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Jurisdictions around the world define the legal status of animals from a property law perspective, which envisions animals as things dominated by humans as their owners. In my presentation, I would like to contrast this paradigm of property law with an approach informed by the regulatory patterns of family law and legal parentage in particular. It aims at reframing the legal status of animals as it is and as it could become, thereby replacing the subject-object divide by a focus on the interests that form part of the legal analysis. The approach is illustrated by the following experiment of thought: If the legal status of animals was assimilated to that of children–would this change of viewpoint by itself imply a different treatment of animals, compared to the current situation? Or could the same treatment as now be derived from what is just another starting point?

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[1] Corte Constitucional del Ecuador [Constitutional Court of Ecuador] Jan. 27, 2022, Judgment No. 253-20-JH/22.

Given the importance of the *Estrellita* case, an analysis from an animal rights perspective is necessary. First, I will summarize the Rights of Nature under the Ecuadorian Constitution and the history of the *Estrellita* case. Secondly, I will explain the ruling of the *Estrellita* case, how the Court recognized individual animals as legal subjects, what rights of wild animals were recognized, the interspecies principle, and the ecological interpretation principle. Thirdly, I will argue why Rights of Nature is not the correct framework for the achievement of rights for animals, mainly because the ecological interpretation principle has the effect of undermining the full realization of those rights. Finally, I will present positive outcomes for animals in Ecuador that derive from the *Estrellita* case, as the Rights of Nature framework has a symbolic and instrumental value that one can use for the benefit of animals.

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In the latest battle, the Southern District of New York ("S.D.N.Y.") exceeded its authority by invalidating M-37050. Moreover, the S.D.N.Y. issued an opinion that conflicts with a Second Circuit ruling, violating the law of the circuit doctrine. The court also did not properly address standing, the threshold question in every federal case.

The first Article ("*Strictly for the Birds: The Scope of Liability Under the Migratory Bird Treaty Act*") advocates for a broad interpretation. Courts are a cornerstone of the country. They have been bestowed with the awesome power of proper and fair administration of justice. When courts dispense their own brand of justice, no matter how noble or righteous the reason, it is the greatest injustice of all.

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Throughout history, the waterways of the United States have served as sources of food, means of commerce and exploration, as well as avenues for recreation and adventure. The beneficiaries of the water are diverse, including waterfront homeowners, cruisers traversing the waterway, to those living aboard vessels at anchor, each of whom have, often competing, priorities with respect to use and access of the waterways. In response to these competing factions, addressing concerns often focused on the issue of derelict and abandoned vessels and state legislators are caught in a tug of war of competing influences. Recent years have seen an increase in overly restrictive regulation passed in response to legitimate issues, but which are so wide sweeping as to sweep-up those cruisers who traverse the waterway in pursuit of distant shores or for the unique experience and character of the waterways themselves. Though an issue often discussed amongst cruisers and stakeholders in waterfront communities, it receives little attention and media coverage, let alone critical analysis. This paper seeks to provide a three-part synopsis of the current state of regulation and the effects on cruisers and other users of the waterways, primarily focusing on the Atlantic Intracoastal Waterway, discussing the drivers of this regulation, namely the issues of derelict vessels and "not in my back yard" influences. This analysis provides a brief primer on the sources of regulation, a summary of current regulation in Atlantic ICW states, as well as [deleted] a proposed model for regulation and infrastructure improvements which can reasonably address the concerns and needs of the various users of the waterways.

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treatment of animals in various areas of the law illustrate a change in societal attitudes from viewing animals as property to seeing animals as something much dearer to our hearts and deserving of more protections under the laws. While no American court has dared to revoke or change such a legal classification, the United States legislatures and judicial systems have found ways around this limiting categorization to better align with American society's treatment of its companion animals. One particular area of law has made substantial developments towards society's evolved recognition of animals as more than mere property: Estate Planning. An exploration into the history of Estate Planning grants insight into how this area of law has been able to become so progressive in its treatment of companion animals by recognizing the unique bond that humans form with the animals in their care and what American society can learn from such a recognition to be able to apply such perceptions and protections to other areas of the law. while Estate Planning has been the most successful in overcoming the barrier of animals' classification as property, other areas of law such as tort remedies for harm caused to our animals, malpractice suits, duties imposed on humans to provide care, criminal laws prohibiting abuse of animals, and even family courts opening their doors to disputes involving humans' beloved animals, all suggest the property status of animals is outdated and American society needs to take the bold step of eliminating such an antiquated classification.

A Family Law Approach to Animal Rights

Felix Aiwanger*

I. An Experiment of Thought

In 1950, Alan Turing proposed a game designed to test the abilities of a machine, particularly its ability to think.[1] What Turing called the "imitation game" and later became known as the Turing test, is vividly depicted in Alex Garland's film "Ex Machina:"[2] Eccentric tech billionaire Nathan invites Caleb, a young programmer of his firm, to his Alaskan hideaway, where he wants Caleb to test his latest version of an android named Ava in terms of her having a mind and consciousness. Embarking on the experiment, Caleb applies certain patterns of human interaction to his sessions with Ava. In this article, I would like to take a similar approach to the legal status of animals and invite you to participate in an experiment of thought: Our imitation game tests the legal status of animals by applying the patterns of family law.

Family law and animal rights—you may ask—what does one have to do with the other? Maybe you have a pet and this pet is like a family member for you. Or you think of divorce proceedings where courts regularly have to decide on the right to spend time with the dog formerly belonging to both spouses. Some statements before court can make you wonder whether the case still revolves around a dog or whether it is a child whose custody is at issue.[3] Before German courts, parties have been invoking visitation rights for dogs over decades,[4] albeit with

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[1] Alan M. Turing, *Computing Machinery and Intelligence*, 59 Mind 433 (1950).

[2] Ex Machina (Film4 & DNA Films 2014).

[3] *See, e.g.,* DeSanctis v. Pritchard, 803 A.2d 230 (Pa. Super. Ct. 2002); Arrington v. Arrington, 613 S.W.2d 565 (Tex. Civ. App. 1981); Cour d'appel [Regional Court of Appeal] Versailles, civ., Jan. 13, 2011, 10/00572 (Fr.); Rechtbank [RB] [Court of First Instance] Limburg, May 15, 2013, RFR 2013, 101, ECLI:NL:RBLIM:2013:CA0058 (Neth.) (discussing the welfare and interests of the animal).

[4] Oberlandesgericht [OLG] [Higher Regional Court] Stuttgart, Apr. 23, 2019, Zeitschrift für das gesamte Familienrecht [FamRZ] 1406 (2019) (Ger.); Oberlandesgericht [OLG] [Higher Regional Court] Hamm, Nov. 19, 2010, Zeitschrift für das gesamte Familienrecht [FamRZ] 893 (2011) (Ger.); Oberlandesgericht [OLG] [Higher Regional Court] Bamberg, June 10, 2003, Zeitschrift für das gesamte

scant success,[5] and the Spanish legislature has recently created a legal basis for similar claims.[6] Even films have built their plot around such post-marital squabbles.[7]

Leaving these rather *petty* details aside,[8] our experiment aims at the bigger picture by applying structural elements of family law to animals in order to contrast the prevailing paradigm of dealing with animals under the flag of property law. To this end, an experimental setup is used, in which family law is applied to animals as if they were *children*. First, we explore the results that the experiment yields (Part II). These results and their implications are then discussed (Part III). A summary of the main findings concludes our study (Part IV).

II. Results of the Experiment

The effects of applying family law to animals can be observed within different aspects of the family relationship: We start with the establishment of a family relationship (a); then turn to the representation of vulnerable relatives in legal dealings (b); which leads us to the substantive duties guiding any decision-making for relatives (c) and their enforcement (d). Within each aspect, the findings of family law (i) will be compared with the results of property law (ii).

a. Establishment of a Relationship

i. Family Law: Parentage and Adoption

How is the familial relationship between parents and a child established? Traditionally, we apply *biological* criteria to determine legal parentage, often with certain presumptions to facilitate the assessment.

Familienrecht [FamRZ] 559 (2004) (Ger.); Oberlandesgericht [OLG] [Higher Regional Court] Schleswig-Holstein, Apr. 21, 1998, Neue Juristische Wochenschrift [NJW] 3127 (1998) (Ger.).

[5] *But see* Amtsgericht [AG] [District Court] Bad Mergentheim, Dec. 19, 1996, Neue Juristische Wochenschrift [NJW] 3033 (1997) (Ger.).

[6] Código Civil [C.C.] [Civil Code] arts. 94 bis, 103 No. 1 bis (Spain).

[7] *See, e.g.,* Who Gets the Dog? (Samuel Goldwyn Films 2016).

[8] Of course, the allocation of companion animals upon family breakdown does raise important questions in individual cases and is of great exemplary value, *see* Sara Mićković, *Fur-Ever Homes after Divorce: The Future of Pet Custody*, 28 Animal L. 47 (2022); Jodi Lazare, *"Who Gets the Dog?": A Family Law Approach*, 45 Queen's L.J. 287 (2020); Deborah Rook, *Who Gets Charlie? The Emergence of Pet Custody Disputes in Family Law: Adapting Theoretical Tools from Child Law*, 28 Int'l J.L. Pol'y & Fam. 177 (2014); *see also* Will Kymlicka, *Social Membership: Animal Law beyond the Property/Personhood Impasse*, 40 Dalhousie L.J. 123, 137–38 (2017).

Thereby, the legal mother is the woman who gives birth to the child and, if married, her husband is presumed as the legal father.[9] Obviously, such biological criteria are not fertile to establish the relationship between humans and animals. Only if the relationship extends to the progeny of an animal, biological criteria can determine such extension.

Apart from biological criteria, many jurisdictions give more and more weight to other factors based on *social* criteria. For example, the French *possession d'état* appoints as parents the persons who treat a child as theirs and are viewed as parents by their environment.[10] In other jurisdictions, the social reality of living together as a family may exclude a later challenge of the parent-child relationship according to biological criteria.[11] Even if a social role does not amount to the status of a legal parent, it is nowadays often reflected in the individual incidents of legal parenthood, such as allocating parental responsibility, parental contact rights, and parental maintenance obligations to a social parent.[12] A social relationship can already be established by mere exposure, as psychologists put it.[13] Thus, a social relationship can emerge from spending time together. It can intensify over time, through common habits and by virtue of strong affection.

Those are factors that can easily be applied to animals, specifically to companion animals, whereas wild animals can generally be regarded as independent from any social parenthood of humans, just as most human adults are from the viewpoint of family law. As regards farmed animals, social interaction with humans is defined by commercial exploitation. Such industrial or commercial relationship to animals is established by way of commercial transactions and a production process.

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[9] *See, e.g.*, Code civil [CC] [Civil Code] arts. 311–25, 312 (Fr.); Bürgerliches Gesetzbuch [BGB] [Civil Code] §§ 1591, 1592, No. 1 (Ger.); Codice civile [C.c.] [Civil Code] arts. 231, 269, para. 3 (It.); Burgerlijk Wetboek [BW] [Civil Code] art. 1:198, para. 1, lit. a, art. 1:199, lit. a (Neth.); Semeĭnyĭ Kodeks Rossiĭskoĭ Federatsii [SK RF] [Family Code] art. 48, paras. 1–2 (Russ.); The Ampthill Peerage Case [1977] AC 547 (HL) 577 (UK) (appeal taken from Eng.); Banbury Peerage Case (1811) 57 Eng. Rep. 62, 1 Sim. & St. 153 (UK); Unif. Parentage Act §§ 201(1)–(2), 204(a)(1)(A) (Unif. L. Comm'n 2017).

[10] Code civil [CC] [Civil Code] art. 311-1 (Fr.); *see also* Unif. Parentage Act § 609 (Unif. L. Comm'n 2017).

[11] *See, e.g.*, Bürgerliches Gesetzbuch [BGB] [Civil Code] § 1600, paras. 2–3 (Ger.); Unif. Parentage Act § 613(a) (Unif. L. Comm'n 2017).

[12] Jonathan Herring, Family Law 382 (8th ed. 2017); Josep Ferrer-Riba, *Parental responsibility in a European perspective*, *in* European Family Law Volume III, 284, 297–99 (Jens M. Scherpe ed., 2016).

[13] Richard L. Moreland & Robert B. Zajonc, *Exposure Effects in Person Perception: Familiarity, Similarity, and Attraction*, 18 J. Exp. Soc. Psych. 395–96 (1982).

In family law, there actually is also a transactional criterion on which legal parentage can be based, namely the *intentions* of the parents. This criterion shows up in cases of surrogate motherhood,[14] in the legal options to acknowledge fatherhood,[15] and, of course, in the procedure of adopting a child. Surrogate mothers agree to relinquish their parental rights in exchange for money or other favors;[16] many jurisdictions allow a man to declare himself the father of a child without evidence of a genetic relationship, possibly accompanied by the approval of the child, the mother, or an existing father;[17] by means of adoption, parentage can be derived from former parents or be established for the first time if a child has not been assigned to any parent so far. The adoption procedure usually requires the previous parents and the adoptive parents to consent, while the children at younger age are rarely involved in the process. Furthermore, most jurisdictions require approval by a court and certain qualifications for the child and the adoptive parents.[18] Often, the adoption is only approved after a probationary period.[19]

Beyond these widely recognized criteria, some theories of legal parentage even take an approach inverse to the one of this article and refer to concepts known from property law in order to determine the parents of a child: One author views the genes of a child as raw material owned by the genetic parents.[20] Another author conceptualizes legal parenthood as a reward for the productive labor of childbearing.[21]

ii. Property Law: Acquisition and Transfer of Ownership

In property law, the basic relationship from which the most comprehensive bundle of powers and duties emanates is ownership.

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[14] Katarina Trimmings & Paul Beaumont, *Parentage and surrogacy in a European perspective*, *in* European Family Law Volume III, 232, 244–48 (Jens M. Scherpe ed., 2016).

[15] *See generally* Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 Cornell J.L. & Pub. Pol'y 1 (2004).

[16] *See, e.g.*, Cal. Fam. Code §§ 7960–7962 (West 2022); Astikos Kodikas [AK] [Civil Code] art. 1464, para. 1 (Greece); Human Fertilisation and Embryology Act 2008, c. 22, § 54 (UK).

[17] *See, e.g.*, Code civil [CC] [Civil Code] art. 316 (Fr.); Bürgerliches Gesetzbuch [BGB] [Civil Code] §§ 1594–95 (Ger.); Burgerlijk Wetboek [BW] [Civil Code] arts. 1:203, 1:204 (Neth.); Births and Deaths Registration Act 1953, c. 20, § 10, para. 1 (UK); Unif. Parentage Act § 301 (Unif. L. Comm'n 2017).

[18] *See* Claire Fenton-Glynn, *Adoption in a European perspective*, *in* European Family Law Volume III, 311, 312–24 (Jens M. Scherpe ed., 2016).

[19] *Cf.* European Convention on the Adoption of Children art. 19, Nov. 27, 2008, C.E.T.S. No. 202 (providing for such regulatory tools).

[20] Kermit Roosevelt III, *The Newest Property: Reproductive Technologies and the Concept of Parenthood*, 39 Santa Clara L. Rev. 79, 88–96 (1998).

[21] Shoshana L. Gillers, *A Labor Theory of Legal Parenthood*, 110 Yale L.J. 691, 706–12 (2001).

How is ownership established? In the first place, you become the owner of a thing if the former owner transfers her title to you. At the core of such transfer, the parties agree that the existing relationship of one party terminates and that a relationship between the other party and the specified thing is created.[22] The common intention of involved parties is a criterion that we also encountered in the family law context.

If we trace the chain of owners back to its origin, ownership has to be acquired by other means like appropriation or manufacturing from existing property. Although these means may seem natural to us, they have an inherently social dimension: Appropriation depends on access to resources, which varies greatly among societies, social classes, and individual actors. Rousseau regarded the appropriation of things found in our natural surroundings even as the origin of social relationships.[23] Just as appropriation of a thing requires some effort, labor put into the manufacture of a new thing amounts to increased effort in the context of social and technical opportunities.[24] Allocating ownership to the provider of the raw material[25] or to the organizer of the manufacturing process,[26] and not to the provider of the means of production or to the individual laborer, is deeply linked to their social role. Finally, long-standing possession as a factual relationship to a thing leads to a status equal to ownership,[27] since the long-time possessor socially appears as the owner.

Besides the intention of the parties and social criteria, property law uses biological criteria to determine the owner of animal progeny: Most legal systems allocate ownership to the owner of the animal giving birth.[28]

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[22] Lars van Vliet, Transfer of movables in German, French, English and Dutch law 203 (2000).

[23] Jean Jacques Rousseau, Discours sur l'origine et les fondements de l'inégalité parmi les hommes 95 (1755); *cf.* Thomas W. Merrill, *Accession and Original Ownership*, 1 J. Legal Analysis 459, 470 (2009) (discussing the landowner's right *ratione soli* to capture wild animals on her soil).

[24] *Cf.* John Locke, Second Treatise of Government, § 27 (1690) (linking property rights to individual labor).

[25] *See, e.g.*, Code civil [CC] [Civil Code] art. 570 (Fr.); Burgerlijk Wetboek [BW] [Civil Code] art. 5:16, para. 1 (Neth.); Grazhdanskiĭ Kodeks Rossiĭskoĭ Federatsii [GK RF] [Civil Code] art. 220, para. 1 (Russ.).

[26] *See, e.g.*, Wetherbee v. Green, 22 Mich. 311, 320–21 (1871); Borden (UK) Ltd. v. Scottish Timber Prods. Ltd. [1979] All ER 961, 966 (UK) (appeal taken from Eng.); Bürgerliches Gesetzbuch [BGB] [Civil Code] § 950, para. 1 (Ger.).

[27] *See, e.g.*, Code civil [CC] [Civil Code] arts. 2258–77 (Fr.); Bürgerliches Gesetzbuch [BGB] [Civil Code] §§ 937–45 (Ger.); Kodeks cywilny [kc] [Civil Code] arts. 172–76 (Poland); Grazhdanskiĭ Kodeks Rossiĭskoĭ Federatsii [Civil Code] art. 234 (Russ.); Código Civil [C.C.] [Civil Code] arts. 1955–56 (Spain); Lag om godtrosförvärv av lösöre [Act on Good Faith Acquisition of Movables] § 4 (Swed.); Limitation Act 1980, c. 58, §§ 2–4 (UK).

[28] Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357,

Ownership rules do not extend to wild animals. This outcome can be reached through two legal constructions with no difference in substance: Wild animals may either not fall into the category of things at all or they may fall into a special category of things that are not ownable[29] or that are owned by the state[30].

b. Representation of and Decision-making for Relatives

i. Family Law: Parents, Guardians and the State

Who is in the position to represent a vulnerable relative in legal dealings? Sometimes, it is argued that animals cannot have rights because they could not *assert* their rights lacking the ability to make a rational decision and communicate such a decision.[31] This, however, would also be true for many children, especially of young age, and even for some adults with cognitive impairments. Yet, all children and all adults are undoubtedly equipped with legal rights. Family law provides for mechanisms by which decisions are made for such vulnerable relatives in their respective interest.

Decision-making is one of three dimensions that are present in the legal allocation of assets. While decision-making deals with the management of an asset, other dimensions concern the allocation of its benefits and its burdens, especially the burden of liability with the respective asset. In many areas of law, the management is separated from the other dimensions and assigned to a different actor, while benefits and liability are independent from the ability to manage and to communicate management decisions.

366 (1954) (also discussing legal certainty and efficiency as underlying factors); *cf., e.g.*, Carruth v. Easterling 247 Miss. 364 (1963); Mínfǎ Diǎn [Civil Code] § 321, para. 1 (China); Code civil [CC] [Civil Code] art. 547 (Fr.); Bürgerliches Gesetzbuch [BGB] [Civil Code] § 953 (Ger.); Codice civile [C.c.] [Civil Code] art. 821, para. 1 (It.); Burgerlijk Wetboek [BW] [Civil Code] art. 5:1, para. 3 (Neth.); Grazhdanskiĭ Kodeksi Rossiĭskoĭ Federatsii [GK RF] [Civil Code] art. 136 (Russ.); Código Civil [C.C.] [Civil Code] art. 354, No. 1, art. 357, para. 2 (Spain).

[29] *See, e.g.*, Občanský zákoník [Civil Code] § 1046 (Czech); Bürgerliches Gesetzbuch [BGB] [Civil Code] § 960, para. 1, sentence 1 (Ger.); Código Civil [C.C.] [Civil Code] art. 465 (Spain); The Case of Swans (1592) 77 Eng. Rep. 435, 438, 7 Co. Rep. 15 (UK).

[30] *See, e.g.*, Zakon za lova i opazvane na diveča [Hunting and Game Preservation Act] art. 2, para. 1 (Bulgaria); Mínfǎ Diǎn [Civil Code] § 251 (China); Legge 11 febbraio 1992, n. 157, art. 1, para. 1 (It.); Prawo łowieckie [Hunting Act] art. 2 (Poland); Michael C. Blumm & Lucu Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 Env't L. 673, 706–12 (2005).

[31] *E.g.*, Richard A. Epstein, *Animals as Objects, or Subjects, of Rights*, *in* Animal Rights: Current Debates and New Directions 143, 151–52, 155 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

Family law usually assigns the management to relatives who form a stable community together with the child, that is both parents if they are married, live together, or have agreed on joint custody.[32] Depending on the importance and urgency of the subject matter, the parents have to decide jointly or each of them may decide individually.[33] Once determined according to biological, social, or transactional criteria, human family members of an animal could thus decide individually on everyday feeding or in a medical emergency, while taking the animal to another country or giving it a name would require mutual agreement. For certain far-reaching decisions, the permission of a court or state agency has to be obtained beforehand.[34]

An important part of representing the interests of an animal consists in the creation or modification of legal relations affecting the animal. In this regard, civil law jurisdictions authorize the parents to act as their child's agents and, for instance, to enter into a contract or file a suit on behalf of the child. The common law tradition achieves similar results by letting parents act for the benefit of their child, but in their own name, be it as trustees or as guardians *ad litem* in court proceedings against a third party.[35] Being represented in a corresponding manner, animals would be enabled to participate in legal transactions, to acquire property, and to sue or be sued.

If the parents are not able to reach an agreement on a particular matter, the decision-making power may be judicially conferred on one of them alone, but confined to the matter at issue.[36] A permanent conflict between the parents and their eventual separation may require sole custody to be conferred on one parent altogether, whether voluntarily by the other parent or by court order.[37]

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[32] Josep Ferrer-Riba, *Parental responsibility in a European perspective*, *in* European Family Law Volume III, 284, 292–93 (Jens M. Scherpe ed., 2016).

[33] *See, e.g.*, Allgemeines Bürgerliches Gesetzbuch [ABGB] [Civil Code] § 167 (Austria); Forældreansvarsloven [Act on Parental Responsibility] § 3 (Den.); Code civil [CC] [Civil Code] arts. 372-2, 382-1 (Fr.); Bürgerliches Gesetzbuch [BGB] [Civil Code] § 1629, para. 1, § 1687, para. 1 (Ger.); Codice civile [C.c.] [Civil Code] art. 320, paras. 1, 3 (It.); Children Act 1989, c. 41, § 2(7), § 13 (UK).

[34] Samuel J. Stoljar, *Children, Parents and Guardians*, *in* 4 International Encyclopedia of Comparative Law: Persons and Family, Chapter 7, §§ 232–34 (Aleck Chloros et al. eds., 1973).

[35] Hein Kötz, European Contract Law 297–98 (Gill Mertens & Tony Weir trans., Oxford University Press 2d ed. 2017) (2015).

[36] *See, e.g.*, Code civil [C.C.] [Civil Code] art. 387 (Fr.); Bürgerliches Gesetzbuch [BGB] [Civil Code] § 1628 (Ger.); Codice civile [C.c.] [Civil Code] art. 316, paras. 2, 3 (It.); Föräldrabalk [FB] [Children and Parents Code] ch. 6 § 13a (Swed.); Children Act 1989, c. 41, § 8 (UK).

[37] *See, e.g.*, Cal. Fam. Code §§ 3040, 3120 (West 2022); N.Y. Dom. Rel. Law § 240(1)(a) (McKinney 2022); Mínfǎ Diǎn [Civil Code] § 1084, para. 3 (China); Bürgerliches Gesetzbuch [BGB] [Civil Code] § 1671 (Ger.); Codice civile [C.c.]

In case there are no close relatives or such relatives are not suited for representing the child, or in our case, the animal, the role of a decision-maker has to be filled by a third party. To this end, courts can appoint a guardian, who may be a private individual, a professional, or an organization. Especially for organizations, there may even exist an obligation to serve as a guardian.[38] As a last resort, a state agency can step in as a guardian.[39]

Adults that are not fully able to look after their interests, may also require such a mechanism, but limited to certain matters or circumstances. In the parallel we have already drawn, this limited human intervention might be adequate for wild animals in a situation where they are in need of special protection. Likewise, if an animal held in captivity is to be reintroduced into the wild, cutting its ties to human protectors is comparable to the legal mechanism known as emancipation of minors in some jurisdictions. Whether the minor can be considered emancipated, has mostly to be reviewed or confirmed by the family court.[40]

ii. Property Law: Owners, Trustees and the State

Who makes decisions with regard to the property owned? In principle, the owner decides how to deal with her property. There can also be two or more owners, whose decisions are organized in the forms of co-ownership. Oftentimes, minor and urgent issues can be decided by one owner alone, while more important issues have to be decided jointly.[41] The above-mentioned examples of individual decisions on everyday feeding or medical emergencies, but joint decisions on traveling abroad or name-giving are thus applicable to co-owners of an animal just like they were to humans acting as parents for an animal. Moreover, certain decisions by an owner on the use of her property also require permission from a state agency. For animals as property, this is

[Civil Code] art. 337-quater (It.); Föräldrabalk [FB] [Children and Parents Code] ch. 6 § 5–6 (Swed.); Children Act 1989, c. 41, § 4(2A) (UK).

[38] *See, e.g.*, Astikos Kodikas [AK] [Civil Code] art. 1599–1600 (Greece).

[39] For a list of competent national agencies *see* Eur. Union Agency for Fundamental Rts., Guardianship systems for children deprived of parental care in the European Union 25 (2015).

[40] *See, e.g.*, Cal. Fam. Code § 7122 (West 2022); Code civil [CC] [Civil Code] art. 413-2 (Fr.).

[41] *See, e.g.*, Mínfǎ Diǎn [Civil Code] §§ 300–01 (China); Bürgerliches Gesetzbuch [BGB] [Civil Code] §§ 744, 745 (Ger.); Codice civile [C.c.] [Civil Code] arts. 1105–09 (It.); Burgerlijk Wetboek [BW] [Civil Code] art. 3:170 (Neth.); Lag om samäganderätt [Co-ownership Act] § 2 (Swed.); Zivilgesetzbuch [ZGB] [Civil Code] arts. 647a–648 (Switz.).

especially the case if they are to be subjected to experiments[42] and could be extended to other ways of treating animals.

Co-ownership of an animal might arise between spouses who jointly take care of it. Though the applicable matrimonial property regime may keep their respective property separate, the spouses can agree on a form of co-ownership by implication. Both of them deciding on the animal's care and bearing the burdens as well as the benefits of owning an animal would strongly indicate such an agreement. In the case of an informal family relationship or a weaker social relationship between the co-owners, matrimonial regimes are not applicable in the first place. Whatever the relationship between the co-owners may look like, the law has to provide criteria on the allocation of jointly owned property if the relationship dissolves or if one of the owners urges to withdraw from the circle of co-owners.[43]

The decision-making powers can further be separated from the decision-maker's own benefit from the property, which Common Law jurisdictions traditionally accomplish by means of a trust with the trustee only as the manager of property, but not as the beneficiary. Trustees occasionally have a function corresponding to that of guardians[44] and can likewise be appointed by court order in lack of other suitable candidates[45]. In all states of the USA it is expressly provided that a trust may be created for an animal without any human beneficiary.[46] Similar results can be reached in other jurisdictions by way of a foundation for the benefit of an animal or by disposing of wealth under the condition that it is used to care for an animal.

c. Responsibility Towards Relatives

i. Family Law: Child Welfare

Having seen *who* decides we can now have a look at the substance of a decision: Which duties guide the decision-making for the vulnerable?

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[42] *See* Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, 2010 O.J. (L 276) 33, art. 36; Lei No. 11.794, de 8 de Outubro de 2008, art. 11 (Braz.); Tierschutzgesetz [TSchG] [Animal Welfare Act] art. 18, para. 1 (Switz.).

[43] As to these criteria, *see infra* Part II. c. ii.

[44] *Cf.* David Favre, *Equitable Self-Ownership for Animals*, 50 Duke L.J. 473, 496–97 (2000).

[45] *See, e.g.*, Trustee Act 1925, c. 19, § 41 (UK); Judicial Trustees Act 1896, c. 35, § 1 (UK); Public Trustee Act 1906, c. 55, § 5 (UK).

[46] *See* Unif. Tr. Code § 408 (Unif. L. Comm'n 2010); *e.g.* Cal. Prob. Code § 15212 (West 2022); N.Y. Est. Powers & Trusts Law § 7-8.1 (McKinney 2022); Tex. Prop. Code § 112.037 (West 2022); David Favre, The Future of Animal Law 99 (2021) (referring to "the animal law trust provisions in all states").

The guiding principle for decisions affecting children is the welfare of the child—also styled the child's best interests.[47] This principle not only serves as the benchmark for the parental management of their child's affairs, but also lies at the core of judicial scrutiny. A court will, for example, allocate the decision-making power in a particular case or general custody of a child in the way that best furthers the child's welfare.

The welfare of the child is, of course, a very broad and vague concept that needs to be filled with more concrete rules. For some situations, the law provides somewhat more instructive guidelines, but in general, the child's welfare is a standard defined by *social*, *ethical*, and *cultural* norms, which are referenced by the law. In a second step, these external norms are adopted by the law and can find their way into *legal* norms. Against this extralegal background, it is not surprising that the protection afforded by law varies greatly at different times and in different cultures.

In this vein, social progress in the field of children's rights is reflected in international conventions, particularly the United Nations Convention on the Rights of the Child, which dates from 1989[48]. We can also find traces of the development in legal terminology: Whereas in the 1980s, the decision-making by parents was styled "parental *powers*" or "parental *authority*," we now speak of "parental *responsibility*."[49]

Translated to our field of study, the concept of animal welfare springs to mind—a concept that also references social norms when it prohibits unnecessary,[50] unreasonable[51] or unjustified[52] suffering, as

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[47] *See* United Nations Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3.

[48] United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

[49] Josep Ferrer-Riba, *Parental responsibility in a European perspective*, *in* European Family Law Volume III, 284, 287 (Jens M. Scherpe ed., 2016).

[50] Cal. Penal Code § 597 (b) (West 2023); Code pénal [CP] [Penal Code] art. 521-1, para. 1 (Fr.); Prevention of Cruelty to Animals Act, 1960, §§ 3(1), 11(1)(a) (India); Codice penale [C.p.] [Penal Code] arts. 544-bis, 544-ter, para. 1 (It.); Wet dieren [WD] [Animals Act] art. 1.3, para. 2, sentence 3 (Neth.); Criminal Code Act (1990), Cap. 77, § 495(1)(b) (Nigeria); Ley para el cuidado de los animales [Care for Animals Act], art. 4, para. 1 (Spain); Djurskyddslag [Animal Welfare Act] ch. 2 § 1 (Swed.); Tierschutzgesetz [TSchG] [Animal Welfare Act] art. 4, para. 2, sentence 2 (Switz.); Animal Welfare Act 2006, c. 45, § 4 (Eng.).

[51] Tierschutzgesetz [TSchG] [Animal Welfare Act] § 6, para. 1 (Austria); Tierschutzgesetz [TierSchG] [Animal Welfare Act] § 1, sentence 2 (Ger.); Dōbutsu no aigo oyobi kanri ni kansuru hōritsu [Act on Welfare and Management of Animals], Law No. 105 of 1973, art. 2, para. 1 (Japan).

[52] N.Y. Agric. & Mkts Law § 353 (McKinney 2021); Tex. Penal Code § 42.09(b)(2) (West 2022); Tierschutzgesetz [TSchG] [Animal Welfare Act] § 5, para. 1 (Austria); Tierschutzgesetz [TSchG] [Animal Welfare Act] art. 3, lit. a, sentence 2, art. 4, para. 2, sentence 1 (Switz.).

the standard is circumscribed throughout many national laws.[53] These concepts build on societal consensus to decide, inter alia, whether it is legal to kill animals for meat, for clothing or for scientific progress. As with the treatment of children, societal views may change over time. This change may be noticed, incorporated into legal analysis and deemed significant enough to revise legal positions.

Another important development in family law is the continuous abolition of discrimination. In the context of legal parentage, illegitimate children have long been, and in some jurisdictions still are, treated less favorably than children born in wedlock.[54] This discrimination may bring to mind the deeply-rooted distinction—or discrimination if you will—between companion animals and working animals. Both classifications—be it of children, be it of animals—originate in traditions that cannot rationally be sustained today.

If we look at the material interests playing a role for child welfare, they resemble the interests relevant to animal welfare: Above all, the freedom from physical harm and the freedom of movement, can both be affected by a decision of the parents in a particular case. Parents decide on the residence and the contacts of the child and are responsible for its health and education. As education is directed towards a change in behavior, to a certain degree parents may rely on sanctioning their child for improper behavior. While, historically, severe and violent sanctions by the parents were tolerated,[55] modern forms of parental sanctions include keeping the child in or limiting its privileges.

Of course, child welfare also has a financial side: money to be used for the child's benefit is paid by means of maintenance. This money is usually also managed by the decision-making relative(s), who may receive part of it from another relative excluded from decision-making. At first sight, vesting animals with a monetary position may seem odd because animals are not able to understand the human concept of money. However, animals' needs and their services and labors, can be measured in amounts of money. It is only the administrative function of monetary assets, which has to be assumed by their human companions.

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[53] *See also* Province of Québec Animal Welfare and Safety Act, c. B-3.1, § 7, para. 1 (Can.) ("generally recognized rules"); Province of Ontario Animal Welfare Services Act, S.O. 2019, c. 13, § 15(4)(c) (Can.) ("standards of care", "reasonable and generally accepted practices").

[54] *See* European Convention on the Legal Status of Children Born out of Wedlock, Oct. 15, 1975, 1138 U.N.T.S. 303; Josep Ferrer-Riba, *Parental responsibility in a European perspective*, *in* European Family Law Volume III, 284, 292 (Jens M. Scherpe ed., 2016).

[55] *See* Tex. Fam. Code § 151.001(e) (West 2022) (still allowing "corporal punishment for the reasonable discipline of a child"); R. (on the application of Williamson) v. Secretary of State for Education and Employment, [2002] EWCA (Civ) 1926 [para. 241] (UK) (discussing reasonable chastisement by a parent).

Therefore, it is conceivable that an animal receives maintenance from a human relative, say the former spouse of its now divorced housemate and provider, having sole custody following the divorce. The maintenance is paid to the custodial ex-spouse as manager of the animal's funds, who in turn provides maintenance in kind to the animal by caring and procuring daily necessities. The amount of maintenance owed in money is calculated according to the animal's needs, the custodial relative's ability to cover the expenses for these needs, and the absent relative's ability to pay.

ii. Property Law: Animal Welfare

Which duties guide the decisions on the use of property? Though the owner is principally free to deal with her property as she likes, this power is always subject to restrictions in the interest of third parties or the general public.[56] There is no such thing as free ownership of property in an absolute sense. In the interest of neighbors, fewer ways of erecting a building are allowed to land owners than are forbidden. More marked examples of ownership to the detriment of the owner's interests are provided by cultural heritage or narcotic substances: Owning an object of cultural heritage does not include the power to destroy the object. And ownership of drugs is restricted to the extent that the owner is not allowed to sell her property.

With this in mind, treating animals as property owned by humans does not by itself imply that the owner is allowed to kill or even harm her animal. Indeed, animal welfare law could restrict the use of owned animals just as much as child welfare restricts parental powers. Some jurisdictions, for instance, acknowledge animal welfare as the guiding principle for allocating ownership of a companion animal after divorce.[57] Most jurisdictions, however, allocate ownership in cases of a breakup either by selling co-owned property and dividing the proceeds[58] or in accordance with the individual needs of each party.[59]

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[56] Ugo Mattei, Basic Principles of Property Law 147–53 (2000); Anthony Maurice Honoré, *Ownership*, *in* Oxford Essays in Jurisprudence 107, 123 (Anthony Gordon Guest ed., 1961).

[57] Alaska Stat. § 25.24.160(a)(5) (West 2023); Cal. Fam. Code § 2605(b) (West 2022); 750 Ill. Comp. Stat. § 5/503(n) (2023); N.H. Rev. Stat. Ann. § 458:16-a(II-a) (2023); Código Civil [C.C.] [Civil Code] arts. 94 bis, 404, para. 3 (Spain); Zivilgesetzbuch [ZGB] [Civil Code] art. 651a, para. 1 (Switz.); Pablo Lerner, *With Whom will the Dog Remain? On the Meaning of the "Good of the Animal" in Israeli Family Custodial Disputes*, 6 J. Animal L. 105, 117 (2010).

[58] *See, e.g.*, Fla. Stat. §§ 64.071, 64.091 (2023); Mínfǎ Diǎn [Civil Code] § 304, para. 1, sentence 2 (China); Code civil [CC] [Civil Code] art. 1686 (Fr.); Bürgerliches Gesetzbuch [BGB] [Civil Code] § 753 (Ger.); Burgerlijk Wetboek [BW] [Civil Code] art. 3:185, para. 2, lit. c (Neth.); Lag om samäganderätt [Co-ownership Act] §§ 6, 8 (Swed.).

[59] *See, e.g.*, Fla. Stat. § 61.075(1) (2023); Bürgerliches Gesetzbuch [BGB]

At least indirectly, these mechanisms can nevertheless promote the welfare of the affected animal: If the animal is sold to the person willing to pay most, this ideally is the person who values the animal most and can therefore be presumed to treat it with the greatest care.[60] While this mechanism surely suffers from the always limited validity of money as a measuring unit, either of the former co-owners has the chance to overbid the other and potential third-party bidders for the sake of the animal's welfare. On the other hand, the criterion of a spouse's needs may reflect more extensive interaction with the animal in the past as well as stronger affection for the animal and thereby also lead to an allocation in line with the animal's interests. Some laws additionally provide for monetary compensation to be paid by the spouse becoming sole owner of the animal to the spouse who is denied ownership.[61] Such an obligation stands in contrast to and may be relativized by the latter's obligation to pay a share of the animal-related expenses as part of maintenance owed to the owning spouse.[62]

It might appear as a difference from other types of ownership restrictions that the interests conflicting with ownership are attributed to animals as the objects of property and not to third parties or the general public (as with building regulations and cultural heritage). This difference, however, stems from a rather materialistic view. From a broader perspective, as soon as animal welfare is an issue, even if only to the slightest degree, animals have to be viewed as third parties, and as the object in a property relation only with regard to their physical appearance. To what extent the interests of animals prevail over ownership interests ultimately boils down to a constitutional analysis incorporating societal views. Just like any other third-party interest, animal welfare restricts the fundamental right to property as laid

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[Civil Code] § 1568b, para. 1 (Ger.), *but see* Oberlandesgericht [OLG] [Higher Regional Court] Oldenburg, Aug. 20, 2018, Zeitschrift für das gesamte Familienrecht [FamRZ] 784 (2019) (Ger.); Oberlandesgericht [OLG] [Higher Regional Court] Nürnberg, Dec. 20, 2016, Zeitschrift für das gesamte Familienrecht [FamRZ] 513 (2017) (Ger.) (considering the animal's welfare); Burgerlijk Wetboek [BW] [Civil Code] art. 3:185, para. 1 (Neth.) (referring also to the public interest); Äktenskapsbalk [Marriage Code] ch. 11 § 8, para. 1 (Swed.).

[60] Hence rather short-sighted the view in Henderson v. Henderson, 2016 SKQB 282, para. 41 (Can.).

[61] *See., e.g.*, Bürgerliches Gesetzbuch [BGB] [Civil Code] § 1568b, para. 3 (Ger.); Burgerlijk Wetboek [BW] [Civil Code] art. 3:185, para. 2, lit. b (Neth.); Äktenskapsbalk [Marriage Code] ch. 11 § 10 (Swed.); Zivilgesetzbuch [ZGB] [Civil Code] art. 651a, para. 2 (Switz.).

[62] *But see* Código Civil [C.C.] [Civil Code] arts. 94 bis, 404, para. 3 (Spain) (providing that the financial burden of caring for the animal is shared between the spouses or co-owners).

down in national constitutions[63] as well as supranational frameworks[64]. Whether such restrictions are justified, eventually depends on balancing the right to property against animal interests being nowadays expressly enshrined in several constitutions[65].

d. Enforcement of Responsibility

i. Family Law: Discharge of Custody

How are legal duties towards relatives enforced? Here, we have to be aware that the family is an autonomous social system with its own self-made rules and its own enforcement mechanisms. As with every such self-regulatory sphere, external control suffers from certain deficiencies: It is difficult for judicial or administrative authorities to gain information about what is going on in a family. Additionally, it is intricate to interfere with family practices and to substitute them with rules imposed by the state. Therefore, the state usually confines its intervention to cases where the self-regulatory powers of the social system are manifestly failing.[66] Such cases often involve serious and unwarranted physical or mental harm inflicted or about to be inflicted on the child.

The means of state intervention are manifold. First and foremost, parents may be partially or completely discharged of their responsibility. Temporary measures limiting parental responsibility may be construed as pertaining only to the *exercise* of parental rights and not

[63] *See, e.g.*, U.S. Const. amend. V; Déclaration des droits de l'homme et du citoyen de 1789 [Declaration of the Rights of Man and of the Citizen of 1789] art. 17 (Fr.); Grundgesetz [GG] [Basic Law] art. 14, para. 1 (Ger.); Konstitutsiia Rossiĭskoĭ Federatsii [Konst. RF] [Constitution] art. 35, para. 1 (Russ.); Constitución Española [C.E.] [Constitution] art. 33, para. 1 (Sp.); Regeringsformen [RF] [Constitution] ch. 2 § 15, para. 1 (Swed.); Bundesverfassung [BV] [Constitution] art. 26, para. 1 (Switz.).

[64] *See, e.g.*, African Charter on Human and Peoples' Rights art. 14, June 27, 1981, 1520 U.N.T.S. 217; American Convention of Human Rights art. 21, para. 1, Nov. 22, 1969, 1144, U.N.T.S. 123; Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, para. 1, May 18, 1954, 213 U.N.T.S. 262.

[65] Bundesverfassungsgesetz über die Nachhaltigkeit, den Tierschutz, den umfassenden Umweltschutz, die Sicherstellung der Wasser- und Lebensmittelversorgung und die Forschung [Federal Constitutional Law on Sustainability and Animal Welfare] § 2 (Austria); Constituição Federal [C.F.] [Federal Constitution] art. 225, para. 1, no. VII (Braz.); Grundgesetz [GG] [Basic Law] art. 20a (Ger.); Bundesverfassung [BV] [Constitution] art. 120, para. 2, sentence 2 (Switz.).

[66] On the exceptional nature of protective measures *see* Johansen v. Norway (No. 1), App. No. 17383/90, 1996-III Eur. Ct. H. R. 980; *see also* Santosky v. Kramer, 455 U.S. 745 (1982).

to the holding of responsibility as such.[67] In any case, these measures concern the decision-making powers of a relative, either curtailing them or removing them entirely. A relative can further be deprived of benefits from the family relation, such as the contact with the vulnerable relative. If the relation to both parents is to be terminated, the child or animal can be placed in foster care or be adopted into a new family relation.[68]

Beyond mere protective measures, civil and criminal liability may be imposed on the misbehaving parent.[69] In the position of a child, the aggrieved animal would be entitled to damages for pecuniary and non-pecuniary losses. Of course, such a claim would have to be asserted by a human representative, who in family law is usually called a curator or guardian ad litem[70]. In severe cases, criminal sanctions will be enforced by the state and may entail the discharge of parental responsibility as an ancillary order.

All these options, however, are faced with the core problems of deficient insight, the high efforts required and the overburdening caseload—problems we are all too familiar with in the context of animal welfare.

ii. Property Law: Seizure, Confiscation and Sale

How are duties of the owner enforced? If the welfare of an animal is impaired or at risk of being impaired, the authorities can take it away from the owner, thereby depriving her of the decision-making power as well as the benefits with regard to the animal.[71] Depending on risk assessment and past violations, such a seizure may be temporary or permanent. As a consequence, the animal has to be committed to the care of someone else, most commonly at an animal shelter. If returning the animal to its previous owner is not viable, ownership eventually has to be transferred to humans who are qualified as more responsible. To

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[67] Josep Ferrer-Riba, *Parental responsibility in a European perspective*, *in* European Family Law Volume III, 284, 291, 301–02 (Jens M. Scherpe ed., 2016).

[68] *Id.* at 302–03.

[69] Salvatore Patti, *Intra-Family Torts*, *in* 4 International Encyclopedia of Comparative Law: Persons and Family, Chapter 9, §§ 17–24 (Aleck Chloros et al. eds., 1998).

[70] *Cf.* David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 Marq. L. Rev. 1021, 1037–38 (2010) (citing court orders appointing guardians for animals).

[71] *See, e.g.*, Tierschutzgesetz [TSchG] [Animal Welfare Act] § 37, paras. 2, 2a (Austria); Tierschutzgesetz [TierSchG] [Animal Welfare Act] § 16a, para. 1, sentence 2, no. 2 (Ger.); Ley para el cuidado de los animales [Care for Animals Act], art. 17, lit. b, art. 20, lit. a (Spain); Djurskyddslag [Animal Welfare Act] ch. 9 §§ 1, 5, 6 (Swed.); Tierschutzgesetz [TSchG] [Animal Welfare Act] art. 23, art. 24, para. 1 (Switz.); Animal Welfare Act 2006, c. 45, § 18(5) (Eng.).

this end, the state may first confiscate the animal and act as a transitional owner or directly arrange the sale to a new owner or shelter acting as another intermediary. By selling the animal in question, the prospective owner's qualification is again measured by her willingness and ability to pay money.[72]

From the perspective of property law, liability is imposed for undue conduct with the property. The state enforcing criminal liability might not formally act in the name of an aggrieved animal as the thing owned, but in substance represents the animal's interests. As already noted, however, public enforcement is generally unable to cope with the number of cases, the lack of inside information, and also political pressure. A certain mode of private enforcement to offset these deficiencies is accomplished when activists act on behalf of maltreated animals and rescue them from the conditions in which their owners keep them. If such intervention is necessary to enforce the owner's duties towards her animals, the activists in turn are not held liable, but rather seen as a substitute for public law enforcement.[73] On the other hand, they obviously run the risk of whether a court in hindsight actually deems their operation as necessary and the owner's duties as violated in the particular case.

III. Discussion of the Results

In view of the results brought to light in our experiment equating animals with children, four implications are to be highlighted. They are political (a), argumentative (b), doctrinal (c) and psychological (d) in nature.

a. Family Law as a Framework for Implementing Animal Rights

First of all, it goes without saying that children are equipped with rights, while such a status for animals remains under debate. Modeling the legal status of animals after that of children would entail the ability to hold rights. In applying the structures of family law to animals, the role of a child has proven to be an adequate framework to describe the legal relations of animals to humans. It has turned out that even the current legal situation under welfarist regimes is quite easily translated into the language of family law. This shows that right-holding by animals is not as peculiar as it might seem at first.

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[72] *See supra* Part II. c. ii.

[73] *See* Oberlandesgericht [OLG] [Higher Regional Court] Naumburg, Feb. 22, 2018, Neue Juristische Wochenschrift [NJW] 2064 (2018) (Ger.); *cf.* Utah v. Hsiung, No. 181500061 (Utah 5th Dist. Ct. Oct. 8, 2022), *see* Andrew Jacobs, *Activists Acquitted in Theft of Smithfield Piglets*, N.Y. Times, Oct. 10, 2022, at A14.

Conversely, if animal rights are to be expressly implemented at some point, the mechanisms of family law may serve as a model. The political demand for animal rights is often uttered in a rather vague fashion, coming down to not much more than a catchword and not buttressed by an elaborate legal concept or detailed rules. Departing from this conceptual vacuum, family law can provide one potential specification of the necessary legal infrastructure in which any right-holding entity has to be embedded.

In this context, Will Kymlicka has pointed to family membership as a potential catalyst for animal personhood.[74] His concept of membership, however, focuses on a bundle of participation rights and would exclude wild animals, while the approach taken in this article aims at a broader impact: it is supposed to lay the structural foundation for any type of right and is able to integrate the role of wild animals.[75]

b. Rights Without Duties in Family Law

Sometimes it is argued against the possibility of animal rights that rights are not conceivable without duties, and since animals cannot be made subject to duties, it appears as a logical conclusion that they cannot qualify as holders of rights either.[76] Giving rights to children who, at least at younger ages, are not bound by legal duties, invalidates this argument. And while children may still be qualified as *future* addressees of duties, other examples from family law show that not even the prospect of owing duties is required to concede the capacity to hold rights. Humans, whose intellectual disabilities do not allow them to control their behaviors during their entire lives, are nonetheless vested with rights while exempt from legal duties. That rights come with duties is solely based on the merit principle and ignores that there is another principle that allocates legal benefits to those in need precisely due to their inability to gain merits.

Although he acknowledges the potentially vast differences in intellectual ability within a group of right-holders, Richard Epstein has asserted that the ordinary intelligence prevailing throughout a species is the decisive junction separating the road to right-holding from the realms

[74] Will Kymlicka, *Social Membership: Animal Law beyond the Property/Personhood Impasse*, 40 Dal. LJ 123, 144 (2017).

[75] *See supra* Parts II. a. i. and II. b. i.

[76] *See* People *ex rel.* Nonhuman Rights Project, Inc. v. Lavery, 124 A.D.3d 148 (N.Y. App. Div. 2014); Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San Diego L. Rev. 27, 66–77 (2009); Richard A. Epstein, *Animals as Objects, or Subjects, of Rights*, *in* Animal Rights: Current Debates and New Directions 143, 154 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

of rightlessness.[77] According to this view, the average human has to be compared to the average representative of an animal species. However, Epstein does not provide any justification for drawing the line between species, but takes this humanly devised distinction for granted. Thus, it remains just as arbitrary as drawing the line between different groups of humans according to their average abilities.

c. Family Law and Property Law as Different Packages with the Same Content

The experimental comparison between family law and property law shows that the same legal effects can be reproduced in either field. The following table summarizes the structures of both fields and their common cores with regard to the various aspects of a relationship:

Family Law	Property Law	Common Core
parentage adoption	appropriation, manufacturing ownership of produce transfer of title	social criteria biological criteria consensual criteria
custody guardianship state agencies, courts	ownership trusteeship state agencies, courts	self-management third party management state supervision
child welfare legitimacy of children maintenance	animal welfare speciesism maintenance for owner	vulnerable interests discrimination financial support
discharge of custody foster care, adoption civil / criminal liability	seizure confiscation, sale civil / criminal liability	prevention of harm substitute care sanction of violations

All in all, the same relationships fit into both family and property law and we can achieve the same results within both regulatory patterns. In family law, the child has rights that are subject to parental powers; in property law, the thing owned does not have rights, but the owner's powers are subject to the protection of the thing. In both cases, enforcement lies to a large extent with the state.

Therefore, we can view family law and property law as two different packages with potentially the same content. This is also evidenced by the historical background of the two fields. The origins of Western family law applied the same legal mechanisms as property law: the Roman *patria potestas* and the Germanic *mund* formed the basis for the father's powers as head of family over children and property

[77] Richard A. Epstein, *Animals as Objects, or Subjects, of Rights*, *in* Animal Rights: Current Debates and New Directions 143, 155 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

alike.[78] Particularly, in Roman law the procedures of *mancipatio* and *in iure cessio* were used for both the transfer of ownership and the establishment of parentage, and through the action of *vindicatio* the surrender of property as well as children could be claimed.[79] Structural similarities still resonate in observations like the one made by Arden LJ that "the common law effectively treats the child as the property of the parent."[80] Conversely, it is presumed that in archaic times, all goods belonging to the household were viewed as having personhood and as members of the family.[81]

In general, ascribing rights to elements of our surroundings is nothing more than putting a label on them for the purpose of operationalizing legal analysis independent of its particular results. Such a label then only defines a fixed point from where to start and from where other aspects can be drawn into the analysis. In fact, one could argue that animals already *do* have rights and that they are just curtailed to a large extent due to opposing interests.

d. Framing Effects of the Different Packages

If the same legal results can be achieved, whether animals are subjects of rights or objects of protection, one could infer that implementing animal rights would be entirely pointless and any effort to push in that direction would be in vain. Does the debate on rights and personhood for animals turn out to be purely academic gimmickry without any impact on real life?

While I have indeed negated a substantial *legal* difference between animal welfare and animal rights, that does not mean that there is no difference at all. Daniel Kahneman and Amos Tversky have shown that our decisions are influenced by how different options are presented—how they are phrased, for instance.[82] These so-called framing effects are

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[78] Margaret Davies, Property: Meaning, histories, theories 55–56 (2007); Samuel J. Stoljar, *Children, Parents and Guardians*, *in* 4 International Encyclopedia of Comparative Law: Persons and Family, Chapter 7, §§ 32–60 (Aleck Chloros et al. eds., 1973); Rudolf Hübner, A History of Germanic Private Law 657–64 (Francis S. Philbrick trans., Little, Brown, and Company 1918) (1913).

[79] Max Kaser, Roman Private Law 306–12 (Rolf Dannenbring trans., University of South Africa 4th ed. 1984) (1983).

[80] R. (on the application of Williamson) v. Secretary of State for Education and Employment, [2002] EWCA (Civ) 1926 [para. 241] (Eng.) (discussing reasonable chastisement by a parent).

[81] Marcel Mauss, *Essai sur le don: Forme et raison de l'échange dans les sociétés archaïques*, 1 L'Année Sociologique 30, 132–34 (1923–24) (Fr.).

[82] Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 Science 453 (1981); Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 Am. Psych. 341, 346 (1984).

omnipresent in our decision-making, shape our perception of reality and produce biases in favor of one option irrespective of its substance.

In particular, a problem can be framed in positive terms or in negative terms and thereby trigger different emotional responses.[83] If the protection of animals' interests is described in terms of owner's rights being restricted, it is framed negatively as a loss, which a decision-maker intuitively tends to avoid. Avoidance of a loss in this case means less protection for animals. If, on the other hand, such protection is described in terms of enhancing the rights of animals, it is framed positively as a gain, which a decision-maker tends to prefer over the alternative loss of rights.

Additionally, the framing of a problem often defines a default option, which is initially favored by a decision-maker.[84] In our context, an animal rights framing might shift the relation of rule and exception towards protecting animals as the default rule and harming animals as the exception, which has to be justified in a particular case.

IV. Conclusion

In terms of our legally reinterpreted Turing test,[85] animals have responded very well to the application of a child's role as right-holder from family law. This shows that animal rights are a feasible mechanism fitting into the existing legal framework.

However, the accordance of rights does not by itself improve the situation of animals. A right is a highly abstract concept that condenses the potential interests of a person into a formal position and that has to be re-materialized in order to assess concrete cases. Under the factual circumstances of a case, the rights of an animal may be restricted in the same or even in a greater degree than its protection as property is reduced in favor of the owner's interests.

Though, from a legal point of view, the same protection of animals' interests can be achieved by way of animal rights or animals as property, the different language is of psychological relevance. Framing animals as right-holders increases the mental and emotional hurdles for approving their maltreatment. Or put in the frame of a well-known metaphor: right-holding might afford animals a seat, and not just a plate, at the table of brotherhood.

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[83] Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 Science 453, 456 (1981).

[84] Daniel Kahneman, Thinking, fast and slow 373 (2011).

[85] *See supra* Part I.

An Analysis of the *Estrellita* Constitutional Case from an Animal Rights Perspective

Marcia Condoy Truyenque*

I. An Introduction to the Rights of Nature in the Ecuadorian Constitution and the *Estrellita* Case

In 2008, Ecuador promulgated a new constitution that, for the first time in the constitutional tradition, recognized rights to Nature.[1] Its preamble proclaims that Pacha Mama (Mother Earth) is vital to our existence, declares a "profound commitment to the present and to the future,"[2] and decides to build "a new form of public coexistence, in diversity and in harmony with Nature, to achieve the good way of living, the *sumak kawsay*."[3] The recognition of the Rights of Nature had two goals: 1) to overcome the Western hegemonic pattern in the relationship

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[1] Constitución de la República del Ecuador [Constitution of the Republic of Ecuador] Oct. 20, 2008, Preamble.

[2] *Id*.

[3] *Id.* art. 14. *Sumak kawsay* is a Quechua expression which could be translated as "good living." *See* Pachamama Alliance, *Sumak Kawsay: Ancient Teachings of Indigenous Peoples*, https://www.pachamama.org/sumak-kawsay#:~:text=Sumak%20Kawsay%20–%20"Good%20Living",is%20much%20deeper%20than%20this (accessed Jan. 3, 2023). *Sumak kawsay,* or good living, is considered the right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and a wholesome way of life. *See Corte Constitucional del Ecuador* [Constitutional Court of Ecuador] Nov. 10, 2021, Judgment No. 1149-19-JP/21 (Los Cedros Forest). The Constitutional Court of Ecuador has recognized that the declarations contained in the Preamble of the Constitution are not a mere rhetorical lyricism but rather emphasize constitutional values and principles of law.

between society and Nature to move towards the recognition of the intrinsic value of Nature; and 2) to face the threats of development, foreign investments, and mining activities.[4]

Article 10 of the Ecuadorian Constitution declares natural persons, peoples, nations, and communities as holders of "the rights guaranteed to them in the Constitution and in international instruments."[5] Article 10 also recognizes Nature as a rights-holder, but only in relation to "rights that the Constitution recognizes for it,"[6] referring to the rights recognized under Chapter VII of Title II (on Rights) of the Ecuadorian Constitution. Basically, three rights correspond to Nature under the Ecuadorian Constitution: i) "the right to integral respect for its existence;"[7] ii) the right to the "maintenance and regeneration of its life cycles, structure, functions and evolutionary processes;"[8] and iii) "the right to be restored." [9]

With the recognition of the Rights of Nature in the Ecuadorian Constitution, Nature has become a legal subject. The Constitution defines Nature as the place "where life is reproduced and occurs,"[10] consequently, the first leading interpretation considered Nature only as physical spaces, such as lands, rivers, or mountains.[11] Progressively, in 2019, animal species[12] were also recognized as legal subjects since the

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[4] *See* Jordi Jaria Manzano, *The Rights of Nature in Ecuador: An Opportunity to Reflect on Society, Law and Environment*, *in* Global Environmental Law at a Crossroads 48, 48–50 (Robert V. Percival et al., eds., 2014).

[5] Constitución de la República del Ecuador [Constitution of the Republic of Ecuador] Oct. 20, 2008, art. 10.

[6] *Id.*

[7] *Id.* art. 71 ("Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes. All persons, communities, peoples, and nations can call upon public authorities to enforce the Rights of Nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate. The State shall give incentives to natural persons and legal entities and to communities to protect Nature and to promote respect for all the elements comprising an ecosystem.").

[8] *Id.*

[9] *Id.* art. 72 ("Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems. In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.").

[10] *Id.* art 71.

[11] Harvard Animal Law, *03/24/22: Animal Personhood, Rights of Nature, and the Estrellita Constitutional Case in Ecuador*, YouTube (Mar. 24, 2022), https://www.youtube.com/watch?v=fKOFCQ8scvc&t=41s&ab_channel=HarvardAnimalLaw.

[12] Corte Constitucional del Ecuador [Constitutional Court of Ecuador] Nov.

Court found that a high number of interacting species creates a diverse and more resilient Nature.[13] Consequently, "ecosystems with their species and biodiversity are subject to intrinsic value in the Ecuadorian Constitution."[14] Until the *Estrellita* case, the interpretation of Rights of Nature did not consider individual animals as subjects of law.

According to the judgment,[15] Estrellita was a chorongo monkey (legothrix lagotricha), which is one of the most threatened monkey species in the Ecuadorian rainforest. Estrellita lived with Ana Beatriz Burbano Proano (Ana) for eighteen years starting from the age of just one month old.[16] On September 11, 2019, because of an anonymous complaint, officials from the Ecuadorian Ministry of the Environment confiscated Estrellita using physical force and transferred her to the San Martín Eco Zoo.[17]

Ana filed a writ of habeas corpus on December 6, 2019, demanding the immediate delivery of Estrellita to her home and the issue of a permit to legally possess Estrellita.[18] On February 20, 2020, during a hearing, the Ministry of the Environment gave notice about Estrellita's death on October 9, 2019. This means that Estrellita was dead for more than four months before her family and the court were

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10, 2021, Judgment No. 1149-19-JP/21, ¶ 46. (The Court defined species as "the set of organisms capable of interbreeding and producing fertile offspring but not with members belonging to other species in a natural state.").

[13] *Id.* ¶ 47 ("It is considered that a diverse ecosystem is one that has a high number of species in interaction. Biodiversity acts as a natural insurance for the ecosystem because it allows it to recover from the events that affect it. If there are several species that fulfill a similar function, such as feeding on plants, it is feasible that, if one of them decreases in its population due to natural catastrophes, the others can supply that deficiency and the ecosystem recovers its stability. Both ecosystems with their species and biodiversity are subject to intrinsic value in the Ecuadorian Constitution.").

[14] *Id.*

[15] Corte Constitucional del Ecuador [Constitutional Court of Ecuador] Jan. 27, 2022, Judgment No. 253-20-JH/22.

[16] *Id.* ¶¶ 24–25 (Ana identified herself before the Court as "Estrellita's mother and caregiver," affirming that she developed "motherly feelings towards her [Estrellita]" who became a member of the family.).

[17] *Id.* ¶ 30.

[18] *Id.* ¶ 39 (Plaintiff pointed out the following in the writ of habeas corpus: "[T]he possible damage to the physical integrity as well as ethological balance of Estrellita is evident and imminent, for which reason an [sic] habeas corpus will stop the mistreatment she is suffering, in precarious conditions totally unknown to her. For this purpose [of the writ of habeas corpus], the Ministry of the Environment will issue a license for the possession of wildlife in which I offer to take care of it in the most appropriate way for her species, including the signing of a commitment to recognize the exceptional right that assists me, in view of the circumstances explained, and in recognition of the need for a dignified treatment and the fundamentals of rights invoked.").

informed. The Ministry of the Environment also reported that the body of Estrellita was frozen for possible taxidermic work.[19] Because the writ of habeas corpus was originally for the return of Estrellita to Ana's house, upon her death the purpose changed to govern the delivery of her body and to determine the official responsibility for her death.[20] Both the trial and appellate courts dismissed the habeas corpus action.[21]

On July 3, 2020, Ana filed an constitutional suit before the Constitutional Court of Ecuador as a last resort to address her petition. The Court admitted the case, selected it for the development of binding jurisprudence, and issued its judgment on January 27, 2022. The judgment declared that Estrellita's rights were violated at three different times: when she was removed from her natural habitat;[22] at the time of her confiscation;[23] and when she was placed in a zoo.[24] However,

[19] *Id.* ¶ 37.

[20] *Id.* ¶ 45 ("Unfortunately today we received the news that the little monkey has died, for this reason I want to request the order of a new necropsy so that the habeas corpus is granted, we want to see the body, unfortunately because of this abrupt separation she could not continue with her life unleashing this painful feeling. [S]he died on October 9th, 2019 and the representatives of the Ministry of Environment did not communicate this, there has been procedural fraud, the hearing has been summoned, the appeal was filed to the court in which they appeared and they never communicated the death…. Estrellita is no longer a non-human person whose right to life we have come to protect, we request that Estrellita's body be handed over to her family in the state it is in, we request that the responsibility of the environment and the owner of the zoo be declared…we request that the violation of Estrellita right to life be declared, we request that a special protocol be created for the case of the restraint of live animals as sentient beings." (quoting Minutes of the Public Hearing at 142–43, Corte Constitucional del Ecuador [Constitutional Court of Ecuador] Feb. 21, 2020 Case File No. 18331-2019-00629.)).

[21] *Id*.

[22] *Id.* ¶ 134 ("In the case of the Estrellita chorongo monkey, due to the circumstances in which the wild animal was found and since there is no reason or allegation in the interspecies principle or ecological interpretation that justifies in the specific case the extraction or subtraction of a wild animal specimen, which then lived in circumstances or conditions not suitable to preserve its life and integrity, it is evident that it could be considered a violation of its rights to integrity and life (in its positive dimension), and, therefore, a violation of the rights of Nature in the specific case.").

