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International Water Rights: A Tale of Two Rivers

Chris Richards*

I. Introduction

Water is the lifeblood of civilization. Human civilization has relied on the presence of fresh water since the Ubaids established the first agrarian societies at the meeting point of the Tigris and Euphrates rivers, located in modern day Iraq, around 5,000 BCE.[1] The confluence of the Tigris and Euphrates provided fertile land where early humans were able to emerge from their previously nomadic lifestyles. For the first time, people could support themselves and others at a single location without needing to follow food sources.

Flowing fresh water does not only provide irrigation for agriculture, it provides the sediment which creates fertile farming land, fish as a food source, an easy method of commerce, and sustainable drinking water for a population. Due to the benefits rivers provide, they have been instrumental to populations since the Mesopotamians started the first civilizations. As civilizations have grown, rivers, which once effortlessly provided all that a civilization needed to prosper, have become over-taxed by the societies that they support. In recent years rivers have been dammed, diverted, and polluted to the point that they no longer support development. Two rivers on different sides of the world that are over strained by the populations they once supported are the Colorado River of North America and the Nile River of northeast Africa.

Spanning more than 1,400 miles, the Colorado River is one of the longest rivers in North America and its drainage basin consists of an area over 242,000 square miles in seven U.S. States and 2,000 sq. miles

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[1] Susan Pollock, Ancient Mesopotamia: The Eden That Never Was 2 (1999).

in the Mexican States of North Baja California and Sonora.[2] Due to the Colorado River's size and importance to both the United States and Mexico, it is often described as one of the most controlled and litigated rivers in the world with every drop of water allocated to different needs.[3] Despite the intense management of the Colorado's water, in the spring of 2014 the Colorado River—the river that dug the Grand Canyon—reached the Pacific Ocean for the first time since 1998.[4]

The Nile River, which drains East Africa and fueled the rise of Egyptian Civilization, stretches more than 4,132 miles from Tanzania and Burundi to the Mediterranean Sea in Egypt.[5] The Nile is often regarded as the longest river in the world and its watershed is shared by eleven different nations. The Nile is the lifeblood of east Africa and it is due to the Nile's water that Egyptian civilization has been able to thrive for more than 5,000 years, since 3,200 BCE.[6] With the rise and development of other nations along the Nile, Egypt's control over and right to the river's resources is being called into question for the first time in history.

The Nile and Colorado Rivers exist on different continents, flow different directions, and empty into different Seas. The only relevant similarity is that both rivers encapsulate an international struggle for the water they carry. While the Colorado River is currently the most fought over river in the world due to disputes between the United States and Mexico and between individual U.S. States, the Nile River and growing conflicts between the eleven sovereign states that it flows through could change the way in which rivers are divided forever. By applying the lessons learned through disputes over the Colorado, the international community can help the eleven Nile states to most effectively have their individual interests represented as the best course for the future of the river is argued and decided.

[2] U.S. Bureau of Reclamation, *Hoover Dam Frequently Asked Questions, The Colorado River*, https://perma-archives.org/warc/5KF2-5ZGZ/http://www.usbr.gov/lc/hooverdam/faqs/riverfaq.html (last updated Mar. 12, 2015). The Colorado River Drainage Basin consists of the main branch of the Colorado River and tributaries. Major tributaries include the Green, Gunnison, San Juan, Virgin, Little Colorado, Bill Williams, and Gila rivers.

[3] Southern Nevada Water Authority, *Colorado River Law*, https://perma.cc/MU5F-7FUG (last visited Oct. 21, 2015).

[4] Sandra Postel, *A Sacred Reunion: The Colorado River Returns to the Sea*, National Geographic (May 19, 2014), https://perma.cc/9YRM-NFD9.

[5] Magdi M. El-Kammash, *Nile River*, Encyclopedia Britannica, https://perma.cc/XUN9-APMM (last updated Mar. 17. 2016).

[6] Arthur Goldschmidt Jr., Modern Egypt: The Formation of a Nation-State 5 (1988).

II. The Colorado River (The American Nile)

The Colorado River is a major part of the iconography that depicts the southwest United States. Originating high in Colorado's Rocky Mountains, the Colorado River flows southwest through the Colorado Plateau into Utah's Arches National park, past the historic crossing of Lee's Ferry, into Lake Mead behind the Hoover Dam, through Arizona's Grand Canyon before finally flowing south into the Mexican desert where it eventually dries up and ceases to flow. Ideally, the Colorado would continue south into its massive, dry, delta that used to empty nutrient rich sediment into the Gulf of California. In its natural state, the Colorado emptied an average of 19,000 cubic feet per second into the Gulf of California.[7] Along with this massive discharge of water came nutrient rich sediment from the upper Rocky Mountains, which created fertile waters in the Gulf of California.

