attitude enough to convince the animal that he will not commit another wrong against the animal."[145] As previously mentioned, this is not to say that the responsibility to forgive is on the animal victim, rather that not only do animals deserve to be treated fairly, but that they expect it. When this expectation is broken, the harm that results must be repaired.

b. Talking Circles

Talking circles can be an important tool in animal cruelty cases for two reasons. First, underlying reasons for animal cruelty are often systemic since some communities may not have the knowledge or resources to adequately care for animals.[146] Cruelty is often a learned behavior that starts at an early age.[147] Juveniles who harm animals may not face intervention and this can have ripple effects for how they treat, and view, animals in the future.[148]

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[140] Mosquera, *supra* note 4.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* ("[Animals with higher cognitive abilities] are able to experience a rebuilding of trust after a wrong is committed to them if the wrongdoer modifies her attitude in the right way so that the animal [who] was wronged in the past can abandon the expectation that a similar wrong will be committed again in the future by the old offender—or by any other human similar to the offender, or who fulfills a similar role as the offender used to have with this animal.").

[146] *See* Reese et al., *Animal Cruelty and Neighborhood Conditions*, Animals, 4 (Nov., 2020) (citing research that showed "general 'community hardship' such as crowded housing, poverty, low income, percent of residents without a high school diploma, crime, and dependent children and seniors" was associated with a prevalence of animal cruelty).

[147] Roshni Trehan Ladny & Laura Meyer, *Traumatized Witnesses: Review of Childhood Exposure to Animal Cruelty*, J. Child & Adolescent Trauma 6 (July 30, 2019).

[148] Melissa Bright et al., *Animal Cruelty As An Indicator of Family Trauma: Using Adverse Childhood Experiences To Look Beyond Child Abuse And Domestic*

Second, talking circles expand the involvement of key players,[149] which can assist in rehabilitating animal cruelty offenders since social service providers and mental health practitioners can participate in ways they may be unable to in traditional court proceedings, by proactively creating a dialogue with the offender and his community.[150] They can educate the offender and his community on available resources, underlying traumas they have experienced, and, most importantly, the humane treatment of animals.[151] Talking circles can bridge a current gap since cruelty offenders are often released back into their communities without resources or knowledge on how to treat their underlying causes of cruelty.[152] "Discussions around animal welfare and safety can benefit both offenders and their communities at large;"[153] particularly if there are systemic issues prevalent in communities that can be addressed, like a lack of resources or how animals are viewed and used.[154] If resources are lacking in communities, talking circles can provide opportunities to brainstorm much-needed resources, such as low-cost veterinary services, and forge connections with those who can implement them.[155]

Violence, 76 Child Abuse & Neglect 288, 294 (2018) ("Children would benefit from intervention to prevent them becoming perpetrators of cruelty or violence.").

[149] Zehr, *supra* note 11, at 65.

[150] *See generally* Kurki, *supra* note 124, at 7 (noting Texas's Community Justice Task Force includes "representatives of criminal justice agencies, social and health services, and community organizations" and assists in "prepar[ing] a Community Justice Plan."). With Texas as an example, talking circles can incorporate mental health clinicians and social service workers to engage with offenders in a more meaningful, impactful way. Further this dialogue can help tailor plans that address and meet the needs of the offender.

[151] *See* Gupta et al., *supra* note 120, at 6 ("If responding to [animal cruelty] with an intervention focus (e.g., instilling better knowledge of animal care) eliminates the reasons for the harmful behavior, it may be an effective and welcome alternative for a significant subset of offenders… .").

[152] *See id.* at 1 ("[I]ncarceration may not be a complete solution for protecting animals from future harm…the principles of balanced and restorative justice emphasize not only offender accountability and community safety, but also the improvement of offender functioning.").

[153] Dawna Komorosky & Keri K. O'Neal, *The Development of Empathy and Pro-Social Behavior Through Humane Education, Restorative Justice, and Animal-Assisted Programs*, 18(4) Contemp. Just. Rev. 395, 400 (2015).

[154] Reese et al., *supra* note 146; *see generally* Zehr *supra* note 11, at 65 ("Participants may address situations in the community that are giving rise to the offense…the obligations that the community might have, community norms, or other related community issues.").

[155] *See* Paul McCold, Dep't. of Soc. & Crim. Just., Old Dominion University, Restorative Justice: The Role of the Community, Paper presented to the Acad. of Crim. Just. Sci. Ann. Conf. (March 1995) ("Strong [r]restorative [j]ustice programs are characterized by an environment that includes local community control. Victim-offender reconciliation programs which have been most likely to succeed respond to community needs and local culture; where planning and implementation remain local

c. Community Restorative Boards

Animal cruelty cases are notorious for not being prosecuted, although there is a lack of data on exact numbers of cases prosecuted versus cases not prosecuted.[156] One often-cited reason for cruelty cases not being prosecuted is that many prosecutors' offices are under-staffed and/or under-funded.[157] With resources already stretched thin in some offices, prosecutors often find themselves lacking the knowledge and resources to successfully prosecute animal cruelty cases.[158] Because many cruelty cases are not prosecuted, it is wise to consider alternatives to, or in conjunction with, prosecution.

A hybrid model of restorative justice could look like a Community Restorative Board (CRB) where offenders start in the criminal justice system by being formally charged, but then are diverted out.[159] CRBs would comprise of a small group of community members who have completed training and conduct public, in-person meetings with offenders.[160] During the meeting, board members would discuss the nature of the offense and negative consequences with the offender.[161] Then, board members would propose sanctions, which they discuss with the offender with input from the surrogate animal victim, to develop a timeline for completion.[162]

In animal cruelty cases, offenders would participate in CBRs with the goal of rehabilitation. CBRs would reach out to mental health experts, veterinarians, and social service providers to propose appropriate sanctions for cruelty offenders that hold cruelty offenders accountable

initiatives; where services make use of, or work closely with, local resources.").

[156] *See* Animal Legal Def. Fund, *Why Prosecutors Don't Prosecute*, https://aldf.org/article/why-prosecutors-dont-prosecute/ (last visited Mar. 29, 2021) (suggesting reasons why prosecutors do not always charge animal cruelty cases).

[157] *See id.*

[158] *Id.*

[159] *See* Kurki, *supra* note 124, at 6 (discussing Vermont's reparative probation program that begins with a judge sentencing a defendant to complete a reparative program after a finding of guilt).

[160] *Community Restorative Boards*, NACRJ, https://nacrj.org/index.php?option=com_easyfolderlistingpro&view=download&format=raw&data=eNpNkE9PwzAMxb9K5BNIoLX8GcO9AUJihx1AnKcsdddITVslzhhCfHfcZBU7xXnx7_k5GssSfwIuEZqhq8lDFfDuFsE6vaew8BSG6I1UY9x11izeKfDgNdsDqXUMbA1NiLhADOSzSUgSQjE_7aNg_wMeELbbpE23VUZ77ZJVgTAdy6zaGiqLRYY8daPm9qxL2MZ2NLP3NwjPg3Oxt_ytzrM-DdrXQV2rV21YfbRErC4-Ny9XavO2vpxYWZqOfKrGujkFpeNo5RfmFKUM1szatI566d4l9VEITwdLX3lBCd-nuVD9_gGRv3JB (last visited Mar. 29, 2021) ("A community restorative board typically is composed of a small group of citizens, prepared for this function by intensive training, who conduct public, face-to-face meetings with offenders sentenced by the court to participate in the process.").

[161] *Id.*

[162] *Id.*

and build a coalition that focuses on treatment, rehabilitation, and education by providing cruelty offenders with resources, knowledge, and tools.[163] Currently, the criminal justice system employs a host of these experts to build cases against cruelty offenders.[164] CBRs would also use status conferences to ensure that offenders are adhering to their timelines, acting as a modified form of probation.[165]

IV. Considerations in Using Restorative Justice

While there are valid reasons for using restorative justice, there are considerations that must be addressed before applying restorative justice. First, there is not a tremendous amount of data on the effectiveness of restorative justice.[166] In part, this is because restorative justice is not used very often in the U.S. criminal justice system, outside of the juvenile justice system.[167] This, alone, should not dissuade the use of restorative justice. Measures of success may differ based on who is collecting data and how success is defined.[168] The data that is available

[163] *See generally* Kurki, *supra* note 124, at 7 (noting Texas's Community Justice Task Force includes "representatives of criminal justice agencies, social and health services, and community organizations" and assists in "prepar[ing] a Community Justice Plan."). Extrapolating on Texas's Community Justice Task Force, a similar task force that brings together mental health experts, veterinarians, and social service providers can be convened for CBRs.

[164] *See Criminal Justice*, Animal Legal Def. Fund, https://aldf.org/how_we_work/criminal-justice/ (last visited May 27, 2021) (detailing various criminal justice stakeholders who are integral in animal cruelty cases, including "prosecutors, law enforcement, and veterinarians…. ").

[165] *See* Kurki, *supra* note 124, at 6 (discussing Vermont's reparative probation program that utilizes restorative justice principles, including board members meeting with the victim and offender, discussing the impacts of the crime on the victim and community, creating a contract—or a sentence—that the offender must complete, and follow-up meetings the offender must attend with the board).

[166] Rugge, *supra* note 17, at 26 ("[T]he main limitation of restorative justice is that the body of research that currently exists is still in its infancy.").

[167] *See* Mark S. Umbriet & Jean Greenwood, *Guidelines for Victim-Sensitive Victim-Offender Mediation: Restorative Justice Through Dialogue*, U.S. Dep't. of Just.: Office of Just. Programs 4 (Apr. 2000) (citing research that showed 289 victim-offender mediation programs existed in the U.S. in 1998); *see also* Marilyn Armour, R*estorative Justice: Some Facts and History*, Charter for Compassion, https://charterforcompassion.org/restorative-justice/restorative-justice-some-facts-and-history (last visited May 28) (Citing research that showed thirty states "either [had] restorative justice principles in their mission statements and policy plans or legislation promoting a more balanced and restorative juvenile justice system.").