[23] *Id.* ¶ 142 ("In the specific case, it is not observed that the environmental authority has examined or evaluated the particular circumstances of the Estrellita monkey to execute its "restraint" or "immobilization", but it was executed directly on September 11th, 2019 only taking care of the inviolability of domicile -since as a preparatory act it is observed that there was a search warrant from a Judicial Unit to enter Ana's house—, but it was not considered in any way the particular conditions of the Estrellita monkey nor the suitability of the measure of restraint or immobilization for the protection of the wild species."); *id.* ¶ 145 (indicating that the rights of Estrellita were violated "by omitting to consider the particular circumstances of the wildlife specimen.").

[24] *Id.* ¶ 154 ("[T]his Constitutional Court cannot overlook the fact that

the habeas corpus petition was dismissed as the Court reasoned that returning Estrellita from the zoo to Ana's house meant continuing to subject the animal to captivity.[25] The Court further established that Ana could not receive Estrellita's body because the corpse of a wild animal within *ex situ* (off-site) conservation must receive the corresponding sanitary treatment made only by the authorities and competent persons with sufficient scientific and technical knowledge.[26]

II. The Recognition of Individual Animals as Legal Subjects and Rights Holders in the Ecuadorian Legal System

Notwithstanding the ruling and the negative outcome for Ana, the main question in the *Estrellita* case was to determine whether animals are legal subjects in the Ecuadorian legal system. The Court rapidly resolved this question by pointing out that even though animals are different from humans, that does not mean that they are not legal subjects.[27] The innovation of the *Estrellita* case, in contrast to previous case law, is that, for the first time, the Court recognized individual animals as legal subjects under the Rights of Nature framework. In doing so, the Court appealed to the following reasons:

> [T]his Court is aware that the rights of Nature not only protect species but also a particular animal, since it would not be possible to recognize an intrinsic value to Nature as a whole and neglect the same value to its elements; and that to that extent, a wild animal should be protected and be free in its natural habitat.[28]
>
> This becomes relevant because protecting only the species of animals—neglecting the protection of individual animals, which in turn make up the species—

Estrellita's death was not due to natural causes, typical of the species. In other words, the physical conditions of the Estrellita monkey—malnutrition, body conditions resulting from an inadequate environment, stress levels, etc.—are the result of the actions or omissions of both Ana and the state entities involved in the administrative procedure in general, since such conditions are precisely because the wild animal was taken from its natural habitat, and did not have the minimum conditions to thrive, given its particular circumstances such as the human imprint, as established in the previous section.").

[25] *Id.* ¶ 172.

[26] *Id.* ¶ 177.

[27] *Id.* ¶ 83.

[28] *Id.* ¶ 125.

> endangers a significant number of animals and fuels the idea of the possibility of extinction. Even in the case of animals whose species is not endangered, neglecting or failing to protect individuals also has an impact.[29]

In other words, the Court used the following argumentative structure to recognize individual animals as legal subjects under the Rights of Nature: Ecuadorian case law already recognizes that Rights of Nature protect animal species;[30] animal species are composed of individual animals; what happens to one individual animal has an impact on the whole animal species; and, consequently, protecting Nature implies also protecting individual animals.[31] The Court also recognized that animals are different from other elements of the environment since animals are "sentient beings in a strict sense."[32] Under these

[29] *Id.* ¶ 126.

[30] Corte Constitucional del Ecuador [Constitutional Court of Ecuador] Nov. 10, 2021, Judgment No. 1149-19-JP/21 (Los Cedros Forest), ¶ 25.

[31] *Id.* For this argumentative structure the Court considered the amicus curiae brief presented by the Brooks McCormick Jr. Animal Law & Policy Program at Harvard Law School and the Nonhuman Rights Project that in its paragraph 4.10 stated that "Species are made up of individuals. Thinking only at the species level has fueled the extinction and endangerment of a significant number of animals. First, many animal species have few individuals left, [so] what happens to these individuals affects the [entire] species." Amicus Curiae Submitted by Harvard Law School Brooks McCormick Jr. Animal Law & Policy Program and the Nonhuman Rights Project at ¶ 4.10, Corte Constitucional del Ecuador [Constitutional Court of Ecuador] Jan. 27, 2022, Judgment No. 253-20-JH/22.

[32] When the Court addresses the issue of the sentience, it distinguishes between sentience in a broad sense and sentience in a strict sense. Sentience in a broad sense would refer to the general capacity of the biotic components of Nature, such as plants and animals, to perceive and respond to stimuli in their environment. On the other hand, sentience in the strict sense would refer to the ability of sentient beings to receive stimuli, process information and produce a specialized and subjectivized response. Corte Constitucional del Ecuador [Constitutional Court of Ecuador] Jan. 27, 2022, Judgment No. 253-20-JH/22, ¶¶ 85–86. It would be worth clarifying the difference between sentience in a broad sense and sentience in a strict sense, since such a categorization is not one commonly used in animal studies, so that the language used by the Court could lead to confusion at the time of application of norms. Thus, when the Court refers to sentience in the broad sense, it would be speaking of sensitivity, a polysemic concept that encompasses the faculty of feeling of animated beings, being that animated beings can be plants or bacteria that can move thanks to the nasties and the tropisms. When the Court refers to sentience in the strict sense, it would be talking about what the academic literature simply calls sentience, the ability to subjectively feel life experiences, such as life itself. According to Romero Campoy, the differentiation between sensitivity and sentience is important for morality and law. Thus, an ethics of sensitivity is aligned with purely welfarist policies because it establishes that we can painlessly kill animals for human benefit, however unnecessary. An ethics that defends sentience as a relevant moral fact, expands moral consideration to the very

considerations, the Court recognized that animals are legal subjects under the Rights of Nature.

With the declaration of animals as legal subjects and rights holders, the Court recognized a set of rights for wild animals. Given that this case was about a wild animal, the court did not discuss rights for domesticated animals, but this does not mean that domesticated animals are not rights-holders. The rights of wild animals the Court identified are the right to life,[33] the right to physical integrity,[34] the right to exist;[35] the right to not be hunted;[36] the right to free development of animal behavior;[37] the right to not be domesticated;[38] the right to not be the object of humanization processes or forced to assimilate human characteristics

lives of sentient animals. For a better understanding of the legal difference between sensibility and sentience, I suggest Daniel Romero Campoy, *Sensibilidad y sintiencia de los animales: una reforma poco clara del Código Civil* [Sensitivity and sentience of animals: an unclear reform of the Civil Code], el Diario (Mar. 12, 2022, 6:01 AM), https://www.eldiario.es/caballodenietzsche/sensibilidad-sintiencia-animales-reforma-codigo-civil_132_8821346.html.

[33] *Id.* ¶¶ 107, 131–32, 153, 155 (recognizing that in the same sense as the right to life for human beings, the right to life of wild animals has two dimensions: a negative dimension according to which the State is prohibited from attempting against life, and a positive dimension according to which the State has the obligation to establish a protection system that punishes any attack on life).

[34] *Id.* ¶¶ 107, 133–134, 145. The right to physical integrity is understood in the physical dimension of the animal: "Regarding the rights of wild animals, their integrity is protected mainly in connection with the physical dimension, which includes 'the preservation of all the body and the functions of its parts, tissues and organs.' Therefore, it is understood that actions that are detrimental to the conservation of the wild animal's body or that affect the functioning of its organs, violate this dimension of the right to integrity. Domestication, turning wild species into pets and their humanization are clear examples of acts that contravene the integrity of wild animals, as stated in the previous section." *Id.* ¶ 133.

[35] According to the Court, the Right to exist is the main right of wild animals, a right that also implies the Right not to be extinct for non-natural or anthropic reasons. It supposes the prohibition of carrying out activities that may lead to the extinction of species, the prohibition of the destruction of ecosystems, and the prohibition of the permanent alteration of their natural cycles. Corte Constitucional del Ecuador [Constitutional Court of Ecuador] Jan. 27, 2022, Judgment No. 253-20-JH/22 ¶ 111.

[36] The Court also recognized the right not to be hunted, fished, captured, collected, extracted, held, trafficked, marketed or bartered. *Id.* ¶ 112.

[37] *Id.* ¶ 112–13, 119, 124, 137 (including the prohibition of removing wild animals from their natural habitat for the convenience with or benefit of human beings; the right of animals to freely develop their cycles, processes, and biological interactions; and the right of wild animals to behave according to their instinct, to their innate behaviors of their species, to behave according to the behaviors transmitted among the members of their population). Could this be a recognition that animals can have culture?

[38] *Id.* ¶ 124.

or appearances;[39] the right to freedom;[40] the right to a good living;[41] the right to have a diet in accordance with the nutritional requirements of the species;[42] the right to live in harmony,[43] the right to health,[44] and the right to habitat.[45] According to the Court, these rights must be analyzed in accordance with two legal principles: the interspecies principle and the principle of ecological interpretation. Interpretative guidelines, this pair of principles set the boundaries for determining the meaning of the recognized rights.

On the one hand, the interspecies principle establishes that the guarantees and rights of animals have to take into account the characteristics of their respective animal species. The Court explained that some rights can only be guaranteed in relation to certain properties of a species; properties which ultimately determine which rights and legal protections will apply to each particular animal species.[46] For instance, according to the Court, the right to respect and conserve migratory routes is a right that can only be protected in those species of animals with migratory behaviors.[47] In this way, the interspecies principle guarantees protection for animals with specific attention to their characteristics, processes, life cycles, structures, functions, and evolutionary processes.[48]

On the other hand, the principle of ecological interpretation promotes respect for biological interactions that exist between species.[49] The Court recognized the importance of biological interactions as the foundation of the equilibrium of ecosystems and thus established that public authorities are legally obligated to ensure that biological interactions maintain their natural balance.[50] Those biological interactions include competition, amensalism, antagonism, neutralism, commensalism, and mutualism.[51] There are also those biological interactions in which some individuals benefit from others and some even cause harm and death[52] such as predation or parasitism.[53] Therefore, the rights of animals are not violated by acts that constitute biological interactions. For instance,

[39] *Id.* ¶¶ 112, 124.
[40] *Id.* ¶¶ 113 (as derived from the right to free animal behavior), 137, 147, 173.
[41] *Id.* ¶ 119.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* ¶ 89.
[47] *Id.* ¶ 99.
[48] *Id.* ¶ 98.
[49] *Id.* ¶ 100.
[50] *Id.* ¶ 105.
[51] *Id.* ¶ 101.
[52] *Id.*
[53] *Id.*

"when a predator kills its prey in compliance with the trophic chain, the right to life of an animal is not illegitimately violated."[54] In other words, the Court has considered biological interactions as legitimate restrictions on the rights of animals under the Rights of Nature.[55]

This was the first time that the Court applied a principle of ecological interpretation to address rights of nature. Nonetheless, a precursor to this principle is identifiable in the *principio ecológico de tolerancia* (ecological principle of tolerance), developed in the *Los Cedros* case. This principle of tolerance establishes a commitment to the protection of Nature's basic characteristics, life cycles, and biological interactions.[56] Both the ecological principle of tolerance and the ecological interpretation principle are based on the right to integral respect for existence and the right to the maintenance and regeneration of life cycles[57] that the Ecuadorian Constitution recognizes for Nature in Article 71.[58] It is important to consider how the Court established that the protection of ecological balance is also a component of the human right to a healthy environment.[59]

The judgment in the *Estrellita* case is binding jurisprudence with the same legal effect as the jurisprudence of the common law. Thus, its ruling has an effect on the whole Ecuadorian legal system. Future cases in Ecuador will be resolved according to the *Estrellita* case's ruling and principles.

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[54] *Id.* ¶ 102

[55] *Id.*

[56] In this regard, it is important to understand the ecological principle of tolerance, which holds that natural systems can only function adaptively within an environment whose basic characteristics have not been altered beyond what is optimal for that system. This principle is closely related to the right to the existence and reproduction of cycles, because as an environment is modified, the adaptive behavior of the ecosystem becomes more and more difficult and eventually impossible. For each characteristic of the environment (amount of rain, humidity, solar radiation, etc.) there are limits beyond which organisms can no longer grow, reproduce, and ultimately survive. In such a way that, when the level of tolerance, it is impossible to exercise the right to reproduce life cycles. Thus, a protective forest can cushion an impact within certain limits beyond which it would lose its structure and would not be able to continue exercising this right to reproduce its life cycles, as established in article 71 of the Constitution. Constitutional Court of Ecuador Nov. 10, 2021, Judgment No. 1149-19-JP/21, ¶ 44.

[57] *Id.*

[58] Constitución de la República del Ecuador Oct. 20, 2008, art. 71.

[59] The Constitution contemplates as part of this right (the right to a healthy environment) to have an ecologically balanced environment, since this means the interaction of the beings that inhabit the environment does not cause or endanger the existence of any of these beings or of the elements that are required for your life. In this environment, the human being also develops as a species that is part of the natural cycles and whose intervention can affect the desired balance. Constitutional Court of Ecuador Nov. 10, 2021, Judgment No. 1149-19-JP/21, ¶ 44.

III. The Reasons Why Rights of Nature is Not the Appropriate Framework for the Achievement of Animal Rights

The *Estrellita* case has received broad public attention due to its ruling. Many media outlets have announced that Ecuador is the first country where animals have legal rights.[60] Nonetheless, that announcement is not technically correct. The following analysis of the judgment will demonstrate that Rights of Nature is not the appropriate framework for the achievement of fundamental animal rights, because under this framework the rights of animals are subject to arbitrary restrictions. These restrictions have the effect of undermining the full realization of those supposed rights.

According to the Court, the rights of animals under the Rights of Nature must be analyzed from the principle of ecological interpretation, which implies respect for the biological interactions that each individual animal is part of. As was recognized by the Court, some biological interactions, such as predation or parasitism,[61] lead individuals to benefit from others by causing harm or death. According to the principle of ecological interpretation, such biological interactions must be respected regardless of their negative implications for individual animals.

Biological interactions include animal-animal and animal-environment interactions, such as "when a predator kills its prey in compliance with the food chain."[62] In cases such as these, according to the principle of ecological interpretation, "the right to life of an animal is not illegitimately violated."[63] This is how the Court established that biological interactions are a legitimate legal restriction on the rights of animals under the Rights of Nature.

Biological interactions also include human-animal interactions, and here is where questions arise. The following statement from the

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[60] *See* Rosie Frost, *Wild animals in Ecuador now have legal rights, thanks to a monkey named Estrellita*, euronews, https://www.euronews.com/green/2022/04/01/wild-animals-in-ecuador-now-have-legal-rights-thanks-to-a-monkey-named-estrellita (June 4, 2022); Olivia Lai, *Ecuador Becomes First Country to Recognise Animal Legal Rights*, Earth.Org (Apr. 4, 2022), https://earth.org/ecuador-becomes-first-country-to-recognise-animal-legal-rights/; *A Landmark Ruling for Animal Rights in Ecuador*, Nonhuman Rights (Mar. 23, 2022), https://www.nonhumanrights.org/blog/landmark-ruling-animal-rights-ecuador/; *Ecuador becomes first country to give legal rights to wild animals: What does this mean for conservation?*, Firstpost (Apr. 5, 2022, 16:48:10 IST), https://www.firstpost.com/world/ecuador-becomes-first-country-to-give-legal-rights-to-wild-animals-what-does-this-mean-for-conservation-10520351.html.

[61] Constitutional Court of Ecuador Nov. 10, 2021, Judgment No. 1149-19-JP/21, ¶ 101.

[62] *Id.* ¶ 102.

[63] *Id.*

Court draws attention: "as human beings are predators, and being omnivorous by Nature, their right to feed on other animals cannot be forbidden."[64] This means that animals can continue to be slaughtered for food even though Ecuador recognizes the rights of animals. Therefore, Ecuador justifies animals slaughtered for food as an unquestionable biological interaction.

Thus, the human interest in consuming animal protein has been declared a legitimate restriction on the rights of animals. This means the fundamental rights that the *Estrellita* case recognized, such as the right to life,[65] to physical integrity,[66] to exist,[67] and not to be hunted,[68] can be negated at any time.[69] Moreover, the *Estrellita* judgment has legitimized other forms of animal use by humans. The Court declared that domesticated animals can be used for transportation, clothing, footwear, and even recreation and leisure.[70] Wild animals can be captured for *ex situ* conservation;[71] that is, they can be placed in zoos, severely

[64] *Id.* ¶ 103.

[65] *Id.* ¶ 107, 131-32, 153, 155.

[66] *Id.* ¶ 107, 133-34, 145 (according to the Court, the right to physical integrity is understood in the physical dimension of the animal: [r]egarding the rights of wild animals, their integrity is protected mainly in connection with the physical dimension, which includes "the preservation of all the body and the functions of its parts, tissues and organs. Therefore, it is understood that actions that are detrimental to the conservation of the wild animal's body or that affect the functioning of its organs, violate this dimension of the right to integrity. Domestication, turning wild species into pets and their humanization are clear examples of acts that contravene the integrity of wild animals, as stated in the previous section).

[67] *Id.* ¶ 111.

[68] *Id.* ¶ 112.

[69] *See id.* ¶ 103 (indeed, the Court made reference at this point to the right to food, enshrined in Article 13 of the Ecuadorian and in International Human Rights instruments, as if the consumption of animals is part of that human right).

[70] *See id.* ¶ 108-09 (here, the breeding, fishing, hunting, and other practices that the Court considers as legitimate activities because they "reflect historical and maintained forms of interaction of the human species with the rest of the animal species; and respond to mechanisms that human beings have been developing and consolidating to ensure their own survival as a heterotrophic species that lacks the capacity to produce its own nutrients") (according to the Court, "the domestication of animals has served to enable humans to respond to threats to their physical integrity and the security of their possessions; to control pests that can endanger livestock, crops and human health; to provide transportation, help in work, for clothing and footwear; and even for recreation and leisure").

[71] *See id.* ¶ 149-50 (for the Court, in situ and ex situ conservation "enhance opportunities for environmental education, research and scientific development") (it was also noted that: "activities such as the extraction of parental stock are recognized, the purpose of which is to provide a reproductive specimen for ex situ management programs, in order to guarantee the survival of species that are affected by a reduction in their population size, restricted distribution, threatened with extinction, threatened by erosion of the national genetic heritage or any other cause, and those that cannot be maintained in situ").

restricting their right to freedom.[72] Invasive species can be exterminated in the name of ecosystem balance,[73] which means a restriction on their right to life, their physical integrity or right to exist, as well as their right to live in harmony[74] and their right to habitat.[75]

Restrictions on fundamental rights cannot be arbitrarily imposed. Some fundamental rights are considered absolute, as they may never be subject to limitations, even if there are compelling reasons to restrict them.[76] Nevertheless, most rights can be subject to restrictions, so long as they are exercised within limits on the rights of others. To protect these non-absolute rights, the fundamental rights theory establishes that no restriction can be imposed arbitrarily. Rather, restrictions to fundamental rights must satisfy three conditions: legitimacy by corresponding to a legitimate objective; legality by being in accordance with the law; and proportionality by being necessary for and suitable to the objectives pursued. This is the international standard for the restriction of rights, but in the *Estrellita* case, the Court did not evaluate any of the above-mentioned conditions for the restriction of rights.

Fundamental rights theory has never considered natural balance and biological interactions as restrictions or obstacles to the enjoyment of fundamental rights because the maintenance of the *status quo*[77] is not what rights do. For instance, the existence of viruses and bacterias in nature are not a justification for not carrying out vaccination campaigns as part of the right to health. Rights theory has the characteristic of ensuring moral progress, such as the prohibition of torture, declarations of freedoms, or the obligations of the State to carry out vaccination campaigns against natural but deadly diseases. To believe that what is natural is *per se* correct is to derive an ought from an is and to fall into a naturalistic fallacy. Naturalistic fallacies are usually contrary to

[72] *Id.* ¶ 113, 137, 147, 173.

[73] *See id.* ¶ 105 (the Court established that "when scientific, technical and ecological reasons so require, subject to applicable environmental regulations, the National Environmental Authority may carry out the necessary actions to control species populations, especially when it is a matter of eliminating invasive, exotic or introduced species that may endanger the balance of ecosystems").

[74] *Id.*

[75] *See id.* ¶ 92, 115, 119, 125.

[76] A right is absolute when it cannot be overridden in any circumstances so that it can never be justifiably infringed and it must be fulfilled without any exceptions. If an absolute right applies, it must be fulfilled, and infringement automatically amounts to a violation. The prohibition on torture or inhumane or degrading treatment or punishment contained in Article 3 of the European Convention on Human Rights is the most expounded and referred example of an absolute right. Natasa Mavronicola, *What is an 'Absolute Right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights*, 12 Hum. Rts L. Rev. 723 (2012).

[77] *See id.* ¶ 104 (the Court noted that public authorities are obliged to guarantee such biological interactions).

fundamental rights, like when a woman is obligated to have a child simply because she is physiologically able to, or when a homosexual couple is denied the right to marry or start a family simply because they cannot physiologically procreate on their own.

Rights of Nature is a framework aimed at protecting environments and their abiotic elements from pollution and overexploitation. The Rights of Nature were not framed to intentionally protect individuals with subjective interests. Protecting a mountain, river, or forest implies a necessary ecological interpretation that allows the maintenance of their integrity, natural balance, natural characteristics, or a pristine landscape. Protecting individuals, with subjective interests, is substantially different. Individuals claim a sphere of protection and fundamental rights that recognizes their autonomy and intangibility, going beyond what is natural. In the same way that one would not accept that biological interactions supersede human rights, one should not accept that biological interactions supersede the rights of animals.

Consequently, the recognition of rights for animals under the Rights of Nature does not constitute significant progress for animals. Rather, as the *Estrellita* case shows, rights for animals under the Rights of Nature remains a welfarist conservationist system. The ecological interpretation principle is of the same sort of problem as necessary/unnecessary suffering is for animal protection in welfarist regimes. Welfare regimes are focused on moderating the treatment of animals without questioning the legal status of animals. The focus is to avoid unnecessary suffering, but at the end of the day, under a justification of necessity, all kinds of animal use can be considered necessary, including the most trivial uses, such as sport hunting, entertainment, or testing for cosmetic products.[78] Within the Rights of Nature framework, the argument for protecting natural balance uses biological interactions in a similar way as the rhetoric to continue justifying the use of animals for human benefit.

If a theory of fundamental rights had been applied to the rights of animals in the *Estrellita* case, human interest in eating animals would not be a legitimate restriction to the right to life of animals.

[78] Cass R. Sunstein, Animal Rights: Current Debates and New Directions 115-16 (Cass R. Sunstein, et. al eds., 2005)(statement of Gary Francione)("Although we express disapproval of the unnecessary suffering of animals, nearly all of our animal use can be justified only by habit, convention, amusement, convenience, or pleasure. To put the matter another way, most of the suffering that we impose on animals is completely unnecessary…. [f]or example, the use of animals for sport hunting and entertainment purposes cannot, by definition, be considered necessary. Nevertheless, these activities are protected by laws that supposedly prohibit the infliction of unnecessary suffering on animals. It is certainly not necessary for us to wear fur coats, or to use animals to test duplicative household products, or to have yet another brand of lipstick or aftershave lotion.").

Rights theory is aimed to "erect the strongest of safeguards for the most vulnerable protecting subordinated groups from dominant groups." [79] In a fundamental rights regime, the interests of the majority with power cannot undermine the enjoyment of the rights of the weak, because rights are protections against the interests of others[80] and are limits on State power. On the contrary, the Rights of Nature framework does not provide animal rights protection against the interests of humans. No fair standard of restrictions is considered under the Rights of Nature framework, as occurs in rights for humans. Rather, the Rights of Nature framework offers a new argument for justifying the continued use of animals for human benefit.

Following a similar approach to welfarist regimes, the Rights of Nature framework puts animals in a residual category of consideration as hierarchically inferior to humans. This leads to the conclusion that the scheme of rights for animals under the Rights of Nature framework is legally different from the scheme of rights recognized for human beings.[81] For instance, the right to life recognized for humans under Article 66[82] of the Ecuadorian Constitution does not have the same legal structure and value that the right to life recognized for animals in the *Estrellita* judgment has.

Article 66 of the Ecuadorian Constitution recognizes several rights of persons, including: the right to the inviolability of life;the right to bodily, psychological, moral, and sexual safety; and the right to a life without violence. Article 66 also establishes prohibitions on torture, forced disappearance, and cruel, inhuman, or degrading treatments and punishments.[83] Nonetheless, all these fundamental freedoms remain exclusive to humans.[84] The rights for animals that the *Estrellita* judgment

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[79] Sue Donaldson & Will Kymlicka, Zoopolis: A Political Theory of Animal Rights 29 (Oxford Univ. Press, Inc., 2011).

[80] *See* Ronald Dworkin, Taking Rights Seriously (Harvard Univ. Press, 1977).

[81] Constitutional Court of Ecuador Nov. 10, 2021, Judgment No. 1149-19-JP/21, ¶ 45-48 (Corral Ponce, J., dissenting) (the grant of habeas corpus in the *Estrellita* case in favor of wild animals, is extremely excessive and contrary to the provisions of our constitutional text and the law on the matter, and habeas corpus is a guarantee that exclusively protects human dignity).

[82] Constitution, Oct. 20, 2008, ¶ 45-48 ("The following rights of persons are recognized and guaranteed: 1. The right to the inviolability of life. There shall be no capital punishment").

[83] Constitution, Oct. 20, 2008, at Article 66.

[84] The following rights of persons are recognized and guaranteed: 1. The right to the inviolability of life. There shall be no capital punishment. 2. The right to a decent life that ensures health, food and nutrition, clean water, housing, environmental sanitation, education, work, employment, rest and leisure, sports, clothing, social security, and other necessary social services. 3. The right to personal well-being, which includes: a) Bodily, psychological, moral, and sexual safety. b) A life without

recognized under the Rights of Nature framework does not provide inviolability of physical or mental integrity, so animals are not protected against slaughter or torture. Autonomy is not recognized either, so animals are not recognized as unique and irreplaceable beings, owners of their own lives, or beings that must be protected from the coercion or domination of others. The recognized rights are also not based on dignity or intrinsic value; rather, animals remain means to human ends. These are not the kind of rights that animal rights theory claims. On the surface, the *Estrellita* judgment gives the appearance of real recognition of rights for animals, but, in fact, only human beings continue being subjects of inviolable rights. For all the aforementioned reasons, the Rights of Nature framework is not an appropriate framework to achieve animal rights, and it should not be promoted for that end.

An analysis of the Rights of Nature within the Ecuadorian Constitution explains why, under the Rights of Nature framework, animals are not holders of inviolable rights; instead, animals remain resources. "Rights of Nature" is the title of Chapter VII of Title II, located alongside other chapters that only recognize rights of humans.[85] In this way, even when the Ecuadorian Constitution declares that humans are a part of Nature,[86] the Ecuadorian Constitution has two different kinds of rights: rights for human beings and rights for Nature and its elements. Therefore, in Ecuador there is a separation between rights for humans and rights for animals that reinforces the human/animal dualism that animal rights theory denounces.[87]

violence in the public and private sectors. The State shall adopt the measures needed to prevent, eliminate, and punish all forms of violence, especially violence against women, children and adolescents, elderly persons, persons with disabilities and against all persons at a disadvantage or in a vulnerable situation; identical measures shall be taken against violence, slavery, and sexual exploitation. c) Prohibition of torture forced disappearance and cruel, inhuman or degrading treatments and punishments. d) Prohibition of the use of genetic material and scientific experimentation that undermines human rights. Constitution, Oct. 20, 2008, at Article 66.

[85] Constitution, Oct. 20, 2008, at Chapter VII of Title II.

[86] Constitution, Oct. 20, 2008, at Preamble.

[87] In the same way that ecofeminist theories reject the dualisms in which women, animals, and nature are marginalized as the less-valued "other," the animal rights theory rejects the hierarchical characterization of animals as "things" in the "person/thing" dualism, where only humans are persons and rights holders. Gary Francione identifies the person/thing dualism as the foundation of all institutionalized animal exploitation that can only be overcome through the achievement of animal rights. Gary L. Francione, Animals as Persons Essays on the Abolition of Animal Exploitation, Columbia University Press, (2008) & Gary L. Francione, Rain Without Thunder: The Ideology of the Animal Rights Movement, Temple University Press (1996).

The Ecuadorian Constitution recognizes Nature as a legal person under an analogy to corporations rather than as mother earth, *Pacha Mama*.[88] The Rights of Nature framework continues operating within a notion of social rights and welfare that in turn is clearly based on a Western economic model that treats Nature as a mere provider of resources.[89] For this reason, Article 74 of the Ecuadorian Constitution establishes the right of human beings to benefit from the environment,[90] which includes benefiting from animals as elements of the environment.

According to the rhetoric, the declaration of the Rights of Nature's purpose is to recognize the intrinsic value of Nature and its elements, including animals; however, the ultimate outcome of the Rights of Nature framework is to serve humans with the healthiest environment possible to provide them welfare and economic growth. Rights of Nature necessarily clash with the right to development and other human rights, even the most fundamental ones, such as access to food, water, and sanitation. The same Special Rapporteur on the right to a healthy environment declared that human rights do not require untouched ecosystems.[91] This is because economic and social development depends on them, for instance, the conversion of natural ecosystems into human-managed ecosystems such as pastures and cropland.[92] Recognizing this fact, Article 407 of the Ecuadorian Constitution prohibits the extraction of non-renewable resources in protected areas and allows the President of Ecuador to lift the ban with consent of the national assembly.[93] As a

[88] Manzano, *supra* note 5, at 52.

[89] *Id.* at 54 ("Ecuador cannot escape from taking part in the process of capitalist accumulation, because it requires foreign investment and foreign consumption of its raw materials to provide economic opportunity for Ecuadorians." The author adds: "the Rights of Nature occupy a strange place against a backdrop of social demands for more exploitation").

[90] Constitution, Oct. 20, 2008, at Article 74 ("Persons, communities, peoples, and nations shall have the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living. Environmental services shall not be subject to appropriation; their production, delivery, use and development shall be regulated by the State").

[91] A/HRC/34/49 Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, (Jan. 19, 2017), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/009/97/PDF/G1700997.pdf?OpenElement*.

[92] *Id.* ("Human rights law does not require that ecosystems remain untouched by human hands. Economic and social development depends on the use of ecosystems, including, in appropriate cases, the conversion of natural ecosystems such as old-growth forests into human-managed ecosystems such as pastures and cropland. To support the continued enjoyment of human rights, however, this development cannot overexploit natural ecosystems and destroy the services on which we depend.").

[93] Constitution, Oct. 20, 2008, at Article 407 ("Activities for the extraction of nonrenewable natural resources are forbidden in protected areas and in areas declared intangible assets, including forestry production. Exceptionally, these resources can

consequence, the final decision about the intangibility of Nature rests with the President and the national assembly, not with the supposed inherent value of Nature.[94] Therefore, the fact that animals continue to be resources for humans after the *Estrellita* judgment is not a surprise.

Additionally, two other flaws in the *Estrellita* ruling can be questioned. The *Estrellita* judgment is quite rich in biological concepts, so it is surprising that the Court reduced the concept of wild animals to "those that have not been domesticated by humans."[95] The Court embraced the traditional binary concept of wild/domesticated, a categorization of animals that is currently being overcome to consider new categories, such as synanthropic, feral, and other classes of liminal animals,[96] whose legal statuses are still unclear. In addition, the recognition of the right to the free development of animal behavior, according to which wild animals have a pattern of behavior typical of their species that the State has to protect, could be detrimental to animals. The respect, protection, and empowerment of the unique forms of life and flourishing indicative to each species[97] is a plausible outcome. Nevertheless, to consider animals from a pure species-specific approach, "in which each individual is only perceived as a token of its inexhaustible" type,[98] is a mistake. Each animal, if recognized as an individual, has unique forms of flourishing and behavior outside of the species-standard that should be addressed on a case-by-case basis, at least in judicial decisions. The recognition of animals as sentient beings and rights holders implies their recognition as individuals, as long as the rights recognized are based on autonomy as is done with human rights.

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be tapped at the substantiated request of the President of the Republic and after a declaration of national interest issued by the National Assembly, which can, if it deems it advisable, convene a referendum").

[94] Manzano, *supra* note 5, at 54.

[95] Constitutional Court of Ecuador Nov. 10, 2021, Judgment No. 1149-19-JP/21, ¶ 111.

[96] Donaldson & Kymlicka, *supra* note 75, at 210 (proposing the term liminal animals to refer to animals whose status is neither wilderness animals nor domesticated animals. These animals, who live amongst humans, even in the heart of the cities and inside of our houses, represent a large variety of non-domesticated species who have adapted to life amongst humans. Some examples of liminal animals are "squirrels, raccoons, rats, starlings, sparrows, gulls, peregrine falcons, and mice;" but also, suburban animals, such as "deer, coyotes, foxes, skunks, and countless others").

[97] Bjørn Ralf Kristensen, *Rethinking Domestication Pathways in the Context of Anthrodependency,* Medium (Mar. 30, 2022), https://medium.com/@bjornkristensen/rethinking-domestication-pathways-in-the-context-of-anthrodependency-9020006ea391.

[98] Matthew Chrulew, *Managing Love and Death at the Zoo: The Biopolitics of Endangered Species Preservation*, 50 Australian Human.'s Rev. (May, 2011), http://australianhumanitiesreview.org/2011/05/01/managing-love-and-death-at-the-zoo-the-biopolitics-of-endangered-species-preservation/.

IV. The Positive Outcomes from the *Estrellita* Case and the Symbolic and Instrumental Value that Could Benefit Animals

I have argued that the Rights of Nature framework is not an appropriate path for the achievement of fundamental rights for animals. The Rights of Nature framework has to be carefully studied through animal rights theory and carefully applied to the animal issue.[99] However, the Rights of Nature framework can be a practical legal tool to be used on behalf of animals.[100]

To begin with, the Rights of Nature framework uses the value-laden Nature of the Constitution and other important legal texts that carry significant symbolic weight.[101] Even when animals only enjoy the Rights of Nature with the aforementioned defects, the sole declaration of those 'supposed' fundamental rights is an achievement for animals given the strong symbolic value that the language of rights has in Western political culture.[102] To recognize animals as legal subjects and rights-holders is powerful as a political declaration that can lead to the recognition of animal rights by their own value, independently from the Rights of Nature framework.

With the recognition of animals as legal subjects, the Constitutional Court of Ecuador has overcome the false idea that only human beings can be rights holders.[103] and with this recognition of animals as subjects, there is no space for the false idea that the holding of rights is necessarily conditioned on the capacity of the right-holder to bear legal obligations. Also, the Court has mentioned that the list of rights that the *Estrellita* case recognizes for wild animals is a *numerus apertus* catalog of rights.[104] Thus, the guarantee of rights will progressively include new rights that, although not explicitly contemplated in the *Estrellita* judgment, will be identified from its interpretation or the interpretation of the Rights of Nature and other normative provisions.[105] The same is true in relation to the recognition of rights for other categories of animals that the *Estrellita* case did not address.

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[99] Kristen Stilt, Note, *Rights of Nature, Rights of Animals*, 134 Harv. L. Rev. F. 276, 285 (2021) ("[Rights of Nature] do not offer a model to be copied wholesale, but instead call for careful study of the parallels and points of disconnection, of the commonalities and the conflicts, with the potential for significant results").

[100] *Id.* (arguing that the Rights of Nature framework can be "instructive to the cause of animal rights, intellectually and practically").

[101] Visa Kurki, *Can Nature Hold Rights? It's Not as Easy as You Think*, Helsinki Legal Studies Research Paper No. 66, May 14, 2021, at 3.

[102] Manzano, *supra* note 5, at 57.

[103] Constitutional Court of Ecuador Nov. 10, 2021, Judgment No. 1149-19-JP/21, ¶ 89.

[104] *Id.* ¶ 95.

[105] *Id.* ¶ 96.

Paragraph 78 of the *Estrellita* judgment is valuable in pointing out that, "although the recognition of animals as subjects of rights is the most recent phase in the development of their legal protection, it does not mean that this is a finished phase free of progression and perfection."[106] In such a way, a future recognition of rights for animals based on sentience, intrinsic value, dignity, or another legal foundation different from the Rights of Nature framework could overcome the aforementioned defects of the *Estrellita* judgment.

The interspecies principle is a first step towards the recognition of inherent rights for animals, as this principle applies a capabilities approach. According to the interspecies principle, the rights for animals will correspond to their specific needs, characteristics, functions, or evolutionary processes.[107] In the *Estrellita* case, this principle seems to consider solely those characteristics in relation to the animal species.[108] Nevertheless, a more progressive interpretation of this principle will lead to the consideration of animals as individuals and consideration of their individual preferences, experiences, fears, choices, needs, and context.

There is also an instrumental value in the Rights of Nature framework that has benefited animals in Ecuador. This is because the Rights of Nature framework treats legal personhood and standing as a tool for environmental protection and, in this case, for the protection of animals.[109] At the time of the *Estrellita* case, the only legal tools to protect animals in Ecuador were the provisions for the Rights of Nature established in the Constitution, as Ecuador does not have an animal protection or animal welfare act to date.[110]

The judgment in the *Estrellita* case made possible the protection of individual animals, as the Court stated that, "the Rights of Nature not only protect species but also a particular animal, since it would not be possible to recognize an intrinsic value to Nature as a whole and neglect the same value to its elements."[111] The Court also recognized the protection of animals even in the case of animals whose species are not endangered.[112]

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[106] *Id.* ¶ 78.

[107] *Id.* ¶ 98.

[108] *Id*. ¶ 98-99.

[109] Kurki, *supra* note 99, at 2.

[110] *LA DEFENSORÍA DEL PUEBLO DE ECUADOR PRESENTÓ EL PROYECTO DE LEY PARA GARANTIZAR LOS DERECHOS DE LOS ANIMALES EN EL ECUADOR*, Defensoría del Pueblo Ecuador (Aug. 19, 2022, 7:27 PM), https://www.dpe.gob.ec/la-defensoria-del-pueblo-de-ecuador-presento-el-proyecto-de-ley-para-garantizar-los-derechos-de-los-animales-en-el-ecuador/.

[111] Constitutional Court of Ecuador Nov. 10, 2021, Judgment No. 1149-19-JP/21, ¶ 125.

[112] *Id.* ¶ 126.

As a necessary part of the recognition of fundamental legal rights, the Court has recognized to animals standing to sue, pointing out that animals have the power to exercise, promote, and demand their rights before the competent authorities.[113] Thus, the rights of Nature are fully justiciable through jurisdictional guarantees, and any person can bring suit on behalf of animals.[114] Habeas corpus can be used in favor of animals, because, according to the Court, no prohibitory or mandatory rule determines that this jurisdictional guarantee cannot protect the rights of animals under the Rights of Nature.[115] In the same way as habeas corpus, other constitutional processes are available for the vindication of the rights of animals under the Rights of Nature, such as habeas data or writs of Amparo. These constitutional processes are faster and have priority over civil, administrative, and criminal processes, as they are dealing with constitutional and fundamental rights. With the recognition of access to justice, the Court has also recognized other procedural rights for animals, such as the right to seek redress and the right to demand enforcement. In general, procedural rights for animals are particularly important as private standing (animals represented by legal guardians) will decentralize both legal animal protection and the demand for enforcement that typically are at the hands and sole discretion of public authorities.[116]

Given that the Court declared the violation of Estrellita's rights, it ordered various national authorities in Ecuador to implement policy measures on behalf of animals as a form of reparation for Estrellita. The Court ordered the Ministry of Environment to create, within a period of

[113] The Court emphasized that the capacity of animals as subjects and holders of rights contemplates, namely, the powers to exercise, promote and demand before the competent authorities their rights understood under the principles of interspecies and ecological interpretation, through the mechanisms established in our current legal system; hence, the rights of wild animals, such as Estrellita, the chorongo monkey, are fully justiciable. For all these reasons and having determined the scope of the rights of Nature, the second problem of this first part of the analysis is answered positively, i.e., that the rights of Nature include the protection of a wild animal such as a chorongo monkey. *Id.* ¶ 121.

[114] *Id.* ¶ 157.

[115] The Court established that: there is no forbidding or mandatory rule in the Constitution or in the LOGJCC [Law of Jurisdictional Guarantees And Constitutional Control] that determines that the rights of Nature cannot be protected under a certain jurisdictional guarantee (prohibition) or that they can only be protected by a specific jurisdictional guarantee (mandate). Hence, the appropriateness of the jurisdictional guarantees according to the type of action, must be verified by the jurisdictional operators from the particularities of the specific case and the purpose of the specific guarantees, and never "prima facie" without observing the pretensions and rights whose protection is demanded. *Id.* ¶ 164.

[116] Saskia Stucki, *Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights*, 40(3) Oxford J. Legal Stud., 533–60 (2020).

up to sixty days, a protocol to guide the actions of the environmental officials to address protection of wild animals in captivity, mainly those that will be subject to confiscation, taking into account the particular situations of the animal.[117] The Court ordered the Ombudsman's Office to prepare, within six months, a bill on animal rights with the participation of civil society and technical organizations.[118] Once the bill is finalized and presented to the legislature, the National Assembly must debate and approve a law on animal rights that respects the rights and principles established and recognized in the *Estrellita* judgment.[119]

[117] To order the Ministry of Environment: I. To create, within a period of up to 60 days and with the support of the Ombudsman's Office, a protocol or regulation to guide the actions of the Ministry for the protection of wild animals, mainly those that will be subject to seizure or restraint, restrictions on the free locomotion of animals in order to evaluate the particular situations of the specimen and adopt appropriate measures to protect it and its species, in accordance with the standards set in this ruling. II. To issue, within a term of up to 60 days, a normative resolution that determines the minimum conditions to be met by animal keepers and caretakers in accordance with the minimum criteria or parameters of this final judgment, particularly the appreciation of such animals as subjects of rights with intrinsic value. *Id.* § VI.

[118] To order the National Assembly and the Ombudsman's Office: I. That the Ombudsman's Office, in a participatory process and with the support of technical organizations, prepare within a period of up to six months a bill on animal rights, in which the rights and principles developed in this final judgment are included, including the minimum criteria or parameters established. II. That the National Assembly, within a term of up to two years, debate and approve a law on animal rights, in which the rights and principles developed in this final judgment are included, including the minimum criteria or parameters established. The term will be counted from the moment the bill is received from the Ombudsman's Office. *Id.*

[119] To order the National Assembly and the Ombudsman's Office:… II. That the National Assembly, within a term of up to two years, debate and approve a law on animal rights, in which the rights and principles developed in this final judgment are included, including the minimum criteria or parameters established. The term will be counted from the moment the bill is received from the Ombudsman's Office. *Id.*

Still Strictly for the Birds II: Reviewing the Southern District of New York's Decision to Vacate an Agency Opinion

Max Birmingham

I. Introduction

The Migratory Bird Treaty Act ("MBTA") is a strict liability statute that carries criminal penalties for any act that "takes" or "kills" a migratory bird. Federal courts across the nation have long disagreed over whether the MBTA applies to actions that incidentally take migratory birds; thus, depending on where it happens, taking a migratory bird while conducting otherwise lawful activities could mean exposure to criminal liability or no liability at all.[1]

In the first Article, *Strictly for the Birds: The Scope of Liability Under the Migratory Bird Treaty Act* (hereinafter "*Strictly I*"), the Author argued that the MBTA should be interpreted broadly in order to better protect the migratory birds.[2] Specifically, that the definitions of "take" and "kill" include incidental activities.[3] The other side of the coin is that said definitions are to be narrowly interpreted and only include activities aimed at birds.[4] In July 2017, *Strictly I* was published. In

[1] *See* Barry M. Hartman et al., *Where You Operate Matters: The Fifth Circuit Widens Split on MBTA Liability*, K&L Gates (Sept. 14, 2015), https://www.klgates.com/Where-You-Operate-Matters-the-Fifth-Circuit-Widens-the-Split-on-MBTA-Liability-09-14-2015.

[2] Max Birmingham, *Strictly for the Birds: The Scope of Strict Liability Under the Migratory Bird Treaty Act*, 13 Animal & Nat. Res. L. Rev. 1 (2017) ("Although some courts have done so by analogizing to the hunting provisions in the MBTA, these courts are actually just engaging in commercial protectionism. *The aforementioned courts rely upon a narrow definition of 'take' in order to limit the scope of the MBTA. The MBTA should be interpreted broadly.* The MBTA was enacted with the purpose of protecting migratory birds from harm. To interpret the MBTA in a narrow scope is incongruent with the meaning and intent of the statute. A narrow reading of the MBTA would effectively render the statute toothless.") (emphasis added); *see also* United States v. Apollo Energies, Inc., 611 F.3d 679, 681–82 (10th Cir. 2010) ("The MBTA…*does not require any particular mental state or mens rea to violate the statute.* See 16 U.S.C. § 707(a). The question this case presents is whether the MBTA constitutionally can make it a crime to violate its provisions absent knowledge or the intent to do so.") (emphasis added).

[3] *Id.*

[4] United States v. CITGO Petroleum Corp., 801 F.3d 477, 490 (5th Cir. 2015) ("Congress well knew how to expand 'take' beyond its common-law origins to include accidental or indirect harm to animals.").

December 2017, then-Principal Deputy Solicitor Daniel Jorjani issued a memorandum (M-37050) which held that the MBTA does not prohibit the accidental or "incidental" taking or killing of migratory birds.[5]

Subsequently, this matter came before the United States District Court for the Southern District of New York ("S.D.N.Y."), and the court reached a similar conclusion to that argued in *Strictly I*.[6] Notwithstanding, the court did not have jurisdiction to reach a decision on the merits.[7] In *Natural Resources Defense Council v. U.S. Dep't of the Interior* ("*NRDC II*"), the S.D.N.Y. engaged in judicial activism[8] by issuing an advisory opinion.[9] Federal courts cannot write "an advisory opinion on an advisory opinion."[10] Moreover, it is not clear that the plaintiffs (environmental interest groups and various states) had standing to bring this action.[11] "Standing is one of the doctrines that define the power of the federal judiciary. Federal courts cannot hear all disputes. Instead, Article III authorizes them to resolve only 'cases' and 'controversies.'"[12] The opinion of *NRDC II* makes no mention of any injury suffered by the moving parties.

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[5] Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 478 F. Supp. 3d 469, 474 (S.D.N.Y. 2020).

[6] *Id.* at 471–72 ("It is not only a sin to kill a mockingbird, it is also a crime. *That has been the letter of the law for the past century.*") (emphasis added).

[7] Am. Fed'n of Gov't Emps. v. Off. of Special Couns., 1 F.4th 180, 182 (4th Cir. 2021) ("*No matter how interesting or elegant a party's argument, the federal courts have no power to breathe life into disputes that come to us without it.*") (emphasis added).

[8] *Judicial Activism*, Black's Law Dictionary (11th ed. 2019) ("A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent.").

[9] *Advisory Opinion*, Black's Law Dictionary (11th ed. 2019) ("Federal courts are constitutionally prohibited from issuing advisory opinions by the case-or-controversy requirement, but other courts, such as the International Court of Justice, render them routinely."). The Article propounds that the plaintiffs did not have standing to bring forth their claims in Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior [hereinafter *NRDC II*], 478 F. Supp. 3d 469, 474 (S.D.N.Y. 2020). *See Flast v. Cohen*, 392 U.S. 83, 95 (1968) ("Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question,when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action.").

[10] *Am. Fed'n of Gov't Emps.*, *supra* note 5, at 182–83 ("*But this court has no authority to write an advisory opinion on an advisory opinion.*") (emphasis added).

[11] *NRDC*, 478 F. Supp. 3d at 474–75.

[12] U.S. Const. art. III, § 2, cl. 1.

This issue has become a political and legal battleground.[13] An intriguing aspect is that there were no active cases at the time of writing. Moreover, the fines issued for MBTA violations are relatively minor.[14] Nevertheless, it was considered a victory for President Joe Biden,[15] as the directive of M-37050 can arguably be seen as a "parting gift" to the oil and gas industry by President Donald Trump.[16]

II. Scienter Requirement

a. Natural Resources Defense Council v. U.S. Department of the Interior

In *NRDC II*, the court conveniently does not discuss in-depth the scienter requirement argument around the MBTA,[17] but does make

[13] *See generally* Maxine Joslow, *Biden officials finalize a rule making it harder to kill birds, reversing Trump*, Wash. Post (Sept. 29, 2021, 1:49 P.M.), https://www.washingtonpost.com/climate-environment/2021/09/29/migratory-bird-treaty-act-biden/, (note how the President Biden (Democrat) and President Trump (Republican) both figure prominently in the headline); *see also* Juliet Eilperin and Sarah Kaplan, *Trump officials move to relax rules on killing birds*, Wash. Post (Nov. 27, 2020, 10:33 A.M.), https://www.washingtonpost.com/climate-environment/2020/11/27/migratory-bird-treaty-act/; Lisa Friedman, *Trump Administration Moves to Relax Rules Against Killing Birds*, N.Y. Times (Jan. 30, 2020), https://www.nytimes.com/2020/01/30/climate/trump-bird-deaths.html; Maxine Joselow, *Biden officials finalize a rule making it harder to kill birds, reversing Trump*, Wash. Post (Sept. 29, 2021, 1:49 P.M.), https://www.washingtonpost.com/climate-environment/2021/09/29/migratory-bird-treaty-act-biden/.

[14] United States v. Apollo Energies, Inc., 611 F.3d 679, 681–82 (10th Cir. 2010) ("The MBTA also specifies a maximum penalty of $15,000 and six months in prison for a misdemeanor violation.…Apollo was fined $1,500 for one violation, and Walker was fined $250 for each of his two violations."); *see also* United States v. FMC Corp., 572 F.2d 902, 908 (2d Cir. 1978) (Defendant was fined $100 on each of the 18 counts, but the fine was remitted on all but 5 counts.").

[15] Lisa Friedman and Catrin Einhorn, *Biden Administration Restores Bird Protections, Repealing Trump Rule*, N.Y. Times (Sept. 29, 2021), https://www.nytimes.com/2021/09/29/climate/biden-birds-protection.html.

[16] Lisa Friedman, *Trump Administration, in Parting Gift to Industry, Reverses Bird Protections*, N.Y. Times (Jan. 5, 2021), https://www.nytimes.com/2021/01/05/climate/trump-migratory-bird-protections.html; Lisa Friedman, *A Trump Policy 'Clarification' All but Ends Punishment for Bird Deaths*, N.Y. Times (Dec. 24, 2019), https://www.nytimes.com/2019/12/24/climate/trump-bird-deaths.html.

[17] Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 478 F. Supp. 3d 469, 477 (S.D.N.Y. 2020) ("That said, the Jorjani Opinion relies heavily on two judicial decisions that slice the MBTA along more pure *actus reus* lines."); *id.* at 477–78 ("With the benefit of *CITGO*, *Mahler*, and Interior's present view in its briefs, and because the Jorjani. Opinion [sic] is less than precise, the Court will accept Interior's formulation of the Opinion for the purpose of deciding the motions for summary judgment. The Court will thus assume going forward that the Jorjani Opinion only

several eyebrow-raising statements. The opinion boldly proclaims that "[w]hile *FMC* does not control this case, the statute's unambiguous text does." Additionally, by declaring that the MBTA's text is unambiguous,[18] Judge Caproni is completely ignoring the current circuit split.[19]

United States v. FMC Corp. ("*FMC*") refers to the Second Circuit case which held that the MBTA is a strict liability statute.[20] The court is completely ignoring the law of the circuit doctrine.[21] District courts must follow the decisions of their respective circuits.[22] The S.D.N.Y. is located within the Second Circuit, and therefore must conform to Second Circuit precedent. Yet opportunistically, the court cites court decisions from the Fifth Circuit and the Southern District of Indiana,[23] which is located within the Seventh Circuit. Therefore, these two aforementioned courts are not binding on the S.D.N.Y.

Furthermore, the *FMC* court offered reasoning that is anathema to the lower *NRDC II* court, and is congruent with M-37050. The Second Circuit held that "[i]mposing strict liability on FMC in this case does not dictate that every death of a bird will result in imposing strict criminal liability on some party."[24] The court went on to elucidate that

limits the MBTA to actions 'directed at' birds in the sense that hunting birds, poaching birds, throwing rocks at birds, pressure washing bird nests off a bridge, or setting poison traps for birds are activities 'directed at' birds. Defs.' Mem. of Law at 1–2, 12, 16, 18–19, 22, 24, 29, 33, 39; *see, e.g.*, AR 41, 82."). Due to the strong medicine which plaintiffs were seeking (universal vacatur), it is peculiar that a Federal District Court would acknowledge rulings by Federal Circuits and effectively overrule them.

[18] *Id.* at 485 ("First, because the statute is unambiguous, . . .").

[19] Newton City Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997) ("Thus, we agree with the Ninth Circuit that the ambiguous terms 'take' and 'kill"' in 16 U.S.C. § 703 mean 'physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918.' Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302 (9th Cir. 1991); *accord* Mahler v. U.S. Forest Serv., 927 F. Supp. 1559, 1573–74 (S.D. Ind. 1996); Citizens Interested in Bull Run, Inc. v. Edrington, 781 F.Supp. 1502, 1509–10 (D. Or. 1991)."); *see* Max Birmingham, *Strictly for the Birds: The Scope of Strict Liability Under the Migratory Bird Treaty Act*, 13 Animal & Nat. Res. L. Rev. 1, 4–8 (2017) (detailing the current circuit split in section "III. Current State of the Law").

[20] United States v. FMC Corp., 572 F.2d 902, 908 (2d Cir. 1978).

[21] Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, Marq. L. Rev. 1401, 1406 (2020) ("Traditionally understood as a tool to help manage increasing caseloads, the law of the circuit doctrine plays an underappreciated role in the development and persistence of conflicts in the federal courts.").

[22] Reiser v. Residential Funding Corp., 380 F.3d 1027, 1029 (7th Cir. 2004) ("Just as the court of appeals must follow decisions of the Supreme Court whether or not we agree with them…so district judges must follow the decisions of th[e] court [of appeals] whether or not they agree.") (citations omitted).

[23] *NRDC*, 478 F. Supp. 3d 469, 479 (S.D.N.Y. 2020).

[24] United States v. FMC Corp., 572 F.2d at 905, 908 (1978).

MBTA does not apply to all incidental takes.[25] "Certainly construction that would bring every killing within the statute, such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly, would offend reason and common sense."[26] In harmony with the Second Circuit's decision, M-37050 plainly states that incidental takes, which are not the purpose of the activity, are outside the scope of the MBTA.[27] The *NRDC II* court freely admits this.[28]

Beguilingly, the *NRDC II* court explicates that M-37050 pertains to the *actus reus* activities "directed at" birds[29] and leans on two court decisions,[30] neither of which is *FMC*. This is because said courts are persuasive authority, not binding authority. Notwithstanding, the court dodges the Interior Department's arguments and instead uses strawman arguments ("hunting birds, poaching birds, throwing rocks at birds, pressure washing bird nests off a bridge, or setting poison traps for birds are activities "directed at" birds")[31] in order to promote its agenda.[32] There may be instances where some of the aforementioned examples were not "directed" (to take or kill) birds. For instance, one man has a job to shoot at birds to keep them off a toxic pit, not to take or kill them.[33]

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[25] *Id.* at 905 ("Where there is no help to be had from legislative history or decisional authority, as in this specific situation, resort must be had to a rule of reason or even better, common sense.").

[26] *Id.*

[27] U.S. Dep't of the Interior, Office of the Solicitor, Memorandum M-37050, 1 ((Dec. 22, 2017) ("Unless permitted by regulation, the MBTA prohibits the 'taking' and 'killing' of migratory birds. 'Incidental take' is take that results from an activity, but is not the purpose of that activity.").

[28] *NRDC*, 478 F. Supp. 3d at 475 ("*Interior, by contrast, argues that the Jorjani Opinion interprets only the actus reus of the MBTA (those acts or behaviors that the statute prohibits and that can result in criminal penalties) by limiting its coverage to activities that are 'directed at' birds.*").

[29] *Id.* at 477–78 ("The Court will thus assume going forward that the Jorjani Opinion only limits the MBTA to actions 'directed at' birds in the sense that hunting birds, poaching birds, throwing rocks at birds, pressure washing bird nests off a bridge, or setting poison traps for birds are activities 'directed at' birds. Defs.' Mem. of Law at 1–2, 12, 16, 18–19, 22, 24, 29, 33, 39; *see*, *e.g.*, AR 41, 82.").

[30] *Id.* at 477 ("That said, the Jorjani Opinion relies heavily on two judicial decisions that slice the MBTA along more pure *actus reus* lines.") (citing United States v. CITGO Petroleum Corp., 801 F.3d 477 (5th Cir. 2015); Mahler v. United States Forest Service, 927 F. Supp. 1559 (S.D. Ind. 1996).).

[31] *Id.*

[32] *See* Max Birmingham*, Whistle While You Work: Interpreting Retaliation Remedies Available to Whistleblowers in the Dodd-Frank Act*, 13 Fla. A&M U.L. Rev. 1, 15 (2017) ("[T]he district court employs judicial activism by masquerading flawed reasoning in order to misinterpret [a term in a statute] broadly for the purpose of promoting a public policy agenda.").

[33] Insider Business, *Meet The Man Who Shoots At Birds All Day To*

It is conceivable that there may be a misfire or bad aim, and said man accidentally shoots and kills a bird. Alternatively, if the man abdicates his duties and lets the birds land on the toxic pits, there is a chance they may die.[34] In *FMC*, the Second Circuit held that there are certain instances where birds may die, but it does not give rise to liability under the MBTA.[35] Conceivably, this could occur where certain activities may be "directed at" birds.[36] Nevertheless, the *NRDC II* opinion expands liability beyond what the *FMC* court held.

The S.D.N.Y. issued a "universal vacatur."[37] While it claims that there is nothing in the text of the legislation to support the Interior Department's position, other courts disagree. In *United States v. Ray Westall Operating, Inc.*, the United States District Court for the District of New Mexico held that Congress did not intend to prohibit acts that incidentally and proximately kill and take birds.[38] The court agreed with

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Keep Them Off A Toxic Pit, YouTube, (Nov. 24, 2021), https://www.youtube.com/watch?v=qtlPTE-UmY4.

[34] United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202, 1203 (D.N.D. 2012) ("The charges are Class B misdemeanors. Defendant Brigham Oil & Gas, L.P. ('Brigham Oil') is charged with 'taking' (killing) two migratory birds found dead near one of its reserve pits. Defendant Newfield Production Company ('Newfield Production') is charged with 'taking' four migratory birds found dead on property located adjacent to one of its reserve pits. Defendant Continental Resources, Inc. ('Continental Resources'), is charged with 'taking' one migratory bird found dead near one of its reserve pits. Three other defendants are also accused of 'taking' migratory birds found dead near their respective reserve pits."); *Threats to Birds*, U.S. Fish & Wildlife Serv., https://www.fws.gov/library/collections/threats-birds (last visited Mar. 22, 2023) (according to the Fish and Wildlife Service, oil pits kill an average of 750,000 birds a year).

[35] United States v. FMC Corp., 572 F.2d 902, 905, 908 (2d Cir. 1978).

[36] *See, e.g.*, United States v. Apollo Energies, Inc., 611 F.3d 679, 682 (10th Cir. 2010) ("*We conclude the district court correctly held that violations of the MBTA are strict liability crimes*. After carefully examining the trial record, we agree Apollo proximately caused the taking of protected birds, but with respect to one of his two convictions, Walker did not. *Due process requires criminal defendants have adequate notice that their conduct is a violation of the Act.*") (emphasis added).

[37] *See* Office of the Att'y Gen., Memorandum from the to the Heads of Civil Litigating Components U.S. Attorneys, Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions 7–8 (Sept. 13, 2018) [hereinafter Litigation Guidelines].

[38] United States v. Ray Westall Operating, Inc., No. CR 05-1516-MV, 2009 WL 8691615, at *7 (D.N.M. Feb. 25, 2009) ("The Court finds that it is highly unlikely that Congress intended to impose criminal liability on every person that indirectly causes the death of a migratory bird. The Court concludes that Congress intended to prohibit only conduct directed towards birds and did not intend to criminalize negligent acts or omissions that are not directed at birds, but which incidentally and proximately cause bird deaths.") (citing Robbins v. Chronister, 435 F.3d 1238, 1241 (10th Cir. 2006) ("When statutory language reasonably admits of alternative constructions, there is nothing remarkable about resolving the textual ambiguity against the alternative

the S.D.N.Y. that the plain language of the MBTA does not extend this prohibition.[39] The District of New Mexico did not engage in judicial activism[40] because the MBTA is ambiguous.[41] To reiterate, the *NRDC II* court is willfully blind to this.[42] Withal, the United States District Court for the Southern District of Indiana blatantly rejected the Second Circuit's interpretation of the MBTA.[43] Notwithstanding, because the

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meaning that produces a result the framers are highly unlikely to have intended.")).

[39] *Id.* at *6 ("There is no language in the MBTA expressly extending the prohibition against killing migratory birds to acts or omissions that are not directed at migratory birds but which may indirectly kill migratory birds. The Court concludes that the MBTA only prohibits conduct directed at migratory birds."); Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior [hereinafter *NRDC II*], 478 F. Supp. 3d 469, 487–88 (S.D.N.Y. 2020)("Interior's statute would have been easy to draft, but that is not the statute Congress drafted. There is nothing in the text of the MBTA that suggests that in order to fall within its prohibition, activity must be directed specifically at birds. Nor does the statute prohibit only intentionally killing migratory birds. And it certainly does not say that only 'some' kills are prohibited. 'It is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts.'") (citations omitted).

[40] Birmingham, *supra* note 2, at 4 ("This Article asserts that judicial activism occurs when a court goes beyond the plain meaning of the text that is plain and unambiguous, to promulgate its politics.").

[41] *Ray Westall Operating, Inc.*, 2009 WL at *3 ("The Court's conclusion that the statute is ambiguous is supported by a split in the Circuit Courts. Two Circuits, the Eighth and the Ninth, concluded that the term 'kill' in the MBTA means physical conduct of the sort engaged by hunters and poachers, while the Second Circuit held that a corporation that performed an affirmative act not related to hunting that caused the death of migratory birds could be held strictly liable under the MBTA.") (citing Newton County Wildlife Assoc. v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997); Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302 (9th Cir. 1991); United States v. FMC Corp., 572 F.2d 902, 908 (2d Cir. 1978)).

[42] *See NRDC II*, 478 F. Supp. 3d 469, 485 (S.D.N.Y. 2020) ("First, because the statute is unambiguous,…"); ***but see***, *e.g.*, *Newton County*, 113 F.3d at 115 ("[W]e agree with the Ninth Circuit that the *ambiguous terms* 'take' and 'kill' in 16 U.S.C. § 703 mean 'physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918.'" (citing *Seattle Audubon*, 952 F .2d at 302) (emphasis added)); United States v. CITGO Petroleum Corp., 801 F.3d 488–89 (5th Cir. 2015) ("[W]e agree with the Eighth and Ninth circuits that a 'taking' is limited to deliberate acts done directly and intentionally to migratory birds."); United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202, 1209, 1211 (D.N.D. 2012) (noting that "[t]he Eighth Circuit found that the *ambiguous terms* 'take' and 'kill' mean 'physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918.'") (emphasis added)); Mahler v. U.S. Forest Service, 927 F. Supp. 1559, 1579 (S.D. Ind. 1996).

[43] *Mahler*, 927 F. Supp. at 1582–83 ("The Second Circuit commented: 'Certainly construction that would bring every killing within the statute, such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly, would offend reason and common sense.' FMC Corp., 572 F.2d at 905. Few would disagree. But the Second Circuit did

MBTA is ambiguous, courts are now able to look at the legislative intent when interpreting the statute.[44] Assuming *arguendo* that the S.D.N.Y. is correct in its interpretation, it still acted *ultra vires* for issuing a universal vacatur. It does not have the powers nor authority to vacate the opinions of other federal district courts or federal appellate courts.

b. Background of the Migratory Bird Treaty Act

The MBTA was conceived with the goal of protecting certain bird populations. At the time the Act was enacted, the biggest threat was hunting. Due to commercial hunting, several species, such as the Labrador Ducks, Great Auks, Passenger Pigeons, Carolina Parakeets, and Heath Hens were extinct or nearly extinct by the end of the 19th century.[45] This was the catalyst for Congress to take action. Accordingly, the "first Federal law protecting wildlife"—the Lacey Act of 1900—was enacted.[46] Laws protecting wildlife would evolve and eventually wind up with the MBTA legislation being passed.[47]

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not resolve this problem by offering a limiting construction of the statute. Instead, it responded to this problem as follows: 'As stated in one of the early decisions under the Act, "[a]n innocent technical violation on the part of any defendant can be taken care of by the imposition of a small or nominal fine." Such situations properly can be left to the sound discretion of prosecutors and the courts.' *Id.* (citing United States v. Schultze, 28 F.Supp. 234, 236 (W.D. Ky.1939)). Such trust in prosecutorial discretion is not really an answer to the issue of statutory construction. Also, for many defendants who may well be quite law-abiding, the significance of having any federal criminal conviction cannot be diminished by the fact that the penalties are not terribly severe.").