Currently, the once proud Colorado River ends just beyond the Morelos Dam in northern Mexico, where the majority of the flow is diverted to irrigate the Mexicali valley and only a trickle extends beyond the dam where it eventually evaporates in the desert. With 36 to 40 million people dependent on the Colorado's water for agriculture, the river has been tasked to its maximum. More than 29 major dams, hundreds of miles of canals which help to irrigate over four million acres of farmland, and the production of more than 12 billion KWH of electricity per year are now the measurement of the Colorado's significance.[8] The river is managed to such an extreme level that the reservoirs along the basin are capable of holding four times the river's annual flow.[9]

The massive engineering efforts and water conservation projects of the Colorado started in 1890 with the building of the Grand Ditch. The Grand Ditch was a 14.3 mile long canal that transported water through the Never Summer Range to Colorado's Front Range urban corridor.[10] As soon as the Grand Ditch was completed, visionaries began picturing the possibility for even more water to be delivered to the Front Range

[7] Kenneth Nowack, Stochastic Streamflow Simulation at Interdecadal Time Scales and Implications to Water Resources Management in the Colorado River Basin 114 (2012).

[8] Brett Walton, *Low Water May Halt Hoover Dam's Power*, Circle of Blue (Sept. 22, 2010, 8:24 PM), http://www.circleofblue.org/waternews/2010/world/low-water-may-still-hoover-dam's-power/ .

[9] Gary Nabhan, *The Beginning and the End of the Colorado River: Protecting the Sources, Ensuring its Courses* (June 12, 2007), https://perma-archives.org/warc/46D3-HAMB/http://garynabhan.com/i/archives/378.

[10] Susan J. Tweit, *Water Across the Divide*, High Country News, Oct. 12, 2009, at 5. The Colorado Front Range Urban Corridor consists of cities including Cheyenne Wyoming, Denver, Boulder, and Colorado Springs Colorado.

urban corridor. In 1930 the Colorado-Big Thompson Project began, which—once completed—was capable of delivering thirteen times the water of the Grand Ditch to the corridor.[11]

Simultaneous to the diversion of water in the upper Colorado River, major projects were underway in the lower basin. With California's Imperial Valley as the goal, Mexico's Alamo River presented a pre-dug canal that was accessible through the construction of the fourteen-mile long Alamo Canal. The Canal was completed in 1902 and by 1903 the Imperial Valley of California was supporting more than 100,000 acres of farmland, located in what was previously a desert.[1213] Because the Colorado River is primarily fed by snowmelt in the Rocky Mountains, its flow is erratic and unreliable.[14] At times the river wouldn't have enough flow to reach the Imperial Valley and during floods engineering efforts on the river were impossible to maintain.[15]

Because of the difficulty in maintaining consistent flow, during the winter of 1905 floodwaters barraged the Alamo Canal and created an uncontrollable flow into the Imperial Valley.[16] For the next two years, despite tremendous efforts, the majority of the Colorado River emptied into the valley and created the Salton Sea in southern California.[17] The disaster of the Salton Sea even caused some fear that erosion due to the uncontrolled flow into the Imperial Valley would redirect the entirety of the Colorado River into the Salton Sink with no real way to remediate the issue. The creation of the Salton Sea led to more exhaustive techniques in controlling rivers and the future damming projects that tamed the Colorado River during the 20th century.

a. The Law of the River

Due to the dangerously erratic flows of the Colorado and increasing demand for the river's water by growing populations in the southwest; seven U.S. States formed the Colorado River Compact in

[11] Robert Autobee, *The Colorado—Big Thompson Project*, Bureau of Reclamation (1996).

[12] John C. Schmidt, *The Colorado River*, *in* Large Rivers: Geomorphology and Management 208 (Avijit Gupta ed., 2008).

[13] David Billington, Donald Jackson, & Martin Melosi, The History of Large Federal Dams: Planning, Design and Construction in the Era of Big Dams, (2005).