[168] Kurki, *supra* note 124, at 3 ("Little evaluation research is available, and there is no consensus on how to measure "success." Most advocates contend that recidivism is not the correct or only measure. Evaluations might also consider such measures as victim and offender satisfaction, amounts of restitution or community

tends to show that victims are generally satisfied with restorative justice, in large part due to having deliberative and meaningful opportunities to heal[169] and restorative justice can, in fact, reduce reoffending.[170]

Second, it is imperative that victims are not re-victimized during the process. For a truly restorative approach, victims *must* be engaged and prepared to participate.[171] Even if victims are willing to participate, they may still experience some post-traumatic stress or other after effects from victimization.[172] It is vital that this is recognized by all participants prior to engaging in the restorative justice process and if at any time a victim feels overwhelmed or wishes not to pursue restorative justice at any point, then they can end their participation.[173] Facilitators and criminal justice system stakeholders should be cognizant of this and employ alternatives, such as surrogate victims, in cases where victims are not ready, willing, or able to participate.[174]

Third, restorative justice is not appropriate for all crimes.[175] For example, Colorado precludes restorative justice from being used in domestic violence cases.[176] There are worries that certain types of crimes, particularly ones involving interpersonal violence, may not be ideal because there may be inherent power imbalances.[177] While traditional restorative justice models may not be suitable for all crimes,

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service, rates at which reparative agreements are fulfilled, levels of volunteer participation and community action, and victims' and offenders' quality of life.").

[169] Sherman & Strang, *supra* note 50, at 22; Cara Tabachinick, *When Criminals and Victims Meet, Both Parties Can Benefit*, Sci. Am. Mind (Sept. 14, 2014), https://www.scientificamerican.com/article/when-criminals-and-victims-meet-both-parties-can-benefit/ (discussing a study that examined the effects of restorative justice on burglary victims. "About a quarter of the victims who went through the criminal justice system showed clinical symptoms of post-traumatic stress, but only 12 percent of the group who also had restorative justice conferences had symptoms.").

[170] Lloyd & Borrill, *supra* note 79.

[171] *See* Zehr, *supra* note 11, at 48 ("Achieving [the goals of restorative justice] requires that victims are involved in the process and come out of it satisfied.").

[172] Dean Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. Traumatic Stress, 1612 (2003) (citing research indicating 25 percent of crime victims experienced lifetime post-traumatic stress disorder).

[173] Umbriet & Greenwood, *supra* note 168, at 8.

[174] Zehr, *supra* note 11, at 67.

[175] *See* Rugge, *supra* note 17, at 26 ("Research continues to explore when restorative justice works and for whom, and in what circumstances.").

[176] *See* Erie Colorado, *Restorative Justice Program,* https://www.erieco.gov/251/Restorative-Justice-Program (last visited May 28, 2021) (stating that sexual assault and domestic violence cases are excluded from Colorado's Restorative Justice Program).

[177] *See* Australian Inst. of Criminology, *Challenges Faced in the Implementation and Application of Restorative Justice*, https://aic.gov.au/publications/rpp/rpp127/challenges-faced-implementation-and-application-restorative-justice.

elements of restorative justice (including victim recognition, healing, and accountability) can be infused throughout various points in the criminal justice system.[178] Restorative justice is still fairly new, so there may be opportunities to continue to explore where, and to what degree, restorative justice options make sense.

Fourth, some may be uncomfortable utilizing restorative justice in animal cruelty cases because it feels like someone is speaking *for* animal victims, especially because animals are considered "voiceless,"[179] but animals have their own language and ways of communicating amongst each other and with humans, even if humans do not recognize this.[180] Even if there are "language gaps," restorative justice can still be employed through the use of surrogate victims. Restorative justice has been used in cases where victims are deceased, in "crimes against legal persons like a company or a school,"[181] and in environmental crimes.[182] Justice is available to all, not to just those who communicate in obvious ways. We know that animals do not want to be harmed and feel pain when they are harmed.[183] The fact that animals are sentient, coupled with research that animals (especially companion animals) expect to be treated fairly,[184] shows that we can advocate on their behalf.[185] Further, to alleviate concerns that the surrogate victim is speaking for the animal victim, parameters can be put in place so the surrogate victim is not bringing an "anthropocentric perspective."[186] Rather, the focal point should remain on healing and restoring the animal victim as much as possible.

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[178] *See generally* Kurki, *supra* note 124 (highlighting how four states—Minnesota, Texas, Vermont, and Oregon—incorporated restorative justice principles into various stages of the criminal justice system).

[179] *See Justin Marceau on Animal Law and Criminal Punishment*, Animal L. Podcast (July 24, 2019), https://www.ourhenhouse.org/2019/07/animal-law-podcast-50-justin-marceau-on-animal-law-and-criminal-punishment/.

[180] Freeman et al., *supra* note 128.

[181] U.N. Off. of Drugs & Crime, *supra* note 20, at 61.

[182] Preston, *supra* note 129, at 14.

[183] German Lopez, *Animals Can Feel Pain. A Biologist Explains How We Know*, Vox (Jan. 23, 2017) https://www.vox.com/science-and-health/2017/1/23/14325172/animals-feel-pain-biologist (last visited on May 27, 2021) (citing research that shows wild animals "nurse their wounds, make noises to show distress, and even become reclusive" and animals in laboratories, including "chickens and rats, self-administer pain relievers when they're hurting.").

[184] Mosquera, *supra* note 4.

[185] Advocates consistently rely on animal sentience to champion protections on behalf of animals. For example, legislation often ensures that animals' basic needs are met because if they are not, animals will suffer.

[186] Preston, *supra* note 129, at 14.

Conclusion

Intervening in animal cruelty cases is extremely important. Society and communities must acknowledge the severity of crimes against animals with an eye towards holding offenders effectively accountable. Responses of the criminal justice system are not always tailored to address an offender's underlying reasons for committing animal cruelty or provide meaningful opportunities for an offender to recognize animals as victims. However, utilizing restorative justice can be a compelling way to hold animal cruelty offenders accountable, address their needs, as well as the needs of animal victims, and, most importantly, recognize that animal are victims and their experiences—including of pain and suffering—must be acknowledged and repaired.

APPENDIX
Example of Restorative Justice Model for Animal Neglect[187]

Jim lives in South Dakota and owns a pit bull named Charlie, who is eight years old and weighs sixty pounds. Jim adopted Charlie from the local humane society when Charlie was two. Jim has kept Charlie in his backyard year-round for the past three years. Unfortunately, South Dakota winters are brutal, and Charlie has endured extreme weather including freezing temperatures, snowfall, and icy winds. Charlie has a doghouse in the backyard, but the weather has worn it down and Jim has not replaced the house or any parts of the house. However, Jim provides Charlie old blankets to curl up on, thinking this should be enough for Charlie's size and breed. Unfortunately, the blankets and shelter are not enough to protect Charlie from suffering during the winter.

In South Dakota, neglect is a "fail[ure] to provide food, water, protection from the elements, adequate sanitation, adequate facilities, or care generally considered to be standard and accepted for the animal's health and well-being consistent with the species, breed, physical condition, and type of animal."[188] Here, Jim has committed animal neglect because he has failed to provide Charlie adequate protection from the severe weather; this is not at issue. Charlie has suffered hypothermia and needs to be hospitalized for medical issues, including getting his internal temperature up. Below, we will explore what restorative justice could look like in this case.

Victim-Offender Dialogue

In a victim-offender dialogue, a surrogate victim would be used, likely the veterinarian who is treating Charlie for his medical needs, Dr. V. Dr. V and Jim meet with a facilitator to have an in-depth conversation that focuses on several things including: requirements of pet ownership, animal physiology and sentience, and ways Jim will make amends to Charlie including setting up a trust to pay for Charlie's ongoing medical care. Charlie is removed from Jim's care and Jim is forbidden from owning animals for one year. Jim will also be required to take courses on basic dog care needs and responsible pet ownership.

Through this process, Jim admits guilt without legal consequences and fully engages in the process. He is educated about Charlie's needs and learns that because of his actions, Charlie suffered. He must reckon with the harm *he* caused Charlie. This process has allowed Jim the opportunity to reflect, atone, and be held accountable for his actions without introducing him to the criminal justice system.

Talking Circle

Here, the process is expanded to include Jim's neighbors, community members and other service providers, including social workers and mental health clinicians. The conversation still centers around the harm Charlie has suffered and the medical attention he must receive. Jim and Dr. V. converse about the requirements of responsible pet ownership and how Jim has failed to adequately provide for Charlie, in addition to animal physiology and sentience. Because community members are present, they also become educated in responsible pet ownership and animal sentience. In addition, community members can reflect on programs and resources available to Jim and themselves to assist in providing for their animals, such as low-cost veterinary clinics. Further, they can brainstorm additional resources their community could benefit from, like a non-profit group that provides stipends to build dog houses.

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[187] This is not based on an actual case. Any resemblance to actual events and/or legal proceedings is purely coincidental.

[188] S.D. Codified Laws § 40-1-1 (2021).

Through their discussions, Jim reveals he has been hoarding things for many years, but it has gotten considerably worse in the past three years, which is the amount of time he has kept Charlie outside. Jim admits that he barely has room in his home for himself, let alone Charlie. He honestly believed that keeping Charlie outside would be better for him. Because the circle includes a mental health care clinician and social worker, a plan is put in place to get Jim the help he needs to address his hoarding. Jim undergoes a thorough mental health evaluation and subsequent treatment plan is put in place that includes mental health care treatment specific to hoarding, humane education, and a course on responsible pet ownership. Meanwhile, Jim is also required to set up a trust for Charlie's ongoing care. Charlie is taken out of Jim's care and Jim is forbidden from owning animals until he completes his treatment plan.

Here, Jim received the assistance to address his mental health needs that he was unable to obtain on his own. Further, he now sees how his hoarding disorder contributed to his actions that ultimately caused Charlie's suffering. Jim's hoarding disorder does not absolve his responsibilities towards Charlie; rather, it helped provide clarity on *why* he failed to provide Charlie with adequate shelter. There is a targeted plan and intervention moving forward that potentially rehabilitates Jim and decreases the chance of him harming another animal. Through restorative justice, Jim takes responsibility for the harm he caused Charlie, understands the importance of recognizing that harm, and participates in a plan to make it right. Jim also can heal himself and receive treatment.

Community Restorative Board

Jim would be charged criminally for animal neglect but would be diverted outside the criminal justice system into a Community Restorative Board (CBR). Here, the CBR is composed of Dr. V., a restorative justice facilitator, and mental health care provider. Together, they discuss, in-depth, how Jim's failure to provide Charlie adequate shelter not only breaks the law, but why adequate shelter is required. They discuss animal physiology and sentience and Jim learns that Charlie feels pain just like humans do. Unlike the criminal justice system, there is dialogue and an opportunity for Jim to ask questions to better understand animal sentience. The board requires Jim to set up a trust for Charlie's continued care and complete an online animal care class. The board also sets up periodic status conferences for Jim to check-in and provide updates on the progress of his class, what he has learned, and how he will apply this to his future interactions with animals. Jim is forbidden from owning another animal for one year and must appear at all status conferences. Once Jim completes all that is required of him, the charge of animal neglect is removed from his record.