[44] Rodriguez v. United States, 480 U.S. 522, 525–26 (1987) (per curiam) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."); Andrus v. Glover Const. Co., 446 U.S. 608, 616–17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.") (citing Continental Casualty Co. v. United States, 314 U.S. 527, 533 (1942)).

[45] Jesse Greenspan, *The Evolution of the Migratory Bird Treaty Act*, Audubon (May 22, 2015),

http://www. audubon.org/news/the-evolution-migratory-bird-treaty-act; *see also* Kristina Rozan, *Brief Summary of the Migratory Bird Treaty Act (MBTA)*, Animal Legal & Hist. Ctr., 2014, https://www.animallaw.info/intro/migratory-bird-treaty-act-mbta#:~:text=The%20Migratory%20Bird%20Treaty%20Act%20(MBTA)%20was%20passed%20in%201918,bird%20populations%20were%20being%20decimated.

[46] U.S. Fish & Wildlife Serv., *Lacey Act*, https://www.fws.gov/history-of-fws; *see generally* 16 U.S.C. §§ 3371–3378; 18 U.S.C. §§ 42–43.

[47] *See* Greenspan *supra* note 45.

In 1916, the United States and Great Britain (on behalf of Canada) signed a convention to protect migratory birds.[48] In 1918, Congress enacted the MBTA in order to implement the convention.[49] The United States would go on to sign conventions with Mexico,[50] Japan,[51] and Russia[52] to protect migratory birds, and Congress would amend the MBTA each time in order to include the respective implementing language.

The legislative history of the 1918 Act does not address whether the MBTA is applicable to incidental takings. The legislative history indicates that Congress was concerned with "effective protection of useful migratory birds,"[53] and complying with the conventions.[54] While the record reflects that Congress was troubled by hunting and poaching, it also notes there should be robust protection from other harms to migratory birds.[55]

Courts are split as to whether there is a scienter requirement for incidental takings under the MBTA.[56] A fascinating aspect is that in 1998,

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[48] Convention for the Protection of Migratory Birds, U.S.-U.K., Aug. 16, 1916, 39 Stat. 1702.

[49] Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2000).

[50] Convention for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., Feb. 7, 1936, 50 Stat. 1311. The MBTA was amended on June 20, 1936 to implement the treaty. 16 U.S.C. § 703 (2006).

[51] Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, U.S.-Japan, Mar. 4, 1972, 25.3 U.S.T. 3329. The MBTA was amended on June 1, 1975 to implement the treaty. 16 U.S.C. § 703 (2006).

[52] Convention Concerning the Conservation of Migratory Birds and Their Environment, U.S.—U.S.S.R., Nov. 26, 1976, 29.4 U.S.T. 4674. The MBTA was amended on November 8, 1978 to implement the treaty. 16 U.S.C. § 703 (2006).

[53] S. Rep. No. 65-27, at 2 (1917).

[54] H.R. Rep. No. 65-243, at 2 (1918).

[55] *Id.* (letter from Secretary of State Robert Lansing to the President) (". . . the extension of agriculture, and particularly the draining on a large scale of swamps and meadows, together with improved firearms and a vast increase in the number of sportsmen, have so altered conditions that comparatively few migratory game birds nest within our limits."); United States v. Corbin Farm Serv., 444 F. Supp. 510, 532 (E.D. Cal. 1978) ("It is undeniable that Congress was concerned with hunting and capturing migratory birds when it enacted the MBTA; the legislative history confirms this section. *The fact that Congress was primarily concerned with hunting does not, however, indicate that hunting was its sole concern*.") (emphasis added).

[56] United States v. Boynton, 63 F.3d 337, 343 (4th Cir. 1995) ("Since the inception of the Migratory Bird Treaty in the early part of this century, misdemeanor violations of the MBTA, including hunting in a baited area, have been interpreted by the majority of the courts as strict liability crimes, not requiring the government to prove any intent element."); United States v. Engler, 806 F.2d 425, 431 (3d Cir. 1986) ("Scienter is not an element of criminal liability under the Act's misdemeanor provisions."); United States v. Catlett, 747 F.2d 1102, 1104 (6th Cir. 1984) ("The majority view, and the view of this circuit, is that…the crime is a strict liability offense."); *contra* United States v. Sylvester, 848 F.2d 520, 522 (5th Cir. 1988)

Congress introduced legislation to clarify that Section 3 of the MBTA does not require strict liability for hunting violations involving baiting.[57] Congress enacted a negligence standard because it was concerned with fairness of strict liability for baiting.[58] Early cases centering on the MBTA involved hunting. In 1939, there were two federal cases which confronted courts with reviewing the absence of an express scienter requirement in the MBTA. In *United States v. Schultze*, the defendants were hunting in a field that was not baited.[59] However, the field was in close proximity to a baited area. In *United States v. Reese*, the court does not discuss the facts of the case.[60] Surprisingly, both the *Schultze* and *Reese* courts acknowledged the common law requirement of scienter, but they nevertheless omitted it as a requirement under the MBTA.[61] Both *Schultze* and *Reese* rely on a U.S. Supreme Court case, *United States v. Balint*,[62] to come to their respective conclusions.[63] SCOTUS

("*Unique among the Circuits, we require a minimum level of scienter as a necessary element for an offense under the MBTA*.") (emphasis added).

[57] S. Rep. No. 105-366, at 2 (1998) ("The elimination of strict liability, however, applies only to hunting with bait or over baited areas, and is not intended in any way to reflect upon the general application of strict liability under the MBTA. Since the MBTA was enacted in 1918, offenses under the statute have been strict liability crimes. The only deviation from this standard was in 1986, when Congress required scienter for felonies under the Act.").

[58] *Id.*

[59] United States v. Schultze, 28 F. Supp. 234, 236 (W.D. Ky. 1939) ("In view of the broad wording of the act, and the evident purpose behind the treaty and the act, this Court is of the opinion that it was not the intention of Congress to require any guilty knowledge or intent to complete the commission of the offense, and that accordingly scienter is not necessary.").

[60] United States v. Reese, 27 F. Supp. 833, 835 (W.D. Tenn. 1939) ("It would seem unreasonable to presume that the omission of a qualifying scienter to constitute guilt was an inadvertence of the lawmakers. *The deduction is plain that Congress deliberately omitted scienter as an essential ingredient of the minor offense under consideration*. This concept is logical in the light of the known practicality of the National Legislature in its enactments in support of the Migratory Bird Treaty. Congress clearly intended to make real the protection against the holocaustic slaughter of migratory birds.") (emphasis added).

[61] *Schultze*, 28 F. Supp. at 235 ("At common law a crime was not committed if the mind of the person doing the act complained of was innocent, and it was necessary to prove in order to sustain a conviction that a guilty intent existed at the time of the act complained of. In common law crimes scienter was necessary."); *Reese*, 27 F. Supp. at 835 ("While the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it (Reg. v. Sleep, 8 Cox, 472), *there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the court*.") (emphasis added) (citation omitted).

[62] United States v. Balint, 258 U.S. 250 (1922).

[63] *Schultze*, 28 F. Supp. at 235; *Reese*, 27 F. Supp. at 835 ("The opinion of

later classified the law at issue as a "public welfare offense,"[64] though neither *Schultze* nor *Reese* use that explicit language.[65]

The *NRDC II* court eschews legislative history of the statute,[66] and it does not provide any analysis of public welfare offenses. In *Strictly I*, it is noted that "[t]he legislative history of the statute explicitly states that the rest of the statute covers misdemeanors, and there is no scienter requirement, which means it is intended to be read with strict liability."[67] However, the S.D.N.Y. does not have the authority to impose its interpretation of the MBTA onto other courts.

The *NRDC II* court alleges that it can vacate M-37050 under the Administrative Procedure Act ("APA"),[68] but it is not clear that it has the authority to do so. The United States Department of Justice ("DOJ") has affirmatively held that "[u]niversal [v]acatur [i]s [n]ot [c]ontemplated by the APA" and that "the APA's text does not permit, let alone require, such a broad remedy."[69] In *NRDC II*, the plaintiffs sought injunctive relief.[70] The DOJ has expressed that Article III courts cannot

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Chief Justice Taft in *United States v. Balint*, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604 (1922), is considered the leading authority on the instant question.").

[64] Morissette v. United States, 342 U.S. 246, 252–53 (1952) ("However, the *Balint* and *Behrman* offenses belong to a category of another character, with very different antecedents and origins. The crimes there involved depend on no mental element but consist only of forbidden acts or omissions. This, while not expressed by the Court, is made clear from examination of a century-old but accelerating tendency, discernible both here and in England, to call into existence new duties and crimes which disregard any ingredient of intent."); *Id.* at 255 ("*This has confronted the courts with a multitude of prosecutions, based on statutes or administrative regulations, for what have been aptly called* '*public welfare offenses*.' These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty.") (emphasis added).

[65] Birmingham, *supra* note 2, at 12–13 (making the case that the MBTA is a public welfare offense).

[66] Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 478 F. Supp. 3d 469, 487 (S.D.N.Y. 2020) ("In any event, the legislative history and extratextual materials on which Interior relies may only be used to 'clear up ambiguity, not create it.'") (citations omitted).

[67] Birmingham, *supra* note 2, at 2–3.

[68] *NRDC*, 478 F. Supp. 3d at 489 ("For the foregoing reasons, Plaintiffs' motions for summary judgment are GRANTED, and Defendants' motion for summary judgment is DENIED. The Court VACATES the Jorjani Opinion (M-37050) and REMANDS to the agency for further proceedings.").

[69] *Litigation Guidelines*, *supra* note 35, at 7–8.

[70] https://ag.ny.gov/sites/default/files/mbta_state_complaint.pdf. Complaint, for Declaratory and Injunctive Relief, State of New York, et al. v. U.S. Department of the Interior, Case 1:18-cv-08084, Document 1 (September 5, 2018).

extend injunctive relief beyond the parties to a case.[71] Furthermore, the arguments made by plaintiffs are remarkably unpersuasive. Their main argument is that "the Jorjani Opinion and FWS Guidance must be vacated because Defendants' interpretation 'conflicts with the plain meaning' of the MBTA."[72] Facially, this argument fails as Federal Circuits have held otherwise.[73] Even more egregious, plaintiffs misquote the law to support this argument. Plaintiffs argue that vacatur is the usual remedy when an agency action is found to be unlawful pursuant to the APA.[74] However, this is not what the Second Circuit said in *Guertin v. United States*.[75] Rather, the court said that if an agency violates its obligation under the APA, then it will vacate a judgment and remand to the agency.[76]

The *NRDC I* court did not base its opinion on APA obligations. Nonetheless, the court could not help itself from displaying its judicial

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[71] *Litigation Guidelines*, *supra* note 35, at 2–3; *See* Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("As the brief and furious history of the regulation before us illustrates, the routine issuance of universal injunctions is patently unworkable, sowing chaos for litigants, the government, courts, and all those affected by these conflicting decisions…*This is not normal. Universal injunctions have little basis in traditional equitable practice. Their use has proliferated only in very recent years.*") (citations omitted) (emphasis added).

[72] *See* Environmental Plaintiffs' Reply in Support of Their Motion for Summary Judgment and Response in Opposition to Defendants' Cross-Motion for Summary Judgment, Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 478 F. Supp. 3d 469, 487 (S.D.N.Y. 2020) (Nos. 18-CV-4596, 18-CV-4601, 18-CV-8084) [hereinafter Environmental Plaintiffs' Reply in Support].

[73] *See NRDC*, 478 F. Supp. 3d at 477 ("That said, the Jorjani Opinion relies heavily on two judicial decisions that slice the MBTA along more pure *actus reus* lines."); *id.* at 477–78 ("With the benefit of *CITGO*, *Mahler*, and Interior's present view in its briefs, and because the Jorjani. Opinion [sic] is less than precise, the Court will accept Interior's formulation of the Opinion for the purpose of deciding the motions for summary judgment. The Court will thus assume going forward that the Jorjani Opinion only limits the MBTA to actions 'directed at' birds in the sense that hunting birds, poaching birds, throwing rocks at birds, pressure washing bird nests off a bridge, or setting poison traps for birds are activities 'directed at' birds. Defs.' Mem. of Law at 1–2, 12, 16, 18–19, 22, 24, 29, 33, 39; *see, e.g.*, AR 41, 82."). Due to the strong medicine which plaintiffs were seeking (universal vacatur), it is peculiar that a Federal District Court would acknowledge rulings by Federal Circuits and effectively overrule them.

[74] Environmental Plaintiffs' Reply in Support, *supra* note 72, at 29–30. ("III. Vacatur is the appropriate remedy" "Vacatur is the "usual" remedy when agency action is held unlawful under the Administration [sic] Procedure Act (APA). *Guertin v. United States*, 743 F.3d 382, 388 (2d Cir. 2014)."). The SDNY was persuaded. Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 478 F. Supp. 3d 469, 488 (S.D.N.Y. 2020) ("V. Vacatur is the appropriate remedy" "When an agency action is held unlawful under the APA, the "usual" remedy is vacatur and remand. *Guertin v. United States*, 743 F.3d 382, 388 (2d Cir. 2014).").

[75] Guertin v. United States, 743 F.3d 382 (2d Cir. 2014).

[76] *Id.* at 388.

activism by opining that "Court agrees with Defendants that the Opinion was not adopted "pursuant to" the APA procedural requirements codified at 5 U.S.C. § 553."[77] In a prior section in the very same opinion, the court explicitly states "Therefore, the Court dismisses the Audubon Plaintiffs' notice-and-comment claim. *Because the Jorjani Opinion is not subject to Section 553's notice-and-comment procedure as a matter of law*, leave to amend is denied."[78] If the court had ruled that APA obligations were not met, it would have been deprived of jurisdiction since the Jorjani Opinion would have been remanded to the FWS.[79] Thus, the court would not have been able to invalidate it. Because the Jorjani Opinion is not subject to notice-and-comment requirement, the DOI did not violate the APA or its obligations thereunder.

The *NRDC II* court flouts SCOTUS when it confesses that the Jorjani Opinion is an interpretive rule, yet it doesn't provide any analysis as to whether it is subject to judicial review.[80] The court's analysis under judicial review is still erroneous. In *NRDC II*, the court falsely claims it did because the interpretation promulgated by the Jorjani Opinion is contrary to law.[81] "Contrary to law" is not a standard under the APA. The standards being referenced are a portmanteau of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"[82] and "contrary to constitutional right, power, privilege, or immunity."[83] To reiterate, it cannot be found to be "not in accordance with the law" if fellow Federal Circuits are in agreement with the Jorjani Opinion's reading of the law.[84] Additionally, the *NRDC II* court did not provide any discussion of a constitutional right, power, privilege or immunity being violated. There is also a clear distinction between vacating a judgment and universal vacatur. The former is relief from a previous ruling by a court, pertaining to the parties before it.[85] The latter, universal vacatur,

[77] Nat. Res. Def. Council v. U.S. Dep't of the Interior, 397 F. Supp. 3d 430, 440 (S.D.N.Y. 2019).

[78] *Id.* at 453 (emphasis added).

[79] Allina Health Services v. Sebelius, 746 F. 3d 1102, 1111 n.6 ("Only in rare cases, when the reviewing court is convinced that remand would serve no purpose, does the court direct the agency how to resolve a problem. *See Nat'l Ass'n of Regulatory Util. Comm's v. U.S. Dep't of Energy*, 736 F.3d 517, 520 (D.C.Cir.2013); *Checkosky v. SEC*, 139 F.3d 221, 227 (D.C.Cir.1998).").

[80] *See*, *e.g.*, Whitman v. American Trucking Associations, 531 U.S. 457, 477–49 (2001) (reviewable interpretive rule).

[81] Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 478 F. Supp. 3d 469, 474–75 (S.D.N.Y. 2020). *NRDC*, 478 F. Supp. 3d at 474–75.

[82] 5 U.S.C. § 706(2)(A).

[83] *Id.* § 706(2)(B).

[84] *See NRDC*, 478 F. Supp. 3d at 477 ("That said, the Jorjani Opinion…").

[85] Litigation Guidelines, *supra* note 37, at 2 ("In cases brought pursuant to the Administrative Procedure Act (APA) that present the possibility of a universal vacatur of a challenged rule, litigators should make similar arguments as appropriate,

means that the agency action cannot be applied to *any* party.[86] Here, in *NRDC II*, there is no previous judgment being vacated. Henceforth, universal vacatur is what the court is serving. In *Trump v. Hawaii*, Justice Thomas authored a concurring opinion in which he specifically called out this disease plaguing the judiciary.[87] The fact that a federal court would be so cavalier in a ruling, let alone one of this magnitude, is frightening.

III. Subject Matter Jurisdiction

a. Standing

In *Natural Resources Defense Council v. U.S. Dep't of the Interior*,[88] the court performed an astonishing display of judicial activism[89] when it stated that "[p]laintiffs had adequately alleged Article III standing, the Jorjani Opinion was a 'final agency action' under Section 704, and the case was ripe for judicial review."[90] The court is conflating standing with subject matter jurisdiction[91] and ripeness.[92] Pursuant to

as well as note that nothing in the APA supersedes the traditional equitable limitation of relief to the parties before the court.").

[86] Jonathan F. Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. 933, 1015 ("[A] court that has 'set aside' an agency action has formally vetoed the agency's work in the same way that a President vetoes a bill.").

[87] Trump v. Hawaii, 138 S. Ct. 2392, 2428 (Thomas, J., concurring) ("By the latter half of the 20th century, however, some jurists began to conceive of the judicial role in terms of resolving general questions of legality, instead of addressing those questions only insofar as they are necessary to resolve individual cases and controversies.").

[88] *See infra* § VI Public Policy.

[89] *See Judicial Activism supra* note 8.

[90] Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 478 F. Supp. 3d 469, 474–75 (S.D.N.Y. 2020).

[91] *See id.*

[92] Key doctrines emanating from Article III include ripeness and mootness. *See* Allen v. Wright, 468 U.S. 737, 750 (1984) ("All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring)); *see generally* Max Birmingham, *The Paper Chase: Should the Principles of Contract Law Govern ERISA Section 302*, 37 Hofstra Lab. & Emp. L.J. 293, 303 (2020) ("The doctrines of standing and ripeness are directed to different concerns. The doctrine of standing requires the plaintiff to demonstrate that he has suffered an injury or will imminently be injured. SCOTUS elucidates that the injury must be 'actual',' 'distinct,' 'palpable,' and 'concrete.' The doctrine of ripeness addresses whether the matter is ready for review or if it is premature, as well as if the

the conjunctive/disjunctive canon, "and" joins a conjunctive list or a disjunctive list, though there are nuances when a negative, plural, and/or specific wording is used.[93]

With regard to Article III standing, "alleging" standing is not sufficient for a federal court to review a case on its merits.[94] Moreover, "Article III" standing is not what must be alleged. [95] The plaintiff instead must allege an "injury" [96] at the pleading stage.[97] Then, the plaintiff must prove that the injury is fairly traceable to the defendant's challenged conduct and that is likely to be redressed by the relief sought.[98] In a footnote, the court uses *circulus in demonstrando*[99] (circular reasoning) to justify its position that plaintiffs have standing.[100] The court maintains

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plaintiff has suffered an injury or will imminently be injured…").

[93] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 116 (2012) ("The conjunctions *and* and *or* are two of the elemental words in the English language. Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives.") (emphasis in original); *see also* United States v. Moore, 613 F. 2d 1029, 1040 (D.C. Cir. 1979) ("Normally, of course, 'or' is to be accepted for its disjunctive connotation, and not as a word interchangeable with 'and.'" But this canon is not inexorable, for sometimes a strict grammatical construction will frustrate legislative intent.").

[94] U.S. Const. art. III, § 2.

[95] Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41 (1976) ("'Although the law of standing has been greatly changed in [recent] years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.' In other words, the 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.") (citation omitted); Warth v. Seldin, 422 U.S. 490, 525–26 (1975) ("True, this Court has held that to maintain standing, a plaintiff must not only allege an injury but must also assert a '"direct" relationship between the alleged injury and the claim sought to be adjudicated,'—that is, '[t]he party who invokes [judicial] power must be able to show…that he has sustained or is immediately in danger of sustaining some direct injury as the result of [a statute's] enforcement.'") (citations omitted).

[96] Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) ("To establish an Art. III case or controversy, a litigant must first clearly demonstrate that he has suffered an 'injury in fact.'"); *Allen*, 468 U.S. at 750–51; Valley Forge Christian College v. Ams. United for Separation of Church & State, 454 U.S. 464, 471–76 (1982).

[97] Pennell v. City of San Jose, 485 U.S. 1, 7 (1988); *Warth*, 422 U.S. at 501.

[98] *Allen*, 468 U.S. at 737, 751; *Valley Forge*, 454 U.S. at 472.

[99] Douglas N. Walton, Plausible Argument in Everyday Conversation 206 (1992). "Wellington is in New Zealand. Therefore, Wellington is in New Zealand." *Id.*

[100] Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 478 F. Supp. 3d 469, 489 n.5 (S.D.N.Y. 2020) ("There is no dispute in the motions for summary judgment that Plaintiffs have standing to sue. The Court finds that Plaintiffs have met their burdens of establishing standing.") (citations omitted); *see also id.* ("'The party

that the plaintiffs have standing because they met their burden to have standing, and then cites a memorandum of law submitted by the plaintiffs.[101] The court provides no analysis as to standing, nor does it even mention the arguments that the plaintiffs made in their filing.

Interestingly, Judge Caproni who presided over *NRDC II* issued a previous opinion where she acknowledged that parties may allege facts at the pleading stage ("*NRDC I*").[102] At the pleading stage, "a judge must accept as true all of the factual allegations contained in the complaint."[103] This is because courts want to refrain from calling a party or parties liars, and also because it would be beyond the pleading stage.[104] Couts would be making determinations as to the merits or veracity of the pleading stage if they did not accept all factual allegations as true.[105]

In *NRDC II*, the court brazenly jumps from the pleading stage to deciding on the merits. In *NDRC I*, the court confessed that "Article III requires only de facto causality, at the pleading stage, Plaintiffs' burden is to allege facts 'showing that third parties will likely react in predictable ways' to the Jorjani Opinion and that their predictable reaction will cause the injuries about which Plaintiffs complain."[106] In *Lujan v. National Wildlife Federation*, SCOTUS explicitly stated the factual allegations made in the pleading stage must be supported by evidence at the final stage.[107] SCOTUS has proclaimed that a plaintiff

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invoking federal jurisdiction bears the burden of establishing' standing—and, at the summary judgment stage, such a party 'can no longer rest on…mere allegations, but must set forth by affidavit or other evidence specific facts.' (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).").

[101] *Id.*

[102] Nat. Res. Def. Council v. U.S. Dep't of the Interior, 397 F. Supp. 3d 430, 440 (S.D.N.Y. 2019) ("The fact that a plaintiff's causation theory rests ultimately on the choices of third parties does not by itself preclude standing. Because Article III requires only *de facto* causality, *at the pleading stage*, Plaintiffs' burden is to allege facts 'showing that third parties will likely react in predictable ways' to the Jorjani Opinion and that their predictable reaction will cause the injuries about which Plaintiffs complain.") (emphasis added) (citation omitted).

[103] Erickson v. Pardus, 551 U.S. 89, 94 (2007).

[104] Eugene Kontorovich, *What Standing is Good For*, 93 Va. L. Rev. 1663, 1684 (2007) ("This account accepts the criticism of standing doctrine that an individual who claims to be injured by a violation of his constitutional rights cannot be presumed to be a liar at the pleading stage.").

[105] *Id.* at 1673 ("As Judge Fletcher has written, to say that a plaintiff who feels injured does not have a cognizable injury in fact is to call him a liar.").

[106] *NRDC*, 397 F. Supp. 3d at 440.

[107] Lujan v. Nat'l Wildlife Fed'n, 504 U.S. 555, 561 (1992) ("*At the pleading stage*, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.' In response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken to be true. *And at the final stage*,

in federal court cannot establish standing to sue simply by alleging a violation of a federal statute; the plaintiff must identify some cognizable real-world harm.[108] To reiterate, Judge Caproni ignores this.[109] In *NRDC II*, Judge Caproni acknowledges *Lujan*[110] but maintains that "at this stage, the Court is satisfied that the Society's 'general factual allegations of injury resulting from [Defendants'] conduct…suffice' to plead injury in fact."[111] Noticeably, the *NRDC II* court never discusses the specific evidence of migratory birds being harmed as a result of a M-37050. And to make matters worse, the *NRDC II* court prevented the Interior Department from raising standing and provided an inane explanation.[112]

Judge Caproni courts blatantly defies SCOTUS. In *Lujan*, the Court emphatically held that "[*i*]*n response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other specific facts.*"[113] Surreptitiously, the *NRDC II* opinion tries to bury its judicial activism in a footnote where it plainly acknowledges the court openly admits it granted standing based upon factual allegations made at the pleading stage despite a motion for summary judgment brought by the defendant.[114] The court's lack of analysis is purposeful. The court knew that plaintiffs did not have standing, and that they could not prove their factual allegations. This is disturbing.

Forbye, Judge Caproni erected a rule, out of judicial fiat, prohibiting the Interior Department from challenging standing in bizarre footnotes. In *NRDC I*, Judge Caproni noted that her ruling with regard to the Plaintiffs having Article III standing is without prejudice to the Interior Department arguing an appropriate remedy.[115] In *NDRC II*, Judge

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those facts (if controverted) must be 'supported adequately by the evidence adduced at trial.'") (emphasis added) (citations omitted).

[108] *See* Spokeo, Inc. v. Robins, 578 U.S. 330 (2016).

[109] *See infra* nn.71–103.

[110] *NRDC*, 397 F. Supp. 3d at 444.

[111] *Id.* (internal quotation marks omitted).

[112] *See infra* nn. 115–119.

[113] Lujan v. Nat'l Wildlife Fed'n, 504 U.S. 555, 561 (1992) (internal quotation marks and citations omitted).

[114] *See supra* nn. 106–108.

[115] *NRDC*, 397 F. Supp. 3d at 456 n.10 ("*On the topic of remedies, the Court notes that it need not concern itself at this stage* with Defendants' contention that 'the only appropriate remedy' if Plaintiffs succeed on their APA claims 'would be a remand to DOI to consider any issues the Court deem[s] necessary, *without vacatur*.' Dkt. 27 (Mem. in Supp. of MTD) at 22 n.9. As Defendants recognize, 'detailed consideration of potential remedies is unnecessary in [resolving] this motion,' *id.*, and in conducting the Article III standing inquiry, the Court must assume that Plaintiffs will succeed on the merits of their claims—including their request for vacatur of the Jorjani Opinion, *see, e.g.*, Scenic Am., Inc. v. U.S. Dep't of Transp., 836 F.3d 42, 55 (D.C. Cir. 2016). *This is without prejudice, of course, to Defendants' litigating the appropriate remedy should*

Caproni then walks this back and states that the Interior Department is foreclosed from briefing the court on this issue.[116] In barefaced judicial activism, the *NRDC II* court asserts that the Interior Department needed confirmation from the court in order to bring forth a standing argument.[117] *First*, standing can be raised *sua sponte*.[118] Second, SCOTUS has clarified that whenever standing is raised it must be addressed.[119] Henceforth, the *NRDC II* court erred by not allowing the Interior Department to raise the issue after summary judgment.

b. Ripeness

A controversy must also be "ripe" for a federal court to review the merits.[120] The ripeness doctrine derives from Article III limitations on the judiciary's authority,[121] as well as prudential considerations.[122] An

Plaintiffs prevail on the merits.") (emphasis added).

[116] Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 478 F. Supp. 3d 469, 489 n.23 (S.D.N.Y. 2020) ("The Court's July 31, 2019, decision on the motion to dismiss notes that 'in conducting the Article III standing inquiry, the Court must assume that Plaintiffs will succeed on the merits of their claims.…This is without prejudice, of course, to Defendants' litigating the appropriate remedy should Plaintiffs prevail on the merits.' *NRDC*, 397 F. Supp. 3d at 442 n.10. *Interior incorrectly assumed that this statement meant that the Court would provide a separate opportunity to brief the issue of remedy after summary judgment; Interior did not, however, seek confirmation from the Court before proceeding on that erroneous assumption*. The Court meant by that language only that Plaintiffs have standing given the remedy they sought (vacatur of the Jorjani Opinion) but recognizing that Defendants remained free to advocate that a different remedy was appropriate.") (emphasis added).

[117] *Id.*

[118] *See*, *e.g.*, Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 110 (2001) ("We are obliged to examine standing *sua sponte*…").

[119] Gonzalez v. Thaler, 565 U.S. 134, 141 (2012) ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented.").

[120] *See* Allen v. Wright, 468 U.S. 737, 750 (1984) ("All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring)); *see generally* Max Birmingham, *The Paper Chase: Should the Principles of Contract Law Govern ERISA Section 302*, 37 Hofstra Lab. & Emp. L.J. 293, 303 (2020) ("The doctrines of standing and ripeness are directed to different concerns. The doctrine of standing requires the plaintiff to demonstrate that he has suffered an injury or will imminently be injured. SCOTUS elucidates that the injury must be 'actual',' 'distinct,' 'palpable,' and 'concrete.' The doctrine of ripeness addresses whether the matter is ready for review or if it is premature, as well as if the plaintiff has suffered an injury or will imminently be injured…").

[121] *See id.*

[122] Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003).

agency opinion is not a final agency action. The doctrine of ripeness aims to prevent parties "from entangling themselves in abstract disagreements over administrative policies, and also…*protect*[*s*] *the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties*."[123] Accordingly, the challenge to M-37050 is not ripe.[124]

When challenging an agency rule, the promulgation of a regulation makes a judicial challenge ripe when the rule requires parties to comply with new restrictions or be subject to penalties.[125] In contrast, if the regulation does not require the parties to alter their day-to-day conduct, the challenge is not yet ripe and would be more appropriate after application of the rule to the parties in a concrete manner.[126]

The complaints do not identify any concrete harm, let alone describe how the parties had to adapt to the changes prescribed by M-37050.[127] Instead, both complaints reek of poorly constructed soundbites for a political campaign. [128] In *NRDC I*, the complaint states "The Jorjani Opinion [M-37050] harms the States by depriving them

[123] Abbott Lab'ys. v. Gardner, 387 U.S. 136, 148–49 (1967).

[124] *See*, *e.g.*, Dietary Supplemental Coal., Inc. v. Sullivan, 978 F.2d 560, 562 (9th Cir. 1992); Los Alamos Study Grp. v. U.S. Dep't of Energy, 692 F.3d 1057, 1065 (10th Cir. 2012).

[125] *Abbott Lab'ys,* 387 U.S. at 152–53.

[126] Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 58 (1993) (Holding that a challenge to agency regulations was not ripe because the rule "impose[d] no penalties for violating any newly imposed restriction, but limit[ed] access to a benefit created by the Reform Act but not automatically bestowed on eligible aliens.").

[127] Nat. Res. Def. Council v. U.S. Dep't of the Interior, 397 F. Supp. 3d 430, 456 n.8 (S.D.N.Y. 2019) ("Because Defendants' standing challenge is a 'facial' one—that is, 'based solely on the allegations of the complaint[s] or the complaint[s] and exhibits attached to [them]'— Plaintiffs bear 'no evidentiary burden' at this stage.… Plaintiffs will, of course, bear an evidentiary burden with respect to standing at later phases of this litigation. *See* Lujan, 504 U.S. at 561, 112 S.Ct. 2130 ('In response to a summary judgment motion…the plaintiff can no longer rest on…mere allegations, but must set forth by affidavit or other evidence specific facts…which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.' (citations and internal quotation marks omitted))."); *id.* at n. 14 ("Because the Court holds that the States have plausibly pleaded Article III standing to seek vacatur of the Jorjani Opinion under Section 706(2)(A) and that the National Audubon Society has plausibly pleaded Article III standing to seek vacatur of the Opinion for failure to comply with Section 553 and NEPA, the Court need not and does not address Plaintiffs' other asserted theories of standing or Defendants' critiques of those theories. Those other theories may, however, become relevant at later stages depending on how the factual record develops."). The *NRDC II* court never explained how the standing allegations were concrete, but rather states "that Plaintiffs had adequately alleged Article III standing." Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 478 F. Supp. 3d 469, 474–75 (S.D.N.Y. 2020). Said Plaintiffs never beared the evidentiary burden.

[128] S*ee* Posner, *infra* note 234.

of the MBTA's protections of migratory birds that engage in breeding, feeding, and sheltering activities as those birds migrate within and through their territories."[129] This is absolute rubbish. Federal law sets a floor below which states cannot fall.[130] New York, which is a plaintiff in this action, has bird laws on the books.[131] Consequently, the Empire State could enact more laws, or amend the ones on the books, regarding taking and killing of migratory birds if it feels the MBTA does not provide sufficient protections.[132]

The ripeness doctrine requires courts to show that an agency's action has "adverse effects of a strictly legal kind" or requires the party to modify their behavior in some capacity.[133] Judge Caproni sidesteps this by making an ill-founded argument.[134] Under a section titled "IV. Ripeness," the court waxes poetic "Defendants' factual-development argument is a throwaway. Defendants do not explain what facts need to be developed, and the only facts that the Court can foresee requiring evidentiary support—those relating to Plaintiffs' standing—should pose no obstacle to judicial review."[135] *First*, the court is mentioning standing under the ripeness section of the opinion.[136] *Second*, it is not up to the Department of the Interior to tell the plaintiffs what facts they need to develop.[137] The Interior Defendant is arguing that the facts before

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[129] *See supra* note 70.

[130] Ilya Somin, *A Floor, Not a Ceiling: Federalism and Remedies for Violations of Constitutional Rights in* Danforth v. Minnesota, 102 Nw. U.L. Rev. Colloquy 365, 365 (2008).

[131] N.Y. Env't. Conserv. Law § 11-0110 (Interference with lawful taking of wildlife prohibited); https://www.dec.ny.gov/permits/45833.html; https://www.dec.ny.gov/outdoor/106847.html. The State of Virginia has also contemplated enacting state laws protecting migratory birds (https://dwr.virginia.gov/blog/groundbreaking-regulations-pass-to-protect-virginias-migratory-birds/.

[132] *Id.*

[133] Ohio Forestry Ass'n., Inc. v. Sierra Club, 523 U.S. 726, 733 (1998).

[134] See *infra* notes 137–43.

[135] Nat. Res. Def. Council v. U.S. Dep't of the Interior, 397 F. Supp. 3d 430, 451 (S.D.N.Y. 2019).

[136] *See Scalia & Garner supra* notes 91.

[137] *NRDC*, 397 F. Supp. 3d at 451 ("Defendants' factual-development argument is a throwaway. Defendants do not explain what facts need to be developed, and the only facts that the Court can foresee requiring evidentiary support— those relating to Plaintiffs' standing—should pose no obstacle to judicial review. Whether the Jorjani Opinion is consistent with the MBTA's text, complied with Section 553, and comported with NEPA are purely legal questions."). It is up to counsel to zealously advocate for their client. *See* James R. Elkins, *The Moral Labyrinth of Zealous Advocacy*, Cap. U. L. Rev. 735, 739 (1992) ("Lawyers take pride in zealous advocacy. It is not something we lawyers do simply because it is demanded of us. It is something we demand of ourselves. We demand it of ourselves in a way that is as much internal (and psychological) as it is external (and sociological). It is part of the ritual of lawyering, grounded in the ethos and ethic of lawyering. We internalize the

the court presented by the plaintiffs are not sufficient.[138] The court is dismissing this by creating a new burden shifting paradigm onto the Interior Department. *Third*, there is no ripeness analysis in the opinion.[139] Instead, it conflates standing with ripeness.[140] *Fourth*, in a subtle attempt to conceal her judicial activism, Judge Caproni alleges in a footnote that because the Interior Department did not make a ripeness argument with regard to a National Environmental Policy Act ("NEPA") claim with one plaintiff, that it overlays all claims and all defendants.[141]

Article III requirements have been designed to safeguard the "proper-and properly limited-role" of the unelected federal judiciary in our constitutional republic.[142] In *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, SCOTUS vividly detailed that a challenge to an agency decision is not ripe if the plaintiffs do not show concrete harm.[143] In *NRDC I*, it is plainly stated that the plaintiffs will have to show how they have been harmed.[144] The court even calls

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notion of zealous advocacy, it becomes a habit and a way of life. Our best virtues are those we enact as a matter of habit. The habit of zealousness is internalized as a way of knowing and embedded in our sense of professionalism.").

[138] *Id.*

[139] Because DOI argued (and this Article concurs) that the Jorjani opinion is not a "final agency action," the court should have explored this more in-depth. See Dalton v. Spencer, 511 U.S. 462, 469 (1994) (holding that a final agency action is subject to judicial review under the APA (quoting 5 U.S.C. § 704)). Ripeness is when a party or parties and an issue are ready for review. "[R]ipeness is peculiarly a question of timing. [I]ts basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements."). Thomas v. Union Carbide Agricultural Products Co., 473 US 568, 580 (1985) (citations omitted).

[140] *NRDC*, 397 F. Supp. 3d at 451 ("Whether the Jorjani Opinion is consistent with the MBTA's text, complied with Section 553, and comported with NEPA are purely legal questions. *See*, *e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 479, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) ("The question before us here is purely one of statutory interpretation that would not benefit from further factual development of the issues presented." (internal quotation marks omitted)); *see also*, *e.g.*, Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 737, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998) ("[*A*] *person with standing* who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, *for the claim can never get riper*.").") (emphasis added).

[141] *Id.* at 456 n.21 ("Defendants appear to concede that the Audubon Plaintiffs' NEPA claim is ripe for review. *See* Dkt. 50 (Reply in Supp. of MTD) at 16 n.8 ("Defendants' argument with respect to ripeness does not encompass the Audubon Plaintiffs' NEPA claim.").").

[142] Warthv v. Seldin, 422 U.S. 490, 498 (1975).

[143] Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 US 172, 187 ("Similarly, in *Agins* v. Tiburon, *supra*, the Court held that *a challenge to the application of a zoning ordinance was not ripe because the property owners had not yet submitted a plan for development of their property*.") (emphasis added).

[144] *NRDC*, 397 F. Supp. 3d at 444 ("*At later stages of this litigation it will*

out, "*at this stage…general factual allegations of injury* resulting from [Defendants'] conduct…suffice to plead injury in fact."[145] Nowhere in the *NRDC II* opinion does it discuss how the injury is specific.

In addition, "[*r*]*ipeness analysis is intertwined with the posture, factual record, and substantive standards of the claim being litigated*. It cannot easily be encompassed by an independent, uniform constitutional limitation on judicial authority."[146] The Defendant-Interior Department specifically called out that there is a lack of factual record. The court tacitly admits this but disregards it because it alleges that the Defendant did not pinpoint facts which needed to be made.

While it is noted that Judge Caproni conflated standing and ripeness, the United States Court of Appeals for the Eleventh Circuit has explained that many courts have done so because they have confused these two doctrines.[147] Nonetheless, Judge Caproni did this intentionally. Assuming *arguendo* that she did not, it does not explain the dearth of analysis with regard to injury. It also does not explain why she proscribed the Interior Department from raising a standing argument in *NRDC II* after she explicitly stated that plaintiffs needed to specify their injuries after the pleading stage in *NRDC I*. This is pure unadulterated judicial activism.

IV. Administrative Procedure Act

It is not settled that the Administrative Procedure Act ("APA") grants a Federal District Court or a Federal Appellate Court the power to review interpretive rules. The S.D.N.Y.[148] has decided to bestow this

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be necessary for the Society and its fellow organizational Plaintiffs to adduce specific evidence that migratory birds are being or will be harmed as a result of the Jorjani Opinion and that those harms will directly affect one or more of their members, separate and apart from their special interest in the subject. *See Lujan*, 504 U.S. at 563, 112 S.Ct. 2130.") (emphasis added).

[145] *Id.* (emphasis added).

[146] Gene R. Nicol, Jr., *Ripeness and the Constitution*, 54 U. Chi. L. Rev. 153, 156 (1987).

[147] Wilderness Soc'y v. Alcock, 83 F. 3d 386, 389–90 (11th Cir. 1996) ("In this case, the district court examined the appellants' claimed injuries through the lens of the standing doctrine as well as through the lens of the ripeness doctrine. *Few courts draw meaningful distinctions between the two doctrines; hence, this aspect of justiciability is one of the most confused areas of the law*. Because we find the framework of the ripeness doctrine more useful when evaluating injuries that have not yet occurred, such as those claimed by appellants here, we affirm the district court on that basis.") (emphasis added).

[148] New York v. U.S. Dep't of Commerce, 351 F. Supp. 3d 502, 672 (S.D.N.Y. 2019), *aff'd in part*, *rev'd in part*, 139 S. Ct. 2551 (2019).

power onto itself[149] by misinterpreting a footnote[150] of a SCOTUS case. In *New York v. U.S. Dep't of Commerce*, the court held that "the 'normal remedy' is to set aside the agency action wholesale, not merely as it applies to the particular plaintiff or plaintiffs who brought the agency action before the court."[151]

The APA's notice-and-comment requirements also do not apply to interpretive rules and general statements of policy.[152] Interpretive rules are referred to as non-legislative rules because they do not carry the force of law.[153] They are intended to be nonbinding and merely advisory.[154] An interpretive rule is one in which an agency announces its interpretation of a statute in a way that "only reminds affected parties of existing duties."[155] Interpretive rules do not "effect[] a substantive change in the regulations.[156] In *Lujan*, SCOTUS declared that there needs to be a concrete injury suffered by a party seeking judicial review under the APA.[157]

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[149] *See supra* note 8 (Courts do not have the authority to go beyond what is prescribed by law); Engle v. Isaac, 456 US 107, 144 (1982) (Brennan, J., dissenting) ("The Court's analysis is completely result-oriented, and represents a noteworthy exercise in the very judicial activism that the Court so deprecates in other contexts."); Gearhart v. Express Scripts, Inc., 422 F. Supp. 3d 1217 (E.D. Ky. 2019) ("This Court does not make the law but applies it. Prospective decision making is the handmaid of judicial activism, and the born enemy of *stare decisis*.") (citation omitted).

[150] *See supra* note 88; *see infra* notes 258–59.

[151] New York v. U.S. Dep't of Com., 351 F. Supp. 3d 502, 672 (S.D.N.Y. 2019) ("[T]he 'normal remedy' is to set aside the agency action wholesale, not merely as it applies to the particular plaintiff or plaintiffs who brought the agency action before the court."), *aff'd in part*, *rev'd in part*, 139 S. Ct. 2551 (2019).

[152] "[I]nterpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" are only exempt from the notice and comment "subsection" of § 553. 5 U.S.C. § 553(b)(3)(A).

[153] William Funk, *A Primer on Nonlegislative Rules*, 53 Admin. L. Rev. 1321, 1322 (2001) ("These rules are often called nonlegislative rules, because they are not 'law' in the way that statutes and substantive rules that have gone through notice and comment are 'law,' in the sense of creating legal obligations on private parties.").

[154] *See* David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 Yale L.J. 276, 286 (2010).

[155] Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc)); *See* Tom C. Clark, Attorney General, Attorney General's Manual on the Administrative Procedure Act, at 30 n.3 (1947), http://www.law.fsu.edu/library/admin/1947iii.html [hereinafter AG Manual].

> ("*Substantive Rules*—rules, other than organization or procedural [rules], issued by an agency pursuant to statutory authority and which implement the statute.... Such rules have the force and effect of law....; *Interpretative rule*—rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers....")

[156] Warder v. Shalala, 149 F.3d 73, 80 (1st Cir. 1998) (quoting Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 100 (1995)).

[157] *Lujan*, 497 U.S. at 891 ("Some statutes permit broad regulations to serve

The Interior Department made the argument that M-37050 is not a final agency action.[158] Par the course, and Judge Caproni's judicial activism in this matter (*NRDC I* and *NRDC II*), the so-called "analysis" is misleading. First, the court furtively concedes that M-37050 replaces another opinion from the DOI (the "Tompkins Opinion"), from an official under a different presidential administration.[159] The Tompkins Opinion view of incidental take and kill under the MBTA just so happens to be the same as that of Judge Caproni.[160] The court notes that the withdrawal and

as the 'agency action,' and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt. Absent such a provision, however, a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. (*The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is 'ripe' for review at once, whether or not explicit statutory review apart from the APA is provided.*))" (emphasis added) (citing the *Abbott Labs* trilogy). To reemphasize, M-37050 is an interpretive rule! It is *not* a substantive rule!

[158] Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 397 F. Supp. 3d 430, 446 ("Defendants contend that, even if some Plaintiffs have Article III standing, the Court nonetheless lacks jurisdiction because the Jorjani Opinion is not a "final agency action" under 5 U.S.C. § 704. *See* Dkt. 27 (Mem. in Supp. of MTD) at 27–34. The Court disagrees.").

[159] *Id.* at 436 ("In early January 2017 DOI's Solicitor— the Department's chief lawyer and the DOI official charged with issuing opinions setting forth DOI's interpretation of federal statutes—issued a memorandum that reaffirmed DOI's "long-standing interpretation that the MBTA prohibits incidental take." AR 43–44. That memorandum, officially known as M-37041, will be referred to as the "Tompkins Opinion" after the DOI Solicitor who issued it. *Following a change in administrations and Mr. Tompkins's departure*, in December 2017 DOI's then-Principal Deputy Solicitor, Daniel Jorjani, issued a new memorandum—M-37050—permanently withdrawing and replacing the Tompkins Opinion. AR 1. This new memorandum will be referred to as the "Jorjani Opinion" or the "Opinion."") (emphasis added).

[160] *Id.* ("Jorjani Opinion reverses the Tompkins Opinion. It concludes that, "consistent with the text, history, and purpose of the MBTA, the statute's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs." Dkt. 28 ex. A (Jorjani Op.) at 2. Acknowledging that "this interpretation is contrary" to DOI's "prior practice," the Opinion states that "[i] nterpreting the MBTA to apply to incidental or accidental actions hangs the sword of Damocles over a host of otherwise lawful and productive actions, threatening up to six months in jail and a $15,000 penalty for each and every bird injured or killed."); *see also* Memorandum from Principal Deputy Solic. of U.S. Dep't Interior to Sec'y, Deputy Sec'y, Assistant Sec'y for Land & Minerals Mgmt. & Assistant Sec'y for Fish & Wildlife & Parks (Dec. 22, 2017) ("In light of further analysis of the text, history, and purpose of the MBTA, as well as relevant case law, this memorandum permanently withdraws and replaces Opinion M-37041.").

replacement of the Tompkins Opinion is permanent.[161] This logic does not follow. If M-37050 can withdraw and replace a previous opinion (Tompkins Opinion), another subsequent opinion could conceivably withdraw and replace M-37050. As luck would have it, this occurred. On March 8, 2021, the Principal Deputy Solicitor of the Department of the Interior permanently withdrew M-37050.[162] If M-37050 were a "final agency action," it would not be undone by a letter from an official in the DOI in a proceeding presidential administration.[163] The court recognizes that the Interior Department made this argument.[164] Moreover, the court buries in a footnote the fact that M-37050 could have been overturned. [165] These are not opinions. This is glaring judicial activism.

In *NRDC I*, the court is disingenuous when it argues that M-37050 is a final agency action because "DOI and FWS cannot make prosecutorial decisions or take other actions that are inconsistent with the Opinion's interpretation of the MBTA."[166] This disdain of the Federal Circuit split, the contra of this is that enforcement was left up to "prosecutorial discretion" or discretion of the courts.[167] The Supreme Court has declared "[i]t will not do to say that a prosecutor's sense of

[161] *Id.* at 439.

[162] Memorandum from Principal Deputy Solic. of U.S. Dep't Interior to Sec'y & Assistant Sec'y of Fish & Wildlife & Parks (Mar. 8, 2021), https://www.doi.gov/sites/doi.gov/files/permanent-withdrawl-of-sol-m-37050-mbta-3.8.2021.pdf.

[163] The prevailing test for what constitutes "final agency action" was articulated in Bennett v. Spear, 520 U.S. 154 (1997) ("As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decision making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow.""") (citations omitted).

[164] Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 397 F. Supp. 3d 430 at 447 ("Defendants' principal argument on the first prong is that the Jorjani Opinion is not the consummation of any decision-making process 'because, standing alone, it is not DOI's final determination on any matter.' Dkt. 27 (Mem. in Supp. of MTD) at 28–32. That kind of 'final determination,' Defendants say, 'will occur only in any forthcoming individual decisions regarding criminal enforcement of the MBTA or other agency actions premised on the application of' the Opinion.").

[165] *Id.* at 456 n.17 ("Theoretically, it is possible that the Secretary or Deputy Secretary of the Interior could overrule Principal Deputy Solicitor Jorjani's Opinion or ratify an agency action that is contrary to it. "That possibility, however, is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal.").

[166] *Id.* at 448.

[167] *See Mahler*, 927 F. Supp. at 1582–83; *see also CITGO*, 801 F.3d at 493–94 ("[t]he scope of liability under the government's preferred interpretation is hard to overstate," and "would enable the government to prosecute at will and even capriciously (but for the minimal protection of prosecutorial discretion) for harsh penalties.").

fairness and the Constitution would prevent a successful…prosecution for some of the activities seemingly embraced within the sweeping statutory definitions."[168] M-37050 brought clarity to the MBTA. To reiterate, the interpretation it made is contrary to what *Strictly I* advocated for.[169] Regardless, the DOI has the authority to issue M-37050 and implement it. [170]

Interpretive rules do not "effect a substantive change in the regulations."[171] The APA does not provide court authority for judicial review of an interpretive rule.[172] The APA bars judicial review of any action that "is committed to agency discretion by law."[173] Such actions are unreviewable because "a court would have no meaningful standard against which to judge the agency's exercise of discretion."[174]

V. Deference

The *NRDC II* court misleadingly titled a section "III. Deference is Not Warranted"[175] in its opinion and then proceeded to explain that

[168] Baggett v. Bullitt, 377 U.S. 360, 373 (1964); United States v. Wells, 519 U.S. 482, 512 n.15 (1997) (Stevens, J., dissenting) ("[T]he liberty of our citizens cannot rest at the whim of an individual who could have a grudge or, perhaps, just exercise bad judgment.").

[169] Birmingham, *supra* note 2, at 1 ("The MBTA should be interpreted broadly. The MBTA was enacted with the purpose of protecting migratory birds from harm. To interpret the MBTA in a narrow scope is incongruent with the meaning and intent of the statute. A narrow reading of the MBTA would effectively render the statute toothless.").

[170] 5 U.S.C. §701(a)(2) ("This chapter applies, according to the provisions thereof, except to the extent that agency action is committed to agency discretion by law."); Heckler v. Chaney, 470 U.S. at 832 ("[W]e recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict — a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'").

[171] Warder v. Shalala, 149 F.3d 73, 80 (1st Cir. 1998) (quoting Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 100 (1995)).

[172] *See*, *e.g.*, Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020, (D.C. Cir. 2000) ("Only 'legislative rules' have the force and effect of law…A 'legislative rule' is one the agency has duly promulgated in compliance with the procedures laid down in the statute or in the Administrative Procedure Act.").

[173] 5 U.S.C. § 701(a)(2).

[174] Webster v. Doe, 486 U.S. 592, 600 (1988) (quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985)).

[175] Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 478 F. Supp. 3d 469, 478–81 (S.D.N.Y. 2020).

M-37050 is entitled to *Skidmore* deference.[176] While *Skidmore*[177] is lower deference than *Chevron*,[178] even to the point of being "weak deference,"[179] it is nevertheless still a level of deference. Courts have wrestled with what level of deference to afford agency opinions.[180] In this matter, the Interior Department did not argue for *Chevron*, and asserted that M-37050 should be given *Skidmore*.[181]

Before delving into deference, it is paramount to distinguish the two types of agency rules: legislative and interpretive.[182] Legislative rules carry the force of law and must be enacted under the procedures of the APA.[183] And adjudications conducted "on the record" must apply formal court-like procedures.[184] With regard to interpretive rules, it is advisory,[185] as it clarifies the agency's position of a statute.[186] An interpretive rule is not binding on the courts. Thus, courts may use their judgment as to the regulation or statute in question. It should be noted, however, that an interpretive rule may be binding on the agency.[187]

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[176] *Id.* at 478 ("Under *Skidmore*, the Court must defer to the Opinion to the extent that it has the "power to persuade." Factors to consider include "the agency's expertise, the care it took in reaching its conclusions, the formality with which it promulgates its interpretations, the consistency of its views over time, and the ultimate persuasiveness of its arguments.") (citations omitted).

[177] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under [the Fair Labor Standards] Act…constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."); United States v. Shimer, 367 U.S. 374, 383 (1961) ("If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.").

[178] *See* Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

[179] *See* Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1194–98 (1995).

[180] *See* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. Pa. L. Rev. 549, 566–67 (1985).

[181] *NRDC*, 478 F. Supp. 3d at 478 ("Interior does not assert that the Jorjani Opinion is entitled to *Chevron* deference, only the lesser *Skidmore* deference. Defs.' Mem. of Law at 16.").

[182] 2 Kenneth C. Davis, Administrative Law Treatise §§ 7:8–7:12 (2d ed. 1979).

[183] *Id.* § 7:10.

[184] 5 U.S.C. §§§ 553, 556, 557.

[185] *Sciarotta v. Bowen*, 735 F. Supp. 148, 151 (D.N.J. 1989).

[186] *National Latino Media Coalition v. F.C.C.*, 816 F.2d 785, 788 (D.C. Cir. 1987); *Flagstaff Medical Ctr. v. Sullivan*, 773 F. Supp. 1325, 1343 (D. Ariz. 1991), *aff'd in part*, *rev'd in part*, 962 F.2d 879 (9th Cir. 1992).

[187] *F.C.C*, 816 F.2d at 790 n.2 ("There is some suggestion in the case law that

There are two primary methods courts use when applying *Skidmore*.[188] The first is the "independent judgment" model. Under this model, a court reviewing an agency's non-binding interpretation using independent judgment considers "the merits of the agency's interpretation" when determining whether it is entitled to deference.[189] The second is the more deferential sliding scale approach. Courts applying this model "consider whether to give weight to the agency's point of view, even if not required to give such weight."[190] These two models demonstrate competing understandings of *Skidmore*. On the one hand, courts applying their own judgment ask whether the agency's interpretation makes sense, putting the agency on equal footing with any other litigant. On the other hand, courts applying the sliding scale approach are predisposed to defer to agency decisions.

These two models demonstrate competing understandings of *Skidmore*. The debate between deference and independent judgment continues in the courts of appeals. Even within the last five years, the lower courts have still struggled with the proper application of *Skidmore* deference.[191] The correct model of *Skidmore* is beyond the scope of this Article, but it is important to note that this level of deference has been contrasting views amongst federal courts.

The *NRDC II* court insolently combines *Skidmore* with *Mead*,[192] which is another distinct deference.[193] To be clear, there is room for judicial interpretation under *Skidmore*. For instance, some courts

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although an interpretative rule or statement of policy does not bind the courts or private parties, it may bind the agency itself, or at least limit its discretion to act. To the extent that the conflicting cases can be harmonized, they seem to state no principle different from the one we have just stated in the text: the "binding" quality of a particular rule or statement will depend on whether the agency intended to establish a "substantive" rule, one which is not merely interpretative but which creates or modifies rights that can be enforced against the agency.") (citations omitted).

[188] Kristin Hickman and Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L. Rev. 1235, 1251–52, 1270–71 (2007).

[189] *Id.* at 1251.

[190] *Id.*

[191] "Independent Judgment" model: Silguero v. CSL Plasma, Inc., 907 F.3d 323, 327 n.9, 328 (5th Cir. 2018); Kidd v. Thomson Reuters Corp., 925 F.3d 99, 105–06 (2d Cir. 2019); N.N.M. Stockman's Ass'n v. U.S. Fish & Wildlife Serv., 30 F.4th 1210, 1226–27 (10th Cir. 2022); Rafferty v. Denny's, Inc., 13 F.4th 1166, 1185 (11th Cir. 2021); Facebook, Inc. v. Windy City Innovations, LLC, 973 F.3d 1321, 1354 (Fed. Cir. 2020); the "Deference" model: Larson v. Saul, 967 F.3d 914, 925 (9th Cir. 2020); Gun Owners of Am., Inc. v. Garland, 19 F.4th 890, 908 (6th Cir. 2021) (en banc); U.S. ex rel. Proctor v. Safeway, Inc., 30 F.4th 649, 662 (7th Cir. 2022).

[192] Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 478 F. Supp. 3d at 478 ("The *Skidmore/Mead* factors disfavor affording the Jorjani Opinion any deference.").

[193] *Id.*

presume that they must accept the agency's interpretation if it is longstanding and consistent with past practice.[194] By contrast, other courts of appeals evaluate an agency's interpretation based solely on the force of its reasoning.[195] To boot, there is also the question as to whether a court independently interprets the statute or evaluates the validity of the agency's reasoning, thereby focusing on the permissibility of the agency's interpretation. There is however, no "*Skidmore*/*Mead*" deference, despite what the court says.

Unsurprisingly, the *NRDC II* court does not adequately address the *Skidmore* factors. Moreover, the court conflates[196] *Skidmore* factors with *Mead* factors. Skidmore factors require that "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[197] In *Mead*, SCOTUS lists a slightly different set of factors: "the degree of the agency's care, its consistency, formality, and relative expertness, and…the persuasiveness of the agency's position."[198] Later on in the *Mead* opinion, the Court offers up another list: "thoroughness, logic and expertness, [and] its fit with prior interpretations."[199]

With regard to opinion letters, SCOTUS narrowed down *Skidmore* even further. In *Christensen v. Harris County* the Court trumpeted that "interpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore*, but only to the extent that those interpretations have the 'power to persuade, *ibid*. As explained above, we find unpersuasive the agency's interpretation of the statute at issue in this case."[200] One fascinating twist is that the Second Circuit has left open the possibility for *Chevron* deference concerning opinion letters.[201] The DOI should have pushed for *Chevron* instead of

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[194] *See*, *e.g.*, Pension Benefit Guar. Corp. v. Wilson N. Jones Mem'l Hosp., 374 F.3d 362, 370 (5th Cir. 2004); Cal. State Legislative Bd. v. Mineta, 328 F.3d 605, 607–08 (9th Cir. 2003).

[195] McGraw v. Barnhar, 450 F.3d 493, 500–01 (10th Cir. 2006); *Skidmore*, 323 U.S. at 140 ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, *the validity of its reasoning*, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.") (emphasis added).

[196] *See supra* notes 192–93.

[197] *Skidmore*, 323 U.S. at 140.

[198] *Mead Corp.*, 533 U.S. at 218, 228 (footnotes omitted).

[199] *Id.* at 235.

[200] Christensen v. Harris Cnty., 529 U.S. 576, 587, 120 S. Ct. 1655, 1663 (2000) (citations omitted).

(citations omitted).

[201] Marcella v. Capital Dist. Physicians' Health Plan, Inc., 293 F.3d 42, 51 n.1 (2d Cir. 2002) ("Because the Department of Labor has the power to issue

deferring to *Skidmore*.[202] Notwithstanding, this does not negate the fact that M-37050 should have been granted deference under *Skidmore*.

The "power to persuade" is the amount of respect or weight that is proportional to the strength of the agency's reasoning.[203] A key ingredient is that the court does not necessarily have to agree with the agency's interpretation for it to be persuasive.[204] This is because there is deference involved.[205] This is a significant miscalculation by the *NRDC II* court.[206] The court comes clean and concedes that there is a federal circuit split, with some courts agreeing with the interpretation promulgated by M-37050.[207] The court tries to brush this off and spews

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administrative interpretations of ERISA which carry the force of law, *see* 29 U.S.C. § 1135, the lack of formal notice-and-comment procedures attending these DOL Opinion Letters does not necessarily foreclose the possibility that they should be afforded *Chevron* deference. *See* United States v. Mead Corp., 533 U.S. 218, 230–31, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). However, because we find the Department of Labor's position in accord with our interpretation of ERISA in any event, we need not decide whether we would be obliged to defer to these opinion letters if we read ERISA differently than the agency does.").

[202] *See NRDC*, 478 F. Supp. 3d at 478.

[203] *Skidmore*, 323 U.S. at 140 ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

[204] Cathedral Candle Co. v. U.S. Int'l Trade Comm'n, 400 F.3d 1352, 1366 (Fed. Cir. 2005) ("At times, the [Supreme] Court has characterized the degree of deference to particular agency interpretations of statutes as depending on "the extent that the interpretations have the 'power to persuade'". We are confident that the Court did not mean for that standard to reduce to the proposition that "we defer if we agree." If that were the guiding principle, *Skidmore* deference would entail no deference at all. Instead, we believe the Supreme Court intends for us to defer to an agency interpretation of the statute that it administers if the agency has conducted a careful analysis of the statutory issue, if the agency's position has been consistent and reflects agency wide policy, and if the agency's position constitutes a reasonable conclusion as to the proper construction of the statute, even if we might not have adopted that construction without the benefit of the agency's analysis.").

[205] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 512 (1989) ("It should not be thought that the *Chevron* doctrine…is entirely new law. To the contrary, courts have been content to accept 'reasonable' executive interpretations of law for some time.").

[206] Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 478 F. Supp. 3d at 480, 485 ("Ultimately, though, the Jorjani Opinion is *simply an unpersuasive interpretation* of the MBTA's unambiguous prohibition on killing protected birds."; Under either version, Interior's use of the canon is *unpersuasive*.") (emphasis added).

[207] *Id.* at 478 ("Second, Interior's argument vastly overstates circuit disagreement and blurs the actual boundaries that have been drawn. Interior

incoherent reasoning that the Interior Department is embellishing the split.[208] Notwithstanding, this does not diminish the fact that some courts have held the same reading of the MBTA as that of M-37050. These courts did so before the agency promulgated this viewpoint. Hence, this sufficiently meets the standard of the "power to persuade" under *Skidmore*. Expanding further, the NRDC II incredulously claims that the MBTA statute is "unambiguous."[209] Other federal courts have expressly held that the MBTA is "ambiguous."[210] Amazingly, the *NRDC II* court, an S.D.N.Y. court, falsely claims that the MBTA is "unambiguous",[211] even after the Second Circuit held otherwise.[212] This is just one layer of the *NRDC II* court defying the Second Circuit, but this is not an opinion. Rather, this is propaganda masquerading as a court decision in order to advance a political program.[213]

Moreover, *NRDC II* impudently disavows *stare decisis,* and alleges that the Second Circuit's holding does not control the S.D.N.Y.[214]

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characterizes the Fifth, Eighth, and Ninth Circuits as having held that incidental take is excluded from coverage under the MBTA and contrasts their positions with the Second and Tenth Circuits, which Interior argues have held the opposite. *Id.* at 7–11. Tensions between the circuits certainly exist, but they are not of the magnitude or kind Interior presents.").

[208] *Id.*; *see also Ray Westall Operating Inc.*, 2009 WL at *3.

[209] *NRDC*, 478 F. Supp. 3d at 480 ("While *FMC* does not control this case, *the statute's unambiguous text does*.") (emphasis added).

[210] *See*, *e.g.*, *Newton City Wildlife Ass'n*, 113 F.3d at 115 ("[W]e agree with the Ninth Circuit that *the ambiguous terms* '*take*' *and* '*kill*' *in 16 U.S.C. § 703* mean 'physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918.'" (citing to *Seattle Audubon*, 952 F.2d at 302) (emphasis added)); *see also Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d at 1209, 1211 (noting that "[t]he Eighth Circuit *found that the ambiguous terms* '*take*' *and* '*kill*' mean 'physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918'" and was "controlling precedent" in case involving uncovered oil reserve pits) (emphasis added).

[211] *NRDC*, 478 F. Supp. 3d at 480 ("While *FMC* does not control, the statute's unambiguous text does. A court must normally assess a statute according to the ordinary meaning of its language at the time the statute was passed.") (citations omitted).

[212] *FMC Corp.*, 572 F.2d at 906 ("*However*, *the term* "*act*" *itself is ambiguous*, and a person failing to act when he has a duty to do so may be held to be criminally liable just as one who has acted improperly. In the most recent Supreme Court case imposing criminal liability for violation of the Food, Drug and Cosmetic Act, the Supreme Court held that the president of a national retail food chain was criminally liable because food being held for sale in a warehouse was allowed to be exposed to contamination by rodents, notwithstanding his lack of knowledge of the situation.") (emphasis added).