[14] U.S. Bureau of Reclamation, *Boulder Canyon Project—Hoover Dam*, Reclamation, https://perma.cc/CC5L-EA69 (last updated Feb. 1, 2012).

[15] *Id*.

[16] Billington et al., *supra* note 13, at 140.

[17] Pat Lafin, *The Salton Sea California's Overlooked Treasure,* The Periscope, (1996), https://perma.cc/4H8B-LF9R. The Salton Sea is still the biggest lake in California with a surface area of 343 square miles.

allotment of water in Lake Mead during particularly wet years, where more efficient storage can take place with less relative evaporation than in the Morales Reservoir.[68] This conservation of water along with the Mexican agreement to renovate irrigation canals to the Mexicali Valley will result in about 45,000 acre feet of water per year being made available to reach the Gulf.[69]

The first observable result of Minute 319 took place on May 16, 2014 when the Colorado River reached the Gulf of Mexico for the first time in sixteen years.[70] The rendezvous of the Colorado and Pacific Ocean was the result of an eight-week pulse flow release from the Morales Dam, aimed at rehabilitation of delta wetland.[71] While the success of May 2014 represent just a fraction of the water that used to reach the Gulf annually, the effort remains a massive victory for international environmental conservation. The United States and Mexico worked together to benefit the environment in an effort to restore ecosystems and help protect plant and animal species.

Even though the Colorado was recently able to reach the Gulf for the first time in sixteen years, the future of the Colorado River and its ecosystems remains uncertain. Over 12.5 million people directly rely on the river's water for survival as well as huge tracts of agricultural land. Increasing salt levels, blockage of sediment, and unnatural water temperatures continue to plague the once vibrant ecosystems of the Colorado. With continued population growth in the American southwest, the future of the Colorado River will likely be subject to more legislation.

As the Law of the River continues to evolve in the 21st century, it is essential that the United States and Mexico continue to work together under the 1944 Water Treaty to help restore the natural order of the Colorado River Basin. While every drop of the Colorado River is already accounted for, responsible development within the basin is necessary so that larger strain is not placed on the watershed. While the United States and Mexican use of the Colorado is largely developed, the international issues surrounding America's Nile reflect a microcosm of the conflicts growing around the distribution of the Nile River's water.

d. How to Fix the Colorado's Ecosystem

While a complete return of the Colorado to its natural ecosystem is reasonably impossible, in an idealistic sense it could be done. To understand the state of the Colorado River, one cannot look past the

[68] *Id*. at 5.

[69] *Id*. at 14.

[70] Postel, *supra* note 4.

[71] *Id*.

1922.[18] The Colorado River Compact essentially split the river in two at Lee Ferry creating the upper and lower Colorado River basins.[19] Under this agreement, each basin was entitled to use 7.5 million acre-feet of water per year.[20] This number represented what was believed to be half of the river's minimum flow at Lee's Ferry.[21] The Colorado River Compact equally split the Colorado's water between the Upper and Lower basins within the United States but it did not initially allocate any water for Mexico or even figure Mexican need for Colorado River water into the agreement.

While The Colorado River Compact was the first agreement over the use of the Colorado River's water, it was far from the last. Glaring holes in the Colorado River Compact included the complete neglect of any downriver Mexican right to the water and Arizona's outright refusal to sign the compact due to fear of California dominating the use of water allocated to the lower basin.[22] Due to continued development and flaws in the Compact, continued legislation and treaties have been created which are now referred to as The Law of the River.[23]

The next major piece of The Law of the River was the Boulder Canyon Project Act of 1928.[24] The Boulder Canyon Project Act achieved several major objectives. Notably, The Act ratified the Colorado River Compact by allocating Arizona 2.8 million acre-feet of water per year from the Colorado and guaranteeing California 4.4 million acre-feet.[25] This agreement protected Arizona's interests and led to their state congress's ratification of the Colorado River Compact so that the agreement could be signed by all party states. Nevada was allocated the remaining 300,000 acre-feet of water per year that was allocated to the lower Colorado River basin.[26] The Boulder Canyon Project Act also authorized the creation of the Hoover Dam and other irrigation projects in the lower basin necessary to help control and allocate the river.[27]

In 1935, the Hoover Dam was completed.[28] Behind the Hoover Dam rose Lake Mead, which was capable of holding twice the average

[18] Colorado River Compact, 1922, *available at* https://perma.cc/N69G-WAKE (stating: The Colorado River Compact was between Colorado, Wyoming, New Mexico, Arizona, Nevada, Utah, and California).