The Bear Necessities: Ursine Suffering Exposed, Explained, and Expelled

Morgan Pattan*

Introduction

Pursuant to court order issued in August 2012, Ben the Bear—a 600-pound, half-black, half-grizzly—was flown from North Carolina to California to be rehomed in a vast sanctuary.[1] For more than six years, Ben the Bear had been confined to a 12 foot by 22 foot kennel, consisting of concrete and chain link, where fed a single meal consisting of dog food each day, which his keepers unceremoniously tossed on the same floor he was forced to eat, sleep, urinate, and defecate on.[2] Living in captivity deprived Ben of the opportunity to roam across miles of terrain each day, forage for food to accommodate his naturally varied diet, bathe himself in streams and ponds, and prevented him from hibernating for several months during the winter.[3] Instead, Ben was exploited for profit by his owners, who ran a roadside zoo**.** As a direct result of the long-term, inhumane confinement that Ben was subjected to, experts observed that Ben exhibited abnormal pacing and other repetitive behaviors that are commonly associated with psychological distress and poor emotional welfare.[4]

Within days of the Animal Legal Defense Fund, PETA, and two concerned citizens filing suit against the roadside zoo to free Ben the Bear, a judge found that the roadside zoo had subjected Ben to cruel treatment in violation of North Carolina law and ordered Ben's

* The author would like to thank Prof. David Favre (Michigan State University) for the opportunity to publish this note and the entire editorial team at MSU ANRLR; also Carney Anne Nasser-Garcia who inspired the research of this topic and provided unwavering encouragement and insight along the way. A special thank you to my mom, dad, and brother who read and critiqued numerous drafts of this note; and to Bentley, my family's dog who lovingly sat on my lap during every writing and editing session, who passed away in February of 2021.

[1] Feature Report, PETA's Investigations & Rescue Fund, *A "Happily Ever After" Ending for Ben the Bear*, https://www.peta.org/features/ben-bear-rescue/ (last visited June 16, 2021).

[2] *Id.*

[3] *Petition for Rulemaking to Ensure the Humane Handling, Treatment, and Care of Captive Bears Under the Animal Welfare Act*, 59 PETA (Sept. 25, 2012), https://secure.mediapeta.com/peta/PDF/2012-Bear-Standards-Petition.pdf [hereinafter *Petition*].

[4] *See id.* at 59.

immediate, emergency transfer to a reputable sanctuary.[5] Ben is one of the lucky few who has been rescued and rehomed to a sanctuary with the available resources to meet the minimum needs of an animal as large and complex as a bear. In the United States alone, thousands of bears are kept in similar conditions to the ones described above in roadside zoos, where they are deprived of everything that is natural and important to their wellbeing.

The practice of capturing and keeping bears in captivity can be traced back nearly four thousand years.[6] Yet, humans are no closer to domesticating bears today than at any point in history. Over the last several decades, organizations such as the Humane Society have recognized that the husbandry needs of bears are much more complex and sophisticated than previously understood.[7] Experts today universally accept that bears are as complex as primates and require special considerations when living in captivity to meet their basic physical and psychological needs.[8]

Behaviors that bears naturally exhibit in the wild contrast sharply with behaviors they manifest when kept in captivity. In the wild, bears forage constantly and spend significant amounts of time swimming.[9] When a bear's ability to exhibit its natural behaviors is taken away, the bear may become stressed or agitated, and ultimately will display signs of psychological distress and poor welfare through abnormal, stereotypic behaviors such as pacing, bar-biting, and head-butting.[10] Such behaviors are not only the result of a bear's enclosure size and design, but also the inability to exhibit its natural behaviors.[11]

Certain animal species have been afforded species-specific protections to better ensure their welfare, as scientific research has led to a greater understanding of their needs. For example, the United States Department of Agriculture (USDA) has codified legislation detailing the specific enclosure size and design, dietary needs, and enrichment activities for marine mammals and primates.[12] While scientific research clearly indicates that bears are as complex and sophisticated as primates,

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[5] *Id.*

[6] Jenny Gray, Zoo Ethics: The Challenges of Compassionate Conservation 11 (Cornell University Press 2017).

[7] Humane Society, *Captive Bear Welfare Issues*, (Dec. 27, 2012), https://www.humanesociety.org/sites/default/files/docs/captive-bear-welfare-factsheet.pdf.

[8] Christine Dell'amore, *Black Bears Can "Count" as Well as Primates*, Nat'l Geo. (Aug. 31, 2012), https://www.nationalgeographic.com/animals/article/120829-black-bears-cognition-animals-science.

[9] Humane Society, *supra* note 7.

[10] *Petition*, *supra* note 3.

[11] Humane Society, *supra* note 7 (including feeding, climbing, foraging, nesting, socializing, exploring, swimming, and denning).

[12] 9 C.F.R. §§ 3.1- 3.142 (1991).

the standards that govern the care and keeping of bears in captivity has relegated bears to a "catch-all" subsection of "other warm-blooded animals."[13]

Current laws and regulations at both the state and federal level do not sufficiently prevent bear keepers from forcing bears to endure cruel conditions of confinement. The federal Animal Welfare Act (AWA) is the primary law that governs the housing, care, and transport of captive bears who are exhibited, while the private ownership of most bear species is governed by (highly inconsistent) state wildlife laws. The AWA empowers the USDA to promulgate rules and carry out the congressional intent of the statute.[14] However, the bare minimum standards prescribed by the AWA regulations are vague, and have proven insufficient to carry out its stated purpose and intent.

In the case of Ben the Bear, USDA inspectors only cited the offending roadside zoo facility for violating federal regulations in a single instance: for a rusty water trough.[15] Clearly, the lack of standards provided to the USDA, for inspectors with the Animal and Plant Health Inspection Service (APHIS) to follow when conducting inspection of licensed exhibitors leads to insufficient animal care and handling and detrimentally affects the welfare of American animals living in captivity. Further, APHIS inspectors have demonstrated confusion in regards to the enforcement of AWA regulations as they relate to bears.[16] Finally, the agency lacks a bear specialist or other specialized inspectors with knowledge or expertise regarding bear behavior to better identify signs of suffering in bears.[17]

Therefore, even in cases where the provisions contained within the AWA are strictly adhered to, bears frequently continue to languish in unacceptable conditions that prevent these large, highly complex, and intelligent animals from thriving. Accordingly, this note takes the position that in order for the USDA to satisfy its duty to bears by carrying out the obligations that the AWA proscribes, the USDA must implement, at minimum, the following two policy changes: first, promulgate species-specific standards for exhibiting bears, and second, appoint at least one bear specialist to the APHIS inspector department.

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[13] *Id*.

[14] 7 U.S.C. § 2151 (1966).

[15] Shakira Croce, *USDA Seeks to Revoke License of Notoriously Cruel Jambbas Ranch*, PETA (June 24, 2013), https://www.peta.org/media/news-releases/usda-seeks-revoke-license-notoriously-cruel-jambbas-ranch/; *Petition*, *supra* note 3.

[16] Animal & Plant Health Inspection Service, *About Animal Care*, U.S. Dep't Ag. (Jun 2, 2020), https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/usda-animal-care-overview [hereinafter *About Animal Care*].

[17] *Id.*

I. History

The practice of capturing and keeping private collections of exotic animals began in the 15th century as a display of power and wealth; menageries were the result of egoistic leaders who required facilities to place the animals they accumulated and traded on display.[18] The Philadelphia Zoo, which opened in 1868, was the first zoo in the United States.[19] It expressed two dual intended purposes: to provide its visitors with education and entertainment.[20] "Entertainment" often involved placing exotic animals on display and training them to perform in shows, so as to attract paying audiences.[21] In short order, many modern zoos followed this example, resulting in competitions amongst zoo directors to secure "the most exotic animals," while remaining woefully unaware of the animal's particular diets, habits, and needs.[22] Thankfully, the purpose and structure of zoos in America has evolved significantly since the opening of these first modern zoos, largely as a result of increased public awareness and interest in environmental and animal welfare issues.[23]

Today, zoos have retrained their primary focus away from entertainment and shifted their concentration upon conservation, scientific research, community engagement with exotic animals, and rehabilitative efforts.[24] The Association of Zoos and Aquariums (AZA) was founded in 1924 to ensure accredited zoos and aquariums "meet the highest standards in animal care and welfare" and remain dedicated to the "advancement of zoos and aquariums in areas of conservation, education, science, and recreation.[25] Modern, accredited zoos also engage in scientific research to better understand the species that are in their care. Many zoos have developed a broad range of cutting-edge programs, including programs dedicated to veterinary medicine, animal-specific nutrition requirements, behavioral studies, and breeding research.[26]

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[18] Gray, *supra* note 6, at 12.

[19] *Id*. at 13.

[20] *Id.*

[21] Pamela M. Henson, *American Zoos: A Shifting Balance Between Recreation and Conservation*, *in* The Ark and Beyond: The Evolution of Zoo and Aquarium Conservation 70 (Ben A. Minteer et al. eds., 2018).

[22] *Id.*

[23] Irus Braverman, Zooland: The Institution of Captivity 5 (Stan. Univ. Press 2013).

[24] *Id.*

[25] Association of Zoos & Aquariums, *About Us*, https://www.aza.org/about-us (last visited June 16, 2021).

[26] *Id.*

While there has been undeniable progress made to ensure the welfare of zoo animals, there is still much that must be done to ensure that animals living in captivity are cared for and have their needs met such that their physical and psychological welfare is ensured. As scientific research evolves to better understand exotic animals, it is essential that the laws and standards governing the care and keeping of these animals evolve in tandem. Nowhere is the need for updated regulation more critical than in the case of bears living in captivity.

II. Bears Living in Captivity Versus Bears in the Wild

The natural behaviors that are at the core of a wild animal's being are nearly non-existent in many captive animals due to the restraints inherent to living in an enclosure.[27] Animals living in captivity commonly display behaviors that are atypical to the behaviors that their species display in the wild.[28] The atypical behaviors can be attributed to the complete lack of freedom that captive animals are burdened with, along with the inescapable differences of living in the wild versus living in captivity.[29] The telling differences in behavior among wild and captive animals is especially notable in bears, because the behaviors that bears exhibit in the wild are nearly impossible to replicate in man-made enclosures. As a result, bears living in captivity are very likely to experience high rates of physiological and psychological suffering.[30]

a. Bears in the Wild

Bears are complex, sentient animals that are tightly programmed with complex instinctual behaviors. They engage in particular habits when searching for food, have changing physiological requirements as the seasons change, and require adequate space to exhibit all of these natural behaviors. Depending on the season and geographical location, bears spend approximately seventy-five percent of their time foraging for food.[31] The behaviors involved in foraging are complex, and require bears to adapt to varied stimuli and environmental contingencies.[32] The foods that bears seek out require extensive time and effort to obtain.[33]

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[27] Ros Clubb & Georgia Mason, *Captivity Effects On Wide Ranging Carnivores*, 425 Nature 473, 473-74 (2003).