[213] *See* Friedman, *supra* note 15; Friedman, *supra* note 16.

[214] *NRDC*, 478 F. Supp. 3d at 480 ("The court notes at the outset that *FMC* does not control this case.").

If this is true, the court needs to distinguish the present case from *FMC*. Predictably, the court does not, and simply proffers some sort of expiration date on the Second Circuit's decision.[215] To state the obvious, *stare decisis* binds lower courts no matter how much time has passed.[216]

In *United States v. FMC Corporation*[*], the Second Circuit upheld a conviction of a corporation because its pesticides poisoned ponds, killing a number of birds.[217] The court narrowed its decision, realizing possible implications. Thus, it held that while it did impose strict liability in this instance, it does not necessarily mean that it is always appropriate to do so.[218] As a solution, the court suggested that prosecutorial discretion and courts could be judges of when the right circumstances to do so are.[219] There are significant flaws with this reasoning, but it is beyond the scope of the argument here. Recall that the purpose of M-37050 is to interpret the MBTA as removing incidental or accidental takings or killings from the ambit of the MBTA.[220] Along this line of reasoning, M-37050 is expanding on the Second Circuit's logic. Assuming, arguendo, that there is disagreement if M-37050 does indeed do this, it is without dispute that the *NRDC II* court had a responsibility to distinguish the holding in *FMC* if it is not controlling as the court alleged; the *NRDC II* court failed to do so.

VI. Public Policy

a. Courts Cannot Vacate an Agency Opinion Because it is Not a Final Agency Action

Astonishingly, the *NRDC* court invalidated an agency opinion. Courts do not have the power to review agency opinions because they

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[215] *Id.* at 479 ("Since *FMC* was decided in 1978, no circuit has held that the MBTA requires the government to prove a guilty state of mind, but circuits have opined on other limitations on liability.").

[216] CBOCS W., Inc. v. Humphries, 553 U.S. 442, 457 (2008). ("Principles of *stare decisis*, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends.").

[217] *FMC Corp.*, 572 F.2d at 908 (2nd Cir. 1978).

[218] *Id.* at 908. ("Imposing strict liability on *FMC* in this case does not dictate that every death of a bird will result in imposing strict criminal liability on some party.").

[219] *Id.* at 905. ("Such situations properly can be left to the sound discretion of prosecutors and the courts.").

[220] Memorandum from Daniel Jorjani, Principal Deputy Solicitor Exercising the Authority of the Solicitor Pursuant to Secretary's Order 3345, U.S Dept. of Interior, to Deputy Secretary, Assistant Secretary for Land and Minerals Management, and Assistant Secreta (Dec. 12, 2017) (on file with author).

are not final agency action. Judicial review under the APA is limited to examining final agency action that is not committed to agency discretion or precluded from review by a different statute.[221]

Courts may review a wide variety of issues pertaining to agencies, but it is limited to agency *action*.[222] Courts have denied review if the agency's challenged conduct does not fit within the statutory definition.[223] Courts have denied requests for judicial review of agency publications, press releases, as well as other documents that do not necessarily qualify as rules, orders, or sanctions because they determined it to be outside the scope of the APA.[224]

While analysis of final agency action does not consist of a bright-line rule, there is a case which can serve as guidance. In *Soundboard Association v. Federal Trade Commission*, the District of Columbia Circuit Court of Appeals (D.C. Circuit) held by a vote of 2-1, that an opinion letter issued by Federal Trade Commission (FTC or Commission) staff was not "final agency action" and, therefore, not judicially reviewable under the APA. The agency action at issue in *Soundboard Association* was a 2016 opinion letter prepared by the Associate Director of the FTC's Division of Marketing Practices, revoking an earlier, contrary staff opinion letter.[225] The *Soundboard Association* decision should serve as precedent for the MBTA issue discussed in this article. The D.C. Circuit is "unique among federal courts, well known for an unusual caseload that is disproportionally weighted toward administrative law."[226] United States Supreme Court Chief Justice John G. Roberts, Jr. observed that, "One-third of the D.C. Circuit appeals are from agency decisions."[227]

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[221] Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345 (1984).

[222] 5 U.S.C. §551(13).

[223] *See, e.g.*, Hearst Radio v. FCC, 167 F.2d 225, 227 (D.C. Cir. 1948). ("Broad as is the judicial review provided by the Administrative Procedure Act, it covers only those activities included within the statutory definition of '*agency action*.'") (emphasis added).

[224] *See, e.g.*, Indus. Safety Equip. Ass'n, Inc. v. EPA, 837 F.2d 1115, 1118–19 (D.C. Cir. 1988); *see also* Trudeau v. Fed. Trade Comm'n, 456 F.3d 178, 189 (D.C. Cir. 2006) (noting that "we have never found a press release of the kind at issue here to constitute 'final agency action' under the APA"). *See also* Barry v. SEC, No. 10-cv-4071, 2012 U.S. Dist. LEXIS 30547, *19 (E.D.N.Y. March 7, 2012) ("The press release is therefore not 'final' action subject to review under the APA.").

[225] Letter from Lois Greisman, Associate Director, Division of Marketing Practices, FTC, to Michael Bills, CEO Call Assistant, LLC. (Sept. 11, 2009) (on file with author).

[226] Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 Cornell J.L. & Pub. Pol'y. 131, 131 (2013).

[227] Chief Justice of the United States John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375, 376 (2006).

Assuming, *arguendo,* that courts do have the powers to review agency opinions, it is repugnant to public policy because the floodgates would be kicked wide open. Withal, it would undoubtedly lead to forum shopping and create a mess across the country. Under President Trump (Republican), Opinion M-37050 was issued and it states, "this memorandum permanently withdraws and replaces Opinion M-37041.[228] Under President Biden (Democrat), Opinion M-37065 was issued and it states, "This Memorandum permanently revokes and withdraws M-37050."[229] Presumably, when the next Republican is elected to office the Solicitor General of the Department of the Interior will issue an opinion revoking Opinion M-37065 and reinstating Opinion M-37050. Notwithstanding, that is up to the discretion of the Interior Department. Courts cannot be expected to weigh in on these types of matters every time a different political party occupies the White House. It is reasonable to presume that if the aforementioned does occur, lawsuits will be brought to block it again. Those advocating for an interpretation that the MBTA does include incidental takings will re-file in the S.D.N.Y. and claim *stare decisis*. On the other side of the coin, those with the interpretation that the MBTA is limited to intentional takings will file in a favorable jurisdiction; for instance, a federal district court within the Fifth Circuit. They will point to the law of the circuit doctrine and note that the holding in *CITGO* is precedent.[230] So, we are left with forum shopping over an opinion letter, which based on precedent, can be revoked based on who is appointed to lead the Interior Department by POTUS. Because of the nature of the revocations of previous opinion letters, it is arduous to argue that they constitute final agency action. The Fourth Circuit explicitly acknowledges this and sagaciously surmised that "[a] case is fit for judicial decision where the issues to be considered are purely legal ones and *where the agency rule or action giving rise to the controversy is final and not dependent upon future uncertainties or intervening agency rulings*."[231] The Fourth Circuit knew that if future intervening agency rulings occur, such as revocations of opinion letters, then there is no limit as to what cases can be brought challenging agency actions. SCOTUS has affirmed this as well.[232]

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[228] Memorandum from Daniel Jorjani, Principal Deputy Solicitor Exercising the Authority of the Solicitor Pursuant to Secretary's Order 3345, U.S Dept. of Interior, to Deputy Secretary, Assistant Secretary for Land and Minerals Management, and Assistant Secretary (Dec. 12, 2017) (on file with author).

[229] Memorandum from Robert T. Anderson, Principal Deputy Solicitor, U.S. Dept. of Interior, to Principal Deputy Solicitor (Mar. 18, 2021) (on file with author).

[230] *CITGO*, 801 F.3d at 488–89 ("*we agree with the Eighth and Ninth circuits that a 'taking' is limited to deliberate acts done directly and intentionally to migratory birds*.") (emphasis added).

[231] Charter Fed. Sav. Bank v. OTS, 976 F. 2d 203, 209 (4th Cir. 1992) (emphasis added).

[232] Wos v. E.M.A. *ex rel.* Johnson, 568 U.S. 627, 643 (2013) ("The 2006 and

b. Agencies Have the Authority to Change Their Stance

It is repugnant to public policy for a court to state that an agency cannot change their stance on an interpretation. Nevertheless, this is exactly what the S.D.N.Y. did when it proclaimed in the beginning of its opinion that "the Principal Deputy Solicitor of the U.S. Department of the Interior ('DOI') *issued a memorandum renouncing almost fifty years of his agency's interpretation* of 'takings' and 'killings' under the Migratory Bird Treaty Act of 1918 ('MBTA')."[233] To paraphrase Judge Richard Posner, this is a campaign ad.[234]

Judge Caproni conveniently, and deliberately, fails to recognize that under President Biden (Democrat), the DOJ reversed positions more times than it did under President Trump (Republican).[235] To be clear, there is politicking going at the federal agencies.[236] To believe otherwise is naïve. To claim otherwise is not honest. It is hard to draw a bright-line rule as to what is within bounds in this respect. Nevertheless, federal agencies have changed positions. In one particular instance, there was litigation over the "must-carry" provision under the Cable Television of Act of 1992. To reiterate, there is no bright-line rule but it was asseverated that "[t]he Executive Branch making and interpreting laws

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2009 documents, however, *no longer reflect the agency's position*. (citation omitted). *And at any rate, the documents are opinion letters, not regulations with the force of law*. We have held that '[*i*]*nterpretations such as those in opinion letters*—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law….'") (emphasis added).

[233] Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 478 F. Supp. 3d at 472.

[234] Judge Richard A. Posner, *Supreme Court Year in Review: Justice Scalia offers no evidence to back up his claims about illegal immigration*, Slate (June 27, 2012, 10:12 AM), https://slate.com/news-and-politics/2012/06/supreme-court-year-in-review-justice-scalia-offers-no-evidence-to-back-up-his-claims-about-illegal-immigration.html ("These are fighting words.…It wouldn't surprise me if Justice Scalia's opinion were quoted in campaign ads. The program that appalls Justice Scalia was announced almost two months after the oral argument in the Arizona case.… The suggestion that illegal immigrants in Arizona are invading Americans' property, straining their social services, and even placing their lives in jeopardy is sufficiently inflammatory to call for a citation to some reputable source of such hyperbole. Justice Scalia cites nothing to support it.").

[235] Debra Cassens Weiss, *Biden DOJ outpaces DOJ for reversing US positions in pending Supreme Court Cases*, A.B.A. J. (Mar. 18, 2021, 11:04 AM), https://www.abajournal.com/news/article/justice-department-outpaces-trump-doj-for-reversing-us-position-in-pending-supreme-court-cases.

[236] *See generally* Glenn Thrush, *Justice Dept. Adds Limits on Political Activity of Staff*, N.Y. Times (Aug. 30, 2022), https://www.nytimes.com/2022/08/30/us/politics/justice-department-political-activity.html.

is the beginning of a slippery slope"[237] as "*the DOJ's shifting views on the "must-carry" provision as the White House went from a Republican President to a Democratic President*."[238] The hard reality is that federal agencies changing stances will continue until the end of time.

The DOJ switching stances, even in cases before SCOTUS,[239] is nothing new. Under the Biden administration, the DOJ changed its position on at least five cases before SCOTUS within a two-month span.[240] The DOJ reversed itself under the Trump administration in four cases,[241] including on matters involving voting rights,[242] labor relations,[243] the constitutionality of the

Consumer Financial Protection Bureau ("CFPB") structure,[244] and the constitutionality of administrative proceedings before

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[237] Max Birmingham, *Lie to Me: Examining Specific Intent Under 18 U.S.C. §§ 1001, 1035*, 14 Fla. A&M U. L. Rev. 271, 295 (2020).

[238] *Id*. at 295–96.

[239] *See* Weiss, *supra* note 235.

[240] *Id.*

[241] Kimberly Strawridge Robinson, *Biden on Pace to Flip Positions at Supreme Court More Than Trump*, BL (Mar. 18, 2021, 4:45 AM), https://news.bloomberglaw.com/business-and-practice/biden-on-pace-to-flip-positions-at-supreme-court-more-than-trump.

[242] Mark Joseph Stern, *The Supreme Court's Decision Greenlighting Voter Purges Is a Big Win for the Trump Administration*, Slate (June 11, 2018, 1:10 PM), https://slate.com/news-and-politics/2018/06/husted-v-randolph-institute-is-a-victory-for-trumps-department-of-justice.html ("The Justice Department's position triumphed in the 6th U.S. Circuit Court of Appeals toward the end of President Barack Obama's tenure. But after the election—and the confirmation of Justice Neil Gorsuch—the Supreme Court agreed to review the 6th Circuit's decision. *A few months later, the DOJ, now under Attorney General Jeff Sessions, switched its position in the case*. The agency urged the Supreme Court to reverse the 6th Circuit and allow Ohio to purge voters on the basis of their failure to vote. Its brief gave no persuasive explanation as to its change of heart, compelling the conclusion that Trump's new political appointees just didn't like the DOJ's prior position.") (emphasis added).

[243] Bradford J. Smith, *Department of Justice Reverses Stance and Urges Supreme Court to Enforce Class Action Waivers in Employment-Related Arbitration Agreements*, Goodwin (June 27, 2017), https://www.goodwinlaw.com/publications/2017/06/06_27_17-department-of-justice-reverses-stance; *see also* Andrew Goudsward, *Here Are the Key Cases Where DOJ Reversed Its Stance From Trump to Biden*, Nat'l L. J. (Dec. 30, 2021), https://www.law.com/nationallawjournal/2021/12/30/here-are-the-key-cases-where-doj-reversed-its-stance-from-trump-to-biden/.

[244] Jonnelle Marte, *Trump Administration calls the structure of the Consumer Financial Protection Bureau unconstitutional in filing*, Wash. Post (Mar. 17, 2017, 6:59 PM), https://www.washingtonpost.com/news/get-there/wp/2017/03/17/in-court-filing-trump-administration-calls-the-structure-of-the-cfpb-unconstitutional/ ("*The brief marks a reversal for the Justice Department*, which filed a friend-of-the-court brief in support of the CFPB during the final days of the Obama administration, asking the court to rehear the case.") (emphasis added).

administrative law judges of the Securities and Exchange Commission ("SEC").[245]

In one instance, President Trump changed his view on a matter involving a census question which was before the United States District Court for the Southern District of Maryland.[246] DOJ attorneys told the judge that a citizenship question would not be on census forms.[247] Judge George Hazel said he unearthed Trump's reversal on this through his personal Twitter account.[248] The DOJ lawyer expressed confusion and noted that he would do his "absolute best to figure out what's going on."[249] Ultimately, the DOJ ended up replacing the legal team.[250]

If a federal agency can change their stance on a position after a case has been granted *certiorari* by SCOTUS, then a federal agency may change their stance on an interpretation via an opinion letter.[251] In 2012, Justice Scalia questioned the Solicitor General: "why should we defer to the views of the current administration," after it changed its stance.[252] One commentator noted that times have changed, and courts understand how dissimilar administrations are.[253] Accordingly, Presidents will deploy their influence on agencies, who in turn will adopt the President's outlook.[254]

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[245] Lucia v. SEC, 138 S. Ct. 2044, 2050–51 (2018) ("Lucia asked us to resolve the split by deciding whether the Commission's ALJs are 'Officers of the United States within the meaning of the Appointments Clause.' (citation omitted). *Up to that point, the Federal Government (as represented by the Department of Justice) had defended the Commission's position that SEC ALJs are employees, not officers*. *But in responding to Lucia's petition, the Government switched sides*. So when we granted the petition, (citation omitted), we also appointed an *amicus curiae* to defend the judgment below.") (emphasis added).

[246] Amanda Robert & Lee Rawles, *Judge Orders DOJ to respond after Trump tweet contradicts plan to print census without citizenship question*, A.B.A J. (Jul. 3, 2019, 11:37 AM), https://www.abajournal.com/news/article/trump-administration-moves-forward-with-census-without-citizenship-question.

[247] *Id.*

[248] *Id.* ("'I don't know how many federal judges have Twitter accounts, but I happen to be one of them, and I follow the president, and so I saw a tweet that directly contradicted the position that Mr. [Joshua] Gardner had shared with me yesterday,' Hazel said in the transcript of a telephone conference that he ordered held on Wednesday.").

[249] *Id.*

[250] Debra Cassens Weiss, *DOJ Replaces Lawyers Defending Citizenship Question After Flip-Flop; Law Prof Suggests This Argument*, A.B.A J. (Jul. 8, 2019, 10:14 AM), https://www.abajournal.com/news/article/justice-department-replaces-lawyers-defending-citizenship-question-after-flip-flop ("The DOJ said in a statement it is 'shifting these matters to a new team of civil division lawyers going forward,' report the New York Times, Politico, the Washington Post and NPR.").

[251] *See* Wos v. E.M.A. *ex rel* Johnson, 133 S. Ct. 1391, 1402 (2013).

[252] *See* Robinson, *supra* note 241.

[253] *Id.*

[254] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653–54 (1952)

VII. Conclusion

While the S.D.N.Y. came to the right conclusion regarding the analysis of the MBTA, it did not have jurisdiction to do so. The plaintiffs lacked standing.[255] "[M]uch more is needed" to establish standing than a mere assertion of "the government's allegedly unlawful regulation (or lack of regulation) of someone else."[256] In a tantalizing facet, Judge Caproni put her reasoning that plaintiffs had standing in footnotes.[257] Some judges have held that footnotes are not binding.[258] Other judges have held that footnotes are superfluous,[259] or even worse, just a way for a jurist to bury material, evidence, and facts that cut against their decision.[260]

Moreover, the *NRDC* court incorrectly, likely on purpose, interprets the Administrative Procedure Act ("APA") as a way to rationalize their holding on this issue: courts can review agency decisions under APA only when they are "final." [261] This is because

("By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.") (note that there are other person or persons who influence agencies); *see* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2253 (2001) ("As the years passed, however, faith in the objectivity of these administrators eroded, and in consequence, an array of interest groups received enhanced opportunities to influence agency conduct.").

[255] California v. Texas, 210 L. Ed. 2d 230 (2021) ("We proceed no further than standing. The Constitution gives federal courts the power to adjudicate only genuine 'Cases' and 'Controversies.' Art. III, §2. That power includes the requirement that litigants have standing").

[256] Lujan v. Defs. of Wildlife, 504 U.S. 555, at 560 (1992).

[257] *See* Walton, *supra* note 82. *See also NRDC*, 478 F. Supp. 3d at 489 n.5; Env'l Pls.' Mem. of Law (Dkt. 68-1) at 14–17; States' Mem. of Law (Dkt. 69-1) at 13–16; Clapper v. Amnesty Int'l USA, 568 U.S. 398, 411–12, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013).

[258] Abner J. Mikva, *Goodbye to Footnotes*, 56 U. Colo. L. Rev. 647, 649 (1985) ("Many legalists insist that footnotes are part of the opinion and entitled to full faith and credit," but "others insist that they are just footnotes.")

[259] Richard A. Posner, *The Federal Courts: Challenge and Reform*, 353 (1996) (Footnotes create confusion because "some propositions that are superfluous or questionable or both."); Ruggero J. Aldisert, *Opinion Writing* § 12.1, at 177 (1990) (Footnotes "obfuscate as much as they illuminate, creating muddlement and even generating additional litigation.").

[260] Posner, *supra* note 259, at 352 ("[O]ften, the opinion writer will have placed material in a footnote because he was not quite sure it was right and yet the material seemed in some way necessary to complete his argument or at least supportive of it.").

[261] *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."); Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt., 460 F.3d 13, 18 (D.C. Cir. 2006) ("Whether there has been 'agency action' or 'final agency action'

courts typically withhold from reviewing to give breathing space to the government agency.[262] An agency opinion is *not*[263] a "final agency action." In *Federal Trade Commission v. Standard Oil Co. of California*, SCOTUS held that initial complaints initiating enforcement actions does not rise to the level of a final agency action.[264] In *Lujan v. National Wildlife Federation*, the Supreme Court ruled that policies and programs are not reviewable as final agency action because they are not discrete agency determinations.[265] Policies and programs, legislative regulations, adjudicatory opinions, manuals, court briefs, policy statements, staff instructions, audits, correspondence, informal advice, guidelines, press releases, testimony before Congress, internal memoranda, speeches, explanatory statements in the Federal Register, like opinion letters, are interpretive rules.[266] Interpretive rules are not final agency action.[267]

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within the meaning of the APA are threshold questions; if these requirements are not met, the action is not reviewable.").

[262] *See* Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 Tex. L. Rev. 331, 376 (2011) ("The foundation for the [first prong of the final agency action test] is avoidance of judicial interference with agency decision making until the agency has completed its own resolution.").

[263] *See*, *e.g.*, Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020, (D.C. Cir. 2000) ("Only 'legislative rules' have the force and effect of law…A 'legislative rule' is one the agency has duly promulgated in compliance with the procedures laid down in the statute or in the Administrative Procedure Act."); *see, e.g.*, Indus. Safety Equip. Ass'n, Inc. v. EPA, 837 F.2d 1115, 1118–19 (D.C. Cir. 1988); *see also* Trudeau v. Fed. Trade Comm'n, 456 F.3d 178, 189 (D.C. Cir. 2006) (noting that "we have never found a press release of the kind at issue here to constitute 'final agency action' under the APA"). *See also* Barry v. SEC, No. 10-cv-4071, 2012 U.S. Dist. LEXIS 30547, *19 (E.D.N.Y. March 7, 2012) ("The press release is therefore not 'final' action subject to review under the APA."); letter from Lois Greisman to Michael Bills, *supr*a note 199.

[264] FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 232, 238–46 (1980).

[265] *Id.* at 872–74.

[266] Nat'l Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 701 (D.C. Cir. 1971) ("But there seems little room for the application of that doctrine when the *interpretative ruling* is signed by the head of the agency. In this situation we are not troubled by the questions that might arise as to the nature or extent of delegation to a subordinate official. The significance of an authoritative interpretation by the Administrator of the Wage and Hour Division, as the head of an agency, is borne out by §§ 9 and 10 of the Portal-to-Portal Act, 29 U.S.C. §§ 258, 259, eliminating liability for the employer who establishes good faith reliance on an agency's 'administrative regulation, order, ruling, approval, or interpretation.' What appears from the cases and the interrelated statutory provisions is that 'authoritative' rulings and interpretations of the agency needed for this defense are those issued by the Administrator of the Wage and Hour Division, and not by regional or field officials, but they can be issued by the Administrator in the form of an '*opinion letter*.'") (emphasis added); *see also* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1, 2 (1990).

[267] https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules#_ftn8; *see also* Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251–

When federal agencies promulgate rules, they are subject to notice-and-comment procedures.[268] Exempted from this requirement are "interpretive rules and "general statements of policy," which may also be referred to as "guidance documents" or "nonlegislative rules."[269]

The FWS revocated M-37050.[270] The FWS noted that it was going to publish a final rule codifying M-37050.[271] While the final rule was never effectuated due to it being revoked before an effective date,[272] the key here is that there is another step: codifying the agency action. This cements the notion that the court did not have authority to vacate an opinion. It is just that–an opinion.

The government has changed its stance on matters of law. The government has even changed its stance during ongoing litigation.[273] Judge Caproni notes that M-37050 replaced a previous opinion which held a different take on "take" and "kill" under the MBTA.[274] Noting that M-37050 was issued under a new Presidential administration,[275] and by Judge Caproni writing that because M-37050 departs from previous agency views,[276] it taints her reasoning. It permeates the rest of the opinion and reinforces the notion that the judiciary is now nothing more than an extension of the legislative branch.

In current times, courts are wrestling with the perception that they are political hacks who engage in judicial activism.[277] Unfortunately, a

53 (D.C. Cir. 2014) (The D.C. Circuit held that an Environmental Protection Agency (EPA) guidance document that instructed agency staff to recommend limitations on mining projects in Clean Water Act permits was not reviewable because it did not compel regulated parties to do anything, state permitting authorities could ignore it, it could not serve as the basis of an enforcement action, and EPA stated throughout the guidance that it did not impose binding requirements or prohibitions.).

[268] 5 U.S.C. § 553 (2006).

[269] *See* Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 Yale L. J. 782, 788 n.17 (2010); William Funk, *A Primer on Nonlegislative Rules*, 53 Admin. L. Rev. 1321, 1322 (2001) ("These rules are often called nonlegislative rules, because they are not 'law' in the way that statutes and substantive rules that have gone through notice and comment are 'law,' in the sense of creating legal obligations on private parties.").

[270] Revocation of Provisions of Regulations Governing Take of Migratory Birds, 86 Fed. Reg. 54642 (Dec. 3, 2021) (to be codified at 50 C.F.R. 10).

[271] *Id.* at 54642.

[272] *Id.* (Furnishing an overview of why it did not meet notice-and-comment requirements.).

[273] *See supra* notes 235–250 and accompanying text.

[274] *See* Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 397 F. Supp. 3d 430, 436 (S.D.N.Y. 2019).

[275] *Id.*

[276] Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 478 F. Supp. 3d 469, 474, 478 (S.D.N.Y. 2020).

[277] Peter Weber, *Justice Amy Coney Barrett, in McConnell Center Speech, insists the Supreme Court isn't 'partisan hacks,'* The Week (Sep. 13, 2021), https://

harsh reality is that the justice system does not always work the way we want it to.[278] But we cannot start cherry-picking which issues and cases get to skip the line and receive preferential treatment because we want them to. Because that is the greatest injustice of all.

theweek.com/supreme-court/1004767/justice-amy-coney-barrett-in-mcconnell-center-speech-insists-the-supreme ("'My goal today is to convince you that this court is not comprised of a bunch of partisan hacks,' she said."); Nate Raymond and Andrew Chung, *U.S. Supreme Court risks its legitimacy by looking political, Justice Kagan says*, Reuters Legal (Sep. 14, 2022 5:10 AM EDT), *available at* https://www.reuters.com/legal/us-supreme-court-risks-its-legitimacy-by-looking-political-justice-kagan-says-2022-09-14/; Debra Cassens Weiss, *Sotomayor: Threat to judicial independence is unprecedented as judicial philosophies are politicized*, A.B.A J. (Feb. 10, 2022, 9:07 AM CST), *available at* https://www.abajournal.com/news/article/sotomayor-threat-to-judicial-independence-unprecedented-amid-politicization-of-judicial-philosophies.

[278] CBS News, *Justice Scalia On Life Part 1*, Youtube (Sept. 23, 2010), *available at* https://www.youtube.com/watch?v=FrFj7JAyutg (Lesley Stahl: "His philosophy has occasionally lead him to decisions he deplores. Like his upholding the constitutionality of flag burning. As he told a group of students in Missouri, "if it was up to me, I would have thrown this bearded, sandal-wearing flag burner into jail. But it was not up to me.").

Disarticulating Onychectomy: The Case for Banning the Medically Unnecessary Procedure in the United States

Kelsey Bees*

I. Introduction

It is Christmas day and a family huddles around the Christmas tree, the two little girls excitedly waiting to open their presents. For months, the girls begged their parents for a pet, any pet. Suddenly, their mother carries in a small, furry being with a bow around its neck: a kitten! Overjoyed by their new furry friend, the children rush over to the kitten and start petting it. After a few minutes of petting, the kitten slashes at the girls and runs off, leaving the girls covered in small scratches. Over the next several months, the kitten continues to scratch everything within reaching distance, children and furniture alike. So, the parents are posed with a dilemma: should the cat be declawed?

Feline onychectomies, or cat declawing procedures, have been around for decades in the United States, and have remained a fairly common procedure for a significant number of years. However, recent research shows that the procedures have harmful side effects. Cats often face serious physical side effects following the procedure, including nail regrowth, lameness, and chronic pain. Behavioral issues, such as house soiling, increased aggression, and increased biting, are unintended consequences of onychectomies and are often the cat's way of outwardly expressing the physical pain it is suffering. Sadly, these behavioral issues cause a significant number of owners to relinquish their cats to local animal shelters. Despite the safe and cost-effective alternatives to surgery, such as nail caps, weekly nail clippings, and scratching boards, many owners insist on declawing procedures to make the cat easier to handle.

This article undertakes an in-depth inquiry into cat declawing procedures in the United States. In order to better protect the health and well-being of domestic cats, the article ultimately proposes a

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full ban of such procedures for cosmetic or nonmedical reasons in accordance with the provisions of a bill recently considered by the state legislature of Massachusetts. This bill, so far, is the most inclusive bill that effectively protects the welfare of domestic cats. Its tiered fine system offers stringent penalties that act as a strong deterrent against the performance *and* solicitation of elective onychectomies. The threat of court-mandated instructive courses related to the humane treatment of animals and prevention of cat ownership after a violation also act as a significant deterrent of elective onychectomies. Furthermore, its extensive recordkeeping requirements allow the board of registration in veterinary medicine to regularly audit veterinarians to ensure they are only performing medically necessary onychectomies and to track down owners who may have solicited the procedure in the first place. By including these core elements of Massachusetts's proposed bill, lawmakers can codify and strengthen necessary protections for domestic cats.

Part II of this article explores natural cat behavior and explains why owners may seek an onychectomy. The article then details the three principal methods of onychectomy currently used by veterinarians in the United States to declaw cats in Part III, and addresses the adverse impacts that these procedures can have on a cat's behavior and physical well-being in Part IV. Part V details the various safe, cost-effective alternatives to feline onychectomies. Next, in Part VI, this article addresses current attitudes of both the general population and veterinarians on declawing procedures. The article then compares existing policies banning cat declawing procedures outside of the United States with statutes and ordinances that have been adopted by various states and municipalities in the United States in Part VII. Part VIII offers proposed legislation, using Massachusetts's proposed bill on cat declawing ban as a model. This article concludes that, while various city ordinances and New York and Maryland's state legislation are significant steps in the right direction, the United States still trails behind other countries in adopting cat declawing bans.

II. Domestication, History, and Behavior of the Cat

The domestic cat, one of the most popular family pets in the world, is often treated as a member of the family.[1] While the domestication process is not fully understood, the most widely accepted understanding is that cats domesticated themselves.[2] Around 11,000 years ago in the

[1] David Grimm, *The Genes That Turns Wildcats into Kitty Cats: Findings Help Show How All Animals Became Tame*, Science, Nov. 14, 2014, at 799.

[2] James A. Serpell, *Domestication and History of the Cat*, *in* The Domestic Cat: The Biology of Its Behavior 83, 87 (3d ed. 2014).

Middle Eastern region, small wildcats became increasingly attracted to rodent-infested granaries.[3] Observing the benefits of allowing such animals to stick around, Neolithic villagers allowed them to return on a nightly basis to hunt rodents.[4] Grain was a staple of the region, and the wildcats allowed grain stores to maintain a competitive edge in the market.[5] Basically, cats "just hung out, and humans tolerated them."[6]

A key characteristic of a cat is its antisocial tendencies.[7] This has led many to ask why cats, even after thousands of years of domestication, still have not shed such individualistic behavior.[8] Or, as David Grimm puts it, "why are cats still a bit wilder than our other favorite domestic, the dog?"[9] Unlike dogs, cats were not specifically selected and bred for a particular purpose.[10] Humans relied on the wildcat's natural predatory behavior to reduce their rodent population rather than capturing the cats and selectively breeding them like dogs.[11] Thus, the wildcats that stuck around the villages slowly began to domesticate themselves.[12]

This is not to say that humans had no hand in the domestication of cats.[13] Humans habitually capture and tame wild animals to keep as pets, and there is "no obvious reason to think that the inhabitants of the Neolithic Near East were any different."[14] Indeed, the evidence suggests that, about 9,500 years ago, some cats controlling the local rodent population were transported on grain-carrying ships from Egypt to Cyprus, an island with no wildcat population.[15] Furthermore, there is evidence of cats in Egyptian tomb paintings about 4,400 years ago, and artwork depicting cats sharing human activities as early as 3,500 years ago.[16] While the human-cat relationship began as a utilitarian one, it slowly became a loving, emotional one.[17] The bond became so strong that it was customary for owners to be buried with their cats upon death in Early Neolithic Cyprus.[18]

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[3] *Id.*

[4] *See id.*

[5] Clare Hargrave, *Cats and Domestication–A Road Less Travelled*, 30 Veterinary Nursing J. 263, 263 (2015).

[6] Grimm, *supra* note 1.

[7] *See id.*

[8] *See id.*

[9] *Id.*

[10] *Id.*

[11] *See id.*; Serpell, *supra* note 2, at 87.

[12] Hargrave, *supra* note 5, at 263.

[13] Serpell, *supra* note 2, at 87.

[14] *Id.*

[15] Hargrave, *supra* note 5, at 263.

[16] *Id.*

[17] Serpell, *supra* note 2, at 88.

[18] *Id.*

The spread of the cat around the world was slow.[19] The Romans continued to use polecats and weasels for rodent control until about 1,600 years ago, and Northern Europe did not have cats until the Vikings brought them about 1,200 years ago.[20] Up until only a few centuries ago, cats were kept as pets only for rodent control.[21] Given that cats were "closely linked in folklore with devil worship and witchcraft in many cultures," it was considerably suspicious if an individual kept a cat in the home for any other purpose than rodent control.[22] While many cats are still used for rodent control today, the "type" of ownership varies from country to country.[23]

Domestic cats that live as domestic companions benefit from an "enhanced access to food, shelter, and company that humans provide."[24] However, "[t]he domestic cat retains a fully functioning predatory sequence of behavior."[25] Cats living with humans are often doted upon and well-fed by their owners, so this predatory behavior is not essential in their day-to-day lives.[26] However, a large number of cats throughout the world do not benefit from a human companion, and "the retention of a 'wild type' behavioral repertoire is essential to survival."[27] Unfortunately, because a large number of domestic cats enter the stray cat population every year, it is crucial for even domestic cats to maintain this predatory behavior to ensure their survival.[28]

A crucial element of this predatory behavior—and a key to a cat's survival—is its claws.[29] Kittens spend several weeks developing and honing their predatory skills, which explains why kittens often scratch while they play.[30] A cat's claws are retractable, and they remain in a sheath while the cat is in a resting state to aid movement.[31] Quick-moving objects and stimuli trigger the predatory response, which leads to the cat protracting its claws with tendons attached to the final toe bone.[32] Traditionally, the claws are used to grip prey.[33] Thus, when the predatory response is activated while a cat is playing, it can lead to scratching.[34]

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[19] Hargrave, *supra* note 5, at 264.
[20] *Id.*
[21] *Id.*
[22] *Id.* (citing Bradshaw et al., 2012).
[23] *See id.*
[24] *Id.*
[25] *Id.*
[26] *See id.*
[27] *Id.* (citing Fitzgerald & Turner, 2000).
[28] *Id.*
[29] *See id.*
[30] *See id.*
[31] Sarah Brown, The Cat: A Natural and Cultural History 45 (2020).
[32] *See id.*; Hargrave, *supra* note 5, at 264.
[33] Brown, *supra* note 31, at 45.
[34] *See* Hargrave, *supra* note 5, at 264.

A cat's claws, like human hair or nails, continuously grow throughout their lives.[35] In an effort to remove older, worn out layers of the claws, cats often "like to scratch surfaces they can get their claws into."[36] This behavior, known as "stropping," helps the cat maintain healthy claws.[37] However, stropping serves some important social functions as well.[38] Cats often repeatedly scratch the same places, which creates a clear visible signal over time.[39] Further, as the cat scratches, it "deposit[s] scent from the interdigital glands between their toes, providing olfactory information to other cats."[40] This is a natural behavior for a cat to exhibit, even for one without claws.[41]

Displays of this sort of natural behavior are often be considered as a "problem" by owners,[42] who have different interpretations of "acceptable" cat behavior.[43] For instance, some owners find the place in which the behavior is expressed to be unacceptable, while others find the manner in which it is expressed to be unacceptable.[44] Some owners "resign themselves to their old couch being used by their cat as a scratching surface."[45] Others, however, find it unacceptable to allow their cat to use their furniture as a scratching post.[46] More often than not, it is this type of behavior that leads an owner to have a cat declawed.[47]

III. The Onychectomy Procedure

The most common form of declawing is an onychectomy.[48] As the number of cats living inside of households grew, the idea of declawing was first introduced by a Chicago veterinarian in 1952 to help owners protect their furniture and young children from scratching.[49]

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[35] Brown, *supra* note 31, at 45.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 83.

[40] *Id.*

[41] *See* Hargrave, *supra* note 5, at 264.

[42] Brown, *supra* note 31, at 146.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] Helier Cheung, *Cat Declawing: Should it be Banned, and Why Does it Happen in the US?*, BBC (June 6, 2019), https://www.bbc.com/news/world-us-canada-48528968.

[48] *Id.*

[49] *See* Steve Dale, *The State of Declawing Today*, Catster (Oct. 29, 2020), https://www.catster.com/lifestyle/the- state-of-declawing-today.

The onychectomy's nickname, "declaw," is a bit of a misnomer.[50] An onychectomy is an elective procedure that requires removal of the third phalanx, rendering a cat unable to scratch.[51] It is, quite literally, cutting off the bones that the claws grow from.[52] Many critics of the procedure compare it to "cutting off someone's toes or fingers at their top joint."[53]

There are some occasions where the surgery may be medically necessary.[54] For instance, if a cat has an infection or tumor in the nailbed, the procedure may be warranted.[55] However, many owners declaw their cats simply to keep them from scratching the furniture.[56]

When the onychectomy was introduced in the 1950s, no existing studies had analyzed the short-term or long-term effects that it may have on cats.[57] The procedure nonetheless became quite popular in America.[58] Many cat owners saw this procedure as an alternative solution to relinquishing a cat because it was ripping up furniture.[59]

When studies on the effects of onychectomy were finally conducted between the 1970s and the 1990s, the consensus was that cats who underwent the procedure did not suffer any long-term pain.[60] However, Dr. Margie Clark, the editor of the Journal of Feline Medicine and Surgery, stated that "those studies were mostly all wrong."[61] Studies conducted around the year 2000 "began to tell a very different story."[62] As scientists gained better tools to assess pain, "[s]tudy after study… demonstrate[d] all kinds of long-term effects of declaw[ing]."[63] As the studies grew and the information on the effects of onychectomies became known to the public, people started paying attention.[64]

There are three different methods of the onychectomy: guillotine, scalpel, or laser.[65] The specific method used typically depends on the veterinarian's experience, preference, and training.[66] While each method

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[50] *See id.*

[51] Kyle Clark et al., *Comparison of 3 Methods of Onychectomy*, 55 Can. Veterinary J. 255, 255 (2014).

[52] Cheung, *supra* note 47.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] Dale, *supra* note 49.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] Clark et al., *supra* note 51, at 255.

[66] *Cat Declawing*, Advanced Care Veterinary Hosp., https://advancedpetvet.com/services/veterinary-services-for- cats/cat-declawing/ (last visited Nov. 26, 2022).

is performed differently, all three involve the "disarticulation and removal of the third phalanx."[67] Regardless of which method is used, the end result is the same: a declawed cat.[68]

a. Guillotine Method

The nail-trimmer method is often referred to as the "guillotine method" because the nail trimmers themselves resemble a small guillotine.[69] The sterilized nail trimmers are used to "disarticulate the third phalanx or amputate the third phalanx below the ungual process, leaving the flexor process *in situ*."[70] In other words, the guillotine-type nail trimmer is placed between the "joint space" between the second and third phalanx.[71] Once the clippers are clamped down, the last digit on the cat's paw is separated and removed.[72]

This particular technique can often be imprecise, causing damage to structures surrounding the third phalanx.[73] On occasion, the procedure can even leave behind bone fragments of the third phalanx.[74] Indeed, cats who are treated with this method are "more than 10 times as likely to have a bony remnant compared with cats that underwent laser onychectomy."[75] Notably, the guillotine method has fallen out of favor among veterinarians due to these risks and complications.[76] However, as discussed *infra*, it is still occasionally used since it is comparatively cheaper than the laser method.[77]

b. Scalpel Method

A scalpel onychectomy is performed with a scalpel blade while using the disarticulation method.[78] Similar to the disarticulation in the

[67] Clark et al., *supra* note 51, at 255.

[68] *See id.*

[69] *What is Declawing?*, SPCA Montréal, https://www.spca.com/en/what-is-declawing/ (last visited Nov. 26, 2022).

[70] Clark et al., *supra* note 51, at 255.

[71] *Id.* at 256 fig.1.

[72] *See id.* at 256.

[73] *What is Declawing?*, *supra* note 69.

[74] *Id.*

[75] Clark et al., *supra* note 51, at 259.

[76] Jacqueline Brister, *Laser Declawing: How It Differs from the Traditional Declawing of Cats*, Embrace Pet Ins., https://www.embracepetinsurance.com/waterbowl/article/laser-declawing (Apr. 8, 2019); Rebecca Ruch-Gallie et al., *Survey Practices and Perceptions Regarding Feline Onychectomy Among Private Practitioners*, 249 J. Am. Veterinary Med. Ass'n 291, 293, 293 tbl.1 (2016).

[77] *See id.*; *see also* Thomas Hansen & Robert M. Miller, *Onychectomy Complications*, 108 Veterinary Med. 488, 488 (2013).

[78] Clark et al., *supra* note 51, at 256.

guillotine method, the veterinarian uses the scalpel to separate and remove the third phalanx from the second phalanx.[79] The scalpel method gives veterinarians more control over the surgical site and allows them to maneuver the tool more easily.[80]

Although more control and maneuverability make the scalpel method more accurate than the guillotine method, it is not without risk.[81] This method often requires the cat to remain under anesthesia for a longer amount of time than the guillotine method, which can lead to complications.[82] Moreover, this method utilizes a tourniquet to limit bleeding because hemorrhaging is more likely to occur.[83] Leaving the tourniquet on too long "can compress the nerves and cause temporary paralysis."[84]

c. Laser Method

Over the past twenty years or so, significant research has been conducted on the use of the carbon dioxide (CO_2) laser in onychectomies.[85] The laser method also utilizes the disarticulation method to separate the third phalanx from the second phalanx.[86] Like a scalpel, the veterinarian "guides the laser beam to the desired target in the surgical field," allowing for more accuracy during the procedure.[87] Unlike the scalpel however, the CO_2 laser results in less hemorrhaging and reduced postoperative pain and swelling.[88] It has thus become the preferred onychectomy method among veterinarians, though it can be more costly because of the required equipment.[89] For instance, the cost of an "old-school" surgical method—such as the guillotine or scalpel method—is around $100, depending on the location of the veterinary office and whether the cat is already anesthetized for another procedure.[90] However, given the special equipment required, the laser method starts at around $250 and can be as high as $400 or more.[91]

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[79] *Id.*

[80] *See* William Phillip Young, *Feline Onychectomy and Elective Procedures*, 32 Veterinary Clinics: Small Animal Prac. 601, 601 (2002).

[81] *What is Declawing?*, *supra* note 69.

[82] *See id.*

[83] *See id.*; Young, *supra* note 80, at 602.

[84] *What is Declawing?*, *supra* note 69.

[85] *See, e.g.,* Young, *supra* note 80.

[86] Clark et al., *supra* note 51, at 256.

[87] Young, *supra* note 80, at 601.

[88] *Id.* at 602.

[89] See Brister, *supra* note 76; *see also Cat Laser Declawing*, Vetinfo, https://www.vetinfo.com/cat-laser- declawing.html (last visited Nov. 26, 2022).

[90] Brister, *supra* note 76.

[91] *Id.*

As with the guillotine and scalpel methods, the laser method is accompanied by risk.[92] In order to achieve a precise cut, the CO_2 laser generates considerable heat, which is why hemorrhaging does not result.[93] However, because of the heat that is produced, the laser can leave burns on the cat's paws.[94]

The laser method is nonetheless considered to be the most humane onychectomy method by many in the veterinary community.[95] Veterinarians claim that a cat's toes undergo less trauma than they would under the other methods, and the nerve endings in the paws are "sealed" off, leading to less pain.[96] Accordingly, the use of a CO_2 laser in onychectomies is slowly growing, though it still is not as common as some would prefer.[97]

IV. Post-Onychectomy Side Effects

Whether the veterinarian uses the guillotine method, the scalpel method, or the laser method, each form of onychectomy has serious short-term and long-term side effects on the cat.[98] Short-term effects include hemorrhaging at the site of the wound, short-term post-operative pain, and some lameness.[99] Long-term effects include infection, permanent lameness, chronic pain syndrome, and even nail regrowth.[100] However, these side effects are not just limited to health issues.[101] The cat may also suffer from life-long behavioral issues, such as house soiling and enhanced aggression, which can adversely impact the cat-owner relationship and often lead owners to relinquish their cats to shelters.[102]

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[92] *See What is Declawing?*, *supra* note 69.

[93] *See* Young, *supra* note 85, at 601.

[94] *What is Declawing?*, *supra* note 69.

[95] Brister, *supra* note 76.

[96] *Id.*

[97] Ameet Singh & Brigitte Brisson, *Feline Onychectomy*, *in* Complications in Small Animal Surgery 573, 575 (1st ed. 2016).

[98] *Id.* at 573.

[99] *Id.*

[100] *Id.*

[101] *See* Brister, *supra* note 76.

[102] *See id.*; Gerard et al., *Telephone Survey to Investigation Relationship Between Onychectomy or Onychectomy Technique and House Soiling in Cats*, 249 J. Am. Veterinary Med. Ass'n 638, 638-39 (2016).

a. Health Issues

i. Short-Term Effects

As with any surgery, a cat may suffer from some short-term side effects after the onychectomy.[103] Some complications include: "hemorrhage, pain, neuropraxia or ischemic injury secondary to tourniquet application, digital pad trauma, lameness, and non-weight bearing."[104] Studies have shown that many of these short-term complications are associated most frequently with the scalpel method.[105] In that study, fifty percent of cats suffered from at least one or more complications shortly after surgery.[106] The cat always suffers at least some postoperative pain, though the duration of the pain varies depending on the onychectomy method used.[107] For instance, the laser method is advocated on the basis that it "reduces early postoperative pain compared with traditional techniques."[108] Be that as it may, a laser onychectomy is still painful for the cat.[109]

1. Infection

Rates of wound infection following an onychectomy appear to be significantly higher than for any other procedure in small animal surgery.[110] Infections occurred in as many as 11.6% of onychectomies, compared to the 4.7% seen in other small animal surgeries.[111] This higher rate of infection is likely due to "a break in asepsis during surgery" and "excessive tissue dissection."[112] Owners also face a considerable challenge in protecting the surgical sites from contamination, given that the cats walk on the wounds within a matter of days after the surgery.[113]

One study found that infection was correlated with the guillotine method and the use of a cyanoacrylate adhesive to close the wound.[114] The authors of the cited study speculate that the nail trimmers used for the guillotine method "crush[es] tissues compromising vascular supply

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[103] *See* Singh & Brisson, *supra* note 97, at 573.

[104] *Id.*

[105] *Id.* (citing K.S. Tobias, *Feline Onychectomy at a Teaching Institution: A Retrospective Study of 163 Cases*, 23 Veterinary Surgery 274 (1994)).

[106] *Id.* (citing Tobias, *supra* note 105).

[107] *See id.*; Brister, *supra* note 76.

[108] Singh & Brisson, *supra* note 97, at 573.

[109] Brister, *supra* note 76.

[110] Singh & Brisson, *supra* note 97, at 575.

[111] *Id.*

[112] *Id.*

[113] *See id.*

[114] *Id.* (citing Tobias, *supra* note 105).

to the region and create[s] a larger surgical wound, predisposing to infection."[115] The study also determined that infection was not associated with either the cat's hair length or the type of antiseptic used to prepare the surgical site.[116] There are several other factors that could influence infection after an onychectomy, including "the influence of aseptic technique, postoperative bandages, CO_2 laser for onychectomy, material used in the litterbox postoperatively, and leaving the surgical wound open to heal by second intention."[117] Unfortunately, no data have been collected on these potential factors.[118] Neither the cited *Tobias* study nor any other study at the time that the article was published in 2016 analyzed any of these factors, or other possible factors, to determine if they had an impact on onychectomy infection rates.[119]

2. Pain and Lameness

Pain and lameness are often debilitating postoperative complications for the cat.[120] Not only does the cat suffer significant emotional distress, but the cat owner does as well.[121] Many recent studies have focused specifically on the CO_2 laser and "its potential for reducing pain and lameness compared with traditional blade dissection."[122] However, even with this method, some pain and lameness are seen in the cat after the surgery.[123]

Cats naturally bear a substantial amount of their body weight on their front paws.[124] It becomes very difficult, therefore, for them to walk properly after an onychectomy.[125] Studies show that cats seem to show more lameness after a scalpel onychectomy than a laser onychectomy.[126] However, regardless of the method, the pain experienced by the cat is so severe that it can be difficult to walk properly for upwards of one week after the onychectomy.[127] The day after surgery, "[c]ats were observed to bear significantly less weight on the surgical than the non-surgical

[115] *Id.* (citing Tobias, *supra* note 105).
[116] *Id.* (citing Tobias, *supra* note 105).
[117] *Id.*
[118] *See id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *See id.*
[124] *See id.*; Dale, *supra* note 49.
[125] *Id.*
[126] Deborah V. Wilson & Peter J. Pascoe, *Pain and Analgesia Following Onychectomy in Cats: A Systematic Review*, 43 Veterinary Anaesthesia & Analgesia 5, 11 (2016).
[127] Dale, *supra* note 49.

limb following unilateral onychectomy."[128] Even twelve days after surgery, "peak vertical force on the surgical limb was still significantly reduced."[129] For some cats, it takes upwards of six months for its limb use to return to normal.[130]

Given that feline patients cannot communicate to practitioners what they are experiencing after a surgery, it can be quite difficult for veterinarians to evaluate pain in cats after onychectomies.[131] Indeed, in one study, "[c]ats that were anesthetized, had their feet bandaged and then recovered (negative control) could not be reliably distinguished from cats that had also undergone onychectomy, highlighting the difficulty of assessing pain in cats."[132] However, "an objective method of limb function after onychectomy has been reported using pressure platform gait analysis."[133] By using pressure platforms for gait analysis, cats who had a laser onychectomy had "significantly improved limb use and function in the first [two] days postoperatively compared with cats having onychectomy with blade dissection."[134] This correlation between improved limb function early on after the surgery and the laser method has been replicated in other studies, though scientists have yet to determine why exactly the two are correlated.[135]

Onychectomies are very painful procedures, but pain and lameness "can be prevented by using a multi-modal approach to perioperative analgesia."[136] "Analgesia" is defined as "the absence of [the] sense of pain," and it is the more medical and technical way of saying "pain relief."[137] Many pain management methods for onychectomies have been evaluated.[138] For instance, the transdermal administration of a fentanyl patch has shown to be beneficial because there is "continuous analgesia…provided without multiple injections."[139] Furthermore, "[o]bjective measurement of gait analysis revealed significantly improved limb function after onychectomy when fentanyl was administered transdermally compared with irrigation of the surgical wound with bupivacaine after onychectomy."[140] Veterinarians "must use meticulous surgical technique and an aggressive approach to perioperative analgesia in an attempt to limit complications associated

[128] Wilson & Pascoe, *supra* note 126, at 9.
[129] *Id.*
[130] *Id.*
[131] *See* Singh & Brisson, *supra* note 97, at 575.
[132] Wilson & Pascoe, *supra* note 126, at 11.
[133] Singh & Brisson, *supra* note 97, at 575.
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Analgesia*, Dictionary.com, https://www.dictionary.com/browse/analgesia (last visited Jan. 7, 2023).
[138] Singh & Brisson, *supra* note 97, at 575.
[139] *Id.*
[140] *Id.*

with this procedure."[141] Failure to do so can turn a short-term complication into a long-term one, such as "chronic pain syndrome."[142] Worse, inadequate analgesia before and after surgery can lead to the development of neuropathic pain in the cat.[143]

ii. Long-Term Effects

While some cats experience immediate postoperative complications, many others do not show any damaging effects until months or years following the onychectomy.[144] Unfortunately, while many studies analyzing the procedure have been conducted since then, the long-term effects of onychectomies have been "poorly described in the literature."[145] "The long-term impact of declawing cats and the effect it may have on weight-bearing adjustments, chronic pain and other musculoskeletal diseases is unknown."[146] Dr. Gary Patronek noted the thin literature on long-term effects of onychectomies, stating that the "[d]ata on the frequency of specific long-term medical complications after onychectomy [are] only available for [five] studies, several of which also contained information on short-term outcomes."[147] Even the data that were collected in these studies showed wide variability.[148] Postoperative lameness lasted for one day for some cats, but 54 days for others.[149] In another study, "[o]ne cat had persistent intermittent lameness 96 months after surgery, [while two] others had lameness that resolved within [four] months."[150] Some of the onychectomies in these studies were performed by veterinary students and there was "substantial variation in [the] techniques used," explaining why there was a significant amount of data variability.[151] Currently, "no study has evaluated long-term follow-up after onychectomy by experienced veterinarians."[152]

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[141] *Id.* at 576.

[142] *Id.* at 575.

[143] Clark et al., *supra* note 51, at 260.

[144] Jennifer Conrad, *Declaw Surgery–Health Problems Due to Declawing*, Paw Project, https://pawproject.org/ about-declawing/declaw-surgery/ (last visited Jan.. 7, 2023).

[145] Singh & Brisson, *supra* note 97, at 576.

[146] Nicole K. Martell-Moran et al., *Pain and Adverse Behavior in Declawed Cats*, 20 J. Feline Med. & Surgery 280, 281 (2018).

[147] Gary J. Patronek, *Assessment of Claims of Short- and Long-Term Complications Associated with Onychectomy in Cats*, 219 J. Am. Veterinary Med. Ass'n. 932, 934 (2001).

[148] *See id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] Clark et al., *supra* note 51, at 256.

1. Chronic Pain

"A report on outcome for the treatment of cats with chronic pain after onychectomy is…lacking from the literature because this complication is underrecognized and not widely reported."[153] However, studies that have analyzed long-term complications suggest that onychectomies can lead to permanent lameness, chronic pain, and even arthritis.[154] Unfortunately, chronic pain is often missed because "[c]ats manifest pain in a wide variety of forms."[155] More often than not, chronic pain is overlooked in cats because "they instinctively try to hide it, leading to owners' and veterinarians' inability to identify it."[156]

In some instances, the third phalanx is not fully removed and bone fragments are left behind.[157] The remaining bone fragment can be pulled under the foot by a connected tendon, producing "a painful 'pebble-in-the-shoe' sensation when [the cat] stand[s] or tr[ies] to walk."[158] Cats with remaining bone fragments are more likely to experience back pain because of it.[159] This type of chronic pain is one of the most common reasons for "a persistent long-term lameness in onychectomized cats."[160]

Due to the intense, chronic pain that a cat suffers, an onychectomy can completely alter a cat's natural gait.[161] Cats naturally walk on their toes; bearing about sixty percent of their body weight on their front feet.[162] By removing the third phalanx, or the tips of its toes, the cat can experience extreme pain trying to support its own body weight when walking or standing.[163] Indeed, in his study, Clark stated:

> Lameness in onychectomized cats is commonly thought to be secondary to chronic pain; however, it may also be a functional change in the gait secondary to the loss of

[153] Singh & Brisson, *supra* note 97, at 574.

[154] *See* Katelyn E. Mills et al., *A Review of Medically Unnecessary Surgeries in Dogs and Cats*, 248 J. Feline Med. & Surgery 162, 166 (2016); Clark et al., *supra* note 51, at 255, 260; Conrad, *supra* note 144.

[155] Martell-Moran et al., *supra* note 146.

[156] *Id.*

[157] *Id.*; Clark et al., *supra* note 51, at 260; Singh & Brisson, *supra* note 97, at 573.

[158] Conrad, *supra* note 144.

[159] Martell-Moran et al., *supra* note 146, at 284.

[160] Singh & Brisson, *supra* note 97, at 573. If remaining bone fragments are found, surgery to remove them should be performed immediately. *Id*. Not only does the surgical removal of the fragments eliminate the chronic pain that the cat endures while walking or standing, it can also resolve any long-term lameness the cat experiences. *Id.* at 574.

[161] Dale, *supra* note 49.

[162] *Id.*; Conrad, *supra* note 144.

[163] Conrad, *supra* note 144.

> the third phalanges, which are important for the normal digitigrade stance of the cat, or pain originating from osteoarthritis of other joints.[164]

To compensate for this pain, a cat will shift its weight further back on its feet and start walking on its "wrists,"[165] which is an extremely abnormal movement for the cat. The resulting stress on the joints may lead to arthritis in the cat's legs, further crippling it.[166] If an onychectomy is not performed properly or is not performed by a qualified individual, the "surgery may cause so much tenderness or pain that the animal can move only by walking on its 'elbows.'"[167]

2. Nail Regrowth

Nail regrowth following an onychectomy is a "well-recognized complication" that is one of the most researched long-term complications of onychectomies.[168] This complication is often observed when the third phalanx is not completely removed and small bone fragments remain in the cat's foot.[169] Regrowth "occurs when the germinal epithelium of the ungual crest of [the third phalanx] is incompletely removed during onychectomy."[170] If these germinal epithelial cells are present, the cells regenerate deformed nails, also known as *scurs*.[171] Because nail clippers are not as accurate as a scalpel or a laser at removing the third phalanx, there is an increased risk of nail regrowth when the veterinarian uses the guillotine method.[172]

Nail regrowth is often an extremely painful condition for the cat. Once the veterinarian diagnoses it, "surgical exploration and removal of the regrown nail with or without bone fragments should be performed."[173] Use of a scalpel to perform removal of the nail regrowth is recommended "because it allows the surgeon to follow the contour of the regrown nail with or without any bone fragment."[174] However, the veterinarian must be extremely cautious during the surgery to avoid causing excessive tissue trauma, which can cause additional long-term complications in the cat.[175]

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164 Clark et al., *supra* note 51, at 260.
165 Conrad, *supra* note 144.
166 *Id.*
167 *Id.*
168 Clark et al., *supra* note 51, at 255; Martell-Moran et al., *supra* note 146.
169 Martell-Moran et al., *supra* note 146; Singh & Brisson, *supra* note 97, at 574.
170 Singh & Brisson, *supra* note 97, at 574.
171 *Id.*
172 *Id.* at 575.
173 *Id.*
174 *Id.*
175 *Id.*

Prior to 2014, only four publications reported claw regrowth following an onychectomy, "with a reported regrowth rate ranging from 1.8% to 10%."[176] All reported cases were related to the use of the guillotine method.[177] However, Clark's study found nail regrowth rates even higher than previously reported.[178] Furthermore, Clark's study found that nail regrowth was identified with every onychectomy method; the complication was not solely limited to the guillotine method.[179] Claw regrowth was seen in 3.5% of cats that experienced a laser onychectomy, 6.5% of cats that experienced a scalpel onychectomy, and 15.4% of cats that experienced a guillotine onychectomy.[180] While the evidence shows that the guillotine method is significantly more likely to lead to nail regrowth than the laser or scalpel method, it is still a serious complication regardless of the method used.[181] Left untreated, the cat can suffer continuous, extreme pain that can alter its natural gait and cause lameness.[182]

b. Behavioral Issues

Onychectomies have been linked to the development of behavioral problems in a cat, including increased aggression, biting, and house soiling.[183] These behavioral differences between declawed and nondeclawed cats are commonly noted by animal shelter workers who frequently handle both.[184] Such behavior is "possibly attributable to behavioral frustration and chronic pain."[185] Cats demonstrate pain in a variety of ways, so this could explain abnormal behaviors that declawed cats may exhibit.[186] If an onychectomy is unavailable, unwanted scratching behavior can cause an owner to relinquish a cat to a shelter.[187] Unfortunately, however, even when an onychectomy is available and elected by an owner, the increased aggression, biting, and house soiling can also lead to an increased rate of relinquishment.[188]

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176 Clark et al., *supra* note 51, at 256.
177 *Id.*
178 *See id.* at 258-59.
179 *See id.*
180 *Id.*
181 *See id.*
182 *See* Singh & Brisson, *supra* note 97, at 574-75.
183 Patronek, *supra* note 147, at 932.
184 *Id.*
185 *Id.*
186 Martell-Moran et al., *supra* note 146.
187 Mills et al., *supra* note 154, at 165.
188 Martell-Moran et al., *supra* note 146, at 287.

i. Increased Aggression and Biting

Owners often declaw their cats to prevent them from scratching people.[189] Indeed, surveys of veterinarians indicate that aggression is a "frequent behavior problem[] reported by cat owners."[190] There seems to be "a relatively high prevalence of aggression in owned cats, with recent research suggesting that 36% of cats display aggression toward their owners and almost 50% of cats display aggression toward either familiar or unfamiliar people."[191] While declawing the cat eliminates scratch-related injuries, it does not resolve the underlying aggression.[192] In fact, declawing may make a cat even more aggressive than before.[193] When a cat is stressed, scared, or in pain, it uses its claws to scratch at individuals in an attempt to defend itself or, at the very least, make it clear to the handler that it is uncomfortable.[194] When a cat's claws are removed and it can no longer use its paws to defend itself, it resorts to biting instead of scratching to make itself clear.[195] In response to a letter to the editor of the Journal of the American Veterinary Medical Association, Dr. Marcus Brown, then-President of the American Association of Feline Practitioners, wrote:

> It is important to realize that most cats, and often most other animals, are simply scared or in pain while at our practices, especially those that are considered difficult to examine or treat.…Even declawed cats, if not handled properly, can bite. That does not give [veterinarians] the right to recommend elective amputations (or extractions) and call it a benefit to the animal.[196]

Aggressive scratching toward people is undesirable because of the possibility of injury or infection, especially in immunocompromised individuals.[197] Some people believe that declawing a cat will help prevent the spread of certain diseases, particularly to immunocompromised cat

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[189] Mills et al., *supra* note 154, at 164.

[190] *Id.* at 164-65.

[191] *Id.* at 165.

[192] *Id.*

[193] *See id.*

[194] *See* Marcus Brown & Paula Monroe, *Letters to the Editor: Dispute Benefits of Onychectomy*, 245 J. Am. Veterinary Med. Ass'n 1085, 1085-86 (2014).

[195] Mills et al., *supra* note 154, at 165; Martell-Moran et al., *supra* note 146, at 285; *see also Declawing Linked to Aggression and Other Abnormal Behaviors in Cats*, Sci. Daily (May 23, 2017), https://www.sciencedaily.com / releases/2017/05/170523124130.htm.

[196] Brown & Monroe, *supra* note 194.

[197] Mills et al., *supra* note 154, at 165.

owners.[198] In order to avoid transmission of a disease from cat scratching, the Centers for Disease Control and Prevention (CDC) recommends trimming a cat's nails regularly, avoiding rough play with cats and kittens, and approaching unfamiliar cats with caution, "even if they seem friendly."[199] "However, declawing is not a recommended part of [the CDC's] strategy."[200] Since a declawed cat often resorts to biting when it would normally scratch, individuals actually face a higher likelihood of contracting a more severe disease than if the cat had scratched them. Dr. Nicole Martell-Moran researched the issue, stating:

> The documented increased biting behavior of declawed cats can lead to more severe disease in people than cat scratches. In one study of cat-inflicted wounds presented to an emergency room, none of the cat scratches resulted in infection, whereas 20% of bite-puncture wounds became infected, with several requiring hospitalization. Cat-bite infection rates on hands can be as high as 30-50%.[201]

ii. House Soiling

House soiling, or inappropriate elimination, is "defecating, urinating, or spraying urine outside of the litter box."[202] Several factors contribute to house soiling by cats, including "concurrent medical conditions, social hierarchy of cats within the home, neuter status, availability of adequately sized and spaced litter boxes, and type and cleanliness of cat litter or litter box."[203] Onychectomies are believed to cause house soiling because of "distress associated with the procedure as well as subsequent litter box substrate aversion."[204] Currently, many researchers believe that "persistent pain and discomfort subsequent to declaw surgery is an important risk factor for the development of behavioral changes such as…inappropriate elimination."[205] Furthermore, many owners report that their cats started house soiling only after the onychectomy was performed.[206] This type of behavior can

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[198] Martell-Mortan et al., *supra* note 146, at 280.

[199] *Healthy Pets, Healthy People, How to Stay Healthy Around Pet Cats*, U.S. Dept. of Health and Hum. Servs., https://www.cdc.gov/healthypets/pets/cats.html (last visited Dec. 26, 2022).

[200] Martell-Moran et al., *supra* note 146, at 280.

[201] *Id.* at 280-81.

[202] Gerard et al., *supra* note 102, at 638.

[203] *Id.*

[204] *Id.* at 639.

[205] Martell-Moran et al., *supra* note 146, at 287.