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] U.S. Bureau of Reclamation, *The Law of the River* (2008*) available at* https://perma.cc/ABH3-9M7L.

[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] 43 U.S.C.A. § 617.

[28] U.S. Bureau of Reclamation, *supra* note 14.

annual flow of the Colorado River.[29] This was a major step in ensuring that even during drought years, development in the Lower Basin was protected. Since the Hoover Dam now regulated the rivers' flow, development on the lower part of the river began to occur rapidly. Chief among the downriver developments was The Imperial Dam, which was built in 1938 just north of the Mexican border outside Yuma, Arizona.[30]

The Imperial Dam was built with the intent of diverting the vast majority of remaining Colorado River water into the All-American and Gila Canals.[31] The All-American Canal is to this day the largest irrigation canal in the world.[32] Through the implementation of desilting technology and better flood control throughout the river, the Imperial Valley of California has been revived as an agricultural area.[33] The All-American Canal provides irrigation for nearly 600,000 acres of farmland in California.[34] The remainder of the water below the Imperial Dam was to be diverted into the Gila Canal that now supports more than 110,000 acres of farmland in southwestern Arizona.[35]

The major problem with the Imperial Dam is that its conceivers failed to consider any downstream right to the Colorado by Mexico. Due to this oversight and the growth of agriculture on both sides of the U.S. Mexico border, a treaty was signed in 1944 that would allocate 1.5 million acre feet per year of the Colorado River to Mexico.[36] This treaty remains the principle agreement between the U.S. and Mexico regarding the Colorado River.[37] A later agreement, Minute 242 of the U.S. and Mexico International Water Commission of 1973, guaranteed to Mexico that the water Mexico was allocated from the Colorado would be protected from increasing salinity.[38] Increased salinity in the Colorado was a direct result of runoff and wastewater that drained into the river mainly from upstream irrigation projects. This agreement led to the passage of the Colorado Basin Salinity Control Act of 1974, which helped to ensure that Mexican agriculture in the Mexicali Valley could continue due to U.S. regulation of its pollution.[39]

[29] *Id*.

[30] *Id.*

[31] *Id*.

[32] *Id*.

[33] *See id.*

[34] *Id*.

[35] Tina Bell, *Gila Project* (1997) U.S. Bureau of Reclamation, *available at* https://perma.cc/5PKX-JF8P.

[36] Allie Umoff, *An analysis of the 1944 U.S. Mexico Water Treaty: Its Past, Present, and Future*, *passim* (2008) *available at* https://perma.cc/DBY6-V2JT.

[37] *Id*.

[38] International Boundary and Water Commission United States and Mexico, Minute No. 242, *Permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River, available at* https://perma.cc/L87M-X7ZC.

[39] 43 U.S.C.A. § 1571.

The Law of the River, which began in 1922 with the Colorado River Compact and was last added to in 1974, is composed of eleven major pieces of legislation and international agreements. Through these agreements, nearly every drop of the Colorado River is allocated to a specific task. Below the Morales Dam in Mexico, very little water is released and aside from the experimental release in 2014, the Colorado has only reached the Gulf of California during El Nino events since the 1960's.[40]

b. Environmental Impact of Legislating the River

The allocation and restriction of the Colorado River has caused several major environmental issues. Chief among the environmental issues are; reduction of the delta, loss of biodiversity due to increased salinity of the water and lower water temperatures, and the developing problem of deposited silt in upstream reservoirs.

Before the United States completed its major damming projects along the Colorado River, seventy-nine million tons of silt was annually deposited in the Gulf of California.[41] This huge amount of silt and sediment created a flourishing 3,000 square mile delta that was home to various species of fish, crustaceans, and mammals.[42] Due to the decrease in river water and sediment reaching the delta, local wildlife populations have rapidly decreased along with the Delta. The delta is also a major flyway destination that shelters migrating bird populations, the lack of Colorado River water to the delta has reduced its capacity in this regard as well.[43]

While dismal, experts believe the current state of the delta can be easily repaired.[44] Researchers predict that allowing just modest annual flows of 32,000 acre feet of water to escape below Morelos Dam per year along with pulse flows of 260,000 acre feet every three or four years could substantially restore the delta and floodplain.[45]

While fixes to delta reduction are possible without significant impact to water allocation upstream, reducing the loss of biodiversity is a larger and more complex problem. Biodiversity loss along the length of the Colorado is due in part to both increased salinity and

[40] Sandra Postel, *Landmark Cooperation Brings the Colorado River* Home (2013) National Geographic, *available at* https://perma.cc/9VLA-WXW7.