[28] *Id.*

[29] Marek Spinka & Francoise Wemelsfelder, *Environmental Challenge and Animal Agency*, *in* Animal Welfare 39 (3d ed. 2018).

[30] Clubb & Mason, *supra* note 27, at 473-74.

[31] David L. Garshelis & Michael R. Pelton, *Activity of Black Bears in the Great Smoky Mountains National Park*, 61.1 J. Mammalogy 8, 13 (1980).

[32] *Id*.

[33] Kathy Carlstead et al., *Environmental Enrichment for Zoo Bears*, 10.1 Zoo

Bears spend time gathering fruit, nuts, and grains from the ground and the trees, digging for insects, and preying on fish and small ground mammals.[34] One of the restrictions that captive living imposes upon animals is the diminishment of home range size, defined as "the area in which an animal usually confines its daily activities."[35] A bear's home-range size varies greatly, based on species, sex, geography, and age, however it can span anywhere between fifty and five hundred square miles for most bears.[36]

Bears also engage in an intricate behavior known as "denning," the process of building elaborate nests in the ground or trees to use on a daily basis for rest and recovery.[37] Bears engage in even more complex denning practices in anticipation of long-term hibernation; research demonstrates that there is inherent positive physiological value in activities related to hibernation for bears that is at once highly complex and instinctual.[38] A bear's hibernation period can last anywhere from a few weeks to eight months, depending on geographic location and climate conditions.[39]

Socialization among bears is another area of importance.[40] Although bears are typically considered to be solitary animals, they often engage in affiliative behaviors and share home ranges.[41] Even when there is competition over resources, bears will interact non-aggressively with other bears in the wild.[42] In the wild, a bear cub will rely on its mother for protection, nurturing, training, and feeding for one to two years following its birth.[43] To deny a bear cub and its mother this opportunity may have detrimental effects on the cub's development and cause the mother stress, confusion and depression.[44]

Biology 3, 4 (1991).

[34] *Id.* at 12.

[35] *Home Range*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/home%20range (last visited June 16, 2021).

[36] Elena Ulav, *Ursus Americanus, Fire Effects Information System (FEIS)*, USDA, https://www.fs.fed.us/database/feis/animals/mammal/uram/all.html (last updated July 18, 2013).

[37] *Id.*

[38] Rob Laidlaw et al., *Status of Bear Welfare in Cherokee, North Carolina*, PETA (Apr. 2010), http://www.zoocheck.com/wp-content/uploads/2015/06/Cherokee_Bear_Welfare_Report.pdf.

[39] Mark D. Jones, *Hibernation Means Different Things to Different Animals*, N.C. Wildlife Res. Comm'n (Apr. 1999), https://www.ncwildlife.org/Learning/Species/Mammals/Black-Bear/Black-Bear-Hibernation.

[40] Ronald R. Swaisgood & David J. Sheperdson, *Scientific Approaches to Enrichment and Stereotypies in Zoo Animals: What's Been Done and Where Should We Go Next?*, 24.6 Zoo Biology 500, 509-10 (2005).

[41] *Id.*

[42] *Id.* at 509-11.

[43] Ulav, *supra* note 36.

[44] *Id.*

Wild bears are highly intelligent and sophisticated animals with varied needs and behavioral instincts. The ability for a bear to act on its natural behaviors is necessary for the bear to maintain its physical and emotional well-being. Yet, it is exceedingly difficult for a bear living in captivity to fulfill even its most basic needs.

b. Bears Living in Captivity

According to the American Humane Society, bears are one of the "most challenging species to keep humanely in captivity" because the behaviors bears exhibit in the wild are nearly impossible to replicate in a captive environment.[45] There are over one thousand bear exhibits in the U.S.; the majority are contained within roadside zoos that have minimum oversight and rarely meet even the minimum standards required to humanely keep bears in captivity.[46]

The enclosures that bears are frequently kept in, especially at roadside zoos, are rarely more than a couple hundred square feet in size and constitute little more than glorified dog runs.[47] Such enclosures usually consist of concrete floors surrounded by cyclone fencing.[48] Other enclosures, referred to as "bear pits," place bears beneath the viewing visitor, which is a psychologically vulnerable position for the bear.[49] Such enclosures rarely offer an opportunity for bears to swim and bathe themselves, as they are often given nothing more than a small metal trough to bathe, cool, and drink from.[50]

For example, a zoo located in Cherokee, North Carolina was found to be keeping two brown bears in a pit style enclosure that was no more than 280 square feet, the size of a standard living room.[51] These pits were made entirely of concrete, did not provide any sort of vegetation or shade, and left the bears with a dirty pool that was intended to serve as their drinking *and* bathing water.[52] The bears were found to be constantly pacing around and frequently begging for food from the visitors.[53]

Feeding behaviors and proper diet is another area that differs greatly when comparing bears in the wild to bears in captivity. Captive

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[45] Humane Society, *supra* note 7.

[46] Barbara King, *Bears Can Face Summer Challenges in Roadside Zoos*, NPR (Aug. 17, 2017, 11:23 AM), https://www.npr.org/sections/13.7/2017/08/17/543682389/bears-can-face-summer-challenges-in-roadside-zoos.

[47] Feature Report, PETA, Take Action for Suffering Captive Bears, https://headlines.peta.org/bears-suffer-in-roadside-zoos.

[48] Humane Society, *supra* note 7.

[49] Laidlaw et al., *supra* note 38, at 16, 25.

[50] *Id.*

[51] *Id.* at 17.

[52] *Id.*

[53] *Id.* at 27.

bears are often fed dry dog food, at routine, single times every day, and are seldom given the opportunity to engage in natural foraging behaviors.[54] An ice cream shop located in York, Pennsylvania confined a black bear named Ricki to a cage that was so small he was only able to take twelve steps along the length of his enclosure for sixteen years.[55] Visitors would watch Ricki pace all day long and would feed her dog food purchased from a vending machine.[56] The only nutritional supplement Ricki's owners saw fit to afford her was corn.[57]

Many bear enclosures, specifically those found in roadside zoos, do not provide bears with adequate space to retreat from other bears or from the view of the visiting public. This leaves bears feeling vulnerable, especially to the humans that visit their enclosure, because many bears perceive humans to be predators.[58] These bears are also deprived of proper veterinary care to ensure their well-being.[59]

Captive bear cubs are often prematurely removed from their mothers and either transferred to other facilities or kept in separate enclosures.[60] Roadside zoos often engage in photoshoots where the cubs are used as props when they are only a few weeks old.[61] The Cherokee Zoo has been fined by the USDA for removing bear cubs from their mothers for photoshoots and transferring the cubs to other roadside zoos when the cubs outgrow their utility as social media props.[62] It takes little imagination to understand the psychological toll this has on both the mother bear and cub, especially when they are additionally confined to problematic exhibits where all of the concerns discussed in this section are present.

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[54] Humane Society, *supra* note 7.

[55] *See id.*; *see also Ricki the Bear Caged at Pennsylvania Ice Cream Shop*, Animal L. Def. Fund (Dec. 15, 2017), https://aldf.org/case/ricki-the-bear-caged-at-pennsylvania-ice-cream-shop/.

[56] *Ricki the Bear*, *supra* note 55.

[57] *Id*.

[58] *Petition supra* note 3 at 55.

[59] Feature Report, PETA, *Help These Bears Suffering in Tourist Traps*, https://headlines.peta.org/bears-suffer-in-roadside-zoos (last visited June 16, 2021); *see, eg.* Jennifer O'Conner, *Tregembo Zoo is Tremendously Awful*, PETA (June 15, 2015), https://www.peta.org/blog/tregembo-zoo-north-carolina-tremendously-awful/ (discussing another bear, also named Ben, was confined at Tregembo Animal Park, where he suffered an extreme case of ocular keratitis, which inflamed and irritated his corneas to the extent that he was likely to become completely blind).

[60] Humane Society, *supra* note 7.

[61] *Id*.

[62] Feature Report, PETA, *Bears Confined to Nearly Barren Pits, Begging Tourists for Food*, https://www.peta.org/action/action alerts/urge-cherokee-bear-zoo-close-cruel-bear-pits/ (last visited June 16, 2021).

The enclosures contained within nearly every roadside zoo are clearly unable to meet a bear's basic needs. Compressed quarters, a lack of proper nutrition, inadequate veterinary care, and the inability to act on natural motivations detrimentally affects a bear's physiological and psychological well-being.

III. Development of Stereotypic Behavior Due to Psychological Suffering

a. Defining Stereotypic Behaviors

While many zoos have emphasized the importance of the physical well-being of the animals they exhibit, research shows that physical health alone does not indicate welfare.[63] Therefore, ensuring the psychological well-being of an animal must be considered equally important.[64] "Stereotypical behavior" is defined as a pattern of repetitive behavior that serves no apparent function.[65] These behaviors are a "physical manifestation of a pathology caused by confinement."[66] The evidence of confinement causing the pathology is clear because such behaviors "almost never occur in the wild."[67]

This behavioral pathology is so widespread among captive animals that it has become known as "zoochosis."[68] Common stereotypical behaviors among captive animals involve pacing, pulling out hair or plucking out feathers, scratching or rubbing to the point of serious self-injury, biting cage bars or walls, and regurgitating and reingesting food.[69] Pacing is the most frequently observed stereotypical behavior and is highly prevalent in captive bears.[70]

Stereotypical behavior among animals in captivity has long been dismissed as individual "behavioral problems" of the specific animal or presented to the general public as admirable and passed off as "dancing."[71]

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[63] Heather Bacon, *A Holistic Approach to the Management of Abnormal Repetitive Behaviors*, 8(7) Animals 103, 110 (June 27, 2018).

[64] *Id.*

[65] Nora Philbin, *Towards an Understanding of Stereotypical Behavior in Macaques*, Animal Welfare Inst. https://awionline.org/content/towards-understanding-stereotypic-behaviour-laboratory-macaques, (last visited March 1, 2021).