[206] Gerard et al., *supra* note 102, at 639.

have a significant adverse impact on the human-cat bond and lead to relinquishment, putting the cat at a greater risk for euthanasia.[207]

Onychectomies are often very painful for a cat, and "studies have shown that cats that have pain when posturing to urinate are more likely to urinate outside of the litter box."[208] The data suggest that cats with remaining third phalanx bone fragments after onychectomy face higher odds of back pain and house soiling than cats who have not received an onychectomy.[209] Lower back pain in a cat is typically associated with house soiling.[210] Additionally, "if the source of pain is declawed phalanges, the act of walking on or digging in a gravel-type substrate may result in pain…."[211] If a cat is experiencing pain with traditional litter, it will refuse to use the litter box and instead defecate or urinate somewhere else.[212] Many cats exhibiting this behavior will often eliminate in areas directly next to the litter box, though they do occasionally eliminate in other areas around the house.[213] These cats typically eliminate on a softer surface, such as carpet or a mat near the litter box, because the surface does not cause pain like traditional litter does.[214]

V. Onychectomy Alternatives

Scratching is a normal cat behavior and it "serves a number of functions…including territorial marking and nail conditioning."[215] While onychectomy prevents damage from scratching, several alternative methods accomplish the same end without the need for surgery.[216] For instance, owners can provide proper scratching materials—such as a scratching post—to provide proper scratching outlets for the cat.[217] This not only enhances the cat's well-being, but it also helps to protect the furniture in the house.[218] Cats are trainable, and if the cat is not initially attracted to the scratching post, products containing pheromones can be used to train the cat to use the scratching post.[219] Negative stimuli, such as aluminum foil or sticky tape, can also be used on furniture to

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[207] *Id.* at 638.
[208] *Id.* at 639.
[209] Martell-Moran et al., *supra* note 146, at 284-85.
[210] *Id.* at 285.
[211] *Id.*
[212] *Id.*
[213] *See id.*
[214] *See id.*
[215] Mills et al., *supra* note 154, at 165.
[216] *Id.*
[217] *Id.*
[218] Brister, *supra* note 76.
[219] Cheung, *supra* note 47.

train the cat not to scratch in those areas.[220] Furthermore, a cat's nails can be temporarily capped with small, soft, nontoxic caps to keep the cat from causing damage when it scratches.[221] Owners can also regularly trim their cat's nails to make the nails slightly less sharp.[222] If a cat's scratching is associated with a particular behavioral issue, environmental enrichment, such as food puzzles or additional play time, may help curb scratching.[223]

Onychectomies are elective surgeries that are considered medically unnecessary because a cat receives no benefit from the surgery and they are not necessary to maintain a cat's health.[224] Given the risks and pain associated with onychectomies, "this procedure should be considered as a last resort after all other behavior modifying measures have been attempted."[225]

VI. Attitudes Towards Onychectomies

Onychectomies are generally "an emotional and divisive topic[,] and there are significant differences in opinions between those who perform the procedure and those who do not."[226] As research continues to reveal the adverse consequences of an onychectomy, the procedure has become increasingly controversial.[227] When the procedure was first developed in the early 1950's, it caught on quickly and many homeowners with indoor cats elected to get the procedure done to protect furniture.[228] Studies were conducted between the 1970's and the 1990's on the effects of an onychectomy, and "the overall consensus was that cats were not in long-term pain."[229] Indoor cat owners thus continued to view onychectomies as a safe, viable option.[230]

However, around the year 2000, studies on onychectomies "began to tell a different story."[231] Each study subsequently released reached the same conclusion: cats who received an onychectomy suffered from a variety of long-term side effects.[232] This forced people to pay attention and consider the ethical baggage that an onychectomy

[220] Dale, *supra* note 49.
[221] *Id.*
[222] *Id.*
[223] Brister, *supra* note 76.
[224] *See* Mills et al., *supra* note 154, at 162, 164.
[225] *Id.* at 166.
[226] Kogan et al., *Feline Onychectomy: Current Practices and Perceptions of Veterinarians in Ontario, Canada*, 57 Can. Veterinary J. 969, 974 (2016).
[227] *See* Dale, *supra* note 49.
[228] *See id.*
[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] *Id.*

carries.[233] As Dr. Downing, Paw Project advisor and Director of Pain Management said, "[o]nce you know something, you can't not know it anymore."[234] Slowly, people began to pay attention.[235]

Not only is the general public split on the issue, the veterinary community is as well.[236] "Conflicts within the profession about declawing are due in part to the numerous short- and long-term complications that have been attributed to the procedure."[237] Many veterinarians are opposed to onychectomies, and urge that owners consider alternatives.[238] In fact, most veterinary technicians and students today are not even taught how to perform an onychectomy.[239] Some veterinarians flat-out refuse to perform the surgery at all, citing ethical concerns.[240]

Veterinarians opposed to the procedure argue that it causes a significant amount of pain and can lead to behavioral issues.[241] Proponents of the procedure argue the opposite: there are minimal postoperative complications associated with onychectomies.[242] Some veterinarians fall somewhere in between, believing that an onychectomy should be used as an absolute last resort.[243] While these veterinarians urge against using onychectomies as the first method to stop scratching behavior, they still believe it "is preferred over other possible negative consequences including euthanasia or abandonment."[244] If given the choice between life without claws or possible death or relinquishment, these veterinarians choose the former.[245]

Many organizations advocating for the well-being of cats have released strong statements opposing onychectomies, stating that owner education on alternatives to surgery and modification of the cat's behavior should come first.[246] Both the American Association of Feline Practitioners (AAFP) and American Veterinary Medical Association (AVMA) strongly oppose onychectomies as an elective procedure.[247] In

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[233] *See id.*

[234] *Id.*

[235] *Id.*

[236] *See* Kogan et al., *supra* note 226, at 969.

[237] *Id.* at 970.

[238] *Id.* at 974.

[239] Dale, *supra* note 49.

[240] Kogan et al., *supra* note 226, at 969.

[241] *Id.* at 970.

[242] Gerard et al., *supra* note 102, at 639.

[243] *See id.*; Kogan et al., *supra* note 226, at 969.

[244] Kogan et al., *supra* note 226, at 969-70.

[245] *See id.*

[246] Dale, *supra* note 49.

[247] *See Declawing Position Statement*, Am. Ass'n of Feline Pract., https://www.catvets.com/guidelines/position-statements/declawing (last visited Dec. 26, 2022); *Declawing of Domestic Cats*, Am. Veterinary Med. Ass'n, https://www.avma.org/resources-tools/avma-policies/declawing-domestic-cats (last visited Dec. 26, 2022).

2014, an individual wrote a letter to the editor of the Journal of the American Veterinary Medical Association, arguing that an onychectomy could provide a cat with some benefits, including reduced risk of punishment by its owner and better veterinary care. Dr. Marcus Brown, the then-President of AAFP, promptly responded, stating:

> We object to the suggestion that cats without claws would receive better veterinary care. Examining and treating cats with claws does sometimes present unique challenges, but then so does examining any other species with claws or teeth. Every animal has defense mechanisms it uses when it feels threatened or scared, and cats are no exception. We, as professional animal caregivers, have the responsibility to be knowledgeable in proper handling of the animals we are treating regardless of whether it's a 100-lb dog or a 10-lb cat.[248]

Furthermore, "very strong anti-declaw statements recently [emerged] from the 90-clinic BluePearl veterinary hospitals, 800 or so VCA Animal Hospitals and over 1,000 Banfield Pet Hospitals."[249] According to Dr. Molly McAllister, chief medical officer at Banfield, many veterinarians are "both supportive and relieved by the position."[250] Veterinarians and cat owners simply want to do what is best for the cat.[251] At this point, many believe it is incumbent on the veterinary community to continue "to educate cat owners about normal cat behaviors such as scratching and the use of positive reinforcement strategies instead of punishment to encourage their cats to behave in a way that is more acceptable to them."[252]

VII. The Ban on Onychectomies

As the ethical concerns surrounding onychectomies grow, the issue has become a political one.[253] Most veterinarians who perform onychectomies "do so only after other alternatives have been offered, following the position of multiple organizations."[254] However, many believe that these organization policy statements are insufficient, and that a legislative ban is imperative.[255]

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[248] Brown & Monroe, *supra* note 194, at 1085.

[249] Dale, *supra* note 49.

[250] *Id.*

[251] *Id.*

[252] Brown & Monroe, *supra* note 194, at 1085.

[253] Dana Atwood-Harvey, *Death or Declaw: Dealing with Moral Ambiguity in a Veterinary Hospital*, 13 Soc'y & Animals 315, 315-16 (2005).

[254] Kogan et al., *supra* note 226.

[255] *Id.*

Several countries, including Australia, New Zealand, Brazil, and the United Kingdom, have banned onychectomies as an elective procedure.[256] In countries where the procedure is banned, a veterinarian who performs an elective onychectomy can actually have his or her license to practice suspended.[257] Meanwhile, in the United States, onychectomies remain a fairly common practice in the vast majority of the country.[258]

Surprisingly, in the face of this controversy surrounding onychectomies, there is little to no data "to help guide the field forward."[259] The political debate surrounding onychectomy bans lacks "empirical and theoretical research on how this practice is maintained and the ethical positions of those who actually participate in this work."[260] Dr. Dana Atwood-Harvey, a sociology professor, believes that these voices should be heard to ensure that public policy properly aligns with ethical positions on the matter.[261] In her 2005 article discussing moral ambiguity in veterinary hospitals, Dr. Atwood-Harvey stated:

> The medical practice of declawing has been the subject of recent political controversy. Yet, empirical and theoretical research on how this practice is maintained and the ethical positions of those who actually participate in this work is lacking. Without such research, the resulting social policy might be dangerously simplistic, focusing strictly on individual solutions and neglecting structural arrangements.[262]

Without the involvement of these voices, public policies may ultimately miss the mark.[263] Consensus in a community regarding what is right and what is wrong "governs the actions of society, which then forms policies and laws."[264] As the debates surrounding onychectomy bans continue, "an analysis of the impact of the bans that have already been implemented could help political leaders make informed decisions."[265]

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256 Clark et al., *supra* note 51, at 255.
257 Wilson & Pascoe, *supra* note 126, at 5.
258 Martell-Moran et al., *supra* note 146.
259 Kogan et al., *supra* note 226.
260 Atwood-Harvey, *supra* note 253.
261 *Id.*
262 *Id.* at 315-16.
263 *See id.*
264 Mills et al., *supra* note 154, at 168.
265 Kogan et al., *supra* note 226.

a. Onychectomy Outside of the United States

Countries throughout the world, particularly in Europe, have banned the procedure decades before it became a controversy in the United States.[266] This is likely because of the differing attitudes on the procedure.[267] In the United States, "it's a matter of freedom and convenience–the right to the freedom to make decisions in terms of how you raise your cat, and convenience."[268] Conversely, in European countries such as the United Kingdom, "any concerns for freedom and convenience are vastly dwarfed by concern [for] the welfare of the cat."[269] Indeed, the United Kingdom banned cat declawing in response to its acceptance in the United States.[270] While onychectomies were extremely rare even before the ban was imposed in 2006, the United Kingdom banned it "as more Americans came to the UK with declawed cats."[271]

Many other European countries, however, banned the procedure even sooner than the United Kingdom.[272] In 1987, several European countries gathered at Strasbourg, France, for the European Convention for the Protection of Pet Animals ("the treaty").[273] The treaty indicates that among its primary purposes are to "recognis[e] that man has a moral obligation to respect all living creatures and bear[] in mind that pet animals have a special relationship with man," and "consider[] the importance of pet animals in contributing to the quality of life and their consequent value to society."[274] The treaty states that "[s]urgical operations for the purpose of modifying the appearance of a pet animal or for other non-curative purposes shall be prohibited and, in particular…declawing and defanging."[275] Accordingly, several European countries swiftly banned onychectomies as an elective procedure.[276] Austria, Belgium, Cyprus, Czech Republic, Denmark, Finland, Germany, Greece, Luxembourg, Norway, Portugal, Sweden, and Switzerland all signed and ratified the treaty, while France, Italy, the Netherlands, and Turkey signed it but have not yet ratified it.[277] The treaty officially went into effect in 1992, and elective onychectomies have been banned in the participating countries ever since.[278]

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[266] Cheung, *supra* note 47.

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] European Convention for the Protection of Pet Animals, Nov. 13, 1987, E.T.S. No. 125 (entered into force May 1, 1992).

[274] *Id.* at pmbl.

[275] *Id.* at art. 10(1)(d).

[276] *See id.*

[277] *Id.*

[278] *Id.*

An individual convicted of declawing a cat often faces serious ramifications.[279] In some countries, it is not uncommon for veterinarians who have performed the surgery to have their licenses to practice suspended.[280] Other countries impose hefty fines—and even prison time—for declawing a cat.[281] For instance, under the United Kingdom's Animal Welfare Act of 2006, an individual convicted of declawing "could face up to a year in prison and/or £20,000 fine."[282] Violators under the European Convention for the Protection of Pet Animals face similar punishments.[283] Similarly, in Israel, an individual convicted of declawing a cat faces up to a year in prison and a $20,000 fine.[284] These countries punish violations so harshly because they "recognize 'declawing' is nothing but a euphemism for mutilation."[285]

b. Onychectomy in the United States

Humans often employ social distancing from other groups as a strategy that allows them "to engage in practices such as genocide, war, slavery, and torture of human others."[286] This tactic is often seen with nonhuman animals as well in order to treat them poorly.[287] However, social theorists have noted that the social distance between humans and companion animals over the last few decades "has decreased for a significant portion of the North American public."[288] In 2001, a survey showed that around 91% of cat owners who elected to have their cats declawed "had an overall positive attitude about the procedure."[289] In just a decade, this number has dropped significantly.[290] An AP poll conducted in 2011 showed that "55% of US cat owners said it was [okay] to declaw their cats."[291] While American attitudes are still significantly more favorable toward declawing than European views, it shows a drastic

[279] *See* Wilson & Pascoe, *supra* note 126, at 5; Judd Birdsall, *Caught in the Claws of UK Cat Culture: How This American Learned to Live with Non-Declawed Cats*, HuffPost (Dec. 11, 2016), https://www.huffpost.com/entry/caught-in-the-claws-of-uk_b_8711596; *Cat Declawing–FAQs*, For All Animals, https://www.forallanimals.org/cat-declawing-faqs/ (last visited Dec. 26, 2022).

[280] Wilson & Pascoe, *supra* note 126, at 5.

[281] *See Cat Declawing–FAQs*, *supra* note 279.

[282] Birdsall, *supra* note 279.

[283] *Id.*

[284] *Cat Declawing–FAQs*, *supra* note 279.

[285] *Id.*

[286] Atwood-Harvey, *supra* note 253, at 316.

[287] *Id.*

[288] *Id.*

[289] Mills et al., *supra* note 154, at 165.

[290] *See* Cheung, *supra* note 47.

[291] *Id.*

downward trend in approval of the procedure.[292] Cats have slowly shifted from being seen as "unfeeling objects" to "members of the family."[293] This shift in attitude toward the procedure helps explain why so many communities in the United States at the city and state level have pushed for more radical changes, such as legal bans.[294]

Several communities across the United States have banned onychectomies as an elective procedure, and the list is growing.[295] California was the first to introduce the idea of banning the procedure.[296] While California has not imposed a ban at the state level, eight of its major cities have passed ordinances banning the procedure from veterinary practice.[297] Following the precedent set by these California cities, other major cities around the United States banned elective onychectomies shortly thereafter.[298] Denver and St. Louis each passed an ordinance banning the procedure in 2017 and 2019, respectively.[299]

The city ordinances vary in wording, but the general consensus is the same: an elective onychectomy is prohibited and violators will be punished.[300] Los Angeles's ordinance prohibits the "declawing of cats or other animals," and it states:

> (a) No person, licensed medical professional or otherwise, shall perform or cause to be performed an onychectomy (declawing) or flexor tendonectomy

[292] *See id.*; Dale, *supra* note 49.

[293] Atwood-Harvey, *supra* note 253, at 316.

[294] *See* Mills et al., *supra* note 154, at 168; Cheung, *supra* note 47; Dale, *supra* note 49.

[295] Dale, *supra* note 49.

[296] *See id.*; *Cat Declawing–FAQs*, *supra* note 279.

[297] Martell-Moran et al., *supra* note 146, at 281; *Cat Declawing–FAQs*, *supra* note 279. These California cities include: Los Angeles, Santa Monica, Beverly Hills, Berkeley, Culver City, Burbank, San Francisco, and West Hollywood. *Id.* California has repeatedly attempted to pass cat declawing bans at the state level for nearly twenty years without success. *See, e.g.,* A.B. 1857, 2003-2004 Cal. Leg., Reg. Sess. (Cal. 2004); A.B. 2427, 2007-2008 Cal. Leg., Reg. Sess. (Cal. 2008); S.B. 762, 2008-2009 Cal. Leg., Reg. Sess. (Cal. 2009); A.B. 2743, 2009-2010 Cal. Leg., Reg. Sess. (Cal. 2010); S.B. 1441, 2017-2018 Cal. Leg., Reg. Sess. (Cal. 2018); A.B. 1230, 2018-2019 Cal. Leg., Reg. Sess. (Cal. 2019); S.B. 585, 2021-2022 Cal. Leg., Reg. Sess. (Cal 2021). A recent proposed bill proposing declawing bans failed to pass as of February 2022, but a new bill, Assembly Bill 2606, was introduced immediately after on February 18, 2022. *See California A.B. 2606*, Open States, https://openstates.org/ca/bills/20212022/AB2606/ (last visited Nov. 20, 2022); *California Residents: Protect Cats' Claws*, Alley Cat Rescue, http://www.saveacat.org/california-declaw-bill.html (last visited Dec. 26,, 2022). Assembly Bill 2606 still needs to be heard and passed by a California Senate Committee. *See California A.B. 2606*, *supra*; *California Residents: Protect Cats' Claws*, *supra*.

[298] *See* Dale, *supra* note 49.

[299] *Id.*

[300] *Cat Declawing–FAQs*, *supra* note 279.

> procedure by any means on a cat or on any other animal within the City, except when necessary for a therapeutic purpose. Therapeutic purpose means the necessity to address the medical condition in the claw that compromises the animal's health. *Therapeutic purpose does not include cosmetic or aesthetic reasons or reasons of convenience in keeping or handling the animal.*
>
> (b) In the event that an onychectomy or flexor tendonectomy procedure is performed on any animal with the City in violation of this Section, each of the following persons shall be guilty of a violation of this Section: (1) the person or persons performing the procedure, (2) all persons assisting in the physical performance of the procedure, and (3) all persons or entities that procured the procedure, including but not limited to the owner or person having custody or control over the animal or any other person or entity that is ordered, requested or paid for the procedure.
>
> (c) A violation of any of the provisions of this Section is a misdemeanor.[301]

This ordinance punishes not only the veterinarian who performs the procedure, but also any assisting veterinary technicians as well as the owner who requested the procedure.[302] Santa Monica's ordinance, which mirrors the prohibitive language found in the Los Angeles ordinance, provides more detail on the punishment for violations.[303] Violators of the ordinance are found guilty of a misdemeanor, similar to violators in Los Angeles, but they are also "fined in an amount not to exceed five hundred dollars or imprisoned for a period of six months, or both."[304]

While the list of major cities that have banned elective onychectomies continues to grow, states have been slow to adopt bans. New York was the first to ban the procedure at the state level.[305] In 2019,

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[301] *Id.* (citing L.A., Cal., Mun. Code ch. V, art. 3, § 53.72 (2009)) (emphasis added).

[302] *See id.*

[303] *See id.* Santa Monica's Ordinance is titled "Prohibition against procuring, performing or assisting in performing onychectomy (declawing) or flexor tendonectomy," and can be cited as Santa Monica, Cal., Mun. Code art. 4, ch. 4, § 275.

[304] *Id.*

[305] David Klepper, *Declawing Cats Banned with New York Bill*, Wash. Times (June 4, 2019), https://www.washingtontimes .com/news/2019/jun/4/declawing-cats-banned-new-york-bill/.

New York officially passed its prohibition of cat declawing procedures.[306] Section 381 states:

> (1) No person shall perform an onychectomy (declawing), partial or complete phalangectomy or tendonectomy procedure by any means on a cat within the state of New York, except when necessary for a therapeutic purpose. Therapeutic purpose means the necessity to address the physical medical condition of the cat, such as an existing or recurring illness, infection, disease, injury or abnormal condition in the claw that compromises the cat's health. Therapeutic purpose does not include cosmetic or aesthetic reasons or reasons of convenience in keeping or handling the cat.
>
> (2) Any person who performs an onychectomy, partial or complete phalangectomy or tendonectomy procedure on any cat within the state of New York in violation of the provisions of subdivision one of this section shall be punishable by a civil penalty not to exceed one thousand dollars.[307]

The language that New York legislators used to draft its law suggests that they considered existing city ordinances and mirrored that language.[308] One notable difference, however, is who is subject to penalty.[309] Unlike the Los Angeles ordinance,[310] New York's statute penalizes only individuals who perform the procedure, licensed to do so or not, making no mention of individuals and cat owners who solicit elective onychectomies.[311] While this language could have been intentional, it leaves the door open for cat owners to request the procedure.[312]

According to Linda Rosenthal, the New York bill's sponsor in the state Assembly, "New York prides itself on being first," and believes New York's passage of the ban "will have a domino effect."[313] Assemblymember Rosenthal's beliefs may be right, as evidenced by the introduction of similar bills in several additional states, including

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[306] N.Y. Agric. & Mkts. Law § 381 (Consol. 2020).
[307] *Id.*
[308] *See id.*; *Cat Declawing–FAQs*, *supra* note 279.
[309] *See* N.Y. Agric. & Mkts. Law § 381 (Consol. 2020).
[310] *See Cat Declawing–FAQs*, *supra* note 279.
[311] *See* N.Y. Agric. & Mkts. Law § 381 (Consol. 2020).
[312] *See id.*
[313] Klepper, *supra* note 305.

Florida, Arizona, New Jersey, Massachusetts, and Michigan.[314] None of the bills in these states have officially been adopted and are still under consideration by state legislators.[315] However, some believe that the bills likely would have already been adopted "if it wasn't for the significant distraction of the pandemic."[316]

As of 2022, the United States has yet to see the "domino effect" in bill passage that Assemblymember Rosenthal hoped for. While several states have introduced legislation proposing bans on cat declawing procedures,[317] Maryland is the only state that has officially adopted a statewide ban of cat declawing procedures since New York's passage in 2019.[318] A final version of Maryland's bill prohibiting cat declawing was passed by both chambers on April 7, 2022, and it was officially signed into law by Governor Larry Hogan on April 21, 2022.[319] The law went into effect on October 1, 2022.[320]

Based on the language, Maryland likely modeled its law after already-existing laws and ordinances. The bill amends Section 2-310 so that the State Board of Veterinary Medical Examiners "may refuse, suspend, or revoke an application or license, and censure or place on probation any licensee after a hearing, if the veterinarian or veterinary practitioner…(13) [w]illfully violates the cat declawing prohibition

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[314] *See* Dale, *supra* note 49.

[315] *Id.*

[316] *Id.*

[317] *See, e.g.,* H.B. 333, 151st Gen. Assemb., Reg. Sess. (Del. 2021); A.B. 2606, 2021-2022 Leg., Reg. Sess. (Cal. 2022); S.B. 48, 2020 Leg., Reg. Sess. (Fla. 2020); A.B. 1073, 2021-2022 Leg., Reg. Sess. (Wis. 2022).

[318] Hilary Hanson, *Maryland Becomes 2nd U.S. State to Ban Declawing Cats*, HuffPost (Apr. 23, 2022, 11:19 AM), https://www.huffpost.com/entry/maryland-bans-declawing-cats_n_62640a1be4b07c34e9e15723; Ashley Hinson, *Maryland Passes Animal Protection Laws, One Banning Cat Declawing*, WBALTV11, https://www.wbaltv.com/article/maryland-passes-animal-protection-laws-banning-cat-declawing/39795791# (Apr. 22, 2022); *see* Zoe Sottile, *Maryland Lawmakers Move to Ban Veterinarians from Declawing Cats*, CNN (Mar. 19, 2022, 9:22 AM), https://www.cnn.com/2022/03/19/us/maryland-bill-declaw-cats-trnd/index.html; Bob D'Angelo, *Maryland House Votes to Ban Declawing of Cats*, WHIOTV7 (Mar. 10, 2022, 11:03 PM), https://www.whio.com/news/trending/maryland-house-votes-ban-declawing-cats/LZBB5FMQ4ZE4TCYJMA6XKMDXEU/.

[319] History H.B. 0022, Md. Gen. Assembly, https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/HB0022?ys=2022RS (July 8, 2022, 2:06 PM) [hereinafter History of H.B. 0022].

[320] Animal Welfare–Declawing Cats–Prohibited Acts, H.B. 0022, 2022 Reg. Sess. (Md. 2022). Maryland previously attempted to pass the same law in 2020, when it introduced House Bill 0445 in the 2020 Regular Session. History of H.B. 0022, *supra* note 320. The bill never progressed, however, likely due to the COVID-19 pandemic in 2020. When the Maryland legislature re-proposed its bans of cat declawing, House Bill 0022 was cross-filed with Senate Bill 0067, *see id.*, suggesting partisan support and a higher likelihood of passage the second time around.

under § 2-313.3 of this subtitle."[321] Like New York's law, Maryland's bill states "a veterinary practitioner may not perform a declawing procedure on a cat" unless "the procedure is necessary for a therapeutic purpose."[322] Maryland's punishment for violating the law is the same as New York's as well: a civil offense subject to a fine up to $1,000.[323]

Though it used New York as a model, Maryland's bill is seemingly more expansive than New York's law. Maryland broadened the law by thoroughly defining what a "declawing procedure" and "therapeutic purpose" is,[324] making it clearer what qualifies as a violation of the law and what does not. The bill states:

> (B-4) (1) "Declawing procedure" means:
>
> (I) An onychectomy, a dactylectomy, a phalangectomy, or any other procedure that removes a portion of the paw or digit of an animal in order to remove a claw.
>
> (II) A tendonectomy or any other procedure that cuts or modifies the tendon of the limb, paw, or digit of an animal in order to prohibit the extension of a claw; or
>
> (III) Any procedure that prevents the normal functioning of one or more claws of an animal.
>
> (2) "Declawing procedure" does not include nail filing, nail trimming, or the placement of temporary nail caps on one or more claws of an animal.
>
> …
>
> (G-1) (1) "Therapeutic purpose" means to address a physical or medical condition that compromises the health or well-being of an animal.
>
> (2) "Therapeutic purpose" does not include cosmetic or aesthetic reasons or reasons of convenience in the keeping or handling of the animal.[325]

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[321] Animal Welfare–Declawing Cats–Prohibited Acts, H.B. 0022, 2022 Reg. Sess. (Md. 2022).

[322] *Id.*; N.Y. Agric. & Mkts. Law § 381 (Consol. 2020).

[323] Animal Welfare–Declawing Cats–Prohibited Acts, H.B. 0022, 2022 Reg. Sess. (Md. 2022); N.Y. Agric. & Mkts. Law § 381 (Consol. 2020).

[324] Animal Welfare–Declawing Cats–Prohibited Acts, H.B. 0022, 2022 Reg. Sess. (Md. 2022).

[325] *Id.*

Maryland's definition of "therapeutic purpose" is almost exactly the same as New York's.[326] However, Maryland's description of declawing is much broader than New York's law.[327] New York does not ban dactylectomies as Maryland does,[328] seemingly suggesting an individual could perform such a procedure without violating the law. Further, Maryland's all-encompassing definition of "declawing procedure" closes the loopholes left in New York's law by banning "any other procedure" that is synonymous with or similar to an onychectomy, dactylectomy, phalangectomy, or tendonectomy, or "any procedure" that keeps a cat's claws from normally functioning.[329]

However, some of the language Maryland used is arguably more ambiguous than New York's law, and it could pose enforcement issues. Like New York, Maryland's bill states a "person" may not perform a declawing procedure on a cat without facing a civil offense and a fine of up to $1,000.[330] At the same time, much of Maryland's bill specifically references "veterinarians" or "veterinary practitioners," suggesting the effect of the ban falls exclusively on them rather than "any person."[331] This is further supported by the bill's purpose, which states "for the purpose of prohibiting a *veterinary practitioner*, except under certain circumstances, from performing certain declawing procedures on a cat."[332] If Maryland's enacted law is ultimately read in such a way to equate "veterinary practitioner" to "a person" due to the language used and the stated purpose, it could unduly restrict the impact of the ban. Such a reading may prohibit veterinary practitioners from performing such procedures, but it could leave the door open for unlicensed veterinarians, veterinary technicians, and even pet owners to engage in such acts.[333]

Massachusetts's proposed bill seems to be more inclusive than New York and Maryland's bans, falling more in line with Los Angeles's

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[326] Both Maryland's bill and New York's law states a "therapeutic purpose" is one that addresses a physical or medical condition the cat may have and does not include "cosmetic or aesthetic reasons or reasons of convenience in keeping or handling" of the cat. *Id.*; N.Y. Agric. & Mkts. Law § 381 (Consol. 2020).

[327] *See* Animal Welfare–Declawing Cats–Prohibited Acts, H.B. 0022, 2022 Reg. Sess. (Md. 2022); N.Y. Agric. & Mkts. Law § 381 (Consol. 2020).

[328] *See id.* .

[329] Animal Welfare–Declawing Cats–Prohibited Acts, H.B. 0022, 2022 Reg. Sess. (Md. 2022).

[330] *Id.*; N.Y. Agric. & Mkts. Law § 381 (Consol. 2020).

[331] Animal Welfare–Declawing Cats–Prohibited Acts, H.B. 0022, 2022 Reg. Sess. (Md. 2022).

[332] *Id.* (emphasis added).

[333] Such a narrow reading of Maryland's new law is probably unlikely. However, to avoid confusion and possible enforcement issues in the future, Maryland could simply change its language from "a person" to "a person, licensed medical professional or otherwise." This language makes it especially clear that the penalty for violating the law not only applies to veterinary practitioners, but every other type of individual as well.

ordinance.[334] For instance, the Massachusetts bill refers not only to individuals performing the onychectomy, but also to individuals who "cause [the procedure] to be performed."[335] Furthermore, it requires veterinarians who perform the surgery to maintain records relating to the cat and its owner for "a period of 4 years after the last contact with the animal," which can be audited by the board of registration in veterinary medicine to ensure the veterinarian performed the surgery for a legitimate therapeutic purpose.[336] Massachusetts proposes more significant punishments for violations of the law as well.[337] While violators in New York and Maryland face a $1,000 fine for performing the procedure,[338] violators in Massachusetts:

> [S]hall be punished by a fine of not more than $1,000 for a first offense, by a fine of not more than $1,500 for a second offense and by a fine of not more than $2,500 for a third or subsequent offense. In addition to said penalty, a court may order that any person who violates this section shall successfully complete a course of instruction relative to the humane treatment of animals or be barred from owning or keeping a cat or sharing a residence with another who owns or keeps a cat for a period of time as determined by said court.[339]

Such legislation is indicative of the belief that elective onychectomies are inhumane and that the well-being of the cat takes precedence over owner convenience.[340]

As more and more states introduce legislation to ban elective onychectomies, there is still significant pushback against such legislation from cat owners and veterinarians alike.[341] An AP Poll conducted in late 2010 found that "59 percent of American pet owners believe declawing is acceptable and 32 percent of cat owners have declawed their feline

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[334] *See* S. 169, 191st Gen. Ct., Reg. Sess. (Mass. 2019); Animal Welfare–Declawing Cats–Prohibited Acts, H.B. 0022, 2022 Reg. Sess. (Md. 2022); N.Y. Agric. & Mkts. Law § 381 (Consol. 2020); L.A., Cal., Mun. Code, ch. V, art. 3, § 53.72 (2009).

[335] S. 169, *supra* note 334.

[336] *Id.*

[337] *Id.*

[338] Animal Welfare–Declawing Cats–Prohibited Acts, H.B. 0022, 2022 Reg. Sess. (Md. 2022); N.Y. Agric. & Mkts. Law § 381 (Consol. 2020).

[339] S. 169, *supra* note 334.

[340] *See id.*

[341] Jonathan Berr, *Cat Declawing: The Battle Lines are Getting Sharper*, CBS News (Oct. 16, 2017, 6:00 AM), https://www.cbsnews.com/news/cat-declawing-the-battle-lines-are-getting-sharper/; Birdsall, *supra* note 279.

friends."[342] The same poll found that "only 18 percent would support outlawing declawing. A full 60 percent said they would oppose such a ban, with 36 percent indicating they would 'strongly oppose' it."[343] Even as a growing number of states adopt legislation banning elective onychectomies, the numbers suggest that a significant amount of the public may not be on board.[344]

Surprisingly, some veterinarian groups opposed the bill in New York before its adoption, and continue to oppose bills in other states such as New Jersey, West Virginia, and Rhode Island.[345] For instance, the New York State Veterinary Medical Society opposed New York's bill, "arguing that declawing should be allowed as a last resort for felines that won't stop scratching furniture or humans–or when the cat's owner has a weakened immune system."[346] In a memorandum opposing New York's legislation, the group stated "[m]edical decisions should be left to the sound discretion of fully trained, licensed and state supervised professionals."[347] Veterinarians opposing legislation in other states echo similar sentiments.[348] However, other veterinarians who support legislation suggest veterinarians opposing the bills are motivated by the desire for financial gain.[349] Dr. Jennifer Conrad, a veterinarian who founded The Paw Project, an anti-declawing group, stated "[t]here are vets who are making over $1,000 an hour doing [onychectomies]…[t]here are vets who say they don't want to give it up because they can make serious money."[350] Supporters also invoke the prohibitions enacted by the California cities and the European Union, emphasizing that none of these places have seen a spike in abandoned or relinquished cats, an argument that many opponents offer as a reason to refuse such bans.[351]

VIII. Proposed Legislation

While existing legislation provides some protections to cats from elective onychectomies, it does not go far enough. As each state continues to propose bills banning elective onychectomies, legislators should closely follow the language seen in Massachusetts's proposed bill.[352] Massachusetts's bill details that the person performing the elective

342 Birdsall, *supra* note 279.
343 *Id.*
344 *See id.*
345 Berr, *supra* note 341.
346 Klepper, *supra* note 305.
347 *Id.*
348 *See* Berr, *supra* note 341.
349 *Id.*
350 *Id.*
351 *Id.*
352 *See* S. 169, *supra* note 334.

onychectomy *and* the owner soliciting the surgery may face penalties.[353] Additionally, Massachusetts's bill requires veterinarians to maintain records relating to the cat and its owner for "a period of 4 years after the last contact with the animal."[354] Extensive recordkeeping allows the board of registration in veterinary medicine to audit the records and ensure that the veterinarian performed the surgery for a legitimate therapeutic or medical purpose.[355]

Under the Massachusetts bill, violators face significant penalties.[356] A violator faces a $1,000 fine for the first offense, a $1,500 fine for the second offense, and $2,500 for the third or subsequent offense.[357] On top of the fine, the courts have discretion in requiring violators to successfully complete an instructive court related to the humane treatment of animals.[358] The court can also bar violators from owning a cat or living with another person who owns or keeps a cat for a specified period of time.[359] Such stringent penalties can act as a strong deterrent and drastically curb elective onychectomy rates. The full text of proposed legislation that sufficiently protects the well-being of domestic cats, which used Massachusetts's proposed bill as a model, can be found in the Appendix to this article.

IX. Conclusion

Feline onychectomies have been available in the United States since the 1950's, but recent research has highlighted the harmful side effects of the procedure. Declawed cats often face serious physical side effects, such as nail regrowth, lameness, and chronic pain. Behavioral issues, such as house soiling, increased aggression, and increased biting, are unintended consequences of onychectomies, and are often the cat's way of outwardly expressing the physical pain that it is suffering. Unfortunately, these side effects cause a significant number of owners to relinquish their cats to local animal shelters.

As time goes on and more data is collected on the adverse consequences of onychectomies, there is a growing consensus in the United States that cat declawing procedures should no longer be performed. Some local and state lawmakers have acknowledged the trend and have at least attempted to represent these voices with bills. Despite these efforts, the United States continues to trail behind other countries in adequately protecting the well-being of domestic cats.

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353 *Id.*
354 *Id.*
355 *See id.*
356 *See id.*
357 *Id.*
358 *Id.*
359 *Id.*

While several state legislators have proposed bills to ban the procedure, as of 2022, New York and Maryland are the *only* two states in the United States to have officially banned cat declawing procedures.

Ultimately, the solution to cat declawing comes down to action. First, veterinarians must continue to educate their clients on all of the safe and cost-effective alternatives to surgery, such as nail caps, weekly nail clippings, and scratching boards. In addition to refusing declawing procedures and opting for safe alternatives, cat owners and animal advocates must push state and local lawmakers to ban the procedure and legally protect cats' well-being. Lastly, lawmakers must consider the growing number of constituents opposed to the surgery and be willing to enact bipartisan laws to effectively ban cat declawing procedures. Current trends suggest that all of this is already happening to some extent, and several more states are on track to join New York and Maryland in banning cat declawing procedures within the next five to ten years. Banning such harmful, medically unnecessary procedures at the state level is the best way to protect the domestic cat's well-being and promote a healthy cat-owner relationship.

Going forward, states considering banning the procedure should study currently existing statutes and ordinances in the United States. The existing ordinances enacted by various cities in California, as well as New York and Maryland's current statutes, provide a solid framework. However, Massachusetts's proposed bill is even stronger than any laws currently enacted and it should be seriously considered by lawmakers in other states. Massachusetts's bill is model legislation and lawmakers should follow its language closely when drafting their own bills so they can adequately protect the well-being of domestic cats. While it would be best to structure a statute in such a way as to impose penalties upon individuals who perform or facilitate the surgery, as well as individuals who solicit the surgery, this may not be palatable to lawmakers or the public. Unlike other countries, the United States is centered around personal freedom.[360] Even individuals who see declawing as a reprehensible procedure do not necessarily support a legislative ban that would effectively deprive owners of the freedom to raise cats in whatever way they see fit. Thus, lawmakers in the United States must draft a law that finds the balancing point between personal freedom and the cat's welfare.

[360] Cheung, *supra* note 47.

Appendix

An Act prohibiting inhumane and elective feline declawing.

(A) For the purposes of this section, the following words shall have the following meanings:

(1) "Board," the board of registration in veterinary medicine.

(2) "Declawing procedure" means:

(a) onychectomy, dactylectomy, phalangectomy, or any other procedure in which a portion of the cat's paw is amputated in order to remove the animal's claws. This includes, but is not limited to, the guillotine method, the scalpel method, and the laser method most commonly used to complete a declawing or onychectomy procedure;

(b) "Tendonectomy" means a procedure in which the tendons to a cat's limbs, paws, or toes are cut or modified so that the claws cannot be extended; or

(c) Any procedure that prevents the normal functioning of one or more claws of an animal.

(3) "Therapeutic purpose" or "medically necessary purpose" means for the purpose of addressing an existing or recurring infection, disease, injury, or abnormal condition in the claw that jeopardizes the cat's health, where addressing the infection, disease, injury, or abnormal condition is a medical necessity. Neither "therapeutic purpose" nor "medically necessary purpose" include cosmetic or aesthetic reasons or reasons of convenience in keeping or handling the animal. Similarly, removing a cat's claws for the purpose of preventing an owner from relinquishing the cat to a shelter or euthanizing the cat is not considered a "therapeutic purpose" or a "medically necessary purpose" for the purposes of this Act.

(B) No person shall perform, assist in the performance of, cause to be performed, or solicit the performance of a declawing procedure on an animal as defined in (A)(2) of this section unless the following apply:

(1) The person performing such declawing procedure is licensed to do so under section __ of chapter __; and

(2) The declawing procedure of a cat is for a therapeutic purpose or medically necessary purpose as defined in (A)(3) of this section; or

(3) The person who causes a declawing procedure to be performed is relying upon the written opinion of a person licensed under section __ of chapter __ that such a declawing procedure is required for a therapeutic purpose or medically necessary purpose.

(C) Any person who is qualified to perform a declawing procedure for a therapeutic or medically necessary purpose as described in (B)(1) and (B)(2) of this section and who actually performs a declawing procedure as defined by (A)(2) of this section on a cat shall keep a record of the procedure for a period of 4 years after the last contact with the animal. This record shall include: the name and address

of the animal's owner; the name and address of the person from whom payment is received for the procedure; a description of the animal, including its name, breed, date of birth, sex, color, markings, current weight, and past medical history; the date and time of the procedure; the reason the procedure was performed; and any diagnostic opinion, analysis, or test results to support the diagnosis. These records shall be subject to audit by the Board.

(D) Any person who is qualified to perform a declawing procedure for a therapeutic or medically necessary purpose as described in (B)(1) and (B)(2) of this section and who actually performs a declawing procedure as defined by (A)(2) of this section on a cat shall report the number or all such procedures to the Board annually on or before March 30. The Board shall maintain all notices received under this subsection for a minimum of 4 years from the date of receipt.

Records maintained under this subsection shall not be considered public record, as defined in clause __ of section __ of chapter __, and these records shall not be publicly disseminated.

(E) The Board shall, annually on or before March 1, report to the joint committee on the environment, natural resources, and agriculture the number or animals that were the subject of declawing, onychectomy, or tendonectomy notices received under subsection (d).

(F) If, after an audit, the Board determines the individual did not perform the declawing procedure for a therapeutic or medically necessary purpose, the Board may suspend his or her license to practice veterinary medicine. An individual whose license is suspended by the Board is still subject to punishments and fines detailed in subsection (G).

(G) Any person who violates subsection (B) shall be punished:

(1) by a fine not more than $1,000, or imprisoned for a period of six months, or both, for a first offense;

(2) by a fine not more than $2,000, or imprisoned for a period of six months, or both, for a second offense; and

(3) by a fine of not more than $2,500, or imprisoned for a period of six months, or both, for a third or subsequent offense.

In addition to said penalty, a court may order that any person who violated this section shall successfully complete a course of instruction relative to the humane treatment of animals or be barred from owning or keeping a cat or sharing a residence with another who owns or keeps a cat for a period of time as determined by said court. A failure to comply with such orders may result in additional fines or imprisonment. It is within the court's discretion to determine the proper amount in fines or additional imprisonment for failing to comply.

(H) Whoever being licensed under section __ of chapter __ violates any provision of this section shall be subject to the suspension or revocation of such section under section __ of said chapter __.

(I) Nothing in this section shall preclude prosecution under section __ of chapter __.

(J) A city or town shall enforce this section through its animal control officers or police officers in a manner consistent with the disposition in section __ of chapter __.

Sweeping Regulations Sweep-up Cruisers: How Increased Regulation for Derelict Boats Restricts Access to America's Waterways for Cruisers

Jonathan Tromp*

We are tied to the ocean. And when we go back to the sea, whether it is to sail or to watch it we are going back from whence we came.[1]

— John F. Kennedy, 1962 America's Cup Dinner

I. Introduction

Answering the call to the sea that President Kennedy so eloquently described, Sean and Louise traded their successful professional careers for a life that would eventually consist of cruising full-time aboard their 52 foot Nova Scotian built steel hulled trawler, *Odyssey*.[2] Though during the past decade their travels have taken them thousands of miles throughout the waters of the United States and Bahamas, Florida is the couple's home waters.[3] These waters, however, have become increasingly unwelcoming to such cruisers.[4] On multiple occasions, *Odyssey* has been chased from her anchorages and forced to move by law enforcement

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Much gratitude is owed to Professor Noga Morag-Levine for her wisdom and advice throughout the drafting process, as well as to those quoted within the note who took time out of their lives to provide many informative and educational conversations.

[1] President John F. Kennedy, Remarks at the America's Cup Dinner Given by the Australian Ambassador (Sept. 14, 1962) https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/americas-cup-dinner-19620914.

[2] Telephone Interview with Sean Welsh (Feb. 1, 2022).

[3] *Id.*

[4] *See generally* Peter Swanson, *Florida: The Most Cruiser Unfriendly State?*, Passagemaker (Mar. 1, 2013), https://www.passagemaker.com/destinations/florida-the-most-cruiser-unfriendly-state (describing the impact of Florida law on cruisers).

attempting to enforce local ordinances prohibiting anchoring.[5] As a United States Coast Guard licensed Captain, and having faced, as he describes, "intimidation tactics" by local law enforcement more than once—Sean is informed of the applicable state laws of Florida, which, other than under a temporary pilot program, did not allow for localities to make such restrictions prior to new legislation introduced in 2021.[6] Such occasions are not unique to Sean and Louise, but are experienced by countless cruisers who all too often are the casualties of overly restrictive regulation targeting the issues posed primarily by derelict, abandoned, and liveaboard vessels.[7]

Cruisers such as Sean and Louise—those who travel aboard their vessels from port to port—utilize the waterways of the United States, including the Atlantic Intracoastal Waterway (ICW), to transit between locations.[8] In that process, they often anchor for periods of time, whether overnight, several days, or even extended periods, be it simply as time to rest before the next day's travels, undertake necessary repairs, or to experience the unique cultures and towns along the water.[9] Traditionally, such cruisers, if needing to overnight, would look for a secure and out of the way spot and drop their anchor.[10] In recent years, however, this seemingly mundane act of selecting a place to anchor has "become more complicated, even contentious" as cruising sailors have been chased from their anchorages, having to navigate a "piecemeal patchwork of laws [which] proved as confusing and frustrating to law enforcement as it did to boaters."[11] A survey of cruiser forums, talks along the docks, or conversations in sailor bars, will yield numerous concerns among cruisers about the increasing regulations being implemented throughout the United States that have deleterious impacts on cruisers.[12] These concerns stem from the recent trend for states to develop and implement increased regulation targeting anchoring and water access.[13]

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[5] Welsh, *supra* note 2.

[6] *Id.*; s*ee also* S.B. 1946, 2021 Leg., Reg. Sess. (Fla. 2021).

[7] Welsh, *supra* note 2.

[8] *See generally What does cruising mean?*, SailNet, https://www.sailnet.com/threads/what-does-cruising-mean.336106/ (last visited Mar. 18, 2022) (discussing what defines a "cruiser").

[9] *See id.*

[10] *See After navigating a difficult but methodical public process some 10 years in the making, the Florida legislature may be about to forge a commonsense anchoring policy that would apply throughout Sunshine State water. Maybe…*, BoatU.S. Found., https://www.boatus.com/expert-advice/expert-advice-archive/2016/december/will-florida-finally-settle-its-anchoring-issues (last visited Mar. 18, 2022).

[11] *Id.*

[12] *See generally id.* (describing the regulatory trend in Florida restricting anchoring).

[13] *See* discussion *infra* Part II.

Such laws are being developed and implemented throughout the nation, from California, Washington, and Oregon along the West Coast, to every Atlantic Coast state through which the ICW flows.[14]

The trend of increasing regulation, the ease with which regulation is passed, and the potentially detrimental impact on the freedom to cruise and enjoy the waterways of the United States, have forced cruisers and the organizations who represent their concerns into an unsustainable tug-of-war to curb the extent of regulation being imposed on access and utilization of the waterways. Through original research, including interviews with the legislators who sponsored the legislation, representatives of the marine industry, and cruisers who have experienced the effects of the regulations, a summary of the impetuses behind the regulatory response, as well as a summary of the evolution and current regulations in place along the Atlantic Intracoastal Waterway have been developed. This paper seeks to provide a three-part synopsis of the "confluence of crossed purposes and unintended consequences" of the imposed regulations and the effects on cruisers and other users of the waterways, primarily focusing on the Atlantic Intracoastal Waterway; as well as proffers an argument that the legislative responses in many states are too encompassing; and proposes a model solution to address the issues.[15] Part I investigates the issues driving the increased legislative activity. These impetuses are summarized by classifying the unique, but related issues, into (1) derelict and abandoned vessels and (2) liveaboards and "Not In My Backyard" (NIMBY) conflicts. Part II provides a primer on sources of authority for state legislation related to the water, and a summary of the current regulations in place or being developed throughout the ICW. This legislative activity can be categorized into three approaches, (1) broad and restrictive, (2) narrowly focused and targeted, and (3) being developed through an investigative committee. Part III provides a summary of important elements to include in crafting an effective response to the presented issues from both a regulatory approach, as well as infrastructure enhancements. The policies and practices of Annapolis, Maryland are provided as a model approach that incorporates many of the key elements offered in this section.

II. Impetuses Behind Restrictive Regulation

Legislators in multiple Intracoastal Waterway (ICW) states have faced mounting pressures from their constituents to address perceived

[14] *See id.*

[15] *See* Telephone Interview with David Dickerson, Vice President, State Gov't Affs., Nat'l Marine Mfrs. Ass'n (Oct. 8, 2021) (quoting Mr. Dickerson's description of the "confluence of crossed purposes and unintended consequences").

problems stemming from divergent users of the waterways.[16] Unlike the "probably five to 10 complaints a week" received by the Oregon Department of State Lands (DSL), "ranging from noise complaints to concerns with pollution, safety, and aesthetics," regarding the Portland "river-dwellers," complaints directed towards a broader anchoring demographic than the "derelicts" are at the root of far more restrictive regulations enacted in Georgia and Florida.[17] When asked what the impetus is for the restrictive legislation being enacted, National Marine Manufacturers Association Vice President of State Government Relations, David Dickerson, described a culmination of "a lot of years of angst" that has two core principles: derelicts and "NIMBY."[18]

At the heart of the issue in every state is the rising presence of "derelict" vessels, a term which lacks a specific definition, but has been applied broadly to encompass a range of vessels. Editorializing in the sailing periodical *Practical Sailor,* Darrell Nicholson noted the definition of derelict "seems to vary according to which side of the shoreline you are on; but the term increasingly is being used to apply to any boat that does not conform to the yachting ideal of a pristine hull…."[19] Though perhaps stated somewhat cynically, the definition emphasizes the ambiguity of the term, the potentially encompassing nature of its application, and the competing perceptions of the vessels to which the term is applied. Absent a universal definition, the term has been applied to a wide range of vessels, from those that are abandoned and at risk of sinking, if not already sunken, to liveaboard vessels, which may or may not be fully functional.[20] Though the delineation between each category may not be concrete and the issues are often conflated due to their related and somewhat common elements, these core principles can be divided between (1) derelict and abandoned boats, a group primarily defined as unseaworthy, poorly maintained and neglected, if

[16] *See generally* Deirdra Funcheon, *Rich Miamians Wage War Against People Who Live on Boats,* Miami New Times, (Mar. 29, 2016, 8:05 AM), https://www.miaminewtimes.com/miami/Print?oid=8351526 (describing the contention in Florida); Jack White, *Open Letter: Why Georgia's HB201 is a Betrayal of the Public Trust*, Waterway Guide (Jan. 7, 2020), https://www.waterwayguide.com/latest-news/news/10265/open-letter-why-georgias-hb201-is-a-betrayal-of-the-public-trust (describing the detrimental impact of Georgia's bill on cruisers).

[17] Phoebe Flanigan, *Who Has The Right To Live On Oregon's Waterways?*, OPB (Sept. 29, 2015, 3:49 PM), https://www.opb.org/news/article/willamette-river-oregon-house-boats-regulations/; *see generally* Funcheon, *supra* note 16 (discussing issues posed in Florida leading to calls for regulation); White, *supra* note 16 (discussing motivations of regulators implementing increased regulation).

[18] *See* Dickerson, *supra* note 15.

[19] Darrell Nicholson, *Florida Anchoring Survey: Here Today, Gone-*, Practical Sailor (Nov. 7, 2019), https://www.practical-sailor.com/blog/florida-anchoring-survey-here-today-gone.

[20] *See* discussion *infra* Part I.

not totally abandoned, and (2) liveaboards, which though potentially insufficiently maintained, serve as affordable living accommodations, and often contribute the NIMBY conflicts. This section breaks down the drivers of regulation into two categories, (1) derelict and abandoned boats, and (2) liveaboards and "Not In My Backyard" conflicts.

a. Derelict and Abandoned Boats

The waters of the ICW are littered with vessels in various states of care.[21] Some of these boats have obviously remained stationary for significant periods of time, as evidenced by substantial scum, algae, and barnacle growth along their hulls, moss and other organic growth creeping along the deck, and remnants of torn sails and canvas covers.[22] For example, there is a moored sailboat in Galesville, Maryland whose mast serves as a nesting site for ospreys.[23] However, though many boats would clearly fall within the definition of "derelict" as used in common parlance, other boats, even if not in a state of prime upkeep, may be fully functional and capable of moving under their own power.[24] Still, some of these "unsightly" boats serve as relatively affordable housing for people who reside in coastal communities, which will be further addressed below.[25] Yet, communities often view these boats as nuisances.[26] Whether these "derelict" boats are abandoned or lived aboard, they pose a unique set of issues for the communities in which they are moored.[27] In order to address these issues, municipalities and states have sought legislation that would target the issues imposed by these vessels—ranging from social concerns of crime, congestion, and trespassing; economic issues

[21] *See Abandoned and Derelict Vessels in Florida and the Caribbean,* NOAA Marine Debris Program (June 22, 2017, 11:00 AM), https://blog.marinedebris.noaa.gov/abandoned-and-derelict-vessels-florida-and-caribbean (noting abandoned and derelict vessels are a problem in many places in the United States).

[22] *See generally* Mary South & Tom Crestodina, *The Dangers of Derelict Boats*, Passagemaker (Mar. 16, 2020), https://www.passagemaker.com/trawler-news/the-many-dangers-of-derelict-boats (describing the general condition of many derelict vessels).

[23] *See generally Natural Resources Police Save Osprey Nest from Abandoned Boat*, Md. Dep't Nat. Res. (Apr. 16, 2021), https://news.maryland.gov/dnr/2021/04/16/natural-resources-police-save-osprey-nest-from-abandoned-boat/ (describing the efforts of Maryland DNR to recover an osprey nest from an abandoned boat, a situation similar to the sailboat mast osprey nest as observed by the author of this Article).

[24] *See generally* South & Crestodina, *supra* note 22.

[25] *See generally* Nancy Klingener, *Liveaboard Life In The Keys Isn't The Easy Ride You Might Think. Will State Make It Harder?*, WLRN (Apr. 29, 2021, 9:41 AM), https://www.wlrn.org/news/2021-04-29/liveaboard-life-in-the-keys-isnt-the-easy-ride-you-might-think-will-state-make-it-harder (describing how liveaboard boats provide affordable housing in the Florida Keys).

[26] Nicholson, *supra* note 19.

[27] *See generally* Klingener, *supra* note 25.

of community resource consumption without contributing to the tax base as would a homeowner, and the burden imposed on governments left footing the bill for removal of hazards resulting from these boats; environmental concerns related to the disposal of effluence, oil and system fluids that leak into the water, or the fiberglass boats themselves that sink or drift into the fragile coastal ecosystems; to navigational hazards endangering recreational and commercial traffic.[28]

Abandoned vessels impose a significant burden on communities.[29] Discussing the abandoned vessel issue in his county, Pinellas County Sheriff Bob Gualtieri captured the nature of the issue, commenting, "They've just been abandoned irresponsibly by their owners, left there, and some have been left there for a year or a year and a half. They're a danger to the public, they're a danger to boaters, a danger to people that are on personal watercraft, and a danger to swimmers. And besides that, they're also an eyesore."[30] South Carolina State Representative Elizabeth Wetmore noted that the city of Folly Beach, where she served as a City Administrator prior to serving as a state Representative, spent over $150,000 in a 10 year period removing derelict vessels.[31] Echoing sentiments expressed by other policymakers, Representative Wetmore noted the difficulty in identifying the owner (or perhaps better expressed as the responsible party) for the abandoned vessels.[32] In a region plagued with hurricanes and other storms, authorities struggle to ascertain who should be contacted to move vessels abandoned and at risk of sinking or drifting into other boats, sensitive shorelines, or infrastructure such as bridges.[33] The latter was an issue for Folly Beach law enforcement, who were forced to risk their lives and resources attempting to tow an abandoned sailboat that posed a threat to a bridge during a storm, which resulted in "wasted taxpayer money," and risked resources that could have been used elsewhere.[34]

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[28] *See generally* Teresa Stepzinski, *New Florida law aims to prevent derelict vessels; removal can be pricey*, Fla. Times-Union (Aug. 6, 2016, 10:22 PM), https://www.jacksonville.com/story/news/2016/08/07/new-florida-law-aims-prevent-derelict-vessels-removal-can-be-pricey/15719770007/ (describing the issues posed in Florida an example of states and municipalities seeking to enact legislation to address such issues); South & Crestodina, *supra* note 22 (describing the dangers of derelict boats).

[29] Telephone Interview with Elizabeth Wetmore, State Representative, S.C. (Oct. 24, 2021).

[30] Carl Lisciandrello, *Pinellas County begins removing derelict boats from the area's waterways*, WUSF (Feb. 22, 2022, 08:09 AM), https://wusfnews.wusf.usf.edu/environment/2022-02-22/pinellas-county-begins-removing-derelict-boats-area-waterways.

[31] Wetmore, *supra* note 29.

[32] *Id.*

[33] *Id.*

[34] *Id.*

Even when the owner is known, taxpayers can be left on the hook for removal costs, which, if the vessel sinks, can be significantly greater than if the vessel were able to be removed while afloat.[35] Maryland State Senator Sarah Elfreth, who sponsored a bill targeting "derelict" vessels, testified that in the instance of the sinking of the *Crazy Girl* near Annapolis that the hydraulics to lift the boat once sunk cost the taxpayers an additional $9,600 over the $2,400 which would have been the cost to tow the vessel prior to sinking.[36] Not only did the boat pose a navigational hazard, it could have leaked fuel into the river.[37] *Crazy Girl* was reported to the Maryland DNR more than a week prior to its sinking, but these reports were "met with hesitation" by the DNR who claimed its hands were tied by Maryland law allowing for the removal of vessels only once having fallen into "disrepair," highlighting the corollary issue of establishing and exercising authority and responsibility between State and local authorities.[38] Even when the Legislature has charged a specific agency with enforcement authority, the agencies, as is the case in Florida with the Fish and Wildlife Commission (FWC), are not always proactive in executing their duties, adding yet another layer of complexity to the issue of dealing with "derelict" or abandoned vessels.[39] Inherent in this hesitation is the ambiguity of at what point action is necessary or even legal to address a so-called "derelict" vessel.[40] This is another issue with which legislators are forced to grapple in addressing the "derelict" problem, compounded in the instance of abandoned vessels where ownership is not clear, yet also pertinent to boats that are occupied.[41]

b. Liveaboards and Not In My Backyard

As one of the last ways to live relatively affordably in waterfront communities, living aboard a boat, whether in a marina, on a mooring, or at anchor, has become an alternative to high rents and expensive real estate.[42] These boats are not always met with open arms by the communities in which they are anchored.[43] As explained by Pinellas

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[35] Zoom Interview with Sarah Elfreth, State Senator, Md. (Oct. 5, 2021).

[36] *Testimony in Favor of SB219: State Boat Act—Abandoned or Sunken Vessels—Removal*, 441st Sess. (Md. 2020) (testimony of Sen. Sarah Elfreth).

[37] Olivia Sanchez, *Annapolis senator introduces bill to tighten regulations on sunken, abandoned boats*, Capital Gazette (Jan. 30, 2020, 5:00 AM), https://www.capitalgazette.com/politics/ac-cn-abandoned-vessels-20200129-20200130-nyqtbl5gwrehfdgl3kqoxpwune-story.html.

[38] *Testimony*, *supra* note 36.

[39] Dickerson, *supra* note 15.

[40] *See generally Testimony*, *supra* note 36; Wetmore, *supra* note 29.

[41] *Id.*

[42] Klingener, *supra* note 25.

[43] *See generally* Jim Carlton, *Housing in San Francisco Is So Expensive*

County Sheriff Gualtieri, "People call a lot and talk about that they live on the Intracoastal Waterway and there's two or three boats behind their house and somebody's living on them."[44] Further south in Florida, the city of Key West estimates there are 250–300 boats anchored around the island.[45] These anchored boats provide inexpensive housing in a community with high costs of living, and a need for low wage hospitality and restaurant employees who otherwise would be unable to afford to live on Key West, which is relatively distant from any area of affordable housing.[46]

This is not a situation unique to Key West or to Florida, as such liveaboards can be found throughout the communities along the ICW, nor is it a phenomenon unique to the Atlantic coast.[47] A "ragtag collection of some 200 barges, sailboats, and other mostly decrepit vessels" has assembled off the coast of wealthy San Francisco Bay area Marin County, whose "homeless floating population" has doubled in recent years.[48] "A tough economy, combined with a chance to live rent-free on the river," has resulted in the rise of so-called "aquatic squatters" along the Willamette and Columbia Rivers in Portland, Oregon.[49] With the rise of liveaboard communities, comes the increased burden on governments faced with growing complaints from the community and swelling costs dealing with such vessels.[50] Monroe County, which includes the Florida Keys, averages $238,415 annually in removing derelict vessels.[51] In 2021, Monroe County removed eighty derelict vessels from public waters, with a total expense of $468,611.[52] These liveaboard vessels, like their unoccupied counterparts, can break loose and hit other boats, damage seagrasses and mangroves, or spill fuel and sewage, issues

Some People Live on Boats, Wall St. J. (May 16, 2019, 5:30 AM), https://www.wsj.com/articles/housing-in-san-francisco-is-so-expensive-some-people-live-on-boats-11557999002 (describing complaints of homeowners regarding liveaboard vessels).

[44] Lisciandrello, *supra* note 30.

[45] Klingener, *supra* note 25.

[46] *Id.*

[47] *See generally* Wetmore, *supra* note 30 (discussing the issues related to liveaboards in South Carolina); Carlton, *supra* note 39 (discussing the liveaboard situation in California); Dana Tims, *Multnomah County's 'aquatic squatters' may have to weigh anchor under new state rules*, Oregonian (Jan. 10, 2019, 10:44 AM), https://www.oregonlive.com/portland/2012/10/multnomah_countys_aquatic_squa.html (describing the liveaboard issues in Portland, Oregon).

[48] Carlton, *supra* note 43.

[49] *See* Tims, *supra* note 47.

[50] *See* Flanigan, *supra* note 17.

[51] *See* Klingener, *supra* note 25.

[52] *See* Timothy O'Hara, *Oh, Buoy*, Key W. Citizen (Apr. 29, 2022), https://www.keysnews.com/news/government/keys-anchoring-bill-approved-vessels-to-move-every-90-days/article_63792264-c6f6-11ec-a93a-63a3e2e937c1.html.

identified by Key West liveaboard and Blue Haven Restaurant manager Kathy Gregory.[53] Marin County homeowner Jim Robertson, told the *Wall Street Journal* that runaway boats have collided with his home sixteen times in two decades, with one instance resulting in $20,000 in dock repairs.[54] Highlighting the burden placed on agencies who are reluctant to address the derelict boat problem, Ms. Gregory called the state to report a derelict vessel, as it was abandoned with no personal belongings onboard, yet the vessel remained abandoned for over a month until it was washed out to sea where it would pose a navigation and safety risk to other vessels, as well as an environmental risk.[55]

Liveaboard vessels pose environmental concerns related to the proper disposal of "black" and "grey" water from toilets, showers, faucets, and bilges.[56] When boats with limited holding tank capacity remain stationary for a significant period of time, occupants are unable to safely dispose of their sewage.[57] As noted by the BoatU.S. Foundation, "The primary environmental concern with…sewage is not the urine (which is basically sterile), but the feces. Human feces contains bacteria, pathogens, and nutrients."[58] "Section 312 of the Clean Water Act requires the use of operable, U.S. Coast Guard-certified marine sanitation devices (MSDs) onboard vessels that are equipped with installed toilets and operating on U.S. navigable waters."[59] Federal regulations prohibit the discharge of untreated sewage, even if dosed with a deodorant product, and require holding tanks equipped with a "Y" valve for direct discharge to be secured in the closed position, with a non-reusable tie, padlock, or removal of the valve handle while operating in inland and coastal waters.[60] A typical cruiser periodically obtains a pump-out from a marina or dumps overboard when in a legal discharge zone, yet for stationary, and often inoperable occupied

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[53] *See* Klingener, *supra* note 25.

[54] *See* Carlton, *supra* note 43.

[55] *See* Klingener, *supra* note 25.

[56] *See generally Human Waste Disposal*, BoatU.S. Found., https://www.boatus.org/study-guide/environment/waste/ (last visited Mar. 14, 2022) (discussing marine waste and sanitation practices, policies, and regulations).