[41] Gupta (2007), pg. 200.

[42] *Id*.

[43] Jennifer Pitt; Daniel Luecke; Michael Cohen; Edward Glenn; Carlos Valdes-Casillas, *Two Nations, One River: Managing Ecosystem Conservation in the Colorado River Delta*, pg. 830 (2000) *available at* https://perma.cc/T9W5-CKRY.

[44] *Id*. at 831.

[45] *Id*.

decreased temperatures.[46] The salinity increase is specifically caused by two separate conditions, a process known as 'salt loading' and by decreases in water flow, which causes a greater concentration of salt in the remaining water.[47] Salt Loading is caused by the reintroduction of agricultural and industrial wastewater that is loaded with pollutants into the watershed.[48] The increase in salt content is responsible for damage to agricultural yield, industrial production, infrastructure involving the rivers' water, and decimation of fresh water species.[49]

While the fix for salinization is widely being implemented, salt levels at the Imperial Dam have been almost double historic levels over the last sixty years.[50] A major international solution was implemented when the Colorado River Salinity Control Act of 1974 caused infrastructure to be installed below the Imperial Dam, which decreased the salinity of water entering Mexico.[51] Unfortunately, similar efforts were not made in the United States until 2011, when the seven states in the Colorado River basin agreed to a plan of implementation.[52] The plan of implementation calls for a reduction of 644,000 tons of salt from the water system by 2030.[53]

Decreased temperatures have caused similar damage to biodiversity in the Colorado River.[54] Traditionally, the Colorado River's water fluctuated between 35 and 85 degrees annually.[55] This natural fluctuation of temperature led to the prevalence of many native species specialized to survive in the various temperatures. Due to the creation of major dams, large and deep reservoirs have been created which insulates cold water deep under the surface of the reservoir. Because of this insulation, and the fact that dams generally release water from deep below the surface, most of the Colorado River now maintains a steady temperature of "46 degrees year round."[56] The limitation of the river to cool water has led to the extinction of the Colorado Pikeminnow and the Bonytail chub, two species that once thrived in the Grand Canyon.[57] The

[46] Glen Canyon Institute, *Grand Canyon, available at* https://perma.cc/R4EU-75LV (last visited Dec. 5, 2014).

[47] Charles Borda, *Economic Impacts from Salinity in the Lower Colorado River Basin*, pg. 1 (2004) *available at* https://perma.cc/R7GT-XHMM.

[48] *Id*. at 2.

[49] *Id*. at 3.

[50] *Id*. at 2.

[51] *Id*. at 1.

[52] Colorado River Basin Salinity Control Forum, *Briefing Document*, pg. 1, *available at* https://perma.cc/8L8Q-77F7 (last visited Dec. 5, 2014).

[53] *Id*. at 2.

[54] Glen Canyon Institute, *supra* note 46.

[55] *Id*.

[56] *Id*.

[57] *Id*.

extinction and endangerment of fish species has been slowed by varied releases of water from multiple depths in recent years, but the danger remains to indigenous species.[58]

An additional cause of species reduction is the interference with sediment and silt flowing downstream.[59] This creates clear, cold water that does not support fish evolved to exist in sediment rich water. The lack of sediment prevents nutrient delivery to the waterway and ultimately causes ecosystem collapse.[60]

The prevention of sediment from flowing downstream creates engineering issues as well as ecological issues. Lake Powell, behind the Glen Canyon Dam, now blocks nearly 95% of the nutrient rich sediment that used to reach the lower basin; most of the remaining sediment accumulates in Lake Mead behind the Hoover Dam.[61] The accumulation of sediment to Lake Powell totals 44,400,000 tons of sediment a year.[62] While major reservoirs are massive and some estimates predict viability of them despite sediment accumulation for up to 700 years, rapid accumulation creates a reduction in storage capacity, which could eventually cause a cessation of energy production.[63]