[66] Laurel Braitman, Animal Madness: How Anxious Dogs, Compulsive Parrots, and Elephants in Recovery Help Us Understand Ourselves 103 (2014).

[67] *Id.*; Laura Smith, *Zoos Drive Animals Crazy*, Slate (June 20, 2014, 9:13 AM), https://slate.com/technology/2014/06/animal-madness-zoochosis-stereotypic-behavior-and-problems-with-zoos.html.

[68] *Id.*

[69] *Id.*

[70] Carlstead et al., *supra* note 33, at 4.

[71] Humane Society, *supra* note 7.

In reality, these behaviors indicate the animal's psychological distress and ultimately, poor emotional welfare.[72] Although studies recognize that stereotypical behavior should not be the sole indicator of an animal's poor welfare, it remains a strong indication that there is a high risk of inadequate emotional wellbeing.[73]

b. Causes of Stereotypical Behavior

The misconception that animals held in captivity enjoy a superior quality and standard of life when compared to their peer species living in the wild stems from the misguided idea that animals in captivity "get fed, taken care of, and are relieved of their kill-to-survive mentality."[74] In reality, keeping animals in captivity deprives animals of their agency and competency, and results in behaviors that are not seen in wild animals of the same species.[75]

Agency refers to a "propensity to engage actively with the environment with the main purpose of gathering knowledge and enhancing skills for future use."[76] The lack of stimulation and exploration that an enclosure provides often results in excessive sleeping and laying, which ultimately may lead to boredom and depression.[77] A zoo animal may become increasingly frustrated with this lack of agency and as a result may show aggressive or fearful tendencies and compulsive behaviors.[78]

Competence is the "tools and strategies that animals possess to deal with novel challenges."[79] An animal that is unable to exhibit its natural behaviors, such as giving birth and raising young, prey-chase behaviors, and the ability to find their food in the environment, is likely to lack competency.[80] A lack of competency in an animal may result in an inability to evaluate environmental stimuli, causing the animal to develop fear, anxiety, and compromised social coping.[81]

The suppression of an animal's agency and competency often results in the emergence of the stereotypical behaviors that correlate with higher levels of stress.[82] An animal's "lack of…control…over their

[72] Bacon, *supra* note 63, at 5.

[73] Swaisgood & Sheperdson, *supra* note 40, at 500.

[74] Marc Bekoff et al., The Animals' Agenda: Freedom, Compassion, and Coexistence in the Human Age 106 (2017).

[75] Spinka & Wemelsfelder, *supra* note 29, at 39.

[76] *Id*. at 40.

[77] *Id*. at 46.

[78] *Id*.

[79] *Id*. at 39.

[80] Bekoff et al., *supra* note 74, at 106.

[81] *Id*. at 108.

[82] *Id*.

daily routines and resources" is a large factor in the development of stereotypical behavior.[83] Providing animals with greater agency may increase competence in captive animals and as a result, improve or absolve stereotypical behavior.[84]

i. Inadequate Space

One of the key contributing factors to stereotypical behaviors is the insufficient space that many captive animals are afforded. Inadequate access to space is particularly problematic for wide-ranging species, as such animals are most susceptible to stereotypical pacing.[85] Many accredited zoos have attempted to address this issue with some success, but inadequate enclosures persist at roadside zoos. The minimum enclosure size requirements laid out by the USDA are measured in feet/meters, in spite of the fact that wide-ranging mammals and carnivores, including bears, range *miles* per day.[86] The subjecting of highly intelligent, sophisticated animals to such insufficient and pinched confinement undeniably leads to psychological suffering and distress.

ii. Lack of Enrichment Activities and Ability to Exhibit Natural Behaviors

"Enrichment" is defined as a "principle that seeks to enhance the quality of captive care by identifying and providing environmental stimuli necessary for optimal psychological and physiological well being."[87] This strategy is a commonly employed mechanism to prevent and treat stereotypical behaviors.[88] Enrichment activities include sophisticated feeding challenges, frequent structural changes, visual and olfactory stimulation, social opportunities, and cognitive provocation.[89]

An essential feature of these devices is that they address the underlying cause of the stereotypical behavior, rather than attempting to entertain the animal and provide for quick behavioral fixes.[90] Further, it

[83] Bacon, *supra* note 63, at 2.

[84] *Id.*

[85] M. Elsbeth McPhee & Kathy Carlstead, *The Importance of Maintaining Natural Behaviors in Captive Mammals*, *in* Wild Mammals in Captivity 303, 306 (D. G. Kleiman et al. eds., 2d ed. 2010).

[86] *See Animal Welfare Act and Animal Welfare Regulations*, USDA (May 2019), https://www.aphis.usda.gov/animal_welfare/downloads/bluebook-ac-awa.pdf.

[87] Swaisgood & Sheperdson, *supra* note 40, at 499.

[88] *Id.*

[89] Terry Maple & Bonnie M. Perdue, Zoo Animal Welfare 96-109 (Clive Phillips ed., 2013).

[90] Bacon, *supra* note 63, at 7.

is important to tailor the enrichment programs to each specific species, as the needs of each species may differ greatly.[91] It is not enough that an exhibit reflects a naturalistic enclosure; an enclosure must provide an avenue for an animal to exhibit its natural behaviors.[92] By suppressing its natural behaviors, an animal living in captivity becomes stressed, which leads to impaired in brain development, and results in the inability to exhibit flexibility or adjust adequately to new environments.[93]

c. Why are Bears Susceptible to Stereotypical Behavior?

The scientific community recognizes that the issue of stereotypical behavior among captive animals stands out. Yet, most published research on this issue continues to center around "large, charismatic, and often endangered species."[94] While the nature of confinement has detrimental effects on many captive animals, there are several reasons that bears are particularly susceptible to developing and exhibiting stereotypical behaviors when living in captivity. The AZA has stated that, due to their solitary nature and their home-range size, bears require copious amounts of enrichment activities, as well as complex environments when living in captivity, "more than other species with similarly advanced cognition."[95]

Bears require enclosures with adequate space, along with sufficient stimulation and enrichment.[96] Enrichment activities are mere substitutes for natural behaviors and therefore must allow for natural motivations and cognitive challenges that bears exhibit in the wild, including food motivated behaviors.[97] Without such conditions, bears, more than any of thirty-three other carnivorous species studied, demonstrate stereotypic behavior indicative of physiological and psychological distress.

i. Enclosure Size and Improper Design

Due to the sheer size of a bear's home range and explorative daily activities in the wild, bears in captivity are likely to suffer from

[91] Maple & Perdue, *supra* note 89, at 95-96.

[92] *Id.*

[93] Clubb & Mason, *supra* note 27, at 473-74 (2003).

[94] Swaisgood & Sheperdson, *supra* note 40, at 499.

[95] Cheryl Frederick et al., *Sun Bear and Sloth Bear Care Manual*, Ass'n Zoos & Aquariums 1, 6-7 (July, 2018), https://assets.speakcdn.com/assets/2332/sun_and_sloth_bear_care_manual_2019.pdf; *see also Biology*, Fla. Fish & Wildlife Serv. Comm'n, https://myfwc.com/wildlifehabitats/wildlife/bear/facts/biology/ (last visited Mar. 30, 2021).

[96] Frederick et al., *supra* note 95, at 6-7.

[97] *Id.*

psychological stress and dysfunction if they are confined to an enclosure that does not provide adequate space and opportunity for exploration. Bears are typically active for up to eighteen hours a day and spend an extensive amount of time foraging for food, yet the extreme confinement that is often present at zoos, especially roadside zoos, forces them to remain relatively sedentary.[98] A predictable or monotonous feeding routine coupled with a lack of nutritious and varied diet contributes to the frequency and severity of stereotypic behavior in bears.[99] Forced inactivity can cause bears to become stressed, frustrated, and bored, which leads to a greater likelihood that they will exhibit stereotypic behaviors.[100]

In addition to the issue of inadequate space requirements, many bears are kept in harmfully designed enclosures that often contain concrete flooring, which is damaging to a bear's paw pads, feet and ankle joints, and knees and hips.[101] Further, concrete flooring prevents many bears from acting on instinctual behaviors, such as digging and rooting.[102] The inability for a bear to construct a nest leaves a bear to sleep on the hard concrete, which exacerbates the joint and tissue damage that occurs when they are active on this rigid surface.[103]

ii. Inability to Exhibit Natural Behaviors and Improper Enrichment Activities.

One of the most significant alleviators for stereotypic behavior amongst captive animals is the presence of species-specific enrichment activities.[104] Bears continuously engage with their environment and manipulate stimuli they are exposed to in the wild, yet bears in captivity are often placed in enclosures that don't offer the bears an opportunity to climb, dig, swim, or exhibit other naturalistic behaviors.[105] Simply providing a bear with naturalistic exhibits and access to enrichment activities will not alleviate a captive animal's psychological suffering; such exhibits represent a mere fraction of what these animals require in the wild, and they are often "bored out of their skin" as a result.[106] It is essential to ensure these exhibits provide the resources and space that a bear needs in order to perform its natural activities of daily living.

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[98] *Id.*
[99] Humane Society, *supra* note 7.
[100] *See generally id.*
[101] Humane Society, *supra* note 7.
[102] *Id*.
[103] *Id*.
[104] Carlstead et al., *supra* note 33, at 4.
[105] Humane Society, *supra* note 7.
[106] Braverman, *supra* note 23, at 34.

Another daily activity that a captive bear is often deprived of is the ability to fully submerge itself in bodies of water for purposes of cleansing, playing, or hunting.[107] The metal troughs that are so often substituted for these bodies of water are frequently filled with stagnant water, which is not optimal for the health of any animal.[108]

A captive bear is also commonly deprived of the choice to engage in social behaviors. Research shows that social interaction may be beneficial to a bear living in captivity, but that the element of choice is essential to promote the bear's well-being.[109] Forcing multiple bears into a cramped enclosure forces the bear to accept socialization rather than present the bear with the choice to engage in social activities. The practice of forced socialization has been found to cause non-aggressive bears to become aggressive toward bears with whom they share an enclosure.[110]

IV. Current Laws, Regulations, and Protective Measures for Captive Bears

a. Overview of the AWA

The Animal Welfare Act (AWA) was the first federal law that was enacted to safeguard animals and remains the largest body of law that seeks to protect animals.[111] When the AWA was first enacted in 1966, its express purpose was to protect laboratory animals, but over time amendments have expanded the AWA, as well as refined the standards and the animals it protects.[112] In its current form, the AWA "sets minimum standards for the treatment of animals by various commercial enterprises, including animal research facilities, animal breeders, and animal exhibitors."[113] "Exhibitor" includes facilities that range from public zoos to roadside zoos, as well as animals used at circuses.[114]

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[107] *Petition supra* note 3 at 15.