[57] *See generally* Jim Waymer, *Proposed Florida legislation eases derelict boat removal*, Fla. Today (Feb. 26, 2021), https://www.floridatoday.com/story/news/local/environment/2021/02/24/proposed-florida-legislation-eases-derelict-boat-removal/4574364001/ (Boats are necessarily outfitted with holding tanks for "grey" and "black" water storage to contain waste when not out at sea. Inherent with this set-up is the requirement for these tanks to be pumped-out regularly due to limited capacity.).

[58] *Human Waste Disposal*, *supra* note 56.

[59] *See Vessel Sewage Frequently Asked Questions*, EPA, https://www.epa.gov/vessels-marinas-and-ports/vessel-sewage-frequently-asked-questions (last visited Mar. 18, 2022).

[60] *See id.*

derelicts, the potential for direct discharge into the water threatens the delicate marine habitat, as well as the sanitation of the waters accessed by the surrounding communities. Representative Wetmore said Folly Beach had a "hell of a time enforcing pump outs."[61] Liveaboards pose an additional risk to the environment in that, when not in a marina or mooring ball, they are necessarily anchored to the seafloor to remain stationary, potentially damaging the seagrasses or other marine habitats when their anchors drag and anchor chains sweep across the sea floor.[62] When asked which was more of a problem for the community, abandoned or occupied derelicts, Representative Wetmore said it was "hard to pick" as the abandoned boats were worse from a safety perspective and the liveaboards from an environmental perspective.[63] This demonstrates the complexity of the problem faced by legislatures seeking to address the cocktail of issues stemming from similar, yet unique sources regarding derelict, abandoned, and liveaboard vessels.

The Not in My Backyard (NIMBY) influence extends the targets of legislation beyond the derelicts and liveaboards to the greater cruising community as a whole, resulting in restrictions to anchoring and land access that affects the thousands of recreational boaters from around the world cruising through and visiting the coastal communities of the United States, especially Florida and Georgia.[64] Though many of the boats targeted by the "NIMBY" crowd are long-term liveaboards, cruisers also become the targets of waterfront homeowners' ire.[65] Some of these cruisers merely anchor for short periods as they transit through areas, but others, many of whom are from the North East or Canada, come down to spend the winters in warmer waters.[66] Some anchor in the same spot year after year and dinghy into shore where they may even have a vehicle.[67] Over the past decades, there has been a dramatic increase in people who have waterfront property and only want to look at an endless view of water.[68] They buy waterfront property, seemingly

[61] Wetmore, *supra* note 29.

[62] *See generally Mooring Field Benefits—Addressing Multiple Anchoring Impacts through the Implementation of Managed Mooring Fields*, Monroe Cnty., Fla., https://www.monroecounty-fl.gov/DocumentCenter/View/7751/Mooring-Field-Benefits-and-Seagrass-Impact-Summary?bidId= (last visited Mar. 18, 2022) (describing sea grass damage resulting from anchoring and the related environmental advantages of mooring fields).

[63] Wetmore, *supra* note 29.

[64] *See* Dickerson, *supra* note 15.

[65] *See generally* Funcheon, *supra* note 16 (describing an experience of a cruising sailor being targeted by a waterfront homeowner for anchoring in public waters).

[66] *See* Dickerson, *supra* note 15.

[67] *See id.*

[68] *See id.*

thinking the property line ends at the horizon.[69] Many don't like the boats in their view, so they take action and have the wherewithal to do so.[70] Mr. Dickerson pointed to one such NIMBY battle, at an island near Miami, where a boater anchored his boat in close proximity to the dock of a celebrity for months on end.[71] Though the celebrity asked him to move and to respect her privacy, the boater refused.[72] Having the necessary financial resources and connections, the celebrity started lobbying the state for the right to limit anchoring in state or county waters so the county could set its own standards—setting a short time limit to "churn" the boats at anchor.[73] This was not an isolated occurrence.[74] Canadian retiree and cruiser Al Holden found himself embroiled in such a battle while anchored in Sunset Lake, between Miami Beach and the Sunset Islands, enroute along the ICW to Key West.[75] During the day, Holden was told to "get lost" by Miami real estate investor Frederic Karlton, whose multi-million dollar Mediterranean-styled home was adjacent to the Canadian cruiser's anchored 34-foot boat.[76] Mr. Karlton retaliated against the cruiser's continued presence by blasting rap music and shining a spotlight onto the boat during the night, a situation which Mr. Holden recorded and posted to YouTube.[77] Mr. Karlton has had run-ins with other cruisers, and went so far as to "go buy thirty 12-foot sailboats, at tremendous cost," which he anchored throughout the bay to restrict the ability of additional anchoring, "in order to protect [his] right to privacy."[78] Such battles highlight the tension that has "simmered for decades between waterfront homeowners, who pay handsomely for pleasant views, and boaters who anchor in public waters exercising a right mariners have enjoyed for centuries."[79]

Lawmakers, in prioritizing and shaping legislation, are caught in a tug-of-war between competing factions, as primarily wealthy and well connected waterfront homeowners seek to restrict anchoring in their "backyards," and cruisers, many of whom are pension or fixed-income

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[69] *See id.*

[70] *See id.*

[71] *See id.*

[72] *See id.*

[73] *See id.*

[74] *See generally* Funcheon, *supra* note 16 (describing an confrontation between a boater and homeowner).

[75] *Id.*

[76] *See id.*

[77] *See id.*

[78] *Id.*; *See also The clash between boaters and Miami Beach*, Waterway Guide, https://www.waterwayguide.com/latest-news/news/6325/the-clash-between-boaters-and-miami-beach?_escaped_fragment_=&_escaped_fragment_=#! (last visited Mar. 14, 2022) (providing an aerial photo of the anchored dinghies).

[79] *See* Funcheon, *supra* note 16.

reliant retirees, seeking to live the cruising lifestyle and enjoy the natural resources and culture of the coastal United States.[80] The latter are mostly represented by various cruising groups such as the America's Great Loop Cruisers' Association (AGLCA), National Marine Manufacturers Association (NMMA), BoatU.S. Foundation, or other organizations, who themselves represent varying interests within the broader boating community, to balance the competing interests of property rights and desires to anchoring rights and centuries of maritime tradition.[81] Additionally, lawmakers are pressured from communities, each of whom have differing views on the presence of anchored boats—from derelicts to cruisers, and the complex relationship between the abilities of the local governments to impose restrictions, the existing State laws, and the authority of various agencies in enforcing and addressing the laws in existence.[82]

III. State Regulation of Anchoring and Mooring

The right to navigate is not a "fundamental right," nor is there a right to anchor indefinitely.[83] Though the Federal Government is vested with the authority to regulate the navigable waters of the United States through the Commerce Clause of the United States Constitution, federal statutory authority has largely delegated the regulatory authority to the states.[84] By enacting the Submerged Lands Act, the Federal

[80] *See* Dickerson, *supra* note 15.

[81] *See* Ed Tillett, *Update on the Proposed Georgia Anchoring Rules*, Cruising World (June 20, 2019), https://www.cruisingworld.com/update-on-proposed-georgia-anchoring-rules/.

[82] *See generally* Jim Flannery, *Florida feuding: Don't drop the hook in my backyard,* Soundings (Sept. 28, 2011), https://www.soundingsonline.com/features/florida-feuding-dont-drop-the-hook-in-my-backyard (describing the competing interests of boaters and homeowners and the pressures to regulate anchoring).

[83] *See* 65 C.J.S. *Navigable Waters* § 36 (Nov. 2021) ; Murphy v. Dep't of Nat. Res., 837 F. Supp. 1217, 1220 (S.D. Fla. 1993) ("Assuming that the right to navigation is a constitutional right in the sense in which Plaintiffs use the term, this does not automatically make it a *fundamental* right meriting strict scrutiny. In fact, this Court is unaware of any case that has employed a strict-scrutiny analysis in addressing the right to navigation, hindrances to navigation, or navigation under the SLA."), *aff'd*, 56 F.3d 1389 (11th Cir. 1995) ("An incident of the public's right of navigation is the right to anchor boats temporarily."); *See also* Higgins Lake Property Owners Ass'n v. Gerrish Tp., 662 N.W.2d 387 (Mich. App. 2003).

[84] United States v. Rand, 389 U.S. 121, 122–23 (1967) ("The Commerce Clause confers a unique position upon the Government in connection with navigable waters. 'The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States.…For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress.'" (quoting Gilman v. City of Philadelphia, 713, 724–725, (1866)).

Government's interests in coastal waters were effectively quitclaimed to the states.[85] According to the public trust doctrine, "all public waters are held in trust by the states for the use and enjoyment of the public."[86] The Police Powers granted to the states under constitutional law afford states "absolute" authority to "control and regulate usage of their navigable waterways."[87] It is within this cadre of authorities that the Atlantic ICW states exercise their powers to institute the array of legislation that has been developed in recent years.

a. Current Regulation and Sources of Authority

The current array of legislation as implemented by the states, through which the Atlantic ICW flows, falls into three general categories: (1) the broad and restrictive regimes of Florida and Georgia, (2) the narrowly targeted approach of Maryland and the Carolinas, and (3) the task-force guided developmental process being undertaken in Virginia.

b. Approach 1: Broad and Restrictive

To understand the concerns of the cruising community spurned by the current litany of regulations, the broad and restrictive regulatory regimes of Georgia and Florida which extend beyond the specific issues of derelict, abandoned, and liveaboard boats to include limitations on anchoring in general must be scrutinized. Unable to anchor freely while traversing the waterways of the United States, cruisers become casualties of regulatory trends meant to target derelict, abandoned, and liveaboard boats.

i. Georgia

Seemingly "out of nowhere," in 2019, Georgia passed one of the most sweeping and restrictive anchoring legislations in the country.[88] Upon receiving Georgia Governor Brian Kemp's signature in May 2019, H.B. 201, which became effective January 2020, immediately sparked outrage amongst the cruising community, including former Georgia state representative Jack White, who decried the bill as a "betrayal of the public trust."[89] In response, cruisers and advocacy groups invested

[85] *See* 33 C.F.R. § 320.2(b) (1986).

[86] 78 Am. Jur. 2d *Waters* § 161 (2022).

[87] Graf v. San Diego Unified Port Dist., 7 Cal. App. 4th 1224, 1231 (1992).

[88] Dickerson, *supra* note 15 (quoting Mr. Dickerson's description of the ease with which the bill was passed); *See also* White, *supra* note 16 (describing the wide sweeping nature of the regulations).

[89] White, *supra* note 16.

significant efforts, most notably a 2019 public gathering of cruisers, advocacy groups, and lawmakers in Brunswick, Georgia in raising awareness of the overly restrictive nature of the law.[90] With some success, those representing cruisers achieved a partial rollback of the most restrictive elements, though the baseline remains significantly shifted further toward increased restrictions to water access.[91] The evolution of the development of law in Georgia and the extent of the efforts necessary to curb the overly restrictive nature is representative of the unsustainable tug-of-war that is ongoing in the challenge to balance opposing desires for utilization of the waterways.

In its original form, the bill starts from the premise of the General Assembly having found that,

> …because of the frequency of *live-aboard vessels utilizing the estuarine areas of this state, it is necessary for the protection of the public health, safety, and welfare to prohibit the discharge of sewage from such vessels into estuarine areas of this state.* It is declared to be the intent of the General Assembly to protect and enhance the quality of the waters of such estuarine areas by requiring greater environmental protection than is provided pursuant to Section 312 of the federal Water Pollution Control Act, as amended, such that any discharge of sewage from a live-aboard vessel into the waters of such estuarine areas shall be prohibited.[92] (emphasis added)

Presented as an act protecting the marine estuaries of Georgia, the bill made it unlawful for any person who "operate[s] or float[s] any live-aboard vessel" within Georgia estuaries, to discharge sewage, whether treated or untreated, into the estuaries, as well as mandated marine storage tanks capable of overboard discharge be equipped with a secured mechanism to prevent such discharge.[93] Vessel operators, as well as pump-out facilities, must maintain records for at least one year of pump-out verification.[94] Coastal Resources Division Director Doug Haymans represented that the intent of H.B. 201 was to "'protect and enhance

[90] *See* Wes Wolfe, *Cruisers*, *DNR staff tackle proposed liveaboard vessel regulations*, Brunswick News (June 19, 2019), https://thebrunswicknews.com/news/local_news/cruisers-dnr-staff-tackle-proposed-live-aboard-vesselregulations/article_7a4d2f40-6ac5-5199-a474-287784cadea5.html.

[91] *See generally* Kim Russo, *Georgia Caves, Defangs Draconian Anchoring Law*, Great Harbor Trawlers, http://www.greatharbourtrawlers.com/georgia-caves-defangs-draconian-anchoring-law.html (last visited Mar. 14, 2022) (describing Georgia's roll-back of legislation in response to concerns of the cruising community).

[92] H.B. 201, 2019–2020 Reg. Sess. (Ga. 2020).

[93] *Id.*

[94] *Id.*

the quality of waters of' the state estuaries by prohibiting 'discharge of sewage from live-aboard vessel' [sic] into those estuaries."[95] However, noting that such discharges are already "covered under the federal Clean Waters Act," a *Brunswick News* editorial expressed the concerns of cruisers, adding that, "It appears this legislation was created to address derelict boats. This sweeping new law will not fix the problem but only create more problems for all boaters…."[96]

These concerns stemmed from the legislation having authorized the promulgation of rules and regulations related to overnight or long-term anchoring within the estuarine areas, including establishment of an anchoring permit, and authorized the Department of Natural Resources to establish anchorage areas and areas in which anchoring is prohibited, making it unlawful to dock or anchor any vessel at night within the estuarine areas of the state unless within a designated anchorage area.[97] Describing the "draconian approach" of Georgia's lawmakers, *Waterway Guide* Editor-In-Chief, Ed Tillet wrote, "Georgia's new law eliminates a large percentage of traditional and known stretches of waterways where boats may anchor using a setback provision from structures and docks."[98]

Despite such concerns expressed by the cruising community, Georgia DNR Commissioner Mark Williams signed an Administrative Order on December 30, 2019 establishing anchorage areas for the purpose of overnight anchoring, and with the exception of marina zones restricting anchoring within 300 to 1,000 feet of certain marina facilities, prohibited anchoring "within 1,000 feet of any structures, such as wharfs, docks, piers, pilings, bridge structures or abutments."[99] Under the promulgated restrictions, utilizing "data from the popular navigation and guide services Active Captain, *Waterway Guide*, and Cruisers' Net," James H. Newsom, writing in *SOUTHWINDS Magazine,* noted,

150 unique anchoring locations were identified and overlaid with DNR maps of the restricted areas. A total of 92 (61%) of popular anchoring locations are impacted or eliminated with 34 (23%) negatively impacted and 58 (39%) essentially eliminated. Of these 92 anchorages impacted or eliminated, the overriding cause was the presence of a structure or docks (74%), followed by commercial shellfish beds (18%) and recreational shellfish beds (8%).[100]

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[95] Wolfe, *supra* note 91.

[96] Bob Keller, *New anchoring law is anti-boating*, Brunswick News (July 6, 2019), https://thebrunswicknews.com/opinion/letters_to_editor/new-anchoring-law-is-anti-boating/article_457df439-628e-514b-b643-d7d1121a31cd.html.

[97] H.B. 201, 2019–2020 Reg. Sess. (Ga. 2019).

[98] Ed Tillett, *Research Reveals Incongruity of Georgia Anchoring Laws*, Waterway Guide (Jan. 1, 2020), https://www.waterwayguide.com/latest-news/news/10316/research-reveals-incongruity-of-georgia-anchoring-laws.

[99] Ga. Dep't Nat. Res., Admin. Ord. by the Comm'r (Dec. 30, 2019).

[100] James H. Newsome, *Georgia Anchoring Locations Impacted or*

The wide-sweeping impact of the bill's restrictions, impacting such a significant portion of the anchoring locations in Georgia, was what made the bill "an anti-boating piece of legislation."[101]

In response to the significant efforts of cruising and marine industry groups, Georgia State Representative Ron Stephens, a "Gold Looper," proposed H.B. 833, which was enacted by the Georgia legislature and rolled back portions of the previous legislation.[102] Groups behind this effort included the American Great Loop Cruisers Association (AGLCA), BoatU.S. Foundation, the Seven Seas Cruising Association, the National Marine Manufacturers Association (NMMA), and the grassroots group, Save Georgia's Anchorages.[103] Additionally, calls for cruisers "to avoid getting screwed by Georgia, just go around it," suggested cruisers take their tourist, repair, and related dollars elsewhere. Most significantly, H.B. 833 reduced the anchoring restriction distances to within 300 feet of a marina, 150 feet of a marine structure, and 500 feet of approved shellfish growing areas.[104] Current law prohibits long-term anchoring, defined as anchoring a vessel within a one mile radius of a documented anchoring point for over 14 days in a calendar year, without first obtaining a Long-Term Anchoring Permit from the DNR.[105] Additionally, short-term anchoring, defined as less than 14 days in a calendar year, is allowed in anchoring restriction areas as long as the vessel is not anchored overnight.[106] The situation in Georgia demonstrates the ease with which states can pass legislation imposing restrictions to use of America's waterways, and the importance of industry groups in representing the interests of those lacking the ability and resources to directly influence the legislation that so greatly affects them.

ii. Florida

After years of debate between cruisers, industry groups, waterfront homeowners, and lobbyists, with no shortage of hostilities and lawsuits, Florida succumbed to the pressures of municipalities and homeowners who sought for the prohibition of anchoring in their backyards. In 2009, the state modified Chapter 327 of Florida Law, launching a pilot

Eliminated, Southwinds Mag. (Mar. 3, 2020), https://issuu.com/southwinds/docs/southwindsmarch2020/s/10301078.

[101] Keller, *supra* note 97.

[102] *See* Russo, *supra* note 92.

[103] *See* Tillett, *supra* note 99.

[104] *See* Russo, *supra* note 92.

[105] *See* Ga. Dep't Nat. Res. Enf't Div., Georgia Estuarine (Marine) Anchoring Law (2020), https://gadnrle.org/sites/default/files/le/pdf/Special-Permits/Georgia%20Estuarine%20(Marine)%20Anchoring%20Law%208-16-22.pdf.

[106] *See id.*

anchoring and mooring program enabling five municipalities to regulate anchoring within their jurisdictions.[107] Though the law as amended, which included an initial expiration of the temporary program in 2017, prohibited local government authorities from regulating anchoring outside of such mooring fields, other than liveaboards, as defined in the regulations, it opened the door for municipalities to seek the ability to restrict anchoring in their waters.[108] In 2021, following continued pressure from both sides of the table, the Florida Legislature passed two bills with wide-sweeping impact on Florida boating and water access, SB 1946 and SB 1086.[109]

At 69 pages, SB 1086 is broad in scope, addressing alcohol-related offenses, speed zones, adds the term "Human-Powered Vessel" to the lexicon, and provisions for protection zones near springs and space launch sites, as well as more pertinent measures to this discussion, such as expansion of no-discharge zones, imposition of requirements to document sanitation system pump-outs for live-aboard vessels, including a more encompassing definition of derelict vessels, and the establishment of Anchorage Limitation Areas.[110]

The Anchorage Limitation Areas (ALA's) have the most deleterious impact on the boating and cruising community, beyond liveaboards and derelicts. Though addressed cursorily in SB 1086, which adds "a temporal limitation" to the ALA's, the ALA's are the primary provision of SB 1946, which authorizes "counties to establish anchoring limitation areas that meet certain requirements."[111] Under the Bill, a county may establish an anchoring limitation area within densely populated urban areas, which have narrow state waterways, residential docking facilities, and significant recreational boating traffic.[112] With limited exceptions, a person may not anchor a vessel for more than forty-five consecutive days in any six-month period in an anchoring limitation area.[113] Absent documentation showing that the vessel was in another location at least one mile away within a period of less than forty-five days,

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[107] Fla. Fish and Wildlife Comm'n, Div. of Law Enf't, Anchoring and Mooring Pilot Program: Proposed Report of Findings and Recommendations (2016), https://www.boatus.com/gov/assets/pdf/fwc-2016-anchoring-and-mooring-report.pdf (hereinafter "Anchoring and Mooring Pilot Program"); *see generally* Flannery, *supra* note 83.

[108] *See* Anchoring and Mooring Pilot Program, *supra* note 108, at 13.

[109] *See generally* S.B. 1946, 2021 Leg., Reg. Sess. (Fla. 2021); S.B. 1086, 2021 Leg., Reg. Sess. (Fla. 2021).

[110] Fla. S.B. 1946.

[111] *See* Fla. S.B. 1086 § 13; Fla. S.B. 1946; *see also State Policy Brief: Amendments to Florida's Boating Laws, 2021,* Univ. Fla. (July 12, 2021), https://ccs.eng.ufl.edu/state-policy-update-amendments-to-floridas-boating-laws-2021/.

[112] Fla. S.B. 1946 § 1(2)(a).

[113] *See* Fla. S.B. 1946 § 1(2)(b).

the violator is subject to civil penalties.[114] A vessel with more than three violations within twelve months shall be declared a public nuisance.[115] In describing the Bill's impact, the Center for Coastal Solutions noted that "municipalities" are more likely to possess the requisite criteria for authorizing the establishment of an ALA, yet receive no mention in the new law, which gives specific authority to counties.[116] "Thus," notes the Center, "arguably Chapter 327's underlying preemption…that prohibits all local governments from restricting transient anchoring continues in force to municipalities."[117] Under this presumption, to establish an ALA within a city, the municipality must petition the county for an ALA, unless being one of the previously designated anchorage limitation areas grandfathered-in under the new Bill.[118]

Recognizing circumstances particular to the Florida Keys, specifically Key West, the Florida Legislature enacted SB 1432, related to vessel anchoring, mooring, and sanitation, in Monroe County.[119] The Bill amends Florida Code Section 253.0346 to include tenancy and lease conditions for approved and permitted mooring and mooring fields in Monroe County, such as allowing for general tenancy on moorings exceeding twelve months, and precluding leases from prohibiting vessel tenancies because an individual has established the vessel as his or her domicile.[120] Under the Bill, a vessel anchored within Monroe County, which is designated as an anchoring limitation area, located within ten nautical miles of a public mooring field or designated anchorage area, must pull anchor and move from its location under the vessels' own power and re-anchor in an area that is (1) no less than one-half nautical mile from its starting location or (2) be in a different designated anchoring area for at least ninety days after anchoring in a new designated anchorage area.[121] Vessels properly established under Section 222.17 as the owner's domicile, are exempt from these anchoring limitations until at least 100 new moorings are available within one mile of Key West Bight City Dock.[122] The Florida Fish and Wildlife Commission, in consultation with Monroe County and the Florida Keys National Marine Sanctuary, shall establish anchorage areas throughout the county, specifying a maximum vessel draft for each area.[123] All vessels with enclosed living space and used by a person as a dwelling or living space overnight at any time,

[114] Fla. S.B. 1946, § 1(b)(2).
[115] Fla. S.B. 1946 § 1(4)(d).
[116] State Policy Brief*, supra* note 112.
[117] *Id.*
[118] *Id.*
[119] *See generally* S.B. 1432, 2022 Leg., Reg. Sess. (Fla. 2022).
[120] *See* Fla. S.B. 1432 § (1).
[121] *See* Fla. S.B. 1432 § (3)(a).
[122] *See* Fla. S.B. 1432 § (d).
[123] *See* Fla. S.B. 1432 § (b).

notwithstanding whether or not the vessel is also used for navigation, or moored in a mooring field, if equipped with a marine sanitation device other than a composting toilet that complies with United States Coast Guard requirements, must maintain a record of the date and location of each pump out for one year after the date of pump out, indicating the vessel was pumped out within at least thirty days.[124] The Act, which took effect on July 1, 2022, is not to be construed to prohibit anchoring for less than 90 days in areas within Monroe County.[125]

c. Approach 2: Narrowly Focused and Targeted

Antithetical to the broad sweeping restrictions imposed by Georgia and Florida, Maryland, South Carolina, and North Carolina have developed more narrow legislation, which seeks to empower local communities to directly address and enforce the issues posed by "derelict" vessels and holding state agencies, tasked with enforcement, accountable to carry-out their mandate, while not imposing restrictions on general anchoring.

i. Maryland

In response to the sinking of an "abandoned" vessel, *Crazy Girl,* other issues with evicted vessels and derelicts, and the unresponsiveness of Natural Resources Police to address the issue, Maryland State Senator Sarah Elfreth proposed Senate Bill 219.[126] This Bill redefines "abandoned and sunken vessel," to broaden the description, enabling earlier action to mitigate the potential issues posed by vessels prior to actually sinking, as in the case of *Crazy Girl*.[127] Frustrated by the delayed response of the Natural Resources Police, which said it did not have the tools to address the problem, claiming to be prohibited by state law, the Bill broadens the law, and authorizes the department, if it determines an abandoned or sunken vessel poses an immediate hazard to navigation, health, or environment, to take the vessel into custody without notice.[128] This assists the many non-municipalities throughout Maryland that, absent local law enforcement, have to rely on Natural Resources Police for enforcement.[129] Additionally, the amount of time a boat has to remain

[124] *See* Fla. S.B. 1432 § (e).

[125] *See* Fla. S.B. 1432 §§ (f) & (3).

[126] *See* Elfreth*, supra* note 35.

[127] S.B. 219 § 1(a), 2020 Leg., 441st Sess. (Md. 2020); *see generally* Elfreth*, supra* note 35.

[128] *See* S.B. 219 § 1(2)(I), 2020 Leg., 441st Sess. (Md. 2020); *see* Elfreth*, supra* note 35.

[129] *See generally* Elfreth*, supra* note 35.

untouched by the owner at a private marina or boatyard was reduced from ninety to sixty days, and set to thirty days if at a private dock or near the water's edge without the property owner's permission.[130] The Bill's scope is narrow, focused solely on derelict and abandoned vessels, without bleeding into liveaboards or general anchoring.[131] Interestingly, no opponents gave verbal testimony at the hearing introducing the Bill.[132]

ii. South Carolina

Having experienced, during her time in local government, the difficulty and expenses endured by waterfront communities in addressing issues posed by "derelict" vessels, South Carolina Representative Elizabeth Wetmore, a Democrat, sponsored House Bill 3865 which was "shockingly easy" to pass through the Republican controlled General Assembly and had the support of the Municipal Association.[133] At slightly over one page, the language of the Bill, developed through working with the South Carolina Boating and Fishing Alliance, described by Representative Wetmore as "libertarian" in its narrow approach and impetus on dealing at the local level, seeks to avoid unintended consequences and is not intended to interfere with living aboard.[134] The Bill is claimed to empower local governments to directly regulate and address the problems in their communities through local laws, while limited to the "model" set forth in the Bill, ensuring some level of consistency throughout the state.[135] Local governments may adopt an ordinance requiring a permit for watercraft or floating structure to remain moored, anchored, or otherwise located in any single five mile radius on public waters within their local jurisdiction for more than fourteen consecutive days.[136] The cost of the permit may not exceed fifteen dollars and is limited to which watercraft it applies.[137]

[130] *See* Md. S.B. 219 § 1(a)(2).

[131] *See generally* Md. S.B. 219.

[132] *See* Sanchez, *supra* note 37.

[133] *See* Wetmore, *supra* note 29.

[134] H.B. 3865, 2021-2022 Leg., 124th Sess. (S.C. 2021); Wetmore, *supra* note 29.

[135] *See* Wetmore, *supra* note 29; H.B. 3865 § 1(B), 2021-2022 Leg., 124th Sess. (S.C. 2021).

[136] *See* S.C. H.B. 3865 § 1(C)(1).

[137] *See id.*

iii. North Carolina

Consistent with its southern neighbor, the legislative efforts of North Carolina are relatively narrow in scope. House Bill 161 (2021) expands the definition of "abandoned vessel" to also include a vessel that is either moored, anchored, stored, or docked, in one location, or aground, beached, sunken, or adrift and unattended, for more than thirty consecutive days in public lands or waters of the State or on private property without written permission of the property owner.[138] The Bill adds the definition of "derelict vessel" to mean a vessel left unattended and in a wrecked, junked, sunken, or substantially damaged or dismantled condition such that the condition may affect the seaworthiness of the vessel.[139]

Wildlife Resource Commission (WRC) protection and other law enforcement officers are granted general enforcement jurisdiction authority to seize, tow, remove, impound, or relocate any vessel from waters or land of the State pursuant to the Article.[140] The Bill provides that after thirty days' notice, the vessel will be deemed abandoned if the owner has not corrected the identified issues or removed the vessel, and abated any environmental impacts.[141] WRC is authorized to approve a one-time extension for fifteen or thirty days, by written request.[142] With restrictions, in part, for funds to be used for "removal, relocation, abatement, storage, or disposal of abandoned and derelict vessels," the Bill established the Waterway Safety and Access Fund, administered by WRC.[143]

A second related measure, North Carolina Senate Bill 279, specifically allows New Bern, Bridgeton, Oriental, and Trent Woods to make, adopt, and enforce ordinances for the navigational waters within their municipal limits and extraterritorial jurisdictions concerning, in part, the restriction of the "anchoring and mooring of boats and vessels as to location and generally to regulate the anchoring and mooring of vessels within the navigable waters within the municipal limits."[144] The Act gives municipal law enforcement officers authority to enforce any local ordinances adopted under the Act and allows municipalities to appropriate funds to carry out the Act.[145] A similar bill, House Bill 1070, "authoriz[es] the Town of Carolina Beach to regulate navigable waters

[138] H.B. 161 § 1(b)(1), 2021-2022 Leg., (N.C. 2021).

[139] N.C. H.B. 161 § 1(b)(1)(e).

[140] *See* N.C. H.B. 161 § 2(b).

[141] *See* N.C. H.B. 161 § 2 Amending § 75A-53 Derelict Vessels (a)(6).

[142] *See* N.C. H.B. 161 § 2 Amending § 75A-53 Derelict Vessels (b).

[143] H.B. 161, § 2 Amending 75A-51 Waterway Safety Access Fund (a) & (b) (1) (N.C. 2021).

[144] S.B. 279, 2021-2022 Leg., §1(a)(2) (N.C. 2021).

[145] *Id.* § 1(c) & (d).

within its corporate limit."[146] These legislative efforts, proposed during the 2021 legislative session, have yet to be signed into law.[147]

d. Approach 3: Task Force Directed

Virginia does currently have laws addressing abandoned and derelict vessels ("ADVs" in the parlance of Virginia conversation).[148] Though the Virginia Administrative Code contains a relatively broad definition of "Abandoned Watercraft," meaning "a watercraft that is left unattended on private property for more than 10 days without the consent of the property's owner, regardless of whether it was brought onto the private property with the consent of the owner or person in control of the private property," according to the State of Virginia Abandoned and Derelict Vessel (ADV) Legislative and Administrative Review, "Virginia statutes do not outline a process for designating vessels as abandoned or derelict."[149] Under current law, the Marine Resources Commission has been charged with the authority to remove a vessel, in the State's waters, if found abandoned, in danger of sinking, or in such a state of disrepair so as to be considered a hazard or obstruction to the waterway.[150] Such vessels can be removed by the commission, if the owner cannot be reached, after publishing a notice in a newspaper of general circulation.[151] Consistent with the legislation enacted in surrounding ICW states, Virginia law allows localities "to enact ordinances authorizing the removal of abandoned vessels."[152] Recognizing the ineffectiveness of the status quo, operating under the auspice of Clean Virginia Waterways (CVW) of Longwood University with support from the Virginia Coastal Zone Management Program (CZM), the Virginia Abandoned and Derelict Vessels Work Group (VA-ADV Work Group) was established in January 2021.[153] Tasked with

[146] H.B. 1070 (N.C. 2022).

[147] *See Bill Look-Up, House Bill 161*, N.C. Gen. Assemb., https://www.ncleg.gov/BillLookUp/2021/H161 (last visited Mar. 10, 2023); *Bill Look-Up, Senate Bill 279*, N.C. Gen. Assemb., https://www.ncleg.gov/BillLookup/2021/S279 (last visited Mar. 10, 2023); *Bill Look-Up, House Bill 1070,* N.C. Gen. Assemb., https://www.ncleg.gov/BillLookUp/2021/H1070 (last visited Mar. 10, 2023).

[148] *See* Va. Admin. Code § 29.1-733.2; *see also State of Virginia, Abandoned and Derelict Vessel (ADV) Legislative and Administrative Review - 2015*, NOAA Marine Debris Program (2015), https://marinedebris.noaa.gov/sites/default/files/ADV-Docs/VIRGINIA_ADV_Legal_Review_2015_NOAA_MDP.pdf.

[149] NOAA Marine Debris Program, *supra* note 149.

[150] *See id.*

[151] *Id.*

[152] *Id.*

[153] *See Virginia Abandoned and Derelict Vessels Work Group*, Clean Va. Waterways, http://www.longwood.edu/cleanva/ADV.html (last visited Mar. 10, 2023); Katherine Hafner, *Abandoned Boats Are a Growing Concern, State Officials*

coordinating "an examination of the issues surrounding recreational, commercial, and 'legacy' ADVs in Virginia, focusing on solutions that have been attempted or implemented in other states with well-developed programs," the Working Group consists of "representatives from pollution regulatory agencies, marine law enforcement, marinas, tribes, nonprofit organizations, the boating community, coastal management, coastal policy and other interested parties."[154] After a year of investigation, including an open-access inventory to catalog the ADVs in the State, the Working Group provided its recommendations to the Virginia Legislature in early 2022.[155] In the interim, Mike Provost, a guest member of the Working Group, established a non-profit, the Vessel Disposal and Reuse Fund (VDRF), to privately subsidize the removal of ADVs in Virginia until the State settles upon a sufficient model to implement statewide.[156]

IV. Towards a Better Solution

The diversity of regulations adopted by the ICW states reflects the cornucopia of circumstances unique to each state, driving the respective legislative responses. Though each state faces its own unique set of issues, and solutions must be tailored accordingly, there is a common thread of problems that is woven through the waterways and, accordingly, there are approaches to resolving those problems that can be of some effect throughout in mitigating the various issues while respecting the needs of the diverse parties affected. Ultimately, these various threads can be sewn into a model for regulation, which recognizes that as, "the hot water that softens a carrot will harden an egg," there is not a one-size-fits-all approach, yet, there can be a basic model that addresses the underlying issues while balancing the various interests of the communities without excessively limiting the access for cruisers and maintaining the important maritime heritage of the United States.[157] Such a model should enable localities to confront the issues in their communities through the ability to enact reasonable

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Say. A Virginia Beach Man Is Taking on the Issue in Local Waters, The Virginia-Pilot (Nov. 21, 2021), https://www.pilotonline.com/news/environment/vp-nw-abandoned-vessels-20211121-ryv5soroxfgelos4ihjr4eegxq-story.html.

[154] Clean Va. Waterways, *supra* note 154.

[155] Telephone Interview with Mike Provost, Exec. Dir., Vessel Disposal & Reuse Found. (Jan. 28, 2011).

[156] *Id.*; *see also* Email from Mike Provost, Exec. Dir., Vessel Disposal & Reuse Found., to author (Jan. 28, 2022, 13:28 EST) (on file with author).

[157] Clayton Christensen, *Book Review of How Will You Measure Your Life?*, Hooked To Books, (Mar. 6, 2019), https://www.hookedtobooks.com/book-review-how-will-you-measure-your-life-clayton-m-christensen/.

limits such as anchoring time and distance, registration, and potential infrastructure enhancements such as designated shore access, hygiene facilities, pump-out options, and mooring fields. This section proposes the policies and facilities of Annapolis, Maryland, as a demonstrative model which includes many of the suggested provisions.

a. Balancing State and Local Authority

The affected communities themselves are in the best position to understand the degree of issues faced within their community, and accordingly, are in the best position to address the problems.[158] The culture of each community is different, and as such, the attitudes towards anchoring and mooring within the surrounding waters will be different.[159] To impose broad restrictions limiting anchoring and access to land with a broad brush, may result in destroying the maritime traditions deeply enshrined in the culture of coastal America, deny cruisers and travelers accessible means to experience the coastal communities that make America unique, deprive communities of the visitors on whose revenue they depend, and close-off a viable alternative living arrangement for people who work and engage in communities with limited and expensive housing. Local communities are able to determine which liveaboards are problems, which derelicts pose a risk, and to what extent cruisers contribute to the success of the community.[160] However, ceding all regulation to the local communities risks a complicated patchwork of laws which become confusing to navigate, or so restrictive as to create "no go" zones for those traveling the waterways.[161] As such, South Carolina State Representative Wetmore's Bill, passed in response to issues posed at the local level, can contribute to developing a model for effective and balanced regulation.[162] The Bill develops a State level approach, which

[158] *See generally* Jennifer Allen, *Derelict Boats Remain a Local Issue in NC*, Coastal Rev. (Nov. 21, 2018), https://coastalreview.org/2018/11/derelict-boats-remain-a-local-issue-in-nc/ (describing the varying degree to which derelicts impact multiple North Carolina municipalities and the efforts of each municipality to respond to the issue).

[159] *See id.*

[160] *Id.*

[161] *See generally Florida Court Strikes Down Anchoring Ordinance*, Boating Indus. (Nov. 2, 2007), https://boatingindustry.com/news/2007/11/02/florida-court-strikes-down-anchoring-ordinance/ (describing a court case in Florida striking down a Marko Island anchoring ordinance implemented in violation of then-existing Florida law and the description of a "patchwork" of local regulations that would otherwise ensue).

[162] *See generally* H.B. 3865, 2021-2022 Leg., 124th Sess. (S.C. 2021) (noting the enabling of localities to impose restrictions in conformity with those of the state law).

provides localities the power to enact regulation consistent with that developed at the state level.[163] This gives each community the authority needed to directly address the problems they face, yet creates a structure in which to develop the local regulation so as to instill a consistent and measured approach throughout the waters of the state. In so doing, such a model would be consistent with a 2014 survey conducted by the Florida Fish and Wildlife Conservation Commission, which found that 52% of respondents preferred anchoring rules be consistently applied across the state, and 40% preferred that if local governments are allowed to implement local restrictions, it should only be permitted to adopt ones authorized by the State.[164]

b. Balanced Provisions

Local governments should be able to adopt provisions that reasonably address the problems in their communities, but what do these provisions look like? Three important ingredients to ensure effective regulation for local governments include: the (1) ability to require registration for watercraft anchored or moored within the public waters of the community, and the ability to determine a reasonable (2) radius and (3) timeframe for anchoring in those waters. The ability to require registration, potentially with a reasonable fee, provides local governments and law enforcement a means through which to obtain necessary information to identify the responsible party for the vessel, proof of insurance, and verification of ability to comply with waste and other disposal measures. Such registration should be easily obtained and any fee imposed (which could help subsidize the costs of enforcement and administration) should be minimal, such as the 15 dollar amount included in South Carolina's bill.[165] In the Florida survey, 66% strongly believed or somewhat agreed with time limits, with only 13% disagreeing with required relocation.[166]

c. Infrastructure Development

Anchoring, as a broad category, presents multiple potential issues for local communities.[167] Boats at anchor can drag anchor, posing risks to other boats, infrastructure such as bridges and piers, as well as

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[163] *Id.*

[164] *See* Jim Flannery, *Florida Anchoring Update*, Soundings (Mar. 30, 2015), https://www.soundingsonline.com/features/florida-anchoring-update.

[165] *See* H.B. 3865, 2021-2022 Leg., 124th Sess. (S.C. 2021).

[166] *See* Flannery, *supra* note 165.

[167] *See generally* Mooring Field Benefits*, supra* note 63 (describing issues related to anchoring).

waterfront private property and the environment.[168] Many liveaboards are at anchor and carry with them their own unique challenges for communities, such as potential trespass for access to shore, eyesore and nuisance, lack of proper waste disposal, and limited hygiene facilities.[169] Cruisers and transistors also anchor in communities, which, though potentially desirable, may result in congestion or some of the same issues posed by liveaboards.[170] Though a more significant undertaking than simply developing regulation, many of the issues presented can be addressed though infrastructure improvements and development.

i. Shore Access

One such development would be designated access sites, such as public community docks, which would provide a place for those anchored to tie their tenders to come to shore and access the community without trespassing through private property.[171] In areas where such ability to tie a tender could be abused, restrictions such as no overnight docking, limited vessel length and engine horsepower, and registration requirements could be imposed, also enabling a means through which to obtain identification and other desired information.[172]

ii. Waste Disposal

With the risks posed to both the environment and health of those who use the water, it is important to ensure that waste is properly disposed of, and accordingly, facilities should be available for disposing of waste. Proper cruising vessels and liveaboards should be equipped with holding tanks for effluence.[173] Though these tanks can legally be dumped overboard when offshore, the tanks must be pumped out periodically when traversing inland waterways or staying at anchor.[174] Providing

[168] *See generally* Charles J. Doane, *Waterlines: Fear of Dragging*, Sail (Oct. 9, 2018), https://www.sailmagazine.com/cruising/waterlines-fear-of-dragging (describing dragging anchor and anchoring practices).

[169] *See generally* Carlton, *supra* note 43 (describing concerns of the San Francisco community regarding liveaboards).

[170] *See generally* Doane, *supra* note 169 (describing dragging anchor and anchoring practices).

[171] *See generally Dinghy Docks*, Annapolis, Md., https://www.annapolis.gov/176/Dinghy-Docks (last visited Mar. 10, 2023) (describing shore access and dinghy dock facilities in Annapolis, MD).

[172] *See generally id.* (describing dinghy dock policies in Annapolis, MD); *see also Anchorages*, Annapolis, Md., https://www.annapolis.gov/170/Anchorages (last visited Mar. 10, 2023) (describing anchoring registration in Annapolis, Maryland).

[173] *See* Human Waste Disposal*, supra* note 56.

[174] *See id.*(describing disposition of human waste on boats).

convenient pump-out facilities would help ensure that vessels are pumping-out their holding tanks rather than simply dumping overboard or directly into the waters where the vessels are anchored.[175] These facilities should not only be convenient, but also affordable. Providing pump-out units at community docks and access to potable water—with no or limited fees—is one way to help protect the environment and health of those using the water.[176] Similarly, providing a pump-out boat that can go to boats at anchor would provide a convenient way to ensure boats are being properly pumped-out.[177] Additionally, the requirement of proof of disposal for composting or pump-outs is not unreasonable.[178]

iii. Mooring Fields

Perhaps the most costly and complicated infrastructure development, the construction of mooring fields, would not only address the above issues and proposed responses, but also provide additional benefits to both the communities and vessels who would ultimately use the mooring fields.[179] These fields would provide a dedicated space for the congregation of cruisers and liveaboard boats, which would not necessarily have to be in the heart of town or adjacent to the most popular bar, but could be constructed in outer areas.[180] Mooring balls offer a relatively secure means to moor a vessel, limit the risk of anchor dragging, and would control the potential for congestion.[181] The screw anchors or blocks used to affix the mooring balls to the seafloor are much less damaging to the sea grasses as opposed to anchors, which drag, and anchor chains, which sweep across the seabed.[182] Part of the mooring facility should be a designated dinghy dock for shore access, as well as

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[175] *Id.*

[176] *See generally Solomons Island*, Chesapeake Bay Mag., https://chesapeakebaymagazine.com/wow/solomons/ (last visited Mar. 10, 2023) (noting Solomons, Maryland as an example of community pump-out dock); *Pump out Boat*, Annapolis, Md., https://www.annapolis.gov/204/Pumpout-Boat (last visited Mar. 10, 2023) (describing how Annapolis, Maryland allows fee paying anchored/moored boats to access municipal docks for water and provides a pump-out boat).

[177] *See generally id.* (describing the pumpout boat process in Annapolis, Maryland).

[178] *See generally Pumpout*, Monroe Cnty., Fla., https://www.monroecounty-fl.gov/pumpout (last visited Mar. 10, 2023) (describing the pump out policies of the Florida Keys, and implementation of such policies in Boot Key Harbor, Marathon, Florida).

[179] *See generally* Mooring Field Benefits*, supra* note 63 (describing benefits of mooring field development).

[180] *See generally* Dickerson, *supra* note 15.

[181] *See generally* Mooring Field Benefits*, supra* note 63 (describing benefits of mooring field development).

[182] *Id.*

facilities such as restrooms and showers, fresh water, and pump-outs, which could either be self-service units, or pump-out boats that pump out all moored vessels on designated days, ensuring boats are actually being pumped out.[183] Mooring fields could require registration and a reasonable fee, which would not only subsidize the cost of constructing and maintaining the facility, but also be a "pay to stay" equivalent of the property taxes or rent paid by those who live on land, and contribute to the "tax base" of the community.[184] Such fees should be minimal and could be charged on a per night, weekly, or monthly basis, catering to cruisers and transients, or annually for locals and liveaboards.[185] If fees are reasonable, those who depend on living aboard to continue living and working in their communities could still afford to "rent" affordable living accommodations.[186]

d. The Annapolis Approach as a Potential Model

Heralded as "America's Sailing Capital," a popular stop for cruisers and host to over 3,000 boats in its harbors, Annapolis, Maryland is not immune from the issues that have spurned regulation along the Atlantic ICW.[187] The policies and infrastructure of Annapolis can serve as a model to use in designing responses addressing anchoring and mooring. The waters of Annapolis are comprised primarily, beyond the dockage available at City Dock, of Spa Creek, Back Creek, Weems Creek, and the Severn River.[188]

i. Mooring Fields

Moorings are provided adjacent to City Dock, available exclusively for transients, with additional moorings throughout Spa Creek, Weems Creek, and Back Creek, which are available to both daily

[183] *See* discussion *infra* Section III.C.

[184] *See generally* Dickerson, *supra* note 15.

[185] *Id.*

[186] *See id.* (noting discussion indicating $25.00-35.00 per night or $300.00 per month would be reasonable fees for a mooring); *see also Pricing*, City of Marathon, Fla., https://www.ci.marathon.fl.us/marinaandports/page/pricing (last visited Mar. 10, 2023) (indicating daily mooring and dinghy dock fees of $22.00); *Moorings*, City of Annapolis, Md., https://www.annapolis.gov/183/Moorings (last visited Mar. 10, 2023) (indicating daily mooring rates from $25.00–35.00).

[187] *See* Candus Thomson, *America's Sailing Capital*, Baltimore Sun (Oct. 10, 2004, 12:00 AM), https://www.baltimoresun.com/news/bs-xpm-2004-10-10-0410090065-story.html; *see also* Daniel Wade, *What Is The Sailing Capital of the World?*, Life of Sailing, https://www.lifeofsailing.com/post/what-is-the-sailing-capital-of-the-world (June 15, 2022).

[188] *See About Us*, City of Annapolis, Md., https://www.annapolis.gov/1200/About-Us (last visited Mar. 10, 2023).

transients and on an annual basis.[189] The fees for these moorings are reasonable, ranging from twenty-five to thirty-five dollars per night, depending on location and maximum boat length.[190] Rates are reduced for weekly reservations paid in advance.[191] Annual mooring permits are available in connection with an application with the fee for recreational boats set at a reasonable $1,200 for residents and $2,000 for non-residents.[192] Annapolis has reserved the mooring field closest to the heart of Downtown Annapolis for transients, which is consistent with the sentiments of those who advocate for inclusion of mooring fields into the solution, such as David Dickerson, noting that liveaboards need not be located in the hub of activity.[193] Multiple mooring fields in Annapolis, including the primary transient field, offer mooring balls for boats up to fifty-five feet in length.[194] Sean, the cruiser previously discussed, expressed his concern with the increased prevalence of mooring fields, in part, being that many fields are not available to his boat at fifty-two feet in length, exceeding the maximum length allowed on many moorings.[195]

ii. Anchorages

Anchorages are available in Annapolis city waters in Back Creek, Spa Creek, Weems Creek, and portions of the Severn River.[196] Registration is recommended for stays exceeding one day, but required for stays beyond three days, with re-registration every thirty days.[197] It is important to include some anchoring areas to accommodate vessels exceeding the capacity of moorings or for those who prefer to trust their own ground tackle, as well as for cruisers who plan to stay for short periods.[198] Yet, registration requirements and stay maximums not only allow for the municipality to obtain the necessary identification information, but also open up anchorage accessibility to cruisers traveling through, rather than being constantly full with boats that stay for long periods of time.[199]

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[189] *See Moorings*, City of Annapolis, Md., https://www.annapolis.gov/183/Moorings (last visited Mar. 10, 2023).

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*; *see also* Dickerson, *supra* note 15.

[194] *See* Moorings, *supra* note 190.

[195] *See* Welsh, *supra* note 2.

[196] *See* Anchorages, *supra* note 173.

[197] *Id.*

[198] *See generally* Welsh, *supra* note 2.

[199] *See* Wetmore, *supra* note 29 (describing the difficulty in obtaining identification information for derelicts); *see also* Welsh, *supra* note 2 (explaining how time limits open up access for cruisers by "churning" the anchorage of those who

iii. Shore Facilities

Vessels at moorings or anchor often need to access the shore. Annapolis is exceptionally accessible as access is available wherever a street ends at the water, which includes twenty-two locations in the city, as well as dedicated dinghy docks in Eastport and Ego Alley at City Dock.[200] A privately operated water taxi is also available.[201] A model approach should include some sort of designated shore access, which could include vessel length and horsepower maximums, as well as limits such as no overnight ties, to reduce the likelihood of abusing the access. Included in the Annapolis mooring fees, and available for a fee to those at anchor, are restroom and shower facilities, plus a laundry.[202] The access to such facilities, in a model approach, could be connected with shore access, such as being located adjacent to the dinghy dock, and accessible as part of the fee paid for the mooring or anchoring.[203] One often utilized approach, rather than charging an "anchoring fee," is to require registration and fees for access to dinghy (tender) docks which include the facilities.[204] Annapolis requires vessels to obtain a pump-out, at a minimum, every two weeks and provides a pump-out boat to facilitate this requirement.[205] Providing a convenient and reasonably priced shore based pump-out station would also be sufficient.[206] Through making unoccupied slips available, during certain times of the day, for moored vessels to utilize the fresh water available at the slips, Annapolis provides access to potable water.[207]

In crafting a response to the very legitimate concerns posed by derelicts, abandoned boats, and liveaboards, so as to avoid an unnavigable patchwork of locally imposed regulations, it is important that states adopt a "model" platform, to which local legislation must conform.[208] That model need not resemble exactly to the approach

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remain for extended periods, opening up space for others to anchor).

[200] *See* Annapolis, Md., *Dinghy Docks*, *supra* note 172.

[201] *See Water Taxi*, Watermark, https://watermarkjourney.com/public-cruises-water-taxi/water-taxi/ (last visited Mar. 10, 2023).

[202] *See Showers & Laundry*, Annapolis, Md., https://www.annapolis.gov/187/Showers-Laundry (last visited Mar. 10, 2023).

[203] *See generally id.* (describing the proximity and availability of shower and laundry facilities in Annapolis, Maryland); *see also* Pricing, *supra* note 187 (describing the proximity and availability of shower and laundry facilities near the dinghy dock in Boot Key Harbor, Marathon, Florida).

[204] *See* Pricing, *supra* note 187.

[205] *See* Pump Out Boat, *supra* note 177.

[206] *Id.*

[207] *See Electricity & Water*, Annapolis, Md., https://www.annapolis.gov/181/Electricity-Water (last visited Mar. 10, 2023).

[208] *See* Welsh, *supra* note 2.

in place in Annapolis, nor look the same from state to state, but it should be consistent throughout each state.[209] The model, regardless of its specifics, should consider the incorporation of mooring fields, anchoring areas with stay limitations and potentially reasonable fees, shore access, hygiene facilities, and some form of registration option, as well as specified enforcement responsibilities and clear, understandable, dissemination of the rules being enforced.[210]

V. Conclusion

The United States is uniquely positioned with an abundance of water, from the oceans that bookend the coasts to the inland rivers, Great Lakes, and the Intracoastal Waterway.[211] These waters, throughout history, have served as a source of food, a means of commerce and exploration, as well as recreation and adventure.[212] As President Kennedy noted, "We are tied to the ocean."[213] This "tie" comes in different forms, and requires balancing the diverse populations who answer this call, be it the homeowners along the shores, the cruisers, such as Sean and Louise, transiting the waters full time, or the liveaboards who turn to the water as an affordable alternative to high costs of living. The various priorities of these diverse users of the water may in some ways conflict, but by developing a model form of legislation consistent throughout their respective states, legislators can provide a reasonable and balanced response that reduces the legitimate threats posed by misuse of the waters of their state while respecting the maritime heritage of the country and the access of those who harken to the call of the sea.

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[209] *See* Flannery, *Florida Anchoring Update*, *supra* note 165 (citing statistic that 52% of respondents desired regulations to be consistently applied throughout the state).

[210] *See generally* Dickerson, *supra* note 15 (describing difficulties when there are multiple local level regulations imposed within a state); H.B. 3865 § 1(B), 2021-2022 Leg., 124th Sess. (S.C. 2021) (allowing for local governments to implement regulations only if consistent with those of the Bill).

[211] *See generally Inland Waterway Navigation—Value to the Nation*, U.S. Army Corps of Eng'rs (May 2000), https://www.mvp.usace.army.mil/Portals/57/docs/Navigation/InlandWaterways-Value.pdf (providing a description and maps of the inland waterways of the United States).

[212] *See generally Native Cultures and the Maritime Heritage Program*, NOAA Nat'l Marine Sanctuaries, https://sanctuaries.noaa.gov/maritime/cultures.html (Feb. 22, 2023) (describing the cultural, historical, and archaeological resources of the waterways).

[213] Kennedy, *supra* note 1.

Litigation Conservation: Positively Impeding Animal and Natural Resource Lawsuits in County Courtrooms

Anthony M. Leo*

"[L]itigation is notoriously time-consuming, inefficient, costly and unpredictable."[1]

"[I]n the strange heat all litigation brings to bear on things, the very process of litigation fosters the most profound misunderstandings in the world."[2]

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good [person]. There will still be business enough."[3]

I. Introduction

Environmental litigation, encompassing the breadth of animal and natural resource actions, against local governments is costly and counterproductive. National environmental organizations are a significant part of this problem and their involvement in litigation against counties

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[1] Letter from Charlie Munger to Blue Chip Stamp's Shareholders (Feb. 28, 1979), *in* Blue Chip Stamps, 1978–1982, 1, 5 (Max Olsen ed.) https://www.valorintrinseco.com/blue-chip-stamps%20annual%20letters.pdf.

[2] Renata Adler, Reckless Disregard: Westmoreland v. CBS et al.; Sharon v. Time 47 (1986).

[3] Abraham Lincoln, Fragment: Notes for a Law Lecture, in Collected Works of Abraham Lincoln: Vol. 2 (1850), https://quod.lib.umich.edu/l/lincoln/lincoln2/1:134.1?rgn=div2;view=fulltext.

negatively impacts animals and natural resources on two levels because both the (1) county and (2) environmental organizations hemorrhage money on costly litigation. Each financial stream could otherwise be diverted in a way that directly and positively impacts animals and natural resources. A solution to litigation against counties lies within dissuading the commencement of actions from the outset. To understand how and why litigation should be curbed, it is crucial to recognize the background of America's complex standing doctrines as well as how standing is practically applied to animal and natural resource actions. It is then necessary to look at the definition of a county, the prevalence of environmental organizations, the purpose of litigation, the negative side of litigation, and how litigation can be dissuaded through legal means. The legal field should rise to the challenge and change an ineffective and burdened system. Now is the time for litigation conservation.

II. Background

Standing is an early requirement for a plaintiff to pursue a lawsuit.[4] Without it, there is no litigation.[5] It is necessary to see *how* litigation happens to understand *why* expanded litigation by environmental organizations against local governments is costly and counterproductive. Recognizing the prerequisite for environmental organizations to sue American counties is fundamental to seeing the existing flaws in the system that negatively impacts animals and natural resources. This section generally summarizes standing doctrine and then applies the doctrine to animals and natural resource precedent.

a. Brief Overview of Standing

Modern standing jurisprudence was developed in response to increased litigation against government agencies.[6] It has henceforth established jurisdictional limits as to preclude courts from overreaching their judicial roles.[7] Every lawsuit in federal court requires standing to sue.[8] Without standing, a lawsuit is dismissed before it reaches the starting line.[9] Standing to bring a lawsuit in a federal court is based on Constitutional (Article III standing) or prudential standing. Constitutional standing stems from Article III of the Constitution while

[4] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

[5] *Id.*

[6] *See* Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 Yale L.J. 350, 387–88 (2011).

[7] *Id.*

[8] *Lujan*, 504 U.S. at 560.

[9] *See id.*

prudential standing is focused on "judicially self-imposed limits on the exercise of federal jurisdiction."[10] "Standing to sue" is foundationally based "in the traditional understanding of a case or controversy."[11]

Furthermore, standing doctrine "developed in [American caselaw] to ensure that federal courts do not exceed their authority as it has been traditionally understood."[12] Standing "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong."[13] Standing is the gatekeeper to litigation and forces plaintiffs to bring a 'real' claim instead of wasting time and resources.[14]

Article III standing "serves to prevent the judicial process from being used to usurp the powers of the political branches."[15] Plaintiffs have the burden of showing that standing exists.[16] A plaintiff's need to meet Article III requirements exists throughout the entirety of the lawsuit and claims will be dismissed if plaintiffs experience changed circumstances that eliminate their standing.[17]

Regarding prudential standing, a plaintiff "must show that the interest it seeks to protect is arguably within the zone of interests to be protected or regulated by the statute…in question or by any provision 'integral[ly] relat[ed]' to it."[18] Prudential standing is centered on assuring that plaintiffs assert an injury that is protected by a statute or constitutional provision, that plaintiffs avoid general claims, and the ability of a "plaintiff to represent the constitutional rights of third parties not before the court."[19] The Court can disregard prudential standing rules and "congress is also free to legislate away prudential restraints and confer standing to the extent permitted by Article III."[20] Prudential standing requirements can be altered over time and these requirements are based on legislative acts.[21] As opposed to Article III, prudential standing is very fluid.[22] Caselaw has shifted in the prudential standing

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[10] Spokeo, Inc. v. Robins, 578 U.S. 330, 337 (2016); Allen v. Wright, 468 U.S. 737, 751 (1984).

[11] *Spokeo*, 578 U.S. at 338.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013).

[16] Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009).

[17] Friends of Santa Clara River v. U.S. Army Corps of Eng'rs, 887 F.3d 906, 917 (9th Cir. 2018).

[18] Grocery Mfrs. Ass'n v. EPA., 693 F.3d 169, 179 (D.C. Cir. 2012) (quoting Natl. Petrochemical & Refiners Ass'n v. EPA, 287 F.3d 1130, 1147 (D.C. Cir. 2002)).

[19] *Standing Requirement: Prudential Standing*, Cornell L. Sch. Legal Info. Inst., https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/standing-requirement-prudential-standing (last visited May 9, 2023).

[20] *Id.*

[21] *See id.*

[22] *See generally id.*; *Friends of Santa Clara River*, 887 F.3d at 917.

area known as the "zone of interests" test.[23] The zone of interests test now emphasizes more careful pleading and "the ability to identify actions governed by the statutes at issue that include considerations important to the plaintiffs."[24] While prudential standing is still broad, its allowances are progressively being narrowed.[25]

A federal court must "find Article III standing before addressing the merits of a case[,]" but it is "entirely proper to consider whether there is prudential standing while leaving the question of constitutional standing in doubt, as there is no mandated 'sequencing of jurisdictional issues.'"[26] Even when the Article III standing threshold has been met, judges may use prudential thresholds to refuse claims.[27]

In summary, standing is based on Article III of the Constitution and is required for a case to move forward.[28] While prudential standing allows judges to have discretion with adjudicating a suit, Article III and prudential standing form part of a minimum standard for environmental organizations to sue counties in federal court.[29]

b. Standing in Animal and Natural Resource Cases

Modern standing doctrine allows environmental organizations to sue counties across the United States.[30] While an organization may be

[23] James M. McElfish Jr., *Developments in Standing for Public Lands and Natural Resources Litigation*, 48 Envtl. L. Rep. News & Analysis 11098, 11121 (2018).

[24] *Id.* at 11099.

[25] *See id.*

[26] Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 179 (D.C. Cir. 2012).

[27] *Standing Requirement: Prudential Standing*, *supra* note 19.

[28] Spokeo, Inc. v. Robins, 578 U.S. 330, 337 (2016); Allen v. Wright, 468 U.S. 737, 751 (1984).

[29] *Id.*; *See generally Standing Requirement: Prudential Standing*, *supra* note 19.

[30] *See, e.g.,* Ctr. for Biological Diversity v. Cnty. of San Bernardino, G051080, 2016 WL 2760538 (Cal. App. 4th Dist. May 10, 2016) (the Center for Biological Diversity is located in Tucson, Arizona which is roughly 500 miles away from San Bernardino County); *see, e.g.*, *Public Interest Groups Sue Plumas and Sierra Counties Over Taxpayer-Funded Wildlife Killing*, Project Coyote (Mar. 2, 2022), https://projectcoyote.org/plumas-sierra-counties-lawsuit/; s*ee also* The Wilderness Socy. v. Kane County, Utah, 581 F.3d 1198, 1217 (10th Cir. 2009) (holding that The Wilderness Society prudential standing), *rev'd en banc*, 632 F.3d 1162 (10th Cir. 2011). Though the latter Wilderness Society case overturned the original, the first case nonetheless worked within the confines of standing doctrine to allow a wildlife organization to litigate against a county. The Wilderness Society is headquartered in Washington D.C. which is roughly 2,000 miles away from Kane County. Standing doctrine thereby allowed the organization to sue the county at the outset. It took nearly a year and a half of litigating for the flawed standing to be remedied and even then, two judges dissented. The Wilderness Soc. v. Kane County, Utah, 632 F.3d 1162, 1180 (10th Cir. 2011). This case could have very well been decided differently. Lisa S.

based in one state, it has the capacity and ability—with relative ease—to sue a local government that exists hundreds or thousands of miles away.[31] The plaintiff is thereby disconnected from the locality that it has brought to court and forces a local government into litigation that can take years, and sometimes decades, to resolve.[32]

The seminal case in environmental standing is *Lujan v. Defenders of Wildlife*.[33] In *Lujan*, the Court reversed the decision of the Eighth Circuit and held that the respondent wildlife organizations did not have standing to sue.[34] In an opinion written by Justice Scalia, the Court asserted three factors that must be present for standing to exist: (1) an injury-in-fact, (2) causation, and (3) redressability.[35] First, the plaintiff "must have suffered an 'injury in fact'—an invasion of a legally protected interest."[36] This threat must be "concrete and particularized" as well as "actual and imminent" as opposed to "conjectural or hypothetical."[37] Second, "there must be a causal connection between the injury and the conduct complained of."[38] Essentially, the injury must be "'fairly traceable' to the defendant's challenged actions."[39] Lastly, a favorable decision must likely redress the plaintiff's injury.[40]

The standards asserted by the Court in *Lujan* "ensure that a plaintiff has alleged 'such a personal stake in the outcome of the controversy' as to assure concrete adverseness warranting invocation of the jurisdiction of federal courts."[41] Therefore, an alleged generalized harm to animals or natural resources does not support standing alone.[42] Though if that harm "in fact affects the recreational or even the mere

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Greenberg, *Standing in the Desert: Prudential Standing in Wilderness Society v. Kane County*, B.C. Env't Affs. L. Rev. 39, 49–54 (2012). Modern standing doctrine is fluid and still allows lawsuits from environmental organizations to target locales on the other side of the country.

[31] *Id.*

[32] *See, e.g.*, *id.*

[33] *See* Ewing & Kysar, *supra* note 6, at 388 ("Contemporary Supreme Court standing jurisprudence revolves around *Lujan v. Defenders of Wildlife* . . .").

[34] Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992).

[35] *Id.* at 560; Aliya Gorelick, *Standing up for Our Planet: It's Time for an Environmental Standing Doctrine*, 53 U. Pac. L. Rev. 179, 187 (2021).

[36] *Lujan*, 504 U.S. at 560.

[37] *Id.*; *See* Ewing & Kysar, *supra* note 6.

[38] *Lujan*, 504 U.S. at 560.

[39] Marisa Martin & James Landman, *Standing: Who Can Sue to Protect the Environment?*, ABA (Oct. 9, 2020), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/standing--who-can-sue-to-protect-the-environment-/.

[40] *Lujan*, 504 U.S. at 561; *See generally* Ewing & Kysar, *supra* note 6.

[41] McElfish Jr., *supra* note 23, at 11098 (quoting Warth v. Seldin, 422 U.S. 490, 498–99 (1975)).