Another problem with sediment accumulation is that as sediment takes up the volume of the reservoir, water capacity decreases. As a result of capacity reduction, the same amount of reservoir surface area is exposed to evaporation over a decreasing amount of water.[64] This lack of efficiency speeds the relative rate of water loss in the reservoir through evaporation.[65] Potential solutions that would reduce sediment deposits and allow the nutrient rich material to once again flow downstream are being investigated, but no reliable solution to the problem is viable.[66]

c. Future of the Colorado

In November of 2012, in an initiative under the 1944 Water Treaty similar to Minute 242 that began desalination efforts, the U.S. and Mexico reached an agreement referred to as Minute 319. Minute 319's purpose would be to help restore annual flow to the Gulf of California.[67] Minute 319 will allow Mexico to store some of their

[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] Josh Weisheit, *A Colorado River Sediment Inventory*, pg. 17 https://perma.cc/LM2F-ZXLU (last visited Dec. 5, 2014).
[63] *Id*. at 21.
[64] *Id*.
[65] *Id*.
[66] *Id*. at 20.
[67] IBWC, *Minute No. 319*, pg. 1 (2012) *available at* https://perma.cc/52VG-KA55.

fact that its water rarely reaches the Pacific Ocean. As the primary source of water in the American southwest, the river is taxed to the point where the ecosystem as a whole is failing, dams and canals have stopped the flow of nutrient rich sediment and prevented annual flood/drought cycles from occurring as they would naturally. In other places of the world, such as India, Japan, Indonesia, and Brazil, an anti-dam movement has been present for decades.[72] Concerns in these countries usually have to do with the displaced people whose homes are lost when dam reservoirs fill.[73]

In the United States, a different anti-dam movement is underway. The U.S. Anti-Dam movement has to do with the restoration of natural rivers and natural ecosystems. Unlike in less-developed nations, the United States is at a point where we no longer rely on hydroelectric power for energy generation. Coal, nuclear, and green technologies have lifted our reliance and as a result of that change people are now becoming motivated to restore natural ecosystems. The Elwha River in Northwest Washington represents an early victory in the U.S. anti-dam movement.[74] In 2011 the Glines Canyon and Elwha Dams, which had decimated a once thriving diadromous[75] fish ecosystem, were removed and the Elwha was restored to its natural flow.[76] Since the dams' removal, the sediment that was once trapped in the reservoirs, has flown downstream and begun to rebuild riverbanks and estuary habitats.[77]

Along with a physically healthy river, the Salmon and other fish species are returning in increasingly greater numbers and due to that return the entire ecosystem has seen benefit. Various invertebrates, bears, otters, and birds have all returned to the river and the once barren ecosystem at the mouth of the river has become a thriving habitat for Dungeness crabs, sand lance, surf smelt, clams, and other species.[78] The ecological effects of the restoration of Elwha have been tremendous and can serve as a model for other river restoration projects.

[72] George Adijondro, *Large Dam Victoms and the Defenders, The Emergence of an Anti-Dam Movement in Indonesia*, pg. 29, *available at* http://books.google.com/books?hl=en&lr=&id=kuiFAgAAQBAJ&oi=fnd&pg=PA29&dq=Anti-dam+movement+Washington&ots=NpAJkL2iWd&sig=e9TOPSLwYqWm1m9AVCxHvIwyHtQ#v=onepage&q&f=false (last visited Dec. 5, 2014).
[73] *Id*.
[74] Michelle Nijhuis, *World's Largest Dam Removal Unleashes U.S. River After Century of Electric Production*, (2014) National Geographic, *available at* https://perma.cc/TML2-7LZT.
[75] Diadromous: A fish which is born in freshwater streams, lives its adult life in the ocean, and then returns to its stream of birth of birth to spawn and die.
[76] *Id*.
[77] *Id*.
[78] *Id*.

While restoring the Colorado in a similar way to the Elwha may seem impossible, there are similar actions that can be taken. Major differences exist between the Elwha and Colorado, primarily the Elwha is located in extremely wet Washington State while the Colorado flows through the mountains and deserts of the American Southwest. The Colorado also supports huge population centers and one of the largest and most lucrative agricultural regions in the world in southern California. If we could abandon unsustainable agricultural practices and find a new way to provide water for the people of Colorado, Arizona, New Mexico, Nevada, and Southern California, then an anti-dam initiative could have boundless ecological results.