[108] *Id*. at 49.

[109] Bacon, *supra* note 63, at 4.

[110] *Id.*

[111] Benjamin Adams & Jean Larson, *Legislative History of the Animal Welfare Act*, U.S. Dep't Ag.: Nat'l Ag. Lib.,
https://www.nal.usda.gov/awic/legislative-history-animal-welfare-act-introduction (last visited Mar. 30, 2021); Animal Welfare Institute, Animal Welfare Act, https://awionline.org/content/animal-welfare-act.

[112] *See id.*

[113] Animal Welfare Act, 7 U.S.C. §§ 2131-2160 (2014); 9 C.F.R. § 1.1 (2020) [hereinafter AWA]; Animal Welfare Institute, *supra* note 111.

[114] Kali S. Grech, *A Detailed Discussion of the Laws Affecting Zoos*, Animal Legal & Hist. Ctr. (2004).

The AWA is enforced by the United States Department of Agriculture (USDA) through the Animal and Plant Inspection Service (APHIS).[115] The Secretary of Agriculture is "authorized to promulgate such rules, regulations, and orders as he may deem necessary" in order to carry out the purpose of the AWA.[116] APHIS has inspectors that conduct unannounced visits to licensed facilities where they "review the care and treatment of animals covered under law" at least once per year.[117] Violations of the AWA can result in the suspension of a facility's license.[118] In addition, the USDA Licensing and Regulations Department provides protection to captive animals, requiring exhibitors with "animals on display to the public" or who "conduct performances featuring animals" to become licensed accordingly."[119] This standard is required for any exhibit open to the public, regardless of its ownership or affiliation.[120]

The AWA represents progress towards providing and ensuring for the welfare of animals in captivity. Yet, it must be noted that the standards contained within the AWA at present merely describe the minimum requirements for keeping exotic animals, and fail to address many aspects of animal welfare.

i. The AWA's Application to Captive Bears

The AWA regulations are contained in the first three sections of 9 C.F.R.[121] Sections 1 and 2 define terms and administrative responsibilities, while section 3 contains the standards and specifications for the "humane handling, care, treatment, and transportation" of a finite list of animals.[122] Subsections A-E contain specific standards for: dogs and cats; guinea pigs and hamsters; rabbits; primates; and marine mammals, including polar bears.[123] Subsection F functions as a "catch all" and sets forth standards for all other warm-blooded animals. Bears fall under subsection F, and as a result, with the exception of polar bears,

[115] AWA §§ 2131 et seq.; 9 C.F.R. §§ 1.1 et seq.

[116] 7 U.S.C. § 2151.

[117] *Id.*;, *AWA Inspection and Annual Reports*, APHIS https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/awa/awa-inspection-and-annual-reports (last modified Sept. 2019) [https://perma.cc/5VMC-4SHH].

[118] AWA § 2149.

[119] Animal & Plant Health Inspection Service, *Licensing and Registration Under the Animal Welfare Act*, U.S. Dep't Ag. (Feb. 2019), https://www.aphis.usda.gov/animal_welfare/downloads/aw/awlicreg_gray-book.pdf [hereinafter *Licensing & Registration*]

[120] *Id.*

[121] *See generally* 9 C.F.R.

[122] *Id.*

[123] 9 C.F.R. §§ 3.1-19, .25-.41, .50-.66, .75- .92, .100-.118.

the species-specific standards for bears remain largely unconsidered.[124] Subsection F merely provides minimum standards for food, water, sanitation, and enclosure space.[125]

While some of the regulations give inspectors a general guide on husbandry needs of bears, the standards are insufficient to properly inform and guide an inspector as to what the positive welfare of a bear is. The USDA has issued specific guidelines on necessary conditions for the humane care of bears.[126] These guidelines lay out a bear's nutritional and dietary needs, hibernation habits, husbandry and habitat needs, veterinary care, and environmental enrichment needs.[127] While these guidelines may provide important information for inspectors when considering the welfare of a bear used in exhibition, it is critical to note that these are mere suggestions for inspectors, and are by no means firm standards that inspectors are required to follow.

b. AZA Standards

Another useful protective measure for animals in captivity is accreditation with the Association of Zoos and Aquariums (AZA). The AZA is a 501(c)(3) non-profit organization that strives to meet high standards of animal welfare and care while advancing areas of conservation, education, science, and recreation.[128] Of the approximately 2,800 exhibitors licensed by the USDA, fewer than ten percent are accredited by the AZA.[129] Accreditation requires a candidate to complete an application and undergo a "multiple day on-site inspection and an in-person hearing in front of the Accreditation Commission."[130] This on-site inspection involves a team with at least one veterinarian, and several "animal and operations experts."[131] Members are required to repeat the entire process every five years in order to ensure its facility meets the AZA's high and evolving standards.[132]

Outside of ensuring high standards of husbandry and animal welfare, the AZA emphasizes the importance of education and conservation.[133] Education is intended to build the connection between

[124] *See* 9 C.F.R. §§ 3.125 – 3.142.

[125] *See id.*

[126] *See* Animal & Plant Health Inspection Service, *Animal Care Aids*, *Bear Care Topics Appendices*, U.S. Dep't Ag. https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/caw/at_caw_animal_care_aids (last modified July. 22, 2020).

[127] *See id.*

[128] Association of Zoos & Aquariums, *supra* note 25.

[129] Association of Zoos & Aquariums, *About AZA Accreditation*, https://www.aza.org/what-is-accreditation (last visited Mar. 5, 2021).

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

people and animals, raise awareness about the effect that people have on animals, promote feelings of empathy, and "influence pro-environmental behavior."[134] Conservation is intended to help ensure the survival of certain species.[135] For example, AZA has enacted a "Species Survival Plan" (SSP) for an enumerated list of animals.[136] The plan outlines breeding and transfer plans to ensure a genetically diverse population and to combat any concerns over surplus animals in zoos.[137]

While the AZA provides high quality standards for the care and keeping of exotic animals in captivity, the overall effect that it has on many species and facilities is minimal. Roadside zoos and other licensed facilities have routinely failed to incorporate the AZA's standards into their practices without repercussions. Considering the majority of exotic animals are kept captive in facilities that are not AZA-accredited, most exotic animals in captivity do not benefit from the AZA aegis.[138]

i. AZA Standards for Captive Bears

The AZA has a 137-page care manual that is specific to bear species, which addresses issues such as habitat design, social environment, nutritional needs, veterinary care, and behavior management, to ensure the highest standard of welfare can be provided.[139] The AZA explicitly states that a bears' high intelligence requires it to live in a stimulating and complex environment and have access to enrichment activities, "similar to what primates receive."[140]

The enclosure standards set forth provide a range of square footage that is recommended for bears in captivity, while acknowledging that exhibit size alone is insufficient to ensure welfare and providing a detailed discussion of recommended enclosure complexity, including climbing structures, foraging opportunities, resting and sleeping locations, safe retreats, visual barriers, and water sources.[141] Yet, despite these guidelines, there are over 1,100 bears that are currently held in non-accredited facilities.[142]

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[134] Shelly Grow et al., *Saving Animals From Extinction: Unifying the Conservation Approach of the AZA Accredited Zoos and Aquariums*, *in* The Ark and Beyond 124 (Ben A. Minteer et al. eds., 2018).

[135] Grech, *supra* note 114.

[136] Association of Zoos & Aquariums, *Species Survival Plan Programs*, https://www.aza.org/species-survival-plan-programs?locale=en (last visited Mar. 5, 2021).

[137] *Id.*

[138] *See* Association of Zoos & Aquariums, *supra* note 129.

[139] *See generally* Frederick et al., *supra* note 95.

[140] *Id.* at 7.

[141] *Id.* at 13, 15-16.

[142] King, *supra* note 46.

The care manual set forth for bears is considered a "living document; it is updated as new information becomes available and at a minimum of every five years."[143] The Woodland Park Zoo in Seattle, Washington is an attestation to the high standards that the AZA enforces.[144] The "Northern Trail" is a six acre exhibit, home to brown bears, who are given a stream and deep pool that contains twenty to thirty live trout to allow for natural feeding.[145] The exhibit implements several other features for environmental enrichment, such as a bear cave and a scatter-feeding plan to allow the bears to wander in search of food.[146]

c. Wildlife Sanctuaries

Many animals are unable to safely return to the wild following a life in captivity, but wildlife sanctuaries provide animals that have suffered from substandard conditions in captivity with a safe place to live out their lives. Similar to zoos, some sanctuaries are accredited, while others are not. Additionally, like most accredited zoos, most accredited sanctuaries employ animal care standards that are far more extensive and species-specific than those standards set out by the USDA.

The Global Federation of Animal Sanctuaries (GFAS) requires an extensive application process to become accredited or verified.[147] For a facility to be eligible to apply for verification, it must demonstrate that it does not breed, commercially trade, or exhibit captive animals, and prove that the public does not and will not have direct contact with the wildlife.[148] In addition, a facility must show that it adheres to the specific standards of animal care laid out by GFAS, which include species-specific standards that address housing, nutrition, veterinary care, handling, etc.[149] The standards are constantly evolving with the "improved knowledge and understanding of the needs of animals and capacities of sanctuaries."[150]

The American Sanctuary Association (ASA) is another organization that provides detailed standards and employs a rigorous

[143] *Id.* at 6.

[144] Woodland Park Zoo, *Woodland Park Zoo General Information*, https://perma.cc/H7YJ-HXMM (last modified May 28, 2020).

[145] *Id.*

[146] Woodland Park Zoo, *Bearcam*, https://www.zoo.org/bearcam (last visited Mar. 30, 2021).

[147] Global Fed'n of Animal Sanctuaries: Accreditation, https://perma.cc/Y5YF-AW8J (last visited Mar. 30, 2021).

[148] Global Fed'n of Animal Sanctuaries: How to Apply, https://perma.cc/6824-HJQM (last visited Mar. 30, 2021).

[149] Global Fed'n of Animal Sanctuaries: Standards of Excellence, https://perma.cc/Q7RV-4YVQ (last visited Mar. 30, 2021).