[42] Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009) (citing Sierra Club v. Morton, 405 U.S. 727, 734–36 (1976)).

esthetic interests of the plaintiff, that will suffice."[43] This extension of Article III standing has led to an influx of litigation that pits shoestring county budgets against national environmental organizations.[44]

Lujan's limitations were limited by *Friends of the Earth v. Laidlaw Environmental Services* when the Court held "that injury to the environment was not necessary to show Article III standing."[45] Therefore, there just has to be injury to the plaintiffs.[46] Applying the *Lujan* test, the Court held that the plaintiffs had standing to bring the suit even though the environment was not alleged to be damaged.[47] Consequently, the original limitations imposed by *Lujan* were curbed and litigation premised on environmental matters were given a longer leash from which they could flourish.[48]

Third-party standing is a Supreme Court recognized extension of Article III standing.[49] In third-party standing, a plaintiff may "litigate the interests of a third party where (i) the plaintiff has Article III standing in his own right, (ii) the plaintiff has 'a close relation' to the third party, and (iii) there is 'some hindrance to the third party's ability to protect his or her own interests.'"[50] Standing doctrine is inherently used by national wildlife organizations to pursue lawsuits in counties that they have no concrete stake in.[51]

Furthermore, standing nuances are constantly evolving.[52] Notably, "standing demands increasing attention from counsel in terms of identifying locus of injury, type of injury, evidence of injury and causation, suitable affiants, and sufficient redundancy to ensure

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[43] *Id.*

[44] *See, e.g.,* Ctr. for Biological Diversity v. Cnty. of San Bernardino, G051080, 2016 WL 2760538 (Cal. App. 4th Dist. May 10, 2016) (The Center for Biological Diversity is located in Tucson, Arizona which is roughly 500 miles away from San Bernardino County); s*ee also* The Wilderness Socy. v. Kane County, Utah, 581 F.3d 1198, 1217 (10th Cir. 2009) (holding that The Wilderness Society prudential standing), *rev'd en banc*, 632 F.3d 1162 (10th Cir. 2011).

[45] Martin & Landman*, supra* note 39; *see* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183 (2000).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] Powers v. Ohio, 499 U.S. 400, 410–11 (1991).

[50] Doe v. Piper, 165 F. Supp. 3d 789 (D. Minn. 2016) (quoting Powers v. Ohio, 499 U.S. 400, 11 (1991)).

[51] *See, e.g.*, Ctr. for Biological Diversity v. Cnty. of San Bernardino, G051080, 2016 WL 2760538 (Cal. App. 4th Dist. May 10, 2016) (The Center for Biological Diversity is located in Tucson, Arizona which is roughly 500 miles away from San Bernardino County); *see also* The Wilderness Socy. v. Kane County, Utah, 581 F.3d 1198, 1217 (10th Cir. 2009) (holding that The Wilderness Society prudential standing), *rev'd en banc*, 632 F.3d 1162 (10th Cir. 2011).

[52] *See* McElfish Jr.*, supra* note 23.

maintenance of standing through the entire course of a case."[53] Standing is changing.[54] How the change will occur, specifically in regard to cases between environmental organizations and counties, demands attention and discussion to determine what actually best serves the needs of the environment. The mountain of standing considerations and evolving environmental litigation arenas make it paramount that changes are enacted in a way that simultaneously protect the environment and protect the complex communities that are embroiled in expensive litigation.

Environmental organizations are often at the heart of litigation over animals and natural resources.[55] These organizations are often nonprofits and have national footprints.[56] Standing for these national organizations is "substantially more difficult" to establish if they are not the "object of the government action or inaction" that they are challenging.[57] As a result, in many animal and natural resource cases, "organizations' ability to allege and maintain standing depends on their demonstration of concrete and particularized injuries to their members at specific places and with respect to specific resources affected by the challenged actions."[58] All that is required to sue a county is that the organization has a member in that county.[59] Anyone can become a member of an environmental organization.[60] Just provide some basic contact information and make a nominal donation.[61] Obtaining membership is that easy.[62] As a result, national environmental organizations can garner hundreds of thousands of members.[63] For example, Sierra Club alone has 750,000 members.[64] Additionally. Defenders of Wildlife, the respondent in *Lujan*, had nearly 2.2 million members in 2020.[65]

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[53] *See Id.* at 11122.

[54] *See id.*

[55] *See generally, e.g., Cases-Natural Resources-Environmental Protection*, Oyez, https://www.oyez.org/issues/292 (last visited May 9, 2023).

[56] *See generally id.; See also Non-Profit Organizations*, Mich. St. Univ., https://www.canr.msu.edu/fw/employment/non_profit_organizations/index (last visited May 9, 2023); *TOP US Conservation Organizations*, Conservation Careers, https://www.conservation-careers.com/top-us-conservation-organizations/ (last visited May 9, 2023).

[57] Lujan v. Defs. of Wildlife, 504 U.S. 555, 562 (1992).

[58] McElfish Jr.*, supra* note 23, at 11099–00.

[59] *Id.*

[60] *See, e.g.*, *Become a Member of Defenders of Wildlife*, Defs. of Wildlife, https://support.defenders.org/page/18265/donate/1?locale=en-US (last visited May 9, 2023).

[61] *Id.* ("Give $15 or more to receive full membership benefits.").

[62] *Id.*

[63] Jonathan Stein & Michael Beckel, *A Guide to Environmental Non-Profits*, Mother Jones (Mar. 2006), https://www.motherjones.com/environment/2006/03/guide-environmental-non-profits/.

[64] *Id.*

[65] *2020 Annual Report*, Defs. Wildlife 1, 12 (2021), https://defenders.org/

It is not hard for an environmental organization to obtain a member in a county.[66] The standing standard for environmental organizations is inadequate and the financial resources used to directly protect animals and natural resources are instead being siphoned to environmental litigation.

In summary, standing is a mandatory prerequisite to begin a lawsuit.[67] Standing doctrine originates in Article III of the Constitution and the threshold for standing has been expanded and altered through prudential standing while third-party standing is a subset of Article III.[68] A consequence resulting from this web of complicated thresholds and varied rules is that national environmental organizations are using them to their advantage and pressing against counties, which are often ill-equipped to handle expensive litigation costs.[69]

III. Discussion

Expensive litigation is negative for counties. Environmental organizations often sue counties and contribute to the extensive litigation that has thrived over the last two decades. The issue of litigation stemming from counties is twofold: (1) counties spend money on litigation that could otherwise be directed to improvements within local communities and (2) environmental organizations spend money that could otherwise be directly spent on their respective initiatives. Litigation is popular. However, to limit litigation and directly funnel funds to animal and natural resources, change will not happen without raising the bar to a level where commencing lawsuits against counties is dissuaded from the outset.

a. Understanding Counties and the People who Live in Them

It is easy to lose sight of the defining scope of counties. Often grouped with and confused with municipalities, counties are the largest subdivisions of American states.[70] 46 states are divided into

sites/default/files/2021-03/Defenders-2020-Annual-Report-web.pdf.

[66] McElfish Jr., *supra* note 23, at 11121; *see*, *e.g.*, *Become a Member*, *supra* note 60; *see also* Stein & Beckel, *supra* note 63.

[67] Spokeo, Inc. v. Robins, 578 U.S. 330, 337 (2016); Allen v. Wright, 468 U.S. 737, 751 (1984).

[68] *Spokeo*, 578 U.S. at 337; *Allen*, 468 U.S. at 751.

[69] *See* discussion *infra* Section II.D–E.

[70] *County*, Merriam-Webster, https://www.merriam-webster.com/dictionary/county (last visited May 9, 2023); *See, e.g.*, *What is Municipal Law?*, FindLaw, https://www.findlaw.com/hirealawyer/choosing-the-right-lawyer/municipal-law.html (last visited May 9, 2023).

counties that each have their own system of governance.[71] Additionally, county equivalents, such as parishes and boroughs, are represented in Louisiana and Alaska, respectively.[72] Only two states, Rhode Island and Connecticut, do not have county governments[73] because their county subdivisions are only geographic and lack government function.[74] Counties are often further subdivided into municipalities (such as cities and towns), townships, and school districts.[75] The United States has over 3,000 counties, including county equivalents.[76]

Counties are granted power by the state in which they are based.[77] They oversee civic functions varying from law enforcement to park maintenance to economic development.[78] Counties can own land and control the natural resources on that land.[79] The responsibilities of counties cumulatively serve to benefit the American population and the natural resources within the country.[80]

Counties govern a growing American population.[81] Between 2010 and 2020 alone, 47 percent of United States counties experienced an increase in population.[82] Counties typically have less direct authority over local government than municipalities but they nonetheless control key social services that the municipalities within the county's jurisdiction

[71] *County*, National Geographic, https://www.nationalgeographic.org/encyclopedia/county/ (last visited May 9, 2023); *State & Local Government*, White House, https://obamawhitehouse.archives.gov/1600/state-and-local-government (last visited May 9, 2023).

[72] *Id.*

[73] *County*, *supra* note 71.

[74] *Id.*

[75] *Cities 101—Types of Local US Governments*, NLC, https://www.nlc.org/resource/cities-101-types-of-local-governments/ (last visited May 9, 2023); *State & Local Government*, *supra* note 71.

[76] *How Many Counties Are in the United States?*, World Atlas, https://www.worldatlas.com/articles/how-many-counties-are-in-the-united-states.html (last visited May 9, 2023).

[77] *Why counties matter!*, NACO 1, 6 (2014), https://www.naco.org/sites/default/files/documents/CountiesMatter_brochure.pdf.; *State & Local Government*, *supra* note 71.

[78] *Id.*

[79] *Ownership*, U.S. Dept. of the Interior, https://revenuedata.doi.gov/how-revenue-works/ownership/ (last visited May 9, 2023).

[80] *See Why counties matter!*, *supra* note 77; *see State & Local Government*, *supra* note 71.

[81] *See generally Growth in the Nation's Largest Counties Rebounds in 2022*, US Census Bureau, https://www.census.gov/newsroom/press-releases/2023/population-estimates-counties.html (last visited May 9, 2023).

[82] *Id.*

rely upon.[83] The extensive division of the United States into counties[84] creates many local government targets for litigation that may be pursued by environmental organizations.[85] As will be discussed later, the litigation inevitably impacts budgets that are funded by millions of American taxpayers and comes at the expense of the other services that counties proffer municipalities and people who need the services the most.[86]

The United States is home to over 320 million people and over half of the people live in less than only *five* percent of the counties.[87] The United States Census Bureau regularly publishes data that demonstrates the concise conclusion that most counties have small populations.[88] Data of nearly 3,000 'small' counties shows a median population of only 24,000 people while similar data of only 140 'large' counties shows a median population of 490,000 people.[89]

While there are clear differences between counties and municipalities, *municipal law* can be used to refer to litigation that involves counties.[90] Municipal law "is the law of cities, towns, *counties* and special districts."[91] So, while the focus of this article going forward is based on litigation between national environmental organizations and counties, the framework often falls within the scope of municipal law and litigation.

With over 3,000 counties across the United States, [92] counties provide prolific targets that are exposed to expensive litigation. The litigation can potentially take away from the financial resources that could otherwise be directly diverted to help animals and natural resources.

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[83] Kurt H. Schindler, *County Government Powers are Very Limited*, Mich. St. Univ. (May 30, 2013), https://www.canr.msu.edu/news/county_government_powers_are_very_limited.

[84] *How Many Counties Are in the United States?*, *supra* note 76.

[85] *See, e.g.*, *supra* note 51.

[86] *See* discussion *infra* Section II.D–E.

[87] Haya El Nasser, *More Than Half of U.S. Population in 4.6 Percent of Counties*, United States Census Bureau (Oct. 24, 2017), https://www.census.gov/library/stories/2017/10/big-and-small-counties.html.

[88] *See, e.g.*, *County Population Totals: 2010–2019*, United States Census Bureau,https://www.census.gov/data/tables/time-series/demo/popest/2010s-counties-total.html (last visited May 9, 2023).

[89] *Id.*

[90] *What is Municipal Law?*, *supra* note 70; *see also State & Local Legal Research: Municipal Law*, Ne. Univ. Sch. L., https://lawlibraryguides.neu.edu/c.php?g=628650&p=4387188 (last visited May 9, 2023).

[91] *State & Local Legal Research: Municipal Law*, *supra* note 90 (emphasis added).

[92] *How Many Counties Are in the United States?*, *supra* note 76.

b. County Budgets

Counties are primarily funded by state aid, property taxes, user charges (such as charges for water, gas, and recreational passes), and sales and use taxes.[93] While "individual revenue diversification in any one county will vary," the general trend is that taxes, charges, and fees support the breadth of county budgets and are supplemented by government funding as required.[94]

Counties spent about $54 billion on services that directly deal with animals and natural resources. [95] The numbers are staggering. Proportionally, these expenses admittedly account for less than two percent of local government spending, and "state and local governments spend most of their resources on education, health care, and social service programs." [96] While the percentage is low, this article is centered on the objectively large amount of money—not the comparative weight on the budget compared to programs that are deemed necessities in modern America. Moreover, advocating for local budget increases for animals and natural resources is a different argument entirely.

As there are nearly 3,000 counties that are respectively small in population size, the budgets of counties are not created equal amongst themselves.[97] Essentially, low county populations equals fewer tax dollars which equals less county funding, and in effect equals less money to spend on litigation initiated by environmental organizations.[98]

c. National Environmental Organizations in Bulk

There are roughly 15,000 registered nonprofit organizations in America that advocate for animal welfare and the environment.[99] Note that these are just *registered* nonprofits and do not include for-profit organizations or unregistered nonprofits.[100] Including for-profit and unregistered nonprofits, there are more than 27,000 environmental organizations.[101]

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[93] *Local Government Revenue Sources – Counties*, Gov't. Fin. Ass'n, https://www.gfoa.org/revenue-dashboard-counties (last visited May 9, 2023).

[94] *Id.*

[95] *State and Local Expenditures*, Urb. Inst., https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-expenditures (last visited May 9, 2023).

[96] *Id.*

[97] *See, e.g.*, *County Population Totals*, *supra* note 88.

[98] *See* discussion *infra* Section II.D–E.

[99] Noelle Alejandra Salmi, *There are Too Many Environmental Organizations*, Matador Network (July 22, 2020), https://matadornetwork.com/read/too-many-environmental-organizations/.

[100] *Id.*

[101] *Environmental Organizations*, Cause IQ, *https*://www.causeiq.com/

11,100 natural resource conservation organizations account for the largest share of the 27,000 environmental organizations.[102] The over 27,000 organizations total combined revenues of more than $19 billion.[103] Combined, national organizations have annual budgets of billions of dollars in which a majority of this substantial sum is spent on administrative costs and legal fees.[104] Only a small portion of the budgets even reach the animals and natural resources that these organizations are trying to protect.[105]

Of the 15,000 registered nonprofits, 20–30 have substantial budgets and show up consistently in caselaw against counties.[106] Organizations, such as Defenders of Wildlife and the Wildlife Defense Fund, appear to embrace litigation against counties and use it as a tool to enact possible change at the expense of time, money, and resources for both sides of the litigants.[107] There are enough environmental organizations.[108]

Litigation costs money for both the plaintiff and defendant, and when money is spent on only one priority, it logically does not reach other important matters. At consequence are the animals and natural resources that counties and environmental organizations are both trying to protect—where significant portions of environmental organizations' budgets are instead heading to administrative costs, including costly litigation. In essence, the system is flawed, and meaningful change is needed.

This article does not advocate for the end of all litigation against counties. Rather, it is advocating for a decrease or an end to lawsuits from national environmental organizations against counties. There are and always will be exceptional circumstances where counties should and need to be held accountable by financially well-equipped environmental organizations, but expansive and extensive litigation has the potential to cripple the financial resources that would otherwise be directly allocated to the protection of animal and natural resources.

Environmental organizations and counties each have limited budgets that benefit the environment without litigation.[109] The fighting within the courts only strains the cash flow toward the animals and natural resources that both counties and environmental organizations are trying

directory/environmental-organizations-list/ (last visited May 9, 2023).

[102] *Id.*

[103] *Id.*

[104] *See* Salmi, *supra* note 99; *Environmental Organizations*, START (July 26, 2021), https://www.startguide.org/orgs/orgs08.html; *Environmental Organizations*, *supra* note 101.

[105] *See generally id.*

[106] *See id.*

[107] *See generally id.*

[108] *See* Salmi, *supra* note 99; *Environmental Organizations*, *supra* note 101.

[109] *See generally Environmental Organizations*, *supra* note 101.

to protect. Expanded litigation against local governments is costly and counterproductive. Litigation is often contrary to the purveyed goals of environmental organizations who choose to enter expensive legal battles rather than aiming the limited funds towards protecting animals and natural resources.

d. National Environmental Organizations' Use of the Law to Target Individual Counties

Part I explained what standing is and how it is achieved in environmental cases by environmental organizations against counties.[110] The opening sections of Part II then elaborated on the definition of a county, county budgets, and the large number of environmental organizations.[111] This section focuses on the specific mechanisms on which environmental organizations base their claims.[112] Seeing why counties can be sued, how counties can be sued, and the extent of litigation against counties allows for the formulation of solutions to this problem in the legal field.[113]

i. Why Counties can be Sued

Counties are local government units that are made of a functional web of people with different jobs, responsibilities, and obligations.[114] The question of how these extensive government entities can be sued in federal court by an animal and natural resource organization falls under the purview of 42 U.S. Code § 1983.[115] § 1983 is "the statutory vehicle for bringing claims against state and local actors who violate federal rights."[116] Briefly, the code says that "*every person*" who deprives a party of their constitutionally and statutorily protected rights will be liable in an action against them.[117] "Every person" was interpreted to include counties in *Monell v. Department of Social Services of New York* when the Court held that local government "bodies sued under § 1983 cannot be entitled to absolute immunity"[118]

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[110] *See* discussion *supra* Part I.

[111] *See* discussion *supra Section* II.A–C.

[112] *See* discussion *supra Section* II.D.

[113] *Id.*

[114] *See generally* Deanna Malatesta & Julia L. Carboni, *The Public–Private Distinction: Insights for Public Administration from the State Action Doctrine*, Pub. Admin. Rev. 63 (Jan. 2015).

[115] Monell v. Dept. of Soc. Services of City of New York, 436 U.S. 658, 700 (1978); The Public Health and Welfare Act, 42 U.S.C. § 1983 (1996).

[116] Fred Smith, *Local Sovereign Immunity*, 116 Colum. L. Rev. 409, 424 (2016).

[117] 42 U.S.C. § 1983 (emphasis added).

[118] *Monell*, 436 U.S. at 700.

The *Monell* holding reversed a previous dispute among the circuit courts over whether § 1983 could be used to sue the local government in addition to individuals within the government.[119] Moreover, any alleged violation brought under § 1983 against a county must flow from a policy or practice of the city or county and may not be based on *respondeat superior* liability through a government employee.[120]

The *Monell* doctrine was refined in *City of St. Louis v. Praprotnik* when the court recognized five guidelines for determining municipal and county liability. The guidelines include that (1) counties are only liable for acts that they are responsible for; (2) "only those municipal officials who have final policymaking authority may subject the municipality to § 1983 liability"; (3) state law (not federal law) determines when an official can subject a county to § 1983 liability; (4) "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business"; and (5) "the court, not the jury, must decide the question of policymakers as a matter of law."[121]

Furthermore, the *Monell* doctrine likely does not apply where a detailed statute, such as the Clean Water Act, displaces § 1983.[122] In *Middlesex County v. National Sea Clammers Association*, the Court stated that "when the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."[123] The Court went on to conclude that the "existence of these express remedies demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any [actions against a county] that otherwise would be available under § 1983."[124] As will be shown later, *Middlesex County* provides a framework that can be embraced and used to limit litigation and divert money into programs that have a directly positive impact on the environment.[125]

In sum, counties can be sued by national wildlife and environmental organizations under § 1983 or under a federal statute if a statute has appropriate details that supersede § 1983, [126] and these are

[119] *Id.* at 662.

[120] *Id.* at 689.

[121] City of St. Louis v. Praprotnik, 485 U.S. 112, 123–144 (1988); 9 Stephen W. Feldman, *West's Fed. Admin. Prac.* § 11333 (2022).

[122] Middlesex County Sewerage Auth. v. Natl. Sea Clammers Ass'n, 453 U.S. 1, 20–21 (1981).

[123] *Id.* at 20.

[124] *Id.* at 21.

[125] *See* discussion *infra* Section II.F(6).

[126] Monell v. Dept. of Soc. Services of City of New York, 436 U.S. 658, 700 (1978); *Natl. Sea Clammers*, 453 U.S. at 20–21.

the tools that are used to strain county budgets in expansive litigation.[127] Environmental organizations have the tools to sue; some of these tools should be taken away.

ii. How to Sue

Environmental organizations can sue counties when "(1) at least one of its members would have standing to sue in its own right, (2) the interest it seeks to protect is germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the member to participate."[128] Obtaining and maintaining standing usually requires national environmental organizations to demonstrate "concrete and particularized injuries to their members at specific places and with respect to specific resources affected by the challenged actions."[129] Essentially, environmental organizations sue local governments on behalf of a member's alleged injuries and the member is not involved in the lawsuit.[130] How someone becomes a member of an environmental organization is lax at best. Practically anyone can become a member and serve as a basis for a lawsuit.[131] These circumstances effectively allow environmental organizations free reign to sue counties in which one person decided to "join" the organization by completing an online form and maybe paying a small fee; the new member does not have any liabilities in the lawsuit because the member is not part of it. The environmental organizations get to pursue costly litigation, the new member does not have any skin in the game, and the county once again has to rally a legal defense that costs significant taxpayer money at a bare minimum.[132]

Litigation pursued against counties by environmental organizations is niche yet impactful—facially meaningful but practically redundant and counterproductive.[133] The average county has a couple hundred thousand people and a budget that is devoted to healthcare, educational expenses, and community projects that help animals and natural resources directly.[134] It may be time to rein in the excess litigation and limit the power that environmental organizations use to pursue costly actions against counties.[135]

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[127] *See* discussion *infra* Section II.E.

[128] McElfish Jr.*, supra* note 23, at 11099–11100.

[129] *Id.*

[130] *Id.*

[131] *See id.* at 11102.

[132] *See Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. on Nat. Res.*, 112th Cong. 1 (2012) (statement of Rep. Doc Hastings, Chairman, Committee on Natural Resources) [hereinafter *Taxpayer-Funded Litigation*].

[133] *See generally*, *id.*

[134] *See* discussion *supra* Section II.A–B.

[135] *See id.*

iii. The Goal of Litigation

Environmental organizations often broadly want legal, equitable, or declaratory relief.[136] Legal relief typically involves monetary damages.[137] These damages go to the environmental organization or to its members. In contrast, equitable relief "typically refers to injunctions, specific performance, or vacatur." [138] A "court will typically award equitable remedies when a legal remedy is insufficient or inadequate." [139] In the context of cases between environmental organizations and counties, equitable relief forces counties to stop committing a certain act or forces a county to see through a policy to an end result.[140] Legal relief directly takes money away from county budgets while equitable relief forces a county to act in a particular way.[141] Legal relief is aggressive and has a direct financial impact on the budgets of local governments, though each form of relief impacts the function of county governance.[142]

Moreover, "declaratory relief is essentially a remedy for a determination of justiciable controversy. This occurs when the plaintiff is in doubt regarding their legal rights."[143] In the context of the litigation analyzed across this article, an environmental organization aims at declaratory relief with the hope that a court will find that the county acted unacceptably—and that if the county continued its course of action, then it would be in violation of the law. Declaratory relief, beyond the unfortunate blow of legal costs in federal court, does not affect county coffers like other forms of relief, such as damages or equitable relief. Rather, declaratory relief against counties involves the county being obliged to cease a course of action or act in a certain way to atone for what have been determined to be misdeeds.

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[136] *See generally* Johanna Gnall, *Addressing Maryland's Restrictive Environmental Standing Law: Maryland's Environmental Standing Law Must Be Reformed to Allow an Individual to Have Standing to Sue Based on Aesthetic or Recreational Injury and to Permit an Organization to Have Standing to Sue on Behalf of a Member Asserting an Aesthetic or Recreational Injury*, 16 U. Balt. J. Envtl. L. 151 (2009).

[137] *Equity*, Cornell L. Sch. Legal Info. Inst, https://www.law.cornell.edu/wex/equity (last visited May 9, 2023).

[138] *Id.*

[139] *Id.*

[140] Jason Gordon, *Equitable Relief – Explained*, The Business Professor (Sept. 23, 2021), https://thebusinessprofessor.com/en_US/criminal-civil-law/equitable-relief-definition.

[141] *Equity*, *supra* note 137.

[142] *See generally id.*

[143] *Declaratory Relief*, Cornell L. Sch. Legal Info. Inst., https://www.law.cornell.edu/wex/declaratory_relief (last visited May 9, 2023).

iv. Litigation in Bulk and a Limited Case Study of Organizations and Counties

Litigation against counties is expansive, extensive, expensive, and common yet there is limited data. The sheer amount of litigation between counties and environmental organizations is hard to quantify due to the sheer load of federal litigation and the number of both counties and environmental organizations.

In recent years, there were over *500,000 pending cases* in United States District Courts alone. [144] Additionally, there were over 40,000 cases waiting for appeal.[145] Considering the 15,000 registered nonprofit organizations in America that advocate for animal welfare and the environment plus the nearly 3,000 counties in the United States, it is nearly impossible to truly ascertain the scope of litigation against counties by environmental organizations.[146] While the large numbers of organizations and counties is problematic for seeing how often this litigation occurs, the prevalence of these suits in the local media reveal a problem that exists and will continue to exist without any curbing. [147]

Local news programs across the nation casually reference lawsuits that are brought against counties.[148] This serves as a baseline of these actions in real time. Federal lawsuits cover an array of complex natural resource litigation and a complex web of national environmental

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[144] *Federal Judicial Caseload Statistics 2020*, United States Courts (2020), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020 (emphasis added).

[145] *Id.*

[146] Salmi, *supra* note 99; *How Many Counties Are in the United States?*, *supra* note 76.

[147] *See, e.g.*, Sarah Vogelsong, *Environmental Groups Sue Henrico County Over Chronic Sewage Violations*, NBC 12 (Dec. 7, 2021), https://www.nbc12.com/2021/12/07/environmental-groups-sue-henrico-county-over-chronic-sewage-violations/; Jesse Mendoza, *Environmental groups to sue Manatee County over Piney Point waste disposal plan*, Herald-Tribune (Sept. 29, 2021), https://www.heraldtribune.com/story/news/local/manatee/2021/09/29 /environmental-groups-sue-manatee-county-over-piney-point-well-plan/5917972001/; Ray Burns, *Environmental Groups Double-Sue Humboldt County Over Controversial SoHum Cannabis Project, Suggest Bohn May Have a Conflict of Interest*, Lost Coast Outpost (Nov. 29, 2021), https://lostcoastoutpost.com/2021/nov/29/environmental-groups-double-sue-humboldt-county-ov/; *Groups Sue Over California County's Plan to Drill Oil Wells*, AP News (Mar. 11, 2021), https://apnews.com/article/environment-bakersfield-lawsuits-california-3b9ebe8c2f11469b027fca7595d5f27b; Camille von Kaenel, *East County Group Cites Environmental Issues, Sues to Stop Wind Project*, inewsource (Apr. 30 2021), https://inewsource.org/2021/04/30/wind-project-on-campo-indian-reservation-snared-in-second-lawsuit/.

[148] *See, e.g.*, Vogelsong*, supra* note 147; Mendoza*, supra* note 147; Burns, *supra* note 147; *Groups Sue Over California County's Plan to Drill Oil Wells*, *supra* note 147; Kaenel, *supra* note 147.

organizations.[149] For example, in December 2021, Chesapeake Bay Foundation and James River Association (represented by watchdog group Environmental Integrity Project) sued Henrico County over an environmental issue.[150] The issue involved the alleged release of sewage into regional waterways.[151] This is a recent lawsuit that was not decided until April 11, 2022.[152] The Plaintiffs wanted declaration, injunction, penalties, fees, and costs.[153]

Henrico county has 330,000 people. Based on the data, Henrico falls within the definition of a small county.[154] By area, it is the 81st largest county in Virginia.[155] The county attorney's office, tasked with the legal duties of local government, spent nearly $3 million in fiscal year 2022 with nearly the same amount earmarked for expenses in 2023.[156] The vast majority of the county's budget went to essential operational expenses such as education, healthcare, public utilities, debt service, law enforcement, the court system, and public works.[157]

In contrast, Chesapeake Bay Foundation (CBF) is a national environmental organization centered in the Northeast.[158] It has net assets of over $130 million, highlights its litigation, spent $30 million in a year, and does not explicitly say how much it spends on the lawsuits it files.[159] Certainly, CBF would not be left without the ability to pay large sums with $100 million left at its disposal at the end of each year.[160] Environmental Integrity Project is also a national nonprofit and is representing a regional group in the matter.[161] While using a comparatively small budget to CBF, it still managed to reportedly spend

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[149] *Id.*

[150] Vogelsong*, supra* note 147.

[151] *Id.*

[152] *See* Chesapeake Bay Found., Inc. v. County of Henrico, 597 F. Supp. 3d 864 (E.D. Va. 2022).

[153] *Id.*

[154] *Henrico County*, *Virginia*, United States Census Bureau, https://data.census.gov/cedsci/profile?g=0500000US51087 (last visited May 9, 2023); *County Population Totals*, *supra* note 88.

[155] *Id.*

[156] *Approved Budget*, Off. Mgmt. and Budget 1, 79 (June 30, 2022), https://henrico.us/pdfs/finance/ApprovedBudgetFY23/FY23%20Budget%20Book%20Full.pdf.

[157] *See Proposed Budget FY 2022*, Henrico Cnty. 1, 30 (2021), https://henrico.us/pdfs/finance/WebProposed FY2022/Proposed%20Budget%20FY22.pdf.

[158] Chesapeake Bay Foundation, https://www.cbf.org/index.html (last visited May 9, 2023).

[159] *2021 Annual Report*, CBF 1, 25 (2021), https://www.cbf.org/document-library/financial-documents/2021-annual-report-no-lists.pdf.

[160] *Id.*

[161] *Who We Are*, Env't Integrity Project, https://environmentalintegrity.org/ (last visited May 9, 2023); Vogelsong*, supra* note 147.

over $500,000 on legal fees in 2020 without any of its budget directly going to the environment.[162]

Henrico is a small county.[163] Henrico's limited legal budget pays for prosecutors, defenders, and general legal help.[164] Its limited budget is now facing litigation from national environmental organizations with large budgets who want "accountability" through penalties, fees, and costs. This brings added expenses that take from the money that the county had earmarked for financing environmental programs that directly affects its land in a positive way.[165]

A simple headline from a regional news outlet reflects a complicated web of high litigation costs, expenses, and national organizations attacking a local government. The headline exemplifies how environmental litigation against counties by environmental organizations has permeated the social conscience.[166] While there are no definitive statistics about environmental litigation between organizations and counties, the above example shows how many interesting levels exist to a singular, recent case from 2022. There are other ways to hold counties liable for alleged wrongs besides litigation. Litigation against local governments, as exemplified by the Henrico County dispute, is costly, counterproductive, and happening in real time. Money that could otherwise be spent on helping the environment is instead being spent on court costs, attorneys, and general litigation.

e. Why Animal and Natural Resource Actions from Environmental Organizations Against Counties are Fundamentally Negative (though Positives Exist)

Litigation between counties and environmental organizations is costly, time consuming, and arguably too prevalent.[167] The "dramatic proliferation of lawsuits has serious consequences for both the species' recovery and for our economy."[168] Communities "are forced to react to lawsuits, thereby affecting the real efforts to conserve and recover species."[169] On top of those negatives, litigation between these two

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[162] *Annual Report, 2020*, Env't Integrity Project 1, 9–10 (2020), https://environmentalintegrity .org/wp-content/uploads/2021/04/EIPS-ANNUAL-REPORT-2020.pdf.

[163] *Henrico County*, *Virginia*, *supra* note 154.

[164] *See Approved Budget*, *supra* note 156, at 79; *See also Proposed Budget FY 2022, supra* note 157, at 30.

[165] *Proposed Budget FY 2022, supra* note 157, at 30.

[166] *See, e.g.*, *Groups Sue Over California County's Plan to Drill Oil Wells*, *supra* note 147.

[167] *See* discussion *supra* Section II.D–E.

[168] *Taxpayer-Funded Litigation*, *supra* note 132.

[169] *Id.*

key parties simultaneously takes away money from both organizations and local governments that can otherwise direct the money towards impacting animals and natural resources in a positive way.[170] Looking at financial issues shows why litigation is parasitic to vital financial resources.

Litigation has the potential to produce positive results.[171] Counties may be held accountable for wrongs that may be overlooked by administrative oversight, and details may emerge during the litigation that contribute to a better-functioning local government.[172] This point is not disputed by the article at hand. Litigation has benefits, but it is occurring at the expense of taxpayers and small communities who lack the budgets to continually and effectively meet the legal field's fiscal demands. The extent of litigation by national environmental organizations against counties can be narrowed in a way that produces a net positive benefit for the animals and natural resources that the organizations and counties are both obligated and motivated to protect.[173]

Counties have other legal liabilities besides defending against environmental lawsuits.[174] Legal costs will always be high. The complexity of environmental organizations fighting counties lies in the way that expensive lawsuits take money from *both* plaintiff organizations and defendant counties. These finances could arguably have a better impact by being funneled, from both private and public sectors, to causes that directly improve the status of animals and natural resources.

i. Litigation is Costly

Litigation cost is a problem that contributes to the negative nature of lawsuits against counties. Litigation is expensive. [175] From filing fees to attorney costs, most parts of litigation do not come cheap. [176] In 2019 alone, counties spent approximately $72 billion on courts, court costs, litigation fees, and other legal matters.[177] Additionally, about $54 billion was also spent on debt interest debt accrued through litigation and general expenses.[178] In 2020 alone, the entirety of the United States'

[170] *See generally id*.

[171] Joanna C. Schwartz, *Introspection Through Litigation*, 90 Notre Dame L. Rev. 1055, 1060–61 (2015).

[172] *Id.*

[173] *See* discussion *infra* Section II.F.

[174] *See generally* Schwartz, *supra* note 171, at 1098.

[175] *See State and Local Expenditures*, Urb. Inst., https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-expenditures (last visited May 9, 2023).

[176] *Id.*

[177] *Id.*

[178] *Id.*

tort system totaled $443 billion—a whopping $3,621 per household.[179] Counties spend billions of dollars on court systems and may be hesitant to show the extent of the money spent on individual cases.[180] The costs are high, and the transparency is lacking. Rather, it is easier to look at costs of federal litigation from a general perspective.

While it is difficult to truly see the extent of legal costs and fees for counties, it is also difficult to see fulfilling data about the litigation costs of environmental groups. Data regarding litigation costs may be grouped into broad categories or misrepresented in a complex data set.[181] It is easier to look at the average cost for litigation in federal court. During 2008, the *median* litigation costs (including attorneys' fees) were $15,000 for plaintiffs and $20,000 for defendants.[182] Utilizing the median is an effective way to limit the impact of extremely low and extremely high data points. Adjusted for 2022 values according to United States inflation calculations, that represents approximate medians of $19,500 and $26,000, respectively.[183] These medians had approximately been the same as costs from 10 years before.[184] The median is just the center value; the average cost of federal litigation is likely heightened by extreme outliers and long-lasting litigation.

Costly litigation serves as a roadblock to meaningful change. Lawsuits cost both time and money. These are both resources that local governments and environmental organizations cannot simply create. The "biggest issue is the impact of litigation on getting practices and projects done."[185] On a regular basis, "litigation [is] being used to halt projects or delay projects which ultimately have an impact on [local economies]."[186] Litigation is used as a tool to hurt counties and bar or delay them from achieving meaningful change in the community.[187]

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[179] *The U.S. Tort System Costs $443 Billion*, U.S. Chamber Com. Inst. Legal Reform (Jan. 5, 2023), https://instituteforlegalreform.com/blog/us-tort-system-costs-443-billion/.

[180] *See* Troy Brynelson, *Clark County Won't Say How Much it Spent Fighting a Wrongful Termination Lawsuit*, Or. Pub. Broad. (May 14, 2021), https://www.opb.org/article/2021/05/14/clark-county-wrongful-termination-lawsuit/.

[181] *See, e.g.*, *82% of WWF Spending is Directed to Worldwide Conservation*, WWF, https://www.worldwildlife.org/about/financials (last visited May 9, 2023).

[182] Emery G. Lee & Thomas E. Willging, *Defining The Problem Of Cost In Federal Civil Litigation*, 60 Duke L.J. 765, 770 (2010).

[183] *CPI Inflation Calculator*, U.S. Bureau Lab. Stats., https://www.bls.gov/data/inflation_calculator.htm (last visited May 9, 2023).

[184] *Id.*

[185] *Experts Tell Congress Ways to Make Environmental Litigation Less Costly, More Streamlined*, W. Wire (Sept. 28, 2018), https://www.westernwire.net/experts-tell-congress-ways-to-make-environmental-litigation-less-costly-more-streamlined/ [hereinafter *Experts Tell Congress*].

[186] *Id.*

[187] *See generally Taxpayer-Funded Litigation*, *supra* note 132.

This change can effectively help animals and natural resources but is otherwise curbed by excessive litigation.[188] Furthermore, the outcome of court cases can be expensive. "Laws are being abused by groups aiming to derail project approvals, who can amass settlements topping six figures from government agencies they challenge in court."[189] Furthermore, "wealthy environmental organizations take advantage of the law's loopholes and exemptions to obtain large fee awards."[190] Local government is being targeted by expensive environmental litigation. At a bare minimum, the litigation will take away from a county's budget. At a conceivable end, a county will be bogged down by millions of dollars in fees and fee awards that can decimate county budgets.

Basically, litigation is costly. Money that could otherwise flow to the betterment of animals and natural resources is spent on expensive squabbles that may produce court decisions that will further perpetuate an expensive litigious cycle on appeal.

ii. Counties and Environmental Organizations have Limited Funds

Litigation financing must come from somewhere; both counties and environmental organizations do not have unlimited funds to toy with. In recent years, counties have faced "unprecedented fiscal challenges."[191] These fiscal challenges have emerged due to "declining revenue" and "increased spending."[192] County budgets are not only limited but are in flux.[193] Spending money on costly litigation either adds to county debt or diminishes the funding for other services as counties prioritize mandatory expenses at the cost of other programs. These programs could benefit the environment directly, on a ground level, but are instead going to attorneys and court costs.[194] With "limited resources, taxpayer dollars need to be directed in a way that has the highest impact." [195] This money should not be spent on tiring litigation regularly pursued by environmental organizations.

Remember Henrico County? On top of the litigation it is facing from the environmental organizations, Henrico County had to pay

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[188] *See id.*

[189] *Experts Tell Congress*, *supra* note 185.

[190] *Id.*

[191] *How Public Officials Can Use Data and Evidence to Make Strategic Budget Cuts*, PEW (Sept. 8, 2020), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2020/09/how-public-officials-can-use-data-and-evidence-to-make-strategic-budget-cuts [hereinafter *How Public Officials Can Use Data*].

[192] *Id.*

[193] *See id.*

[194] *See generally Taxpayer-Funded Litigation*, *supra* note 132.

[195] *How Public Officials Can Use Data*, *supra* note 191.

$200,000 in state penalties over the same issues.[196] The county paid and now it has to pay some more.[197]

Environmental "nonprofits share a common goal of maximizing social impact (by using quantifiable indicators)."[198] Though, "in practice, many [environmental] nonprofits focus on output instead of impact."[199] Working with limited budgets that have recently been hit by American economic issues, environmental organizations continue to spend money on expensive litigation.[200] The money is finite and environmental organizations choose to spend it on costly court battles against local governments instead of implementing projects that can directly help the status of animals and natural resources.

iii. Modern Movements and Mechanisms

Litigation is "[a] contest in a court of justice, for the purpose of enforcing a right."[201] Environmental organizations are allowed to sue counties to protect or enforce the rights of their members.[202] But there are other ways and mechanisms to enforce rights and to hold counties accountable for perceived wrongs against animals and natural resources.

With nearly 40,000 elected officials, county governments serve at the behest of American voters.[203] Voting is a direct way to influence future policy and to remove bad actors from office. Also, counties often have oversight committees, policies, and procedures that can remedy wrongs in real time.[204] Individuals pursuing these existing mechanisms and routes can fix problems within existing structures without initiating the costly monetary and time-consuming expenses caused by federal litigation.

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[196] Eric Kolenich, *Henrico County Will Pay $200,000 in Penalties After 3 Years of Water Pollution*, Richmond Times (Dec. 15, 2021), https://richmond.com/news/local/henrico-county-will-pay-200-000-in-penalties-after-3-years-of-water-pollution/article_ee6a5f70-600b-50cd-a709-42bdbd55c2e1.html.

[197] *See id.*

[198] Morvarid Rahmani & Karthik Ramachandran, *How Nonprofits Can Maximize Impact With Limited Budgets*, NonProfit PRO (June 30, 2020), https://www.nonprofitpro.com/article/how-nonprofits-can-maximize-impact-with-limited-budgets/.

[199] *Id.*

[200] *Id.*

[201] *Litigation*, *The Law Dictionary*, https://thelawdictionary.org/litigation/ (last visited May 9, 2023).

[202] McElfish Jr.*, supra* note 23, at 11100–01.

[203] *Counties Matter*, NACo, https://www.naco.org/resources/featured/counties-matter (last visited May 9, 2023).

[204] *See Importance of Accountability in Local Government*, POWER DMS (Dec. 29, 2020), https://www.powerdms.com/policy-learning-center/importance-of-accountability-in-local-government.

Furthermore, spending to help the environment is starting to increase on its own. County spending "to protect the nation's natural resources [increased] from $27.7 billion in 2014 to $32.3 billion in 2018."[205] That is an increase of fourteen percent in just four years.[206] Specific programs include the "protection of soil and water resources, including controlling beach erosion, managing dams to prevent floods, educating the public about conservation and generating hydroelectric energy."[207] Spending is steadily increasing without any trigger aside from changing times. Predatory litigation against counties by environmental organizations is not needed.

Lastly, individuals maintain rights to sue counties. The expense of litigation, communal drama, time commitment, and reputation risk serve as large-enough deterrents to prevent the same frivolous lawsuits that various environmental organizations are equipped to handle. When individuals sue, there is a good chance that they are suing for a cause and are not wasting time as many environmental organization suits do.

Litigation against counties by environmental organizations serves to be costly, time consuming, and redundant while taking away from limited county and organizational budgets. Existing accountability measures and routes, combined with the ability of individuals to sue counties, are enough to hold counties accountable when they step out of line. Environmental organizations are usually not needed to stop the perceived wrongs of counties and often waste time and resources, of both local government organizations and environmental interest groups, that would be better diverted directly to animal and natural resources causes. Modern movements and mechanisms already accomplish the same goal of environmental litigation without the need for lengthy court battles.

f. Brief Proposals for Dissuading Litigation between Environmental Organizations and Counties

Environmental organizations do not usually have a problem with establishing standing.[208] The complexity, strength, and resources of the organizations make establishing standing a very surmountable task.[209] Raising the bar for standing in litigation between counties

[205] Lynda Lee, *Steady Increase in Funding of Green Programs by State and Local Governments*, United States Census Bureau (June 7, 2021), https://www.census.gov/library/stories/2021/06/ public-spending-on-protecting-environment-up.html.

[206] *Id.*

[207] *Id.*

[208] Mark A. Ryan, *Clean Water Act Citizen Suits: What the Numbers Tell Us*, 32 Nat. Res. & Env. 20, 21 (Fall 2017).

[209] *See generally id.*

and national environmental organizations is paramount to defeating the excessive litigation before it takes too much time, costs too much money, and subsumes too many working hours. It allows courts to put a boot on the car before it even leaves the parking lot.[210] By raising the bar, less money will be spent on litigation and free financial assets for use by both counties *and* environmental organizations to spend on policies, procedures, and efforts that directly benefit animals and natural resources.

i. Standing Should generally be Limited in Instances where an Environmental Organization wants to Sue a County

"[L]itigation by activist groups" and their attorneys have the capacity to abuse the purpose of good-intentioned statutes and take away from the effectiveness that environmental statutes are meant to provide.[211] Across the country, "[g]overnment scientists are working with states, counties, cities, and individual land owners [sic] to develop science-based solutions that work for people and protected species."[212] Environmentalists "have long been pushing the government, consumers and corporations to protect our planet, promoting everything from tougher environmental standards to paperless communications and environmentally friendly products like reusable shopping [bags]. Government is stepping up." [213] Litigation is exhausting, and environmental groups have a valid purpose. These two concepts can be reconciled by constricting litigation and coaxing the funds from litigious environmental organizations in a way that allows them to be directly funneled to meaningful projects while simultaneously increasing the flexibility of county budgets to accommodate environmental needs.

There is strong value in challenging the actions of counties/local governments and pursuing change.[214] Counties will never be perfect. But the reality is that there are already mechanisms in place to accomplish the same positive goals that litigation allegedly seeks to accomplish.[215] Private organizational enforcement of statutes, policies, etcetera in court

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[210] *See generally* Spokeo, Inc. v. Robins, 578 U.S. 330, 337 (2016).

[211] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. on Nat. Res.*, 112th Cong. 25 (2012) (statement of Kent Holsinger, Attorney, Holsinger Law).

[212] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. on Nat. Res.*, 112th Cong. 4 (2012) (statement of Rep. Edward J. Markey, Ranking Member, Committee on Natural Resources).

[213] Lee, *supra* note 205.

[214] *See* Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. Rev. 931, 957 (1998).

[215] *See generally id.*

is too common and wastes time. Notably, "[o]ne of the great concerns of private enforcement is that it will result in over-enforcement of environmental regulations."[216] Government agencies already use "their discretionary powers to balance various interests, only enforcing when it is necessary and efficient to do so."[217]

Counties have adequate oversight as the present situation exists. "Individuals and groups, however, may force [local government] to strictly comply with permits and regulations, not taking other economic interests into account."[218] The use of "lawsuits as political tools to halt growth of certain industries" is also a threat that is caused by the relative leniency of standing.[219] Limiting standing limits litigation.[220] Only the most secure and worthy lawsuits from environmental organizations will be allowed to press on.[221] Now is the time to limit standing in environmental organization actions against counties and simultaneously save budgets and directly create larger funds to help the environment head-on.

ii. Adamantly Enforce Article III Standing

Enforcing and embracing Article III standing as it was articulated in *Lujan v. Defenders of Wildlife* is a good first step toward limiting environmental lawsuits from environmental organizations against counties. The Court in *Lujan* held that a plaintiff has to be directly injured to have standing.[222] General injury to the environment is not good enough to meet the *Lujan* standing requirement.[223] A member of an environmental organization has to be directly injured in order for there to actually be standing.[224] This dictum raises the bar for the national environmental organizations that are trying to sue counties—there must be actual injury to an organization member as opposed to simply showing generalized injury.[225] Enforcing this barrier to a lawsuit raises the bar and prevents excessive litigation while still allowing for

[216] Elizabeth Rae Potts, *A Proposal for an Alternative to the Private Enforcement of Environmental Regulations and Statutes Through Citizen Suits: Transferable Property Rights in Common Resources*, 36 San Diego L. Rev. 547, 556 (1999).

[217] *Id.*

[218] *Id.*

[219] *Id.* at 558.

[220] *See generally* Ewing & Kysar, *supra* note 6.

[221] *See generally id.*

[222] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

[223] Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009).

[224] *Id.*

[225] *See generally id.*

individuals to file lawsuits.[226] The individuals have likely experienced direct harm, are located within the community as opposed to having a national footprint, and they are not seen as a problem within the scope of this paper.[227]

Environmental organizations tend to approach litigation in a way that may "ignore or underplay" the harm that individual people "actually experience from the environmental degradation at issue."[228] Enforcing standing requirements effectively raises the bar for national environmental organizations to press a lawsuit. Embracing stringent Article III standing requirements against national environmental organizations leads to more time and financial resources spent on demonstrating that the lawsuit meets the standing requirements.[229]

The proposed heightened barrier to entry leads to increased risk that the environmental organizations will lose their case on standing grounds alone and ideally dissuade excessive litigation in favor of impactful community work that will directly impact the environment.[230] The death of all litigation between environmental organizations and counties is not being advocated. Rather, a better strainer is needed to halt the use of the law as a tool to cripple the financial resources that could otherwise have a direct impact on regional animal and natural resource interests.

iii. Tighten the Prudential Zone of Interests Component

To limit standing in animal and natural resource cases between national environmental organizations and counties requires that standing be restricted under both Article III[231] and through prudential standing.[232] To review every form of standing and subset of standing is beyond the scope of this article. Extensive litigation against local governments is costly and counterproductive, it is critical to comprehend that limiting standing prevents excessive lawsuits from getting past the first step of the litigation processes.

Article III standing is a requirement for a lawsuit and prudential standing allows judges flexibility in determining whether many lawsuits have standing.[233] To specifically restrict the zone of interests

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[226] *See generally id* at 493–94.

[227] *See* discussion *supra* Section II.D.

[228] Carlson, *supra* note 214, at 958.

[229] *Id* at 957.

[230] *See generally id*.

[231] *See* discussion *supra* Section II.F.2.

[232] *Id.*

[233] *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016); *See also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

test articulated in *Association of Data Processing Service Organizations v. Camp* would allow courts to utilize higher standing limits to both prevent and dissuade the use of litigation by national environmental organizations to target counties.[234] The zone of interests test as articulated in *Camp* asks, "whether the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[235] This test essentially gives judges latitude in determining whether a lawsuit is barred by what the legislation was meant to protect.[236]

To tighten the componential prudential zone of interests would create a legal system that disfavors litigation between counties and national environmental organizations.[237] Tightening the grip over the zone of interests test could be done through practice or precedent.[238] The desired goal would be to construe that the interests of national environmental organizations are not often within the zone of interests that statutes and the Constitution is trying to protect. The organizations would thereby not have standing, and many lawsuits would be made moot while preserving the integrity of the occasional organizational lawsuit against a county that truly matters (as is demonstrated by meeting the higher threshold). In sum, limiting prudential standing would undermine the ability of national environmental organizations to utilize their budgets for excessive litigation as opposed to helping the environment directly.

iv. Strictly Construe or Amend Citizen Suit Provisions

Citizen suits allow environmental organizations to sue counties in federal court under a provision of a specific environmental law.[239] If an organization wins, then it can receive civil penalties and injunctive relief.[240] Citizen suit provisions are found within many major environmental statutes including the Clean Air Act (CAA), the Clean Water Act (CWA), and the Resource Conservation and Recovery Act

[234] *See generally* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

[235] *Id.* at 153.

[236] *See* Sanford A. Church, *A Defense of the "Zone of Interests" Standing Test*, 1983 Duke L.J. 447, 447–48 (1983).

[237] *See generally id.*

[238] *See generally id.*

[239] *See* David E. Adelman & Jori Reilly-Diakun, *Environmental Citizen Suits and the Inequities of Races to the Top*, 90 Colorado L. Rev. 377 (2021); 33 U.S.C. § 1365.

[240] Rochelle Bobroff & Jeffrey S. Gutman, *Implied Causes of Action*, Shriver Center (2017), https://www.federalpracticemanual.org/chapter5/section2.html#footnote5_6i0dq7y.

(RCRA).[241] Almost "every major federal environmental statute includes a citizen suit provision, which allows any person or entity to sue any other private or public entity for environmental violations."[242] Environmental organizations are litigious and use citizen suit provisions often.[243] "Large, well-established organizations such as the Sierra Club and Earth justice launch suits across the country and lend support and representation to smaller [environmental non-governmental organizations]."[244]

Strictly construing or amending citizen suit provisions can limit the legal avenues that environmental organizations have to challenge counties over animal and natural resource violations. A key example of this effect can be found in *Gwaltney of Smithfield v. Chesapeake Bay Foundation* where the Court held that the Chesapeake Bay Foundation could not bring a citizen suit under the CWA for "wholly past violations of the Act."[245] Further limitations through the establishment of legal precedent or statutory change would restrict the avenues used by environmental organizations to target the local governments and counties.

v. Embrace Current Trends Surrounding Implied Causes of Action

Implied cause of action framework arises when federal statutes do not contain a citizen suit provision. In order to "demonstrate an implied [cause] of action from the statute itself, a plaintiff [environmental organization]—in addition to demonstrating that the statute evidences a congressional intent to create an enforceable right— must also demonstrate an intent to create a private remedy for a violation of that right."[246]

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[241] *See generally* Church*, supra* note 236; *Citizen Suit Provisions in Environmental Law*, Environmental Rights Database, http://environmentalrightsdatabase.org/citizen-suit-provisions-in-environmental-law/ (last visited May 9, 2023).

[242] Nathanson et. al., *Practitioner Insights: Citizen Suit Enforcement—What to Expect and How to Prepare*, Bloomberg 1, 2 (Mar. 15, 2017), https://www.crowell.com/files/20170315-Practitioner-Insights-Citizen-Suit-Enforcement-What-to-Expect-and-How-to-Prepare-Nathanson-Chung-Leff.pdf.

[243] *Id.*

[244] *Id.*

[245] Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 66 (1987).

[246] *See generally* Wen S. Shen, *Courts Split on Whether Private Individuals Can Sue to Challenge States' Medicaid Defunding Decisions: Considerations for Congress (Part I of II)*, Cong. Rsch. Serv. 1, 2 (July 3, 2019), https://sgp.fas.org/crs/misc/LSB10320.pdf.

The Supreme Court was originally "receptive to implying a cause of action."[247] While "these decisions have not been formally overruled, the Court is now highly reluctant to imply a cause of action for damages in the Constitution."[248] The Court has recently acknowledged that "implied causes of action are disfavored."[249] "The Court has similarly imposed a nearly impossible standard for implying a cause of action in a federal statute" because it requires an environmental organization to "supply evidence of congressional intent to confer a right of action from the text and structure of a statute that does not expressly specify access to enforcement in the federal courts."[250] On the other hand, the Court is likely to allow claims for injunctive and declaratory relief.[251]

Cases seeking injunctive or declaratory relief are far less potentially destructive to county budgets. The county would be essentially barred from continuing allegedly harmful actions and the litigation, while still potentially costly, would be less likely to accrue formidable damages against local government budgets. The current trend against implied cause of actions is desirable and the Court's stance in allowing cases that deal with declaratory and injunctive relief is acceptable for the limited number of statutes and constitutional provisions that do not contain citizen suit provisions.

vi. Extend and Aggressively Expand the *Middlesex County* Dicta

Counties can be sued by national wildlife and environmental organizations under 42 U.S.C. § 1983.[252] They can also be sued under a federal statute if a statute has appropriate details that supersede § 1983 as the Court in *Middlesex County* put forth.[253]

A logical solution to lessen litigation between environmental organizations and counties is to aggressively expand the holding in *Middlesex County*. This means finding that more environmental statutes have sufficient detail to preclude remedies for organizations that are seeking relief from counties. Effectively, by construing statutes as being sufficiently detailed, federal courts would be able to lessen litigation that directly embroils counties and serves as avenues for expensive litigation

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[247] Bobroff & Gutman, *supra* note 240.

[248] *Id.*

[249] Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009).

[250] Bobroff & Gutman, *supra* note 240.

[251] *Id.*

[252] 42 U.S.C. § 1983.

[253] Monell v. Dep't of Soc. Serv. of City of New York, 436 U.S. 658, 700 (1978); Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20–21 (1981).

beyond the scope of § 1983. This action requires courts and judges to be more willing to apply *Middlesex County* precedent to cases between environmental organizations and counties. It is a solution of exponential returns. As more courts take on the issue and apply *Middlesex County* to preclude counties from litigating under the specific language of a statute, even more litigation will be barred from starting in the first place.

vii. Limit the *Monell* Doctrine

As *Monell* noted, any alleged violation brought under 42 U.S. Code § 1983 against a county must flow from a policy or practice of the county and may not be based on *respondeat superior* liability through a government employee.[254] Contesting what constitutes a "policy or practice" can lead to less animal and natural resource litigation between environmental organizations and counties.

Essentially, to see this action materialize would require courts to limit the scope of what a policy or practice constitutes in favor of a narrow view that limits county liability under § 1983. This narrowed scope would close the door on many lawsuits and the trend towards a limited scope would further dissuade extensive litigation brought against counties by environmental organizations. This section is not perpetuating a discussion about *Monell* and the many cases that extended it. Rather, this solution is advocating for narrowing the language that defines when counties can be sued under § 1983. This tactic to dissuade litigation rests on the growth of a movement within the court system to become more litigation averse.

IV. Conclusion

Environmental litigation against local governments is costly and counterproductive. National environmental organizations are a significant part of this problem and their involvement in litigation against counties negatively impacts animals and natural resources on two levels. (1) The county *and* (2) environmental organizations hemorrhage money on costly litigation. Both financial streams could be otherwise diverted in a way that positively impacts animals and natural resources directly. A solution to litigation against counties lies within dissuading actions from the outset.

A natural extension of this article's research and argument is that other forms of litigation against local governments could and should be discouraged. While the focus is on animal and natural resource actions, the potential for an even greater discourse is prevalent.

[254] *Monell*, 436 U.S. at 691.

Dissuading litigation may present itself as a Sisyphean task though doing so can be done in a significant number of ways. Ultimately, reducing litigation between counties and environmental organizations is beneficial for animals and natural resources. It is time for change. The legal field should rise to the challenge and change an ineffective and burdened system. Now is the time for litigation conservation.

From Doghouse to the Dog's House: How American Trust Law is Defying Animals' Property Status

Skylar Steel*

I. Introduction

American society has evolved its mindset in the way that people think and care about animals. The most significant change is seen with the animals that Americans have opened their homes to. The increased love and care given to these animals has led people to call themselves "pet parents" and their furry companions, "children."[1] This is further demonstrated by how 78% of pet parents consider their furry children to be a part of the family.[2] We have even designated a holiday that celebrates this status, titled "National Pet Parents Day."[3] Today's companion animals are being treated increasingly like our human children: we fasten them in seatbelts for car rides, throw them birthday parties, take them with us on vacation, and sleep with them in our beds. Our furry children's safety, health, and wellbeing are on pet parents' minds like never before.

Despite these changing attitudes towards animals as family, American law has been reluctant to acknowledge this change. Animals are still legally categorized as property, putting them in the same box as inanimate objects, like couches and refrigerators. This categorization

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[1] While there is a movement to change what we traditionally categorized as "pets" to "companion animals," for purposes of this note I will generally refer to companion animals as "furry children" to attempt to magnify how pet parents feel about the animals they consider as part of their family.

[2] *See* Michael Hollan, *A third of pet owners prefer their animals to their children, survey finds*, Fox News (Sept. 12, 2019, 11:16 AM), https://www.foxnews.com/lifestyle/survery-pets-preferred-children.

[3] *See National Pet Parents Day - Last Sunday in April,* Nat'l Day Calendar, https://nationaldaycalendar.com/national-pet-parents-day-last-sunday-in-april/ (Feb. 3, 2023) ("On the last Sunday in April, National Pet Parents Day recognizes the pet parents who go the extra mile to care for their fur babies").

has made progressive change in the law cumbersome. The property distinction has also made difficult the ability of pet parents to utilize various legal tools to protect their furry children.

While several legal tools *do* exist for pet parents, the scope of such tools are limited by animals' categorization as property. One area of law that has made significant progress despite animals' property status is estate planning. All fifty states and the District of Columbia allow for the creation of pet trusts, which enable pet parents to create legally binding instruments that provide continued care for their furry children in the event that the pet parents predecease them. Other areas of law have been slower to adapt to current societal attitudes regarding our companion animals, such as imposing a duty on pet parents to provide medical treatment, civil remedies if harm befalls them, and pet custody disputes.

This student note explains why American trust law has been able to evolve to recognize that the pure property status of domesticated animals is not reflective of how we are currently treating our companion animals and why other areas of the law have not been able to make such progress. By diving into the history of American estate planning, this note discusses what we can learn from changes in probate and trust codes recognizing the bond between humans and animals and understand how these changes can be applied to other areas of law that have been more resistant in recognizing animals as more than mere property. Additionally, unique challenges faced by the areas of law regarding medical treatment, criminal statutes imposing a duty on pet parents, civil remedies for harm, and disputes over custody are considered. This note investigates why certain areas have had an easier time than others enacting positive change. Finally, in considering all the positive change that has been made in increasing protections and available remedies for animals, this note concludes by explaining why the property distinction of companion animals has thus been rendered obsolete.

II. History of Testamentary Instruments

a. Freedom of Disposition

The history of estate planning in the United States becomes relevant when trying to understand how probate and trust codes have been able to recognize animals as more than mere property. The law of succession focuses on what happens to our property at death.[4] American succession law has been strongly influenced by the principle of freedom

[4] Robert H. Sitkoff & Jesse Dukeminier, Wills, Trusts, and Estates 1 (10th ed. 2017).

of disposition, which grants property owners the "nearly unrestricted right to dispose of their property as they please."[5] Under American law of succession, courts cannot question if a donor acted wisely, fairly, or reasonably in the disposition of her property.[6] Courts generally only have the authority to impose on the freedom of disposition when a donor attempts to dispose of her property in a way that is prohibited or restricted by existing law.[7] American law of succession allows an individual to distribute her property as she wishes, and if she does not make plans for the disposition of her property during life, her property will pass through a default system of succession, called intestacy, which follows the probable intent of the average decedent.[8]

A decedent's property passes one of many ways upon death. If a decedent legally drafted and executed a will during life, her property must pass through probate court and be distributed according to the terms of her will.[9] While a will is a probate testamentary instrument, meaning the property passes through probate upon death, there are several other testamentary instruments that can be executed during life that will avoid probate, known as non-probate will substitutes.[10] Examples of will substitutes include inter vivos trusts, pay-on-death and transfer-on-death contracts, life insurance policies, and joint tenancies.[11] The most common will substitute takes the form of a beneficiary designation, which allows property owners to name a beneficiary of certain types of property, such as a bank account or insurance policy, that will automatically transfer ownership to the beneficiary upon the property owner's death. Will substitutes are desirable because they are a fast and inexpensive alternative to probate administration.[12] In contrast, if a decedent did not execute any testamentary instruments or will substitutes during life, she is said to have passed away intestate, and her property must also pass through probate and be distributed based on her probable intent.[13]

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[5] *See* Restatement (Third) of Prop.: Wills and & Don. Trans. § 10.1 cmt. a (Am. L. Inst. 2003).

[6] *See id.* § 10.1 cmt. c.

[7] *See id.*

[8] Sitkoff & Dukeminier, *supra* note 4, at 19.

[9] *Id.* at 63.

[10] *Id.* at 40.

[11] *Id.* at 40–41 (stating that pay-on-death contracts, transfer-on-death contracts, life insurance policies, and joint tenancies require only a death certificate for the beneficiary or surviving party to collect property or title).

[12] *Id.* at 40.

[13] *Id.* at 63.

b. History of Trusts

While many individuals can now dispose of all of their assets through beneficiary designations, others may opt for a more all encompassing instrument, such as a trust. The traditional rules of a trust require that a person drafting and executing the trust, known as the settlor, conveys property to a trustee, to hold that property in trust for the benefit of a definite beneficiary or beneficiaries.[14] To create a valid, enforceable trust instrument, the settlor must have the intent to create a trust.[15] Additionally, the settlor must identify ascertainable beneficiaries and the specific property to be held in trust, known as the res.[16] In addition to the settlor who conveys the property, there also needs to be a trustee with active duties and responsibilities for the trust to not fail.[17] However, if a trustee is not explicitly named in the instrument, "[a] trust will not fail for want of a trustee."[18]

Trusts can be testamentary, meaning they are created by will and take effect only after the person who drafted and executed the will, the testator, passes away.[19] Because testamentary trusts are created by will, the testamentary trust assets must pass through probate with the rest of the will.[20] Since the trust is created by the will, the document must also follow the Wills Act formalities to be valid, which requires a documented writing, signed by the testator/settlor, and attested by two witnesses.[21] Alternatively, trusts can be created during the settlor's lifetime, known as inter vivos trusts, which is one of the types of will substitutes that avoid probate.[22] In order to create a trust, a settlor must have intent to create a trust, identify ascertainable beneficiaries to the trust, and identify specific property to be held in trust.[23] An inter vivos trust can be created by a declaration of trust, being a verbal expression of intention by a settlor to hold property in trust for an ascertainable beneficiary, which does not require actual delivery and acceptance.[24] Trusts involving real property must be created by a deed of trust and comply with the Statute of Frauds, which requires a writing and actual delivery to the trustee.[25]

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[14] *Id.* at 385.

[15] *Id.* at 401.

[16] *Id.*

[17] *Id.* at 402–03.

[18] *Id.* at 402; *see* Restatement (Third) of Tr. § 31 (Am. L. Inst. 2003) (explaining if a trustee is not designated or is unwilling or unable to serve as trustee, the court will appoint one).