Until more sustainable methods are found, as a nation we should make an effort to give the Colorado some of its previous assets. The first major thing we could do is find a way to transport sediment through the Glen Canyon and Hoover Dams. Conveyor apparatus could help to return some of the nutrients to the lower course of the river and provide nutrients to fish and plant species. An even easier improvement would be an increase in the number of warm water releases during the summer and fall months. By releasing water from the upper area of the reservoir, native fish species could live in a more hospitable environment and could be protected. Warm water releases also wouldn't be very difficult and would greatly aid fish species dying off in the Grand Canyon. The final thing we could do is guarantee an annual allotment of water, greater than the 2014 pulse flow, to keep the estuary and delta habitats thriving in a state somewhat resembling what is natural. Committing to greater flow from the Colorado would require major sacrifices by both the U.S. and Mexico, but through conservation and advanced technology perhaps more water could be made available.

The plight of the Colorado is one of a river that has already been fought over. The water is divided and used in countless ways; because of the use, the natural ecosystem has been decimated. Conversely, the Nile is a river that is currently entering into the realm of dispute. Perhaps as Nile Basin countries divide up and plan projects for the Nile, they can use lessons learned on the Colorado as an example. Once Dams are built and industry is supported, it is very difficult to remove the infrastructure. If Egypt and its up-stream states keep the Nile's ecology in mind during the coming decades, perhaps they can avoid the ecological disaster that currently plagues the once mighty Colorado.

III. The Nile River

Often regarded as the longest river in the world, the Nile River's water is shared by eleven countries. With the watershed beginning in the hills surrounding Lake Victoria; Tanzania, Uganda, Rwanda, Burundi, Democratic Republic of Congo (DRC), Kenya, Ethiopia, Eritrea, South Sudan, Sudan, and Egypt all share the Nile River Basin. The sheer number of countries in the Nile watershed and the huge still developing populations, which rely on the river's water, are already causing international struggle. While Egypt's massive claim to Nile River water is the oldest, exploding populations throughout the region are beginning to raise questions regarding which nation has rights to the water.[79]

Throughout recorded history, Egypt has dominated the political and economic interests of the Nile River. Since the third millennium BCE, Egyptian civilization has thrived along the river's banks.[80] Due to silt deposits left by the Nile, the Nile Delta provided fertile land for agriculture and allowed ancient civilizations to flourish.[81] Today, Egypt supports a population of nearly 90 million people and sustains the 24th largest economy in the world as measured by GDP.[82] This significant economy and large population are primarily possible due to the fertile Nile River delta. The second most developed country along the Nile River is Sudan where the confluence of the Blue and White Niles is located. Sudan has a population of over 35 million and 80% of their labor force is occupied in agriculture made possible through Nile River water.[83]

In addition to being the last two nations that the Nile flows through before reaching the Mediterranean Sea, Egypt and Sudan are both completely dependent on the waters of the Nile River.[84] For example, Sudan relies on hydroelectric power generation from dams for 66% of their total electrical production.[85] Part of this need to rely on hydroelectric power is a direct result of the fact that Sudan is quite poor and unsophisticated; in comparison, Egypt only draws 8% of its power from hydroelectric sources, having well-developed infrastructure

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[79] M. Chatteri, *Conflict Management of Water Resources*, pg. 146 (2002).

[80] Toby Wilkinson, *The Rise and Fall of Ancient Egypt*, part 1 Divine Right (2010) *available at* https://perma.cc/A7BR-WHGY.

[81] *Id*.

[82] CIA World Factbook, *Egypt* (2014), Central Intelligence Agency, *available at* https://perma.cc/FN3A-A7YR.

[83] CIA World Factbook, *Sudan*, (2014) Central Intelligence Agency, available at https://perma.cc/J9G6-5GGJ.

[84] Andrew Carlson, *Who Owns the Nile? Egypt, Sudan and Ethiopia's History-Changin Dam*, (2013), *available at* https://perma.cc/ZC23-CLDL.

[85] CIA World Factbook, *Sudan*, *supra* 83.

capable of producing coal-generated electricity.[86] Egypt's reliance on the Nile is ultimately due to the need for drinking water, irrigation, and industrial transportation.

In Sudan the Nile splits into its principle tributaries, the Blue and White Nile Rivers; the White tracks south through South Sudan eventually ending in Lake Victoria and the Blue heads to its source in the Ethiopian highlands. However, due to the lack of stability in the states upstream of Sudan, use of the water developing in the headwaters thousands of miles from Egypt has been dominated by Egypt's economic and military might.