[150] *Id.*

application process to become a member. ASA membership requires that a sanctuary does not breed animals or use animals for any commercial activity, maintains individual policies on animal care and welfare for the animals in its custody, etc.[151]

Sanctuaries place the well-being of the animals in their care as their top priority. The Wild Animal Sanctuary in Keenesburg, Colorado is the largest carnivore sanctuary in the world, with nearly 10,500 acres of natural habitat and more than 520 animals that have been rescued are being rehabilitated, with the goal of releasing the majority of these animals back into the wild.[152] The Wild Animal Sanctuary is home to many exotic animals that were confiscated by the USDA for AWA violations.[153]

There are many US facilities that aspire to the highest of animal care standards. These organizations should be lauded and encouraged to continue their good work. However, too many animal-based businesses are more concerned with profit than the welfare of the animals.

d. Insufficiency of Laws and Regulations to Afford Proper Protection to Bears

While the AWA and AZA represent steps in the right direction toward ensuring animal welfare, specifically as in regards to the keeping of exotic species in captivity, the current laws and regulations that govern the exhibition of bears are lacking in three key areas. First, the absence of guidance for USDA inspectors in regards to species-specific standards results in many violations of the AWA going unreported. Second, the USDA does not engage in thorough investigations of licensed facilities to ensure proper care. Rather, the USDA has been found to engage in "rubber stamping" license renewals, which leave animals in the care of licensees who violate the AWA and actively supports the continued suffering of animals in captivity. Third, the USDA blackout leaves the visiting public and animal welfare organizations without a method to verify whether the facilities that they are visiting meet these minimum standards.

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[151] Am. Sanctuary Ass'n: Sanctuary Criteria, https://perma.cc/ZY28-8AZQ (last visited Mar. 30, 2021).

[152] Wild Animal Sanctuary, *About Us*, https://www.wildanimalsanctuary.org/copy-of-about-us (last visited Feb. 16, 2021).

[153] Feature Report, PETA, *Pure Joy: Elderly Bears Take First Steps After Decades in Tiny Pens*, https://perma.cc/3YHD-Y4XY (last visited Feb. 15, 2021) (including Fifi, Bruno, Pocahontas, and Marsha, bears who were forced to perform tricks, such as riding a tricycle, at the Big Bear Farm at a roadside zoo in Pennsylvania that received several AWA violations and eventually forced to close after keeping the bears in tiny pens for two decades).

i. No Specific Standards

The standards in place for the handling, care, treatment, and transportation for bears are contained within a "catch-all" group of all other warm-blooded animals.[154] This lack of species-specific standards for APHIS inspectors to utilize leaves inspectors unsure of whether violations exist, and as a result, APHIS inspectors often err on the side of under-reporting perceived potential violations.[155] The culture surrounding insufficient standards and under-reporting potential violations of the AWA set a baseline for care that prioritizes the ease of license renewal over the welfare of animals, which is a value that is specifically and explicitly asserted in the animal care strategy plan for APHIS inspections.[156]

APHIS, the USDA's investigative arm, has listed animal-specific standards for various animals, including marine mammals, non-human primates, and rodents such as hamsters and guinea pigs.[157] It has been scientifically demonstrated that bears are equally as demanding as these enumerated animals and require specific husbandry practices to ensure their welfare.[158]

While many AZA-accredited zoos provide species-specific requirements for the care and keeping of bears, the great majority of them do not. To combat these deficiencies, it is essential that bear specific standards are created to ensure that exhibitors provide bears with proper care and ensure that inspectors are fully aware of the proper care, needs, and requirements.

ii. Lack of Inspector Expertise and Lack of Resources for Additional Inspectors

The USDA employs approximately two hundred inspectors to perform pre-licensing inspections and routine, unannounced compliance inspections.[159] While the inspectors are all classified veterinary medical officers or animal care inspectors, few are veterinarians with specialized knowledge and experience in a particular animal species.[160] In 2018, the USDA Animal Care employed specialists with "expertise with birds,

[154] *About Animal Care*, *supra* note 16.

[155] *Id.*

[156] *Id.*

[157] 9 C.F.R. §§ 3.1-.19, .25-. 41, .50- .66, .75- .92, .100-.118.

[158] G. Law & A. Reid, *Enriching the Lives of Bears in Zoos*, 44 Int'l Zoo Yearbook 65, 69 (2010).

[159] *Animal Welfare Act Inspections*, USDA, https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/awa/ct_awa_inspections (last modified Nov. 18, 2020).

[160] *Id.*

elephants, marine mammals, exotic cats, and non-human primates."[161] Additionally, APHIS inspectors conduct nearly ten thousand annual inspections under the AWA (averaging fifty inspections per inspector, per year), with 6,614 of those inspections being licensed breeders, dealers, or exhibitors.[162]

The lack of USDA inspectors with any specialized knowledge or expertise in bears, paired with the minimum standards set forth by the AWA, leave this highly intelligent species vulnerable to inadequate protections and more prone to psychological harm.[163]

iii. USDA's Lack of Transparency

In addition to the lack of bear-specific standards and expert inspectors, which serve to ensure the humane treatment of bears in captivity, the USDA's continued and all-too-frequent practice of rubber stamping renewal licenses, frequent use of "teachable moments"to excuse facilities in violation of the AWA, and practice of "blacking out" inspection records have a harmful effect on all animals, including bears. By allowing facilities that are in violation to continue exhibiting these animals while promulgating inhumane standards of care, the USDA actively undermines the portion of the law that is specifically intended to provide back-end protection for facilities that are already licensed and condemns untold numbers of bears to a life in illegal and harmful conditions.

1. The Practice of Rubber Stamping License Renewal

The USDA is tasked with performing pre-licensed inspections to determine whether a particular exhibitor has met the federal standards for keeping specific species in their care.[164] For an exhibitor to renew its license, the USDA sends it a renewal kit, which it must complete along with the renewal form, and submit everything back with an application fee.[165] The USDA merely reviews the renewal application for completeness and does not mandate any inspection before issuing a renewal license, despite the requirement for an exhibitor to demonstrate compliance with the AWA before the issuance or renewal of a license.[166]

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[161] *About Animal Care*, *supra* note 16.

[162] Animal & Plant Health Inspection Service, *Fiscal Year 2018: Animal Care Impact Report*, U.S. Dep't Ag., https://www.aphis.usda.gov/animal_welfare/downloads/FY2018-Animal-Care-Impact-Report.pdf (last visited Feb. 15, 2021).

[163] AWA, *supra* note 115.

[164] *Licensing & Registration Under the Animal Welfare Act*, *supra* note 119.

[165] *Id.*

[166] 9 C.F.R. § 2.2.

The lack of renewal inspections often results in facilities that are in violation of the AWA remaining licensed without repercussion.

This rubber-stamping practice was a partial cause in Ben the bear's suffering, as the facility where he was kept, Jambbas Ranch, was cited for numerous violations of the AWA over a period of six years.[167] While agencies are given broad discretion to interpret statutes, in this case, the USDA's interpretation and application of the renewal policy undermines the provision of the AWA that states that the exhibitor "shall have demonstrated that his facilities comply with the standards."[168] Further, this interpretation of the renewal policy leaves animals in captivity that are in situations similar to those of Ben the bear, without humane remedy for prolonged periods of time. In 2015, the USDA renewed the license of the Cricket Hollow Zoo, despite the facility having received over one hundred AWA violations in the prior five years.[169] These violations included inadequate staffing, unsanitary facilities, and poor veterinary care.[170] Allowing a facility to renew their license despite the knowledge that they are grossly violating the bare minimum standards is counterproductive to assuring the humane care and treatment of animals.

2. USDA Blackout and Intentionally Withholding Records

Another major issue surrounding the proper protection of bears is the USDA's practice of purging inspection records that allege violations of the AWA.[171] While information surrounding a facility's inspections may be obtained through a formal Freedom of Information Act (FOIA) request, this process can take several months or even years, and may hinder an advocate's ability to inspect a facility before supporting it.[172] In 2017, the USDA purged tens of thousands of documents, including, but not limited to, inspection reports that documented violations of the AWA, official warning letters, and administrative complaints against the facilities that were in violation.[173]

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[167] *Ben the Bear Caged at Roadside Zoo in North Carolina*, Animal Legal Def. Fund, (Aug. 27, 2018) https://aldf.org/case/ben-the bear-caged-at-roadside-zoo-in-north-carolina/.

[168] Chevron U.S.A., Inc. v. Nat. Res. Def. Counsel, 468 U.S. 837 (1984); 7 U.S.C. § 2133 (2012).

[169] *Challenging the USDA for Reissuing Roadside Zoo's License*, Animal Legal Def. Fund, (Dec. 27, 2019) https://aldf.org/case/challenging-the-usda-for-reissuing-roadside-zoos-license/.

[170] *Id.*

[171] *Exposing Animal Abusers: Update on the Animal Welfare Blackout*, Animal Legal Def. Fund, (Sept. 18, 2019) https://aldf.org/article/exposing-animal-abusers-update-on-the-animal-welfare-blackout/.

[172] 5 U.S.C. § 522.

[173] *Id.*

The USDA was sued by the Animal Legal Defense Fund, along with several other animal advocacy groups, alleging a violation of the AWA for purging these important inspection documents.[174] The USDA was ordered to restore inspection records to its database, yet the database now has limited information and several inspection records contain redacted material.[175] This lack of transparency leaves non-complying facilities with the ability to continue their operations without any regard for the welfare of their animals, similar to the situation with Ben the bear at Jambbas Ranch.

In addition, the USDA has withheld information that could have ended tremendous suffering for the animals at Greater Wynnewood Exotic Animal Park (G.W. Zoo). PETA requested the inspection records for this zoo, but the USDA responded by stating that they were entitled to withhold this information under an exemption because "it has been determined that there is a substantial privacy interest…the risk of revealing the inspection findings could cause embarrassment, harassment, or other stigma to the licensee."[176]

Nearly two years after receiving the request, the USDA provided PETA with G.W. Zoo's inspection records, but withheld thirty-eight of the forty-nine documents due to continued privacy concerns.[177] Further, the records USDA did provide were almost entirely blacked out.[178] In summary, the USDA "complied" with the FOIA request, but clearly demonstrated its interest in preserving the business of the exhibitor over the wellbeing of the animals in their care.

V. Remedies

The Animal Welfare Act of 1966 was a monumental step for the protection of animals, however, the Act falls short of affording proper protection to many of the animals that are kept in captivity. While the amendments that have been added throughout the years to the AWA have provided improved standards for several animal species, bears are still not afforded proper protection under the AWA to ensure they have positive welfare in captivity. The constraints placed on the

[174] *Animal Welfare Records Blackout,* Animal Legal Def. Fund, (last updated Sept. 12, 2019) https://aldf.org/case/animal-welfare-records-blackout.