[19] Sitkoff & Dukeminier, *supra* note 4, at 385.

[20] *Id.*

[21] *Id.* at 401.

[22] *Id.* at 385.

[23] *Id.* at 401.

[24] *Id.* at 408.

[25] *Id.* at 401.

III. The History of Naming Pets as Beneficiaries

a. Rule Against Perpetuities

Under traditional law, trusts also had to comply with the Rule Against Perpetuities, which stated that "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[26] This principle was created by courts to place limits on the excessive control the deceased retained over their property through the creation of trusts with several contingent interests in particular real property, which prevented land from becoming marketable.[27] The Rule Against Perpetuities requires that any contingent interest must vest or terminate within twenty-one years after the life in being, meaning some person who is alive at the creation of the interest.[28] If the interest is created by will, the person who is the life in being must be alive when the testator passes away.[29] If the interest is created by an inter vivos trust, the person who is the life in being must be alive at the time the interest is transferred.[30]

The key language of the Rule Against Perpetuities is "life in being," because the measurable life must be a human life.[31] Thus, naming an animal as a beneficiary of a trust automatically violated the Rule Against Perpetuities because an animal is not a validating life. Additionally, a trust that named a pet as a beneficiary was invalid because the requirement of an ascertainable beneficiary was not satisfied.[32] This is because of the longstanding categorization of animals as property, and therefore, property cannot own its own property.[33]

b. Gifts to Animals Void

A gift to an animal in a will is also void for the same concerns of animals being property themselves. The case *In re Estate of Russell* is

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[26] John Chipman Gray, The Rule Against Perpetuities 174 (3d ed. 1915).

[27] *See* Jesse Dukeminier et al., Property: Concise Edition 238–39 (3d ed. 2021) (discussing how contingent interests are uncertain as they do not become vested until the occurrence of some future event).

[28] *Id.* at 244.

[29] *Id.*

[30] *Id.*

[31] *See* Restatement (First) of Prop. § 374 cmt. h (Am. L. Inst. 1944) (Noting that "no such measurement may be expressed in terms of the life of any animal (other than man), even though the animal is one of a type having a life span typically shorter than that of human beings….").

[32] Sitkoff & Dukeminier, *supra* note 4, at 422.

[33] *See* David S. Favre, Animal Law: Welfare, Interests, and Rights 60 (Wolters Kluwer, 3d ed. 2020).

illustrative.[34] Here, a woman passed away, leaving a valid holographic will that read "I leave everything I own Real & Personal to Chester H. Quinn & Roxy Russell."[35] Chester was one of the testator's close friends and Roxy was the testator's pet dog.[36] The Supreme Court of California interpreted the testator's will to be a disposition of the residue of her estate to go to both Chester and Roxy in equal shares.[37] Because a dog cannot be a beneficiary in a will, the gift to Roxy was void.[38] The court cited a Supreme Court case dealing with limitations of devises for its reasoning.[39] In *United States v. Fox*, the Supreme Court held that all devises of real property must be done "within the limitations of the statute or he cannot devise them at all."[40] In *United States v. Burnison*, the Court affirmed the *Fox* decision and extended this rule to include devises of personal property.[41]

The reason an animal cannot be a beneficiary in a will is because the animal itself is considered personal property of the testator, and therefore, cannot take legal ownership of any gifted property.[42] Similar to why an animal cannot be a beneficiary in a will under traditional law, an animal cannot be a beneficiary of a traditional trust because they are considered personal property of a settlor.[43]

c. What about a Charitable Trust?

A charitable trust avoids both the requirements of an ascertainable beneficiary and the Rule Against Perpetuities.[44] This is because instead of requiring an ascertainable beneficiary to be valid, a charitable trust requires a charitable purpose.[45] Because this type of trust is for a charitable purpose rather than the typical purpose of protecting assets during and after life for particular individuals, the Rule Against Perpetuities does not apply and the trust may continue indefinitely.[46] However, a trust that designates a companion animal as a beneficiary cannot be saved by a charitable trust analysis, because the care of an animal is not a valid charitable purpose.[47] There are several legally recognized charitable

[34] *See generally In re* Estate of Russell, 444 P.2d 353 (Cal. 1968).
[35] *Id.* at 355.
[36] *Id.*
[37] *Id.* at 363.
[38] *Id.*
[39] *See id.* (citing United States v. Burnison, 399 U.S. 87 (1950)).
[40] United States v. Fox, 94 U.S. 315, 321 (1877).
[41] *See Burnison*, 399 U.S. at 93.
[42] Sitkoff & Dukeminier, *supra* note 4, at 425–26.
[43] *Id.* at 426.
[44] *Id.* at 760, 765.
[45] *Id.* at 760.
[46] *Id.* at 765.
[47] *Id.* at 426.

purposes: poverty, education, religion, health, governmental purposes, and those that are otherwise beneficial to the community.[48] Because a trust for the care of an animal is not a valid charitable purpose under the Uniform Trust Code [hereinafter "UTC"], there is no way under traditional law to save a trust naming a pet animal as a beneficiary.

d. Traditional Law Honorary Trusts

To accommodate the growing desire to create trusts for non-charitable purposes, like the care of one's furry children, and to further American law's focus on the freedom of disposition principle, courts began authorizing the creation of trusts categorized as honorary trusts. In 1935, the Restatement (First) of Trusts designated that when a settlor intended to create a trust for a specific non-charitable purpose but failed to designate an ascertainable beneficiary, a valid trust was not created.[49] The resulting instrument was an *intended* trust, which was commonly referred to as an honorary trust.[50] The person to whom the property was transferred (the transferee) could choose to follow the intended purpose and apply the property as designated in the instrument so long as doing so did not violate the Rule Against Perpetuities and it was not for an illegal or capricious purpose.[51] The Restatement explicitly stated that an intended trust with a purpose for providing for the care of an individual's animals was a valid, non-capricious purpose, and thus, the transferee was not forbidden from applying the property as designated.[52]

However, because there is no ascertainable beneficiary, and therefore, no beneficiary to enforce what was intended to be a trust, the transferee was not compelled to carry out the terms of the instrument.[53] Thus, the instrument was unenforceable as a matter of law because the transferee had no duties like those under a traditional trust.[54] A settlor who executed this kind of trust was dependent on the cooperation and compassion of the person to whom the settlor designated possession of their furry child for such intended purposes.[55] If the transferee did not wish to carry out the terms of the intended trust, the transferee was required to transfer the furry child back to the settlor or the settlor's estate.[56]

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[48] *See* Unif. Tr. Code § 405(a) (Unif. L. Comm'n 2000); *see also* Restatement (Third) of Trs. § 28 (Am. L. Inst. 2003).

[49] *See* Restatement (First) of Trs. § 124 (Am. L. Inst. 1935).

[50] *See id.* cmt. c.

[51] *See id.* § 124.

[52] *See id.* cmt. g.

[53] *See id.* cmt. a.

[54] *See id.* (discussing how the transferee has no ascertainable beneficiary to legally owe any duties to).

[55] *See* Favre, *supra* note 33.

[56] *See* § 124, cmt. b.

Courts then began to apply the Restatement when encountered with specific non-charitable purpose trusts that failed to have ascertainable beneficiaries and fell within the applicable intended purposes.[57] The case *In re Searight's Estate* illustrates the emergence of courts discussing honorary trusts in the context of the care of an animal.[58] Here, a man provided the following in his will: "I give and bequeath my dog, Trixie, to Florence Hand…and I direct my executor to deposit…$1000.00 to be used by him to pay Florence Hand at the rate of 75 cents per day for the keep and care of my dog as long as it shall live."[59] Florence accepted the bequest of the dog, Trixie, and the executor began making mandatory distributions of the stated 75 cents a day for the care of the dog.[60] In this particular jurisdiction, existing precedent established that if a trust beneficiary did not have legal standing in court to demand an accounting of the trustee, the trust failed.[61] Because the court held this was an invalid traditional trust, the court discussed the concept of an honorary trust, which was starting to be used by various authorities for bequests for the care of an animal.[62] Utilizing this school of thought, the court determined the object and purpose of the trust, being for the care of the pet parent's dog, was not a capricious or illegal purpose.[63] It also discussed how several modern authorities have upheld the validity of trusts that have been for the care of an animal, and specifically when the person accepts the responsibility of a bequest of custody of and duty of care of an animal.[64] The court, therefore, concluded that the bequest for the care of the dog, Trixie, was not unlawful.[65] While this case demonstrates how a companion animal cannot be a beneficiary of a traditional trust because of its property status, a companion animal can be the res, meaning the property that is subject to the trust.[66]

Under traditional law, because a companion animal is not a validating life, an honorary trust could only last for twenty-one years after the creation of the trust to avoid a perpetuities violation.[67] This meant that any animal with a lifespan over twenty-one years, such as cockatoos who live to be eighty years old or tortoises who live over 150 years, would render the honorary trust for the benefit of such an

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[57] Sitkoff & Dukeminier, *supra* note 4, at 426.
[58] *See generally In re* Searight's Estate, 95 N.E.2d 779 (Ohio Ct. App. 1950).
[59] *Id.* at 780.
[60] *Id.*
[61] *Id.* at 781.
[62] *Id.*
[63] *Id.* at 782.
[64] *Id.*
[65] *Id.*
[66] Sitkoff & Dukeminier, *supra* note 4, at 426.
[67] *Id.*

animal void.[68] The court in *Searight* also discussed the Rule Against Perpetuities and concluded the amount designated to the trust res would be exhausted within a short enough time to not violate the rule.[69]

IV. Emergence of Modern Honorary Trusts and Pet Trusts

a. The Uniform Probate Code [hereinafter the UPC]

Thirty-four years after the Restatement (First) of Trusts, a model provision for validating honorary trusts and trusts for companion animals was codified in the UPC in 1969.[70] This provision specifies the criteria for an honorable trust: the instrument must be for a lawful non-charitable purpose, have no named ascertainable beneficiary, and have a limited duration of twenty-one years regardless of whether a longer term is contemplated.[71] The comment to the provision suggests that each jurisdiction is free to choose a longer or shorter duration.[72] Additionally, the UPC explicitly designates a trust for pets as its own category of trusts and states that "a trust for the care of a designated domestic or pet animal is valid."[73] A trust for the care of an animal terminates when the last animal covered by the trust passes away.[74] Thus, only honorary trusts are subject to the Rule Against Perpetuities.[75]

Under the UPC, both pet trusts and honorary trusts are subject to several of the same provisions. The trust property can only be used for the trust's designated purposes or benefit of a covered animal.[76] After the trust terminates, the trustee must follow specific guidelines for the transfer of any remaining property.[77] The trust's intended purpose and use of the trust property can either be enforced by the person designated for that purpose in the trust or by someone appointed by the court.[78] Likewise, the court can appoint a trustee if no trustee is named or if the designated trustee is unwilling or unable to act.[79] The trustee is under no duty to

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[68] *Id.*

[69] *See Searight*, 95 N.E.2d at 783 (finding that the $1,000 distributed at 75 cents per day would be exhausted in around 4 years).

[70] *See generally* Unif. Prob. Code § 2-907 (amended 2010).

[71] *Id.* § 2-907(a) (meaning it does not matter if a settlor intended for the trust to continue for longer than twenty-one years).

[72] *Id.* § 2-907(a) cmt.

[73] *Id.* § 2-907(b).

[74] *Id.*

[75] *Id.* § 2-907(c).

[76] *Id.* § 2-907(c)(1).

[77] *Id.* § 2-907(c)(2).

[78] *Id.* § 2-907(c)(4).

[79] *Id.* § 2-907(c)(7).

inform and account because there is no ascertainable beneficiary.[80] Most significantly, courts are authorized to reduce the amount designated to the trust in the amount that a court decides "substantially exceeds the amount required for the intended use."[81] Any amount the court deems as excessive then passes in the same manner as the termination of the trust.[82]

b. The Uniform Trust Code [the UTC]

In 2000, the akin criteria of an honorary trust found in the UPC was codified in the UTC for non-charitable trusts without ascertainable beneficiaries.[83] This provision discusses the same rule as the UPC that a trust for a non-charitable purpose may be created without an ascertainable beneficiary but may only be enforced for twenty-one years.[84] Likewise, discretion is left to the states to select a different limit on duration.[85] Honorary trusts can be enforced by a person appointed either by the trust or the court.[86] The property subject to the trust may only be used for its intended use.[87] Like the UPC, the UTC grants courts the near absolute discretion to determine if the amount placed in trust "exceeds the amount required for the intended use."[88] Any amount the court does find to be excessive must then be distributed either to the settlor or the settlor's successors.[89] The purpose of the trust must also not be capricious.[90] The most common example of specific non-charitable purposes subject to this section are trusts created for the care of a cemetery plot.[91]

The UTC also codified a specific section on trusts that are for the care of an animal, rather than some other specific non-charitable purpose.[92] This section allows for the creation of a trust for the care of an animal that is alive during the settlor's lifetime.[93] Animals can be added to the trust after its creation if they are added before the settlor's death.[94] The trust may also include animals in gestation or those not born at the

[80] *See id.* § 2-907(c)(5).
[81] *Id.* § 2-907(c)(6).
[82] *Id.*
[83] Unif. Tr. Code § 409 (Unif. L. Comm'n 2000).
[84] *Id.* § 409(1).
[85] *See id.* § 409 cmt.
[86] *Id.* § 409(2).
[87] *Id.* § 409(3).
[88] *Id.*
[89] *Id.*
[90] *See id.* § 409 cmt.
[91] *Id.*
[92] Unif. Tr. Code § 408 (Unif. L. Comm'n 2000).
[93] *See id.* § 408(a).
[94] *See id.* § 408 cmt.

creation of the trust, if the terms of the trust specify their inclusion.[95] A single trust for the care of an animal can actually be for the benefit of several animals so long as they are designated in the trust.[96]

Just as other non-charitable purpose trusts, a trust for the care of an animal can be enforced by either the named or appointed trustee.[97] The trust property can only be used for its intended use.[98] This provision again grants the courts the discretionary power to determine if the trust property exceeds the amount needed for its intended use, and any amount deemed not required for the intended use must be distributed to the settlor or the settlor's successors.[99]

Different from an honorary trust, a trust for the care of an animal allows for *any* person who has an interest in the welfare of the animal to have standing to request that the court appoint someone to enforce the trust or have someone removed.[100] Any person the court appoints should also have an identified interest in the animal's welfare.[101] Thus, honorary trusts created pursuant to the UTC, rather than the traditional law of trusts, are valid and legally enforceable trust instruments.[102]

V. Pet Trusts Today

Pet trusts are a growing phenomenon in American society, being utilized across all fifty states and the District of Columbia. In a recent survey, 44% of pet parents expressed they had a plan for the care of their furry children.[103] There are several reasons why a pet parent should create a pet trust for their furry children. A pet parent can designate custody of their furry children, specify wellness standards, such as diet, veterinary care, recreational activities, and grooming, and name the trustee, whether that be the person designated to take custody or a third-party.[104] However, the limits of what exactly is permissible in any given pet trust depends on the jurisdiction the instrument is created in.

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[95] *Id.*

[96] *Id.*

[97] *Id.* § 408(b).

[98] *Id.* § 408(c).

[99] *Id.*

[100] *Id.* § 408(b).

[101] *Id.* § 408 cmt.

[102] *Id.*

[103] *See* Margarida Correia, *$61,000 for a parrot? Estate planning for pets*, Bank Inv. Consultant (Mar. 26, 2018, 11:36 AM), https://bic.financial-planning.com/conference/news/animal-attraction-clients-throw-big-money-in-trust-funds-for-their-pets?regconf=1.

[104] *See Pet Trust Primer*, ASPCA, https://www.aspca.org/pet-care/pet-planning/pet-trust-primer (last visited Mar. 12, 2023).

a. Comparative Analysis

Today, all fifty states and the District of Columbia have enacted pet trust statutes allowing pet parents to plan for the care and custody of their furry children in the event a pet parent either becomes physically unable to take care of their children or a pet parent predeceases their children.[105] While every jurisdiction legally recognizes pet trusts, there are variations among the jurisdictions on the type of animals that are legally recognized, the duration the trust can endure, whether offspring and animals in gestation are included, and whether courts have discretionary power to reduce the amount designated to the pet trust.[106] The common theme of the statutes is to explicitly provide that a trust for the care of an animal is a valid enforceable trust, like expressed in the UPC and UTC.[107] Another common theme among the statutes is to specify that trusts for the care of an animal should be liberally construed to presume that the instrument is intended to be an enforceable pet trust, rather than an honorary disposition.[108]

i. Animal v. Domestic or Pet Animal

Terminology plays a big role in determining what species of animals can be encompassed as valid beneficiaries of a pet trust. To illustrate, Delaware is the only jurisdiction that specifically defines an animal in its pet trust statute as "any nonhuman member of the animal kingdom [except] plants and inanimate objects."[109] The UPC provides guidelines for pet trusts defining them as "a trust for the care of a designated domestic or pet animal."[110] This signifies that the jurisdiction's definition of "domestic animal" and "pet animal" serves as a limitation on what species such a trust can be created for. In contrast, the UTC broadly defines pet trusts as a trust "for the care of an animal."[111] While still subject to the jurisdiction's definition of "animal," it is less limiting in that it does not automatically exclude animals that are not typically domesticated or kept as "pets." Only four jurisdictions, Alaska, Hawaii,

[105] *See Pet Trust Laws*, ASPCA, https://www.aspca.org/pet-care/pet-planning/pet-trust-laws (last visited Mar. 12, 2023).

[106] *See id.*

[107] *See* Unif. Prob. Code § 2-907(b) (amended 2010) (stating "a trust for the care of a designated domestic or pet animal is valid"); *see also* Unif. Tr. Code § 408 cmt. (Unif. L. Comm'n 2000) (declaring trusts for the care of an animal are "valid and enforceable").

[108] *See* § 2-907(b).

[109] *See* Del. Code Ann. tit. 12, § 3555(g) (West 2006) (amended 2008).

[110] *See* § 2-907(b).

[111] *See* § 408(a).

North Carolina, and Oklahoma, currently use the UPC language of "domestic or pet animal," rather than the broad use of "animal" from the UTC.[112] The majority of titles from across jurisdictions resemble something along the lines of "Trust for Care of Animal" as in the UTC.[113] Out of these, ten jurisdictions' titles specify trusts for a *pet*, rather than animal broadly.

While no jurisdiction explicitly uses the language "companion animal," these statutes still gesture towards recognition by the legislatures of the bond between pet parent and furry child. The trade-off between using limiting language, such as "pet animal," verses the broad term "animal," is that the word "pet" implies the existence of such a bond between human and animal, while "animal" starts to encompass the species that are more typically still associated with property, such as farm animals. Nonetheless, encompassing a greater number of species helps ensure the validity of such trusts for animals beyond what you may find in a typical household. This also ensures that any individual who desires to dispose of their assets by providing care for an animal is not prevented from doing so, which would interfere with the principle of freedom of disposition.

Lastly, while Idaho does not prohibit the creation of trusts for the care of animals, it is the only jurisdiction that does not specifically address trusts for the care of animals.[114] This demonstrates that the Idaho legislature has not contemplated the importance in recognizing trusts specifically for the care of animals and thus, fails to recognize that animals are more than property. It could be argued that Idaho is the most progressive jurisdiction and can truly encompass any animal, as it states that trusts created for "any purpose" are valid.[115] However, just because Idaho is progressive in the types of trusts it is willing to recognize, it lacks a clear intention in its decision to use broad language having anything to do with its recognition of animals' property status being obsolete. Rather, it seems Idaho has avoided this debate all together by recognizing any purpose trust as valid, making such trusts for the care of an animal valid regardless of property status.

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[112] *See* Alaska Stat. Ann. § 13.12.907(b) (West 1996); Haw. Rev. Stat. Ann. § 554D-408(a) (West 2022) (formally cited as § 560:7-501 (West 2005)); N.C. Gen. Stat. Ann. § 36C-4-408(a) (West 2006); Okla. Stat. Ann. tit. 60, § 199(A) (West 2010).

[113] *See generally* § 408.

[114] *See generally* Idaho Code Ann. § 15-7-601 (West 2005) (amended 2020) (stating that trusts for any purpose are valid).

[115] *See id.* § 15-7-601(1).

ii. Termination

One of the most interesting areas of divergence is in the limitation on duration of a pet trust. Most jurisdictions have set the termination of a pet trust at the death of the last surviving animal covered by the trust, rather than confining the trust to the common law Rule Against Perpetuities.[116] If jurisdictions limited the duration of the pet trust to twenty-one years it could be detrimental to the pet parent's purpose of drafting a pet trust depending on the companion animal they intend to have cared for in the event the pet parent predeceases their child. While we sadly know that the average lifespans of cats and dogs are under the twenty-one-year mark, several other domesticated species' lifespans go well beyond twenty-one years.[117] What does such a limitation on a pet trust's duration do for pet parents of companion horses and various species of reptiles, fish, or birds? Domesticated horses live between twenty-five and thirty years.[118] With horses being such a large animal, requiring more expansive care than a fish or cat, horse parents likely would want to plan for their continued care and maintenance, as well as establish who would take such care and custody of the horse.[119] Because the care of a horse is associated with much higher costs than a cat or dog, a horse parent has a high incentive to designate an adequate amount of money to such a pet trust to ensure the horse's continued standard of care and maintenance.[120] If pet trusts were subject to the Rule Against Perpetuities, pet parents would have to simply hope that the designated caregiver will continue to take care of the companion animal in the manner set out in the trust once the trust would terminate by statute.

One interesting perspective emerging from Massachusetts's pet trust statute is that while pet trusts are subject to the Rule Against Perpetuities, the "lives in being" are measured using the animals

[116] *See* Gray, *supra* note 26.

[117] *See* Carina Salt et al., *Association Between Life Span and Body Condition in Neutered Client-Owned Dogs*, 33 J. Veterinary Internal Med. 89, 96 (2018) (discussing how the average lifespan of a healthy dog is 12–16 years); *see also How long do cats live?*, Blue Cross, https://www.bluecross.org.uk/advice/cat/how-long-do-cats-live (Aug. 4, 2022) (discussing how domestic cats can live up to twenty years).

[118] *See* Draco Graham-Kevan & Suzanne Constance, *Lifespans of fish and other animals*, INJAF, https://injaf.org/the-think-tank/lifespans-of-fish-and-other-animals/ (last visited Apr. 10, 2023).

[119] *See Horse care guidelines*, Humane Soc'y, https://www.humanesociety.org/resources/horse-care-guidelines (last visited Mar. 12, 2023) (discussing how horses consume about twenty pounds of food a day and drink over eight gallons of water daily, need hoof maintenance, veterinary care, exercise, and shelter).

[120] *See* Miles Henry, *The Cost to Own a Horse? Plus 5 cost-saving tips!*, Horse Racing Sense, https://horseracingsense.com/how-much-does-it-cost-to-own-a-horse/ (last visited Apr. 10, 2023) (explaining that the average yearly expense of owning a horse is between $6,000–$7,000).

who are alive at the pet parent's death or when the trust otherwise becomes irrevocable.[121] This is contrary to the common law Rule Against Perpetuities, because it allows the measuring lives to be the beneficiary *animals*, rather than the lives of *humans*.[122] This language of the Massachusetts statute is a curious approach to maintaining the intentions of the Rule Against Perpetuities, ensuring interests will vest in a particular generation, while also recognizing the unique nature of pet trusts, which is that the beneficiaries are animals, not people.

The best language to ensure continued care of an animal for their entire lifespan is to terminate the trust "when no living animal is covered by its terms."[123] Minnesota and Tennessee currently allow for the continuation of a pet trust until either the death of the last surviving animal or ninety years, whichever comes first.[124] Most interesting of all is Washington's statute, which currently terminates the trust either at the death of the last surviving animal or 150 years, whichever comes first.[125] While language that does not limit the trust duration in any way is preferrable, these durations are much more considerate of the lifespan of animals that live longer than twenty-one years. The most noteworthy example is domesticated birds. Becoming a bird parent comes with a lifetime commitment, as the scenario of birds outliving their human parents is very common.[126] Parrots, macaws, cockatoos, and conures can live over 100 years.[127] Because becoming a bird parent is such a large responsibility, a pet trust designating for the care of a bird is crucial to ensure the bird is taken care of for the whole duration of its life.

Another interesting termination provision is found in Virginia's statute, which specifically states that at the termination of the trust, any remaining funds may be used for any "burial or other postdeath (sic) expenditures" of any covered animal of the trust instrument.[128] This implies serious contemplation into effectuating the pet parent's wishes

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[121] *See* Mass. Gen. Laws Ann. ch. 183-210, § 408(h) (West 2012).

[122] *Compare id.* ("[t]he measuring lives shall be those of the beneficiary animals, not human lives"), *with* Restatement (First) of Prop. § 374 cmt. h (Am. L. Inst. 1944) ("[t]he lives which can be used in measuring the permissible period under the rule against perpetuities must be lives of human beings").

[123] *See, e.g.*, Iowa Code Ann. § 633A.2105(2) (West 2005).

[124] *See* Minn. Stat. Ann. § 501C.0408(1) (West 2022); *see also* Tenn. Code Ann. § 35-15-408(a) (West 2013).

[125] *See* Wash. Rev. Code Ann. § 11.98.130 (West 2001) (trust durations are limited to 150 years); Wash. Rev. Code Ann. § 11.118.020 (West 2001) (discussing the validity of animal trusts and how they terminate when no animal covered by the trust is living).

[126] *See Selecting a pet bird*, AVMA, https://www.avma.org/resources/pet-owners/petcare/selecting-pet-bird (last visited Mar. 12, 2023).

[127] *Id.*

[128] *See* Va. Code Ann. § 64.2-726(A) (West 2012).

by recognizing the emotional importance of putting a companion animal to rest. It is surprising that no other jurisdiction specifies that after the event triggering the pet trust termination (the last surviving animal's death), the animal can be properly put to rest using funds from the trust before the remaining funds must be distributed to the settlor or the settlor's successors. It is possible that this is an oddity among the jurisdictions simply because many existing pet trusts already specify the pet parent's wishes regarding burial or cremation within the document, so it does not need specific mention in the governing jurisdiction's statute.

iii. Authority of Court to Reduce Trust Res

Another common theme most jurisdictions adopted from the UPC and UTC is a provision granting courts the authority to reduce the amount designated to the pet trust if the presiding judge determines the amount exceeds what is necessary to fulfill the trust's intended purpose.[129] Currently, only five jurisdictions, California, Colorado, Delaware, Georgia, and Oklahoma, do not contain such a provision in their statute, meaning the court is not allowed to reduce the amount that a pet parent places in trust for the care of their furry children.[130] Not allowing courts to reduce the amount pet parents intend to place in trust for their furry children ensures that their true intent and purpose in creating the pet trust is carried out.

Out of all the jurisdictions that do permit courts to exercise discretion over reducing the trust res, Hawaii is the only jurisdiction that currently offers more specification than just reducing to the amount "necessary" for the intended purpose.[131] Hawaii's pet trust statute states that a court can only reduce the trust res after a finding that "there will be no substantial adverse impact in the care, maintenance, health, or appearance" of the animal.[132] The question then becomes how much of an inquiry satisfies this requirement and how subjective does the analysis end up being.

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[129] *See* Unif. Prob. Code § 2-907(c)(6) (amended 2010) (allowing court to reduce if amount "substantially exceeds" the amount required); *see also* Unif. Tr. Code § 409(3) (Unif. L. Comm'n 2000); Unif. Tr. Code § 408(c) (Unif. L. Comm'n 2000).

[130] *See generally* Cal. Prob. Code § 15212 (West 2009); Colo. Rev. Stat. Ann. § 15-11-901 (West 1995); Del. Code Ann. tit. 12, § 3555 (West 2006) (amended 2008); Ga. Code Ann. § 53-12-28 (West 2010); Okla. Stat. Ann. tit. 60, § 199 (West 2010).

[131] *See generally* Haw. Rev. Stat. Ann. § 554D-408 (West 2022).

[132] *Id.* § 554D-408(b)(5).

b. Who are Pet Trusts For?

Except for pet parents who are using a Pet Protection Agreement solely to establish custody of their pet in the event of their incapacitation or death, pet trusts are largely a tool for the middle to upper classes, because a trust requires money.[133] One estate-planning attorney in San Francisco estimated the average amount of money pet parents put into pet trusts is about $15,000 to $20,000.[134] And $20,000 is a modest amount considering the average annual costs of having dog or cat furry children. The American Society for the Prevention of Cruelty to Animals [hereinafter ASPCA] estimated the average annual cost for the care of a dog in 2021 was $835.00.[135] If you add the cost of more optional care, such as pet insurance, professional grooming, and dental exams, that number gets up to $2,151.00.[136] These figures do not account for needing new accessories, like harnesses or beds, or for needing new medications for developed conditions. God forbid your furry child needs more than routine veterinary care, like seeing a specialist, going to emergency for illnesses or accidents, or needing surgery for injury. An illness or injury can easily double the annual amount spent on your furry child. Likewise, failing to keep up on dental exams can have the effect of skyrocketing the cost of a dental exam due to needed extractions.

The main reason pet trusts are currently only utilized as a tool for the wealthy is because younger generations, which are more likely to consider their furry children as family, have not begun thinking about estate planning yet, as they do not have the kind of assets to signal the need to place assets in trust during their life. Additionally, because the care of an animal is not cheap, only the upper-class can fully utilize pet trusts and ensure their pets are taken care of exactly as desired *after* the pet parent's life. As discussed earlier, pet insurance is not exactly cheap either and is likely only a tool for the middle to upper-class. Pet parents

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[133] *See* Rachel Hirschfeld, Esq., *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, 19 NAEPC J. Est. & Tax Plan., 1, 11 (2014) (explaining that the Hirschfeld Pet Protection Agreement,™ created by Rachel Hirschfeld, does not require an attorney to execute the document, but rather, is a legally binding agreement between the pet parent and the person named to take custody and care of the furry child).

[134] *See Pet Trust Funds*, Pet Ins., https://www.petinsurance.com/healthzone/ownership-adoption/pet-ownership/pet-owner-topics/pet-trust-funds/ (last visited Mar. 12, 2023).

[135] *See Cutting Pet Care Costs*, ASPCA, https://www.aspca.org/pet-care/general-pet-care/cutting-pet-care-costs (2021) (showing the average annual cost of dog food at $300.00, routine medical costs at $225.00, preventative medications at $185.00, toys at $37.00, treats at $60.00, and grooming supplies at $28.00).

[136] *See id.* (finding the average annual cost of pet insurance at $516.00, professional grooming at $300.00, and dental exams at $500.00).

that can afford pet insurance are only able to ensure their furry children are taken care of *during* the pet parents' lives. In contrast, pet parents that cannot afford pet insurance are still opting for economic euthanasia, not being able to afford anything other than routine vet care.[137] Surely, a pet parent who struggles to provide necessities for their furry children during their lifetime will never even contemplate a pet trust.

Moreover, while Baby Boomers and Gen X pet parents are more likely to have an estate plan in place because of age, the younger generation pet parents are the ones spending more money on their furry children.[138] As of 2021, Millennials make up the largest percentage of pet parents.[139] In addition to opting for more veterinary care, younger generations are selecting the best food, harnesses, grooming, etc. to provide the best lives for their furry children. Younger generations are spending in ways the older generations never would have dreamed of: organic food, supplements, safety tested harnesses, crash tested carriers and seatbelts, regular grooming services, monthly toy and treat subscription boxes, doggy day care facilities, pet cameras, and dog walking services, to name a few.

Thus, while the younger generation pet parents might not be considering estate plans yet as they still are settling into their careers and accumulating assets, this will be a common question in the near future. I predict that the use of pet trusts will grow exponentially as Millennials and Gen Z pet parents begin seriously thinking about estate planning.

c. Downfalls to Pet Trusts

While the law in every jurisdiction *allows* for the creation of a pet trust, this does not mean that the jurisdiction will *support* the actual

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[137] *See* Celia Miller, *Animal Euthanasia Statistics*, Spots, https://spots.com/animal-euthanasia-statistics/ (Oct. 2, 2021) (finding that over 500,000 animals are euthanized each year as a result of lack of funds); *see also The Sad Truth: Financial Euthanasia On The Rise*, iCare Fin., https://www.icarefinancialcorp.com/news/the-sad-truth-financial-euthanasia-on-the-rise (last visited Apr. 13, 2023) (noting that two out of every three pets are euthanized solely due to financial reasons every single week).

[138] *See* Robert Kulas, *Baby Boomers Aren't Creating Estate Plans – What That Means for You*, Kulas & Crawford (Apr. 30, 2020), https://www.kulaslaw.com/baby-boomers-arent-creating-estate-plans-what-that-means-for-you/ (highlighting that only one in five persons between 18–34 years old have an estate plan compared with 66% of those over 65 years old).

[139] *See Pet Industry Market Size, Trends & Ownership Statistics*, Am. Pet Prods. Ass'n (Mar. 24, 2021), https://www.americanpetproducts.org/press_industrytrends.asp (explaining that Millennials make up 31% of pet parents compared with 24% for Gen X and 27% for Baby Boomers).

pet trust. One of the biggest hurdles in the law of pet trusts is the pet parent's wishes not being respected by both contestants to the trust instruments and the courts. Jurisdictions granting courts the discretion to determine what amount placed in trust for the care of a furry child is "excessive" allows a presiding judge to override the wishes of a pet parent and decide what she *believes* is necessary to carry out the intended purpose. If this Nation prioritizes the freedom of disposition and allows people to dispose of their property in any manner that does not violate public policy, why is a court's opinion on whether an amount of money designated for the care of a beloved furry child is excessive given any consideration at all?

The best way to combat this current discretion is to provide for the remainder of the trust res within the pet trust instrument. This is because any amount that the court deems excessive will pass in the same manner as any remaining trust property would pass upon the trust termination.[140] The majority of statutes list the order that such property shall be passed in accordance with, all stating "as directed in the terms of the trust."[141] If the terms of the trust do not explicitly provide for what is to be done with the remaining trust property, any remainder passes to the settlor, if he or she is still living, or if the instrument was created by a will, then it passes under the residuary clause of the will.[142] However, in the event that the instrument was not created by a will or there are no takers, the remaining property then passes to the settlor's heirs.[143] Thus, there is a good chance that the trust property could go to someone other than the pet parent intended or would have wanted that portion of their estate to go to. An easy way to avoid this is by expressly designating a remainder beneficiary in the pet trust, pet parents can take back some of the control over their disposition to ensure the trust property passes in accordance with their wishes, such as designating the caretaker of their furry child as the remainder beneficiary or an organization having interest in the welfare of the furry child.

There is no scenario where a judge should have the discretion to reduce a pet trust's res absent a mistake or unforeseen circumstance by the pet parent at the time of drafting. Granting courts the ability to reduce a pet trust's res goes against effectuating the deceased pet parent's intent. Whether someone thinks an amount is excessive should not matter, because the UPC and UTC already account for structured

[140] *See, e.g.*, Mich. Comp. Laws Ann. § 700.2722(3)(f) (West 2010) (discussing how if the court reduces the trust res, it will pass the same way the remaining property would pass upon the trust's termination).

[141] *See id.* § 700.2722(3)(b)(i).

[142] *See id.* § 700.2722(3)(b)(ii)-(iii).

[143] *See id.* § 700.2722(3)(b)(iv).

ways of distributing any residue left after termination of the pet trust.[144] Thus, there is no reason to contradict the intent of the pet parent by reducing the trust res before its termination and potentially disrupting the animal's care.

VI. Medical Treatment

a. Pet Insurance

Pet insurance is exactly what you think it is: health insurance for furry children. Pet parents who pay for pet insurance get reimbursed for significant portions of veterinary bills from a wide range of services including wellness checks, illnesses, and injuries.[145] Pet insurance makes treatment more affordable, allowing pet parents to be able to opt for more procedures they otherwise would not be able to afford for their furry children. Pet insurance has many similarities to human health insurance: annual premiums and deductibles, different levels of coverage to choose from, waiting periods, claim centers, and caps on amounts the insurance company will pay out.[146] A pet parent can choose a basic coverage plan, with low reimbursement and coverage for only some injuries and illnesses; a comprehensive coverage plan, with more reimbursement for accidents or illnesses; or a plan offering the most coverage, with exam fees, preventative care, and majority of vet visits covered.[147]

The North American Pet Health Insurance Association reported that an estimated 3.1 million companion animals were insured by one of the many providers of pet insurance in the United States at the end of 2020, accounting for 89.8% of the total number of insured companion animals in all of North America.[148] The number of insured companion animals in the U.S. had a growth rate of 23.2% from 2019 to 2020, further demonstrating how more and more pet parents are beginning to prioritize the health of their furry children by beginning to utilize health insurance.[149] Because of the increase in those insured, the amount being

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[144] *See* Unif. Prob. Code § 2-907(2) (amended 2010) (discussing how at termination the property should be transferred in accordance with the trust instrument, or if not specified, in accordance with the will, or if there is no taker or no one specified, to the pet parent's heirs); *see also* Unif. Tr. Code § 408 cmt. (Unif. L. Comm'n 2000).

[145] *See Facts about pet insurance,* Ins. Info. Inst., https://www.iii.org/article/facts-about-pet-insurance (last visited Mar. 12, 2023).

[146] *Id.*

[147] *Id.*

[148] *See Total Pets Insured, Pet Insurance in North America*, N. Am. Pet Health Ins. Ass'n, (May 4, 2021), https://naphia.org/industry-data/section-2-total-pets-insured/.

[149] *Id.*

spent on pet insurance has also increased, as the total amount spent on pet insurance premiums in 2020 was 1.99 billion dollars, which is a 27.5% increase from 2019.[150] The monthly cost of pet insurance varies depending on the selected coverage plan and the animals' species, age, and health profile.[151]

i. Drawbacks: Cost and Scope

Just like human insurance, the longer you wait to get insurance for your furry child, the more expensive the coverage will be. Additionally, the longer you wait, the greater the risk of your furry child developing any kind of condition that pet insurance companies will then categorize as a pre-existing condition and will not cover any treatment associated with the condition.[152] Realistically not every pet parent can afford the annual cost and deductible as the yearly average is $516.00 for dogs and $348.00 for cats.[153]

While pet insurance is a phenomenal service and helps increase the lifespan of our furry children by making unforeseen accidents and illnesses more affordable, this tool does not account for the event where the pet parent predeceases their furry child.

b. Duty to Provide Care v. Duty to Provide Treatment

In recent years, criminal statutes have imposed a duty on "owners" of animals to provide a minimum level of care to such animals.[154] The rationale for imposing this duty is that animals under the care of a human are otherwise unable to properly care for themselves.[155] However, the majority of Americans have not agreed on whether this duty extends to requiring a human to provide veterinary care for the animal.[156]

The case *People v. Arroyo* is illustrative of the view held by many courts that there is no duty to provide medical care.[157] Here, an "owner" of a dog was charged under the state's anti-cruelty statute for failing to provide the terminally ill dog with medical treatment.[158] The anti-cruelty

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[150] *See Gross Written Premium*, *Pet Insurance in North America*, N. Am. Pet Health Ins. Ass'n, (May 4, 2021), https://naphia.org/industry-data/section-1-gross-written-premium/.

[151] *See Facts about pet insurance*, *supra* note 145.

[152] *Id.*

[153] *See Cutting Pet Care Costs*, *supra* note 135.

[154] *See* Favre, *supra* note 33, at 243.

[155] *See id.*

[156] *See id.* at 257.

[157] *See generally* People v. Arroyo, 3 Misc. 3d 668 (N.Y. Crim. Ct. 2004).

[158] *See id.* at 669–70 (detailing how an investigator of the ASPCA responded

statute criminalized a person for "depriv[ing] any animal of necessary sustenance" that resulted in "unjustifiable physical pain."[159] The "owner" challenged this language as too vague to provide adequate notice that owners must provide medical treatment to terminally ill animals.[160] The court held that the anti-cruelty statute was unconstitutionally vague and did not give notice to a person of ordinary intelligence that an "owner" of a terminally ill animal is obligated to provide medical treatment.[161] In reaching this conclusion, the court explained that reading the statute as "an affirmative duty to provide medical care in all cases, regardless of the expenses or the owner's ability to meet them, implies a standard of morality and decency that the court is not persuaded society has adopted."[162]

It is important to note that this case only found the current provision of the state's anti-cruelty law as vague, not that the legislature could not enact a provision that appropriately put "owners" on notice of the duty to provide medical care, stating:

> If we, as a society, have arrived at the point where we feel that the provision of medical care to alleviate or avoid pain and suffering is a duty undertaken by pet [parents] toward their [furry children,] and that failure to fulfill this duty should be a crime, it is incumbent upon our legislature to enact a provision that clearly sets the standard for—and gives notice of—the proscribed conduct.[163]

Other courts have found a duty to provide medical treatment within the scope of anti-cruelty provisions.[164] Additionally, some jurisdictions specifically state that failure to provide an animal with "necessary veterinary care" constitutes abuse or neglect of an animal.[165]

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to an amanous call concerned about a dog, observed the dog behind a fence having trouble walking due to a large bleeding tumor on its stomach).

[159] *Id.* at 671; *see also* N.Y. Agric. & Mkts. Law § 353 (McKinney 2005) (provision for failure to provide proper sustenance); *see also* N.Y. Agric. & Mkts. Law § 350(2) (McKinney 1999) (defining cruelty as "every act, omission, or neglect, whereby unjustifiable physical pain, suffering or death is caused or permitted").

[160] *See Arroyo*, 3 Misc. 3d at 670.

[161] *See id.* at 680.

[162] *Id.* at 678.

[163] *See id*. at 680.

[164] *See, e.g.*, People v. Sanchez, 94 Cal. App. 4th 622, 634, 636 (2001) (finding a dog "owner's" failure to provide medical treatment to a severely wounded puppy as a "form of continuing neglect…much like failing to provide adequate food, water, and shelter").

[165] *See, e.g.*, M.D. Code Ann., Crim. Law § 10-604(a)(5)(ii) (West 2019)

The biggest hurdle of imposing such a duty to provide medical care across all jurisdictions is the consideration of what pet parents can actually afford. As previously mentioned, if a pet parent does not have pet insurance for their furry child, the ability to pay for medical treatment is significantly impacted. While I would argue that if you cannot afford "necessary veterinary care," you should not have a furry child, pet parents not being able to afford recommended or even necessary medical procedures is not uncommon.[166]

Our society recognizes that pain and suffering of animals is bad, as evident by the adoption of anti-cruelty statutes in all 50 states.[167] However, we currently do not impose a duty of veterinary care because of this cost obstacle. While some courts are worried about the policy implications of imposing such a duty and what the scope would be, such views fail to recognize that the legislature can easily set minimum standards of care.[168] Additionally, courts have demonstrated a deferral to the legislature regarding our treatment of animals in our society by justifying the courts' inaction as actual restraint, with language like "the court will not substitute its own *sensibilities* for those of the legislature and is *constrained* to find that a pet owner may not be prosecuted…for failing to provide an ill pet with medical care."[169] This kind of statement by a court clearly demonstrates a recognition of the need for policy reform, but a fear to speak out against existing law. Nonetheless, as recognition of animals as living beings rather than "things" increases, hopefully it will open the door to more jurisdictions recognizing that some level of duty to provide veterinary care must be imposed to adequately protect domesticated animals.

(prohibiting a person who has "charge or custody of an animal" from failing to provide the animal with "necessary veterinary care").

[166] *See, e.g.*, AJ Horch, *Most Americans own a pet, but not the insurance 1 in 3 faithful companions will need*, CNBC, https://www.cnbc.com/2019/06/20/most-americans-own-a-pet-but-cant-afford-to-pay-their-medical-bills.html (June 25, 2019, 10:49 AM) (detailing the findings of a 2018 Report on the Economic Well-being of U.S. Households, which found that when faced with an unexpected visit to the veterinarian costing just $400.00, 27% of pet parents would have to borrow or sell something and 12% would not be able to cover the expense at all).

[167] *See Laws that Protect Animals*, ALDF, https://aldf.org/article/laws-that-protect-animals/ (last visited Mar. 12, 2023).

[168] *See, e.g.*, *Arroyo*, 3 Misc. 3d at 679–80 (posing the question of whether regular veterinary care would be sufficient when more sophisticated, expensive treatment options are available like chemotherapy).

[169] *Id.* (emphasis added).

VII. Pet Custody Battles

What happens to companion animals when their pet parents go separate ways? While people who are not pet parents might scoff at the idea of fighting over a companion animal, decisions on the custody of a furry child in the event of a separation can be a very emotional ordeal, especially when the pet parents do not agree on what is best for their furry child. In contrast to what would be a custody dispute if a human child was involved, a dispute over the custody of a furry child is merely a property dispute in the eyes of the law.

Because of animals' status as property, courts traditionally have viewed disputes over an animal as an economic analysis, focusing on who had a better claim to title of the property.[170] Courts have struggled to see the commonality between human child custody disputes versus furry children custody disputes, claiming that "the wholesale application of the practices and principles associated with child custody cases to dog custody cases is unworkable and unwarranted."[171] However, there has been a push for courts to consider the intrinsic value of an animal, rather than just its market value.[172]

a. Current Legislation

Alaska was the first jurisdiction to enact a provision explicitly taking the well-being of the animal into consideration in pet custody disputes arising from divorce actions.[173] However, the language of this provision is unclear as to whether this consideration is mandatory or suggestive, and the Alaska court has not answered this question.[174] If the consideration is merely suggestive, courts are granted the discretion to ignore the clear intention of the legislature to consider what is best for

[170] *See, e.g.*, Travis v. Murray, 42 Misc. 3d 447, 453 (N.Y. Sup. Ct. 2013) ("it is the property rights of the litigants, rather than their respective abilities to care for the dog or their emotional ties to it, that are ultimately determinative" of who is awarded ownership and possession of dog in custody dispute).

[171] *Id.* at 459.

[172] *See Urging the Court to Consider Animals' Value*, ALDF, https://aldf.org/case/urging-the-court-to-consider-animals-value/ (last visited Mar. 12, 2023) (discussing how ALDF filed an amicus brief in a malpractice suit over the death of a companion animal where the trial court limited the pet parent's damages to market value and ALDF urged for the appeals court to consider its intrinsic value); *see also* Sherman v. Kissinger, 195 P.3d 539 (Wash. Ct. App. 2008).

[173] *See* Alaska Stat. Ann. § 25.24.160(a)(5) (West 2017) ("if an animal is owned, for the ownership or joint ownership of the animal, taking into consideration the well-being of the animal").

[174] *Id.*; *see also* Rachael Bouwma, *How to Apply the "Best Interest of the Pet" Standard in Divorce Proceedings in Accordance with Newly Enacted Laws*, Animal Legal & Hist. Ctr., 2019, at 14–15.

the animal and focus instead on simply who paid the expenses and has a stronger claim to title of the animal.

Illinois was the second jurisdiction to enact a provision in the law considering the well-being of the animal in the disposition of property in divorce actions.[175] This provision states that "[i]f the court finds that a companion animal of the parties is a marital asset…the court shall take into consideration the well-being of the companion animal."[176] Here, the legislature intentionally uses the term "companion animal," rather than animal, signaling a recognition of the bond between pet parents and their furry children. Additionally, unlike the Alaska provision's uncertainty as to whether such a consideration is mandatory, the Illinois's provision is clearly mandatory with the use of the language "shall."[177] Not allowing courts the discretion to use the well-being analysis is another signal by this legislature that the jurisdiction of Illinois legally recognizes the bond between pet parent and furry child.

California was the third jurisdiction to enact a similar provision stating that the court "may assign sole or joint ownership of a pet animal taking into consideration the care of the pet animal."[178] This jurisdiction uses the term "pet animal" defined as "any animal that is community property and kept as a household pet."[179] By including the term "may" take the care of the pet animal into consideration, the legislature failed to make this consideration mandatory.[180] Additionally, the provision discusses the court's ability to consider the "care of the pet animal" not the actual well-being.[181] Care is defined as "the prevention of acts of harm or cruelty…and the provision of food, water, veterinary care, and safe and protected shelter."[182] This signals the legislature's focus on basic necessities and a minimum standard of care rather than any intention to recognize the actual bond between a pet parent and furry child. Thus, this jurisdiction's statute does not provide any progress in recognizing animals as more than mere property.

Most recently, New York Governor Kathy Houchul, signed a bill into law known as the "pet custody bill."[183] Now codified in New York's domestic relations law, the provision states that "in awarding

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[175] *See* 750 Ill. Comp. Stat. Ann. § 5/503(n) (West 2019).

[176] *Id.*

[177] *Id.*

[178] Cal. Fam. Code § 2605(b) (West 2019).

[179] *Id.* § 2605(c)(2).

[180] *Id.* § 2605(b).

[181] *Id.*

[182] *Id.* § 2605(c)(1).

[183] Pheben Kassahun, *Gov. Hochul signs "pet custody" bill into law, goes into effect immediately*, WKBW, https://www.wkbw.com/news/state-news/gov-hochul-signs-pet-custody-bill-into-law-goes-into-effect-immediately (Nov. 1, 2021, 11:26 PM); *see also* N.Y. A.B. 5775, 244th Leg. (N.Y. 2021).

the possession of a companion animal, the court shall consider the best interests of such animal."[184] This provision is analogous to the Illinois statute, both using the terms "companion animal" and "shall."[185] By signing this bill into law, New York has also legally recognized the emotional bond between a pet parent and furry child.

While these are the only jurisdictions with explicit references in their laws to considering more than the economic value of furry children in pet custody disputes, several courts are now beginning to use a "best for all concerned" approach, considering which pet parent can provide the better opportunity for their furry child to live, prosper, love, and be loved.[186] Courts that utilize a "best for all concerned" approach are demonstrating a recognition of how important furry children are to their pet parents, and in turn, the courts are seeing the animals as important and taking the issue seriously.

b. Why Family Court Has Been Slow to Recognize this Bond

Why has American trust law been able to universally recognize the validity of estate planning for our furry children, but family law has been unable to universally recognize the validity of pet custody disputes? Recognizing the validity of pet trusts involves following the rationale of long-standing jurisprudence in prioritizing the freedom of disposition and allowing for persons to dispose of their property in the way they see fit.[187] In contrast, recognizing the validity of pet custody disputes as a separate dispute from the division of other personal property in a divorce proceeding, like a couch or table, requires recognizing animals as more than mere property and straying away from long-standing jurisprudence categorizing animals as such.

Another reason pet trusts have been so successful is because pet trusts are private agreements. If the pet trust is created during life, rather than by a will, probate is entirely avoided, and therefore, likely will never become tied up in a court.[188] Recognizing the validity of pet parents disposing of their estates by ensuring for the continued care of their furry children does not involve any kind of dispute over the animals. Even when pet trusts are challenged, the disputes focus on the validity of the testamentary instrument, or the alleged excessiveness of the amount placed in trust. No analysis into the well-being of the animal or its property status is required. In contrast, pet custody disputes

[184] N.Y. Dom. Rel. Law § 236(B)(5)(d)(15) (McKinney 2021).

[185] *Id.*; *see also* 750 Ill. Comp. Stat. Ann. § 5/503(n) (West 2019).

[186] *See* Raymond v. Lachmann, 264 A.D.2d 340, 341(N.Y. App. Div. 1999); *see also* Travis v. Murray, 42 Misc. 3d 447, 460 (N.Y. Sup. Ct. 2013).

[187] *See* Sitkoff & Dukeminier, *supra* note 4.

[188] *Id.* at 40.

inherently arise as a property dispute because of animals' categorization as personal property. Because animals are categorized the same as inanimate objects, these disputes have traditionally been lumped in with the division of all other marital property. Changing the analysis from who paid for the animal to what would be best for the well-being of the animal requires a recognition of animals as something more than mere property.

Additionally, an analysis into the well-being of an animal requires a very subjective inquiry into what a particular presiding judge believes is best for the well-being of an animal in each pet custody dispute. Out of the few jurisdictions that do specify the consideration of the well-being of animals in determining custody of furry children, none of these laws currently detail what exactly can or should be considered to determine what is in the best interest of the animal's well-being. In contrast, the only subjective inquiry involved with pet trusts is in jurisdictions where courts retain the discretion to reduce the amount placed in trust.[189]

Another difference is the lack of competing interests in pet trusts. Pet trusts only involve the pet parent, the pet parent's furry child, and the person the pet parent designates as the caregiver of the furry child. Opposition to these trusts only comes from persons not included in this agreement. On the other hand, pet custody disputes involve competing interests of each pet parent, each wanting to retain custody of the same furry child. Pet custody disputes involve declaring a "winner" and a "loser" rather than just carrying out the clear wishes of a pet parent.

However, because all fifty states and the District of Columbia have been able to universally recognize the validity of pet trusts and pet parents planning for the continued care of their furry children, all jurisdictions should now more easily be able to recognize the validity of pet custody disputes as a separate property division from other personal property. While this area of law has been slow to evolve due to the entwinement with animals' property status, recent enactments in the aforementioned jurisdictions demonstrate that legislatures are starting to contemplate and recognize this change in attitude towards our animals.

VIII. Harm to our Furry Children

Historically, there has been little redress for animal "owners" through the courts for any harm to their animals. This is because in traditional law, animals were seen as objects to be possessed and for

[189] *See, e.g.,* Unif. Prob. Code § 2-907(6) (amended 2010); Unif. Tr. Code § 409(3) (Unif. L. Comm'n 2000); *see also* Unif. Tr. Code § 408(c) (Unif. L. Comm'n 2000).

humans to exert ownership over.[190] Thus, when an "owned" animal was wounded or killed, the "owner" would sue for damages to his personal property.[191]

Before modern society, animals were kept solely for economic value, rather than any emotional value that comes to mind today. Thus, courts traditionally rejected awarding any damages other than fair market value of the animal.[192] For example, in negligence suits over the death of one's furry child, courts have rejected jury instructions allowing for the consideration of a value in addition to fair market value.[193] Thus, courts viewed the death of one's furry child like an object with a price tag, rather than a living being that was part of that pet parent's family. Additionally, companion animals that are older, have health conditions, or are from shelters, have little to no market value. In recognizing this, courts began to substitute market value for replacement value, which still failed to consider any emotional or companionship value.[194] This view, while conscious of cases where furry children do not have economic value, still exclusively focused on treating the animal as a "thing" by allowing damages to include the cost of replacement, as if the animal was a vase that shattered.

a. Infliction of Emotional Distress

Even today, where American households having "pets" is very common and many consider those animals their companions and furry children, the law has been reluctant to accept the distinction of animals being more than mere property. For example, many courts have barred pet parents from pursuing claims of intentional infliction of emotional distress from witnessing their furry children get killed, simply because the furry child was not related to the pet parent like a "spouse, parent, child, sibling, grandparent, or grandchild."[195] Even though courts recognize the merit of such claims, courts have cowered away from

[190] *See* Pierson v. Post, 3 Cai. R. 175, 179 (N.Y. Sup. Ct. 1805) (holding that mere pursuit is not sufficient to establish ownership of an animal).

[191] *See Personal Property*, Black's Law Dictionary (11th ed. 2019) ("Any movable or intangible *thing* that is subject to ownership and not classified as real property") (emphasis added); *see also Chattel*, Black's Law Dictionary (11th ed. 2019).

[192] *See Fair Market Value*, Black's Law Dictionary (11th ed. 2019) (defining fair market value as the "price that a seller is willing to accept, and a buyer is willing to pay on the open market").

[193] *See, e.g.*, Dillion v. O'Connor, 412 P.2d 126, 128 (Wash. 1966).

[194] *See* Mitchell v. Heinrichs, 27 P.3d 309, 312–13 (Alaska 2001) (holding that reasonable replacement costs include the cost of purchasing a new dog of the same breed, immunization, spay or neuter, and any comparable training).

[195] *See* Rabideau v. City of Racine, 627 N.W.2d 795, 801 (Wis. 2001).

allowing them simply because it would entail answering questions about who exactly can sue and what animals can be included.[196]

Courts feel bound to rule against pet parents in claims of clear loss of companionship solely because of animals' categorization as property. Courts effectively place blame on the law and our Nation's history in treatment of animals to justify denying damages for pet parents' pain and suffering from the loss of their furry child. For example, in 2013, the Supreme Court of Texas denied pet parents from seeking non-economic damages for the loss of companionship caused when an animal shelter negligently euthanized their furry child.[197] The court stressed how furry children are "treated—and treasured—not as mere personal property but as beloved friends and confidants, even family members."[198] However, the court then recited precedent of a 1891 case expressly recognizing animals' property status.[199] Thus, the court decided to adhere to the 122-year-old precedent in classifying animals as property for tort law purposes, limiting the damages for pet parents to economic damages.[200] In justifying this decision, the court expressed sympathy for pet parents' recovery for emotional harm being barred, but concluded that this is something that would have to be legislated and that the court's hands were tied.[201] Clearly society acknowledges this bond between pet parent and furry child, but the disconnect lies with the lack of change in the law adequately protecting this bond.

b. Malpractice

Our growing love for our companion animals is also evident through the appearance of malpractice suits against veterinarians who harm our furry children. Malpractice suits are different from suing for damage to our personal property, like a claim we would bring for damage to our car. Bringing a malpractice claim is about attempting to obtain justice for our furry children. A claim of malpractice encompasses a much stronger emotional tie than that of an inanimate object that we can replace. However, suing for malpractice is not an easy claim to prevail

[196] *See id.* at 798, 802 (explaining the court's discomfort with the law's characterization of dogs as mere property and that this characterization "fails to describe the value human beings place upon the companion that they enjoy with a dog").

[197] *See* Strickland v. Medlen, 397 S.W.3d 184, 185, 198 (Tex. 2013).

[198] *Id.* at 185.

[199] *See id.* (citing Heiligmann v. Rose, 16 S.W. 931, 932 (Tex. 1891)).

[200] *See id.* at 185 ("We reaffirm our long-settled rule, which tracks the overwhelming weight of authority nationally….").

[201] *See id.* at 198 (noting that "limiting recovery to market (or actual) value seems incommensurate with the emotional harm suffered, but pet-death actions compensating for such harm…can certainly be legislated").

on. For a pet parent to recover damages for injury to their furry children based on malpractice, experts must testify to whether the standard of care the veterinarian used in treating the animal was of the average reasonably prudent veterinarian.[202] Then, the court must assess what kind of damages a pet parent can recover. Typically, such recoveries are again limited to any economic value of the animal and possibly veterinary bills. Some courts have rejected juries' awards of damages for pain and suffering and claim that such damages are "vindictive."[203]

Some scholars argue against the wishes of pet parents and believe that allowing for the recovery of non-economic damages will result in higher costs for veterinarians' malpractice insurance and thus, veterinarians will increase the cost of their services, placing this burden on pet parents.[204] Other scholars argue that because substantial non-economic damage awards have been traditionally barred in veterinary malpractice claims, suddenly allowing them would result in substantial increases in the number of claims and the awarded damages.[205] This suggests that more claims would be filed simply because of knowledge of the potential financial award. This logic is flawed as it implies that there are many pet parents out there who have not pursued litigation only because the payout was too low while dismissing just how expensive and cumbersome litigation can be.

This very debate demonstrates that part of the obstacle to making progress in the law towards more remedies for harm to animals is due to how people differ drastically in how they feel about animals. Only humans who identify as pet parents would consider pursuing claims for emotional distress and want broader remedies available for harm to their furry children. Humans that have not developed this same bond with their animals, and therefore, would not identify as pet parents, are more likely to only pursue traditional property claims, seeing their animals for their economic rather than emotional value.

c. Increasing Available Remedies

Just as pet custody disputes involve what has traditionally been a property dispute, claims involving harm to furry children have also traditionally involved a property dispute, in that they have involved

[202] *See* Favre, *supra* note 33, at 138.

[203] *See, e.g.,* Carroll v. Rock, 469 S.E.2d 391, 393 (Ga. Ct. App.).

[204] *See* Mary Margaret McEachern Nunalee & G. Robert Weedon, *Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine*, 10 Animal L. 125, 159–60 (2004).

[205] *See, e.g.*, Gerald L. Eichinger, *Veterinary Medicine: External Pressures on an Insular Profession and How Those Pressures Threaten to Change Current Malpractice Jurisdiction*, 67 Mont. L. Rev. 231, 253 (2006).

claims for damage to property. Thus, both areas of the law have a long history of focusing on the economic value of the animal, looking at the dispute through a property lens. Recognizing the validity of remedies outside of traditional property damage requires a recognition of animals as more than property. However, where changes in laws for pet custody disputes only involve introducing a consideration of the animals' well-being, changes in laws increasing the available remedies for pet parents to pursue following harm to their furry children requires a complete change in the law. For example, recognizing the bond between pet parent and furry child and acknowledging the real loss and grief that is suffered following harm to furry children would lead to allowing claims of emotional distress and loss of companionship, both of which have been routinely denied by courts.

IX. Property Status

The main reason for the cumbersome change in the law for animals is because of the continued designation of animals as property. The classification of animals as property continues to make them comparable to inanimate objects rather than living beings. Some animal rights activists believe the solution is the complete abolition of the property status of animals. We have justified animals' pain and suffering whenever there is a human "benefit" that can be derived from the animals' use.[206] The idea behind removal of animals' property status is that if we no longer consider animals as "things" but as beings with their own interests and rights to physical security, society will no longer be able to justify "the institutionalized exploitation of animals for food, experiments, clothing, or entertainment."[207]

There is a lot of criticism towards the abolitionist approach because there is little discussion on what removal of the property status would mean for animals going forward. There are many benefits to the property status that are often overlooked. The most important benefit being that the property status of an animal attaches with it a human "owner" who is responsible for that animal's care.[208] "Ownership" of an animal comes with a duty of care imposed by the state, through the use of criminal penalties.[209] The most common example is the duty to provide adequate food, water, and shelter, which if an "owner" fails to

[206] *See* Gary L. Francione, *Animal Rights Theory and Utilitarianism: Relative Normative Guidance*, 3 Animal L. 75 (1997).

[207] *Id.*

[208] *See* David S. Favre, Respecting Animals: A Balanced Approach to our Relationship with Pets, Food, and Wildlife 61 (2018).

[209] *Id.*

do so, can be found guilty of a felony.[210] Therefore, some activists argue that the solution is not in eliminating the property status altogether, but in the adoption of a new category of property, called living property.[211] Proponents of the living property model argue that the problem is not animals' categorization as property, but rather, the disrespectful use of animals.[212] The concept of living property also acknowledges a legally enforceable duty on humans to take care of such living property. However, the full extent of that duty is unclear, as it is limited to current anti-cruelty laws and other existing protections for animals.[213] The living property model also overlooks the variety of ways to impose a duty of care on someone who has taken in an animal and assumed responsibility for its care without needing to designate these living beings as *any* kind of property. For example, we impose duties of care on parents for their human children without neither considering human children as property nor parents as owners.

X. Conclusion

Companion animals in the United States are considered true members of the family. Pet parents are spending more on their furry children than ever before: opting for healthier food, increased mental and physical stimulation, and better veterinary care. The property status of companion animals is an outdated, irreflective notion considering how we treat them in various areas of the law. Estate planning has found ways around the invalidation of gifts to animals by allowing pet parents to plan for the continued care of their furry children in the event they predecease them through use of a pet trust. Insurance companies now insure animals in addition to humans and their property. Divorce proceedings, which traditionally have focused on the division of property, now involve disputes over the custody of our furry children. Malpractice suits are no longer just for seeking justice for human victims, but also encompass holding veterinarians accountable for malpractice and negligence involving our furry children.

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[210] *See, e.g.*, Conn. Gen. Stat. Ann. § 53-247(a) (West 2016) (noting that a person having charge or custody of an animal who "fails to provide it with proper food, drink or protection from the weather" commits a felony).

[211] *See generally* David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 Marq. L. Rev. 1021 (2010); *id.* at 1043 (attempting to define this new category of property, called living property, by describing it as encompassing the living beings that are "knowingly possessed by a human (or human substitute such as a city or corporation) with an intention to exclude others").

[212] *See* Favre, *supra* note 208.

[213] *See* Favre, *supra* note 211 (noting that the full extent of such duties are outside the scope of the article, so the article instead "seeks to establish that there is a duty, and that this duty is owed to the animal").

While eliminating the property status of companion animals will not automatically increase legal protections for such animals, reflecting current social attitudes will help perpetuate further change in animal law. Legally recognizing animals as more than mere property would delegitimize granting courts discretion to reduce the amount placed in trust by a pet parent for the continued care of a furry child. Additionally, recognition of the animals' interests and well-being in disputes over the custody of furry children would be required. Most notably, the excuse of the courts for not allowing pet parents to pursue adequate remedies for harm to their furry children would be eliminated. Recognizing that societal attitudes towards companion animals have changed drastically since animals' initial categorization as personal property renders such status obsolete.