[175] Feature Report, PETA, *Victory: Lawsuit Over USDA Website Blackout to Return to Court* (March 18, 2019), https://www.peta.org/media/news-releases/victory-lawsuit-over-usda-website-blackout-to-return-to-court/ [hereinafter *PETA Blackout Lawsuit*]

[176] Feature Report, PETA, *USDA Response to FOIA Request* (Dec. 26, 2017), https://www.peta.org/wp-content/uploads/2018/03/2017-12-26_USDA-FOIA-Response_Garold-Wayne.pdf.

[177] *PETA Blackout Lawsuit*, *supra* note 175.

[178] *Id.*

USDA, because of the meager guidance present in the captive animal section of the AWA, relegates it to providing mere suggestions to zoos and exhibitors and fails to give it adequate authority to assure positive animal welfare.

In its current form, the AWA imposes the bare minimum standards that a facility must meet in order to become licensed to possess and display bears. To ensure that all captive bears have positive welfare, rather than minimally adequate welfare, the AWA must provide, with species-specific standards, regulations for licensing and procedures to ensure that licensed facilities are sustaining positive welfare to the bears in their charge. This could be done in three different ways: first, incentivizing AZA accreditation, second, requiring non-accredited exhibitors to undergo stringent annual inspections governed by expanded USDA requirements for captive bears, and third, eliminating the ability of exhibitors to have bears if they are unable to adhere to either of the first two options.

a. Encouraging AZA Accreditation

Currently, AZA accreditation is not required to obtain a license as an exhibitor, however, U.S. agencies, including the USDA, often use AZA standards as a baseline when evaluating institutions. Harmonious standards amongst all levels and types of captive animal facilities (including zoos, roadside exhibits, etc.) may help the USDA in its evaluation of these facilities. Without a codified set of standards or policies in place, the USDA and APHIS are limited to offering mere suggestions; they lack the authority needed to offer licit protection to the animals. By incentivizing AZA accreditation, these concerns could be mitigated.

While accreditation may not be an option for some exhibitors, for numerous reasons, it is important that such facilities are held to high and consistent standards for animal welfare. Those facilities that choose not to seek accreditation should be required to have more frequent and intensive inspections to ensure the animals in their charge have continuing positive welfare. Eliminating the practices of self-assessment and rubber-stamped renewal would ensure that inspections identify sites where standards are not being upheld and possibly introduce accountability to bad actors.

If an exhibitor is unable to meet and continually implement the high species-specific standards promulgated by the AZA, it is ludicrous to allow it to keep exotic animals in its possession. Many of these animals (e.g. bears, elephants, lions, etc.) do not fare well in captivity, despite excellent standards of dietary and veterinary care by the institution. With this knowledge, allowing bears to continue to be placed in non-accredited exhibits seems to be the height of hypocrisy.

b. Bear-Specific Standards Adopted By the USDA

Ninety percent of the facilities that house captive bears are not AZA accredited.[179] It is this large majority of bears that are in need of species-specific standards to ensure their welfare. The forthcoming recommendations are designed to address these needs. Bears have complex behaviors, specific dietary needs, social preferences, and home range sizes that vary greatly from other captive species. It is impractical to believe that generalist inspectors are able to precisely evaluate the global welfare of all of the species that are captive in every facility.

The USDA has addressed this matter for other complex species, such as marine mammals, non-human primates, etc., by employing specialists with expertise and experience with these individual animals. It has been shown that bears are every bit as complex as the animals listed above; therefore, it is essential that the USDA employ a specialist for bears as well. With a bear specialist, the historical record of inaccurate or misleading reports on the well-being of the bears inspected will be avoided or eliminated. Further, instituting a bear-specialist at the USDA would help prevent inspectors from overlooking subtle cases of bears suffering from physiological or psychological deprivation. The proposed language for the USDA to adopt is as follows:

> Subpart F. Specifications for the Humane Handling, Care, Treatment, and Transportation of Bears
>
> *Licensees must comply with the following requirements for all species of bears with the exception of polar bears.*
>
> [A] Primary enclosure general requirements.
> 1) primary enclosures must be designed and constructed of suitable substrate that mimics a natural habitat of a bear such as: soil, soft earth, grass, mulch.
> 2) Concrete substrate shall be prohibited except for enclosure features designed for spectator safety.
> 3) Primary enclosures must provide shelter and protection from the viewing public. The bears must have an opportunity to seek solitude and privacy at their discretion.

[179] *About AZA Accreditation*, *supra* note 129.

4) Primary enclosures must provide shelter and protection from extreme temperatures and weather conditions and give them a chance to retreat from sunlight by providing adequate accessible shaded areas at all times of the day.
5) Primary enclosure must provide bears with easy and convenient access to clean food and water.
6) Primary enclosures for bears must include a pool that is large enough for the bear to fully submerge itself and express species-typical behaviors. The pool cannot be made of metal material. The pools must be cleaned regularly (water for drinking must be freshened daily) to ensure proper water quality.
7) Primary enclosures must include a den that is not made of metal and is large enough for a bear to stand up; the den must be large enough to allow mothers and their cubs to den together.

[B] Minimum space requirements. The primary enclosures size must be measured in integral multiples of acres rather than in square feet. If several bears are housed together, the enclosure must expand by the multiples of the animals, (i.e. 2 bears require 2 acres, 3 bears require 3 acres, etc.).

[C] Environmental Enhancement. Exhibitors must develop and follow an appropriate plan for environmental enhancement adequate to promote the psychological well-being of bears.
1) Social grouping. The environment enhancement plan must include specific provisions to address the proper socialization of bears. Bears must be given the opportunity to choose to socialize or remain in solitude.
2) Handling of bear cubs. Bear cubs may not be removed from their mothers until brought out of the den by the female. Bear cub handling by the public is prohibited.
3) Environmental enrichment. The physical environment of the primary enclosure must be enriched by providing means of expressing species behavior that bears would exhibit in the wild.

(a) Sensory stimulation. Environmental enhancement must offer olfactory, visual, auditory and tactile stimuli. If an enrichment activity's effect wears off, it must be revised or replaced. The minimum standards of enrichment must provide bears with the opportunity for all of the following behaviors:
   i. Climbing
   ii. Digging
   iii. Nest Building
   iv. Hibernating

[D] Feeding. Bears must be fed a varied diet that includes fresh, seasonally available food, similar to what they would eat in the wild, that is presented in a stimulating manner that encourages natural foraging behavior. Public feedings are prohibited.

[E] Veterinary Care. Bears must have ready access to acute veterinary care. They must have regularly scheduled veterinary check-ups to ensure their physical and psychological well-being. Veterinary findings of illness or insufficient well-being must be addressed with a plan to resolve, or demonstrate progress toward resolution of, the issue within one week.

[F] Adequately-trained employees. Every exhibit subject to the Animal Welfare regulations for maintaining bears must have sufficient employees to carry out the level of husbandry practices and care required in this subpart. The employees who provide husbandry practice and care, or handle bears, must be trained and supervised by an individual who has the knowledge, background, and experience in proper husbandry and care of bears.

c. Remedies That Focus on the Animal Rather Than the Exhibitor

Currently, the inspection process focuses on the exhibitor's business viability rather than the well-being of the animal. An exhibitor that is found in violation of the AWA will first receive warning letters. If numerous or repetitive, serious violations have been found, a civil penalty of up to four thousand dollars may be imposed.[180] This minimal penalty allows exhibitors to factor violation penalties into the cost of

[180] 7 USCS § 2149(b); Animal Legal & Historical Center, *Animal Welfare Act Decisions*, https://www.animallaw.info/statute/us-awa-animal-welfare-act-decisions.

doing business and continue operating a zoo that fails to provide its animals with even merely adequate care. To ensure the well-being of bears in captivity, facilities that are discovered to be in violation of the AWA must have swift and corrective discipline imposed. It is necessary to prioritize the well-being of the animal above the fiscal condition of the exhibit. Exhibitors unable or unwilling to ensure the health of the animals in their charge should be excluded from the privilege of displaying them to the public.

If a facility continually demonstrates its unwillingness to abide by the bare minimum ursine standards set out by the USDA, its license should be summarily revoked. Most importantly, bears exhibiting psychological stress/distress should be afforded rapid intervention to prevent permanent damage or incidents dangerous to the animal, staff, or visitors of the facility. The AWA must provide corrective remedies for the bears whether or not the facility housing the bear is in compliance with AWA standards and regulations. The long-term welfare of animals must be, at all times, the top priority of the inspection process.

If the zoo/exhibit in violation of the AWA cannot swiftly remedy a bear's suffering, it must be required to relocate such bear to a facility or location that is able to care for the bear's specific needs and provide assessment of its recovery. This relocation process should be mandated to be done at the violator's expense. This may mean reintroducing the bear back to its natural habitat, transferring the bear to a facility that exhibits positive animal welfare with that specific species, or transferring the bear to an accredited or verified animal sanctuary.

The lack of positive animal welfare may not always be the direct result of facility negligence as non-domesticable animals, such as bears, are often poorly adapted for life in captivity. If a facility is found to be in full compliance with the AWA, yet has an animal that is displaying signs of poor animal welfare, there must be a rapid and curative remedy enacted for the animal's benefit. This remedy would be identical to the one listed above, however the relocation would not be done at the exhibitor's expense and no financial penalties shall be imposed.

There are several examples of animals that have suffered cruel psychological and physiological distress due to their captive living conditions. Fortunately, many of these animals have been relocated to a facility or sanctuary that promotes the welfare of the animal above all else. For example, Ben the Bear was transferred to the PAWS Sanctuary, where he will live out the rest of his life in a two acre habitat (340 times the size of his previous enclosure), which allows him to act on his naturalistic instincts. Since his transfer in 2012, Ben has not engaged in stereotypical behaviors. This remedy refocuses the AWA on the well-being of the animals, rather than the wrongdoing of the exhibitor, and should be used as a template for cure of violations going forward.

Conclusion

"The public is becoming more sensitive to the exploitation of captive big cats and elephants, yet they are not as aware of the problems bears face in captivity."[181] The AWA is obsolete in regards to its protection of captive bears. Scientific research has demonstrated that bears require more care and attention than they are currently afforded in the majority of bear exhibits. The congressional intent of the AWA is not being met for these complex animals with the current standards in place. There are imminently feasible, reasonable changes to the AWA that can cure these current deficiencies. This Note has sought to address those cures and hopes to alleviate the continued suffering of these intelligent animals.

[181] Paws Performing Animal Welfare Society, *Bears in Captivity: The Overlooked Animals*, All-Creatures (Feb. 2018), https://www.all-creatures.org/articles/ar-bears-in-captivity.html.