Egyptian control over Nile waters stems from the 1929 treaty between Egypt and the British colonies of Burundi, Kenya, Rwanda, Tanzania, and Uganda.[87] The 1929 treaty essentially gave 57% of the Nile's water to Egypt and required that any upstream nation clear any major water project with Cairo before they begin execution.[88] In 1959, a second treaty between Egypt and Sudan raised Egypt's share of Nile water to 66% of the total flow. Egypt and Sudan were the only two signatories and in making this agreement did not even consult Ethiopia, the source of the vast majority of the Nile's water.[89] Since the enacting of these treaties Egypt has controlled the majority of the Nile's water without challenge, until recently.

Countries below Sudan, which have a considerable interest in the waters that become the Nile River, include: South Sudan, Ethiopia, Uganda, Burundi, Rwanda, Kenya, and Tanzania. Uganda, Burundi, Rwanda, and Tanzania all have considerable portions of their land drain into Lake Victoria.[90] Kenya borders Lake Victoria and, therefore, has a legitimate interest in its waters and Ethiopia is the major contributor to the Blue Nile. As these nations' economies continue to develop and their populations grow, Egypt and Sudan are being challenged for the first time over whom the Nile's water belongs to. Former Egyptian Minister of State Boutros Boutros-Ghali stated thirty years ago: "The next war in our region will be over the waters of the Nile, not politics."[91]

[86] CIA World Factbook, *Egypt*, *supra* note 84.

[87] Hassan Hussein, *Egypt and Ethiopia Spar Over the Nile*, (2014), *available at* https://perma.cc/Y4P9-3WF6.

[88] *Id*.

[89] *Id*.

[90] *Id*.

[91] Nizar Manek, *Water Politics Along the Nile*, (2014), *available at* https://perma.cc/5SGS-8535.

a. Growing Crisis, The Grand Ethiopian Renaissance Dam

The Blue Nile, which originates in Ethiopia before flowing North and meeting the White Nile near Khartoum, Sudan, accounts for over 85% of the Nile's total water flow.[92] On April 2nd, 2011 the foundation stone was laid on the Grand Ethiopian Renaissance Dam, starting the first major water project by the emerging Ethiopian State.[93] The Project is a major development in Ethiopia, construction has created 12,000 jobs, the dam will provide 6,000MW of energy production, and the dam will hold a reservoir of nineteen and a half trillion gallons of water.[94] This reservoir will not only cut down on flooding in Sudan, but also provide irrigation for about 500,000 hectares of land,[95] which will help to support and foster Ethiopia's growing population—of almost 100 million—and economy.[96] From 2011 to 2013, Ethiopia's GDP grew from 101.8 Billion USD to 118.2 billion USD, annual growth of around 8%.[97] While this project is one of the largest in Ethiopian history and represents the possibility for future growth and economic development, Egypt sees the project as an affront to their national security.[98]

Egypt currently uses 85% of the Nile River water that flows through the Aswan Dam for irrigation and maintains the rights to 66% of the Nile's total flow as was designated in the 1959 treaty.[99] While Egypt has continually requested that Ethiopia pause construction on the Grand Ethiopian Renaissance Dam, Ethiopia has refused. Support for the Egyptian position that Ethiopia should cease construction was lessened in 2012 when Sudan, who gets 35% of the Nile's water under the 1959 treaty, rescinded its opposition to the Renaissance Dam.[100] On December 9th, 2013, Egypt, Ethiopia, and Sudan decided to form a committee comprising of four members from each country to oversee studies of the dam's downstream impact. Unfortunately, this initiative has led to little progress as Ethiopia refuses to slow construction and Egypt holds that it actually needs more than the 66% it was allocated

[92] Sudan Tribune, *Sudan Foreign Minister Criticises Egypt Over Ethipian Dam Dispute*, (2014), *available at* https://perma.cc/EA35-6SBC.

[93] *Grand Ethiopian Renaissance Dam Project, Benishangul—Gumuz, Ethiopia*, (2014) *available* at https://perma.cc/N8UZ-9QX8.

[94] *Id*.

[95] *Id*.

[96] CIA World Factbook, *Ethiopia*, (2014) Central Intelligence Agency, *available at* https://perma.cc/J8BN-RQQK.

[97] *Id*.

[98] Hussein, *supra* note 87.

[99] Nile Basin Initiative, *Nile Basin National Water Quality Monitoring Baseline Study Report for Egypt*, (2005), *available at* https://perma.cc/2H9D-FD7B.

[100] Hussein, *supra* note 87.

in the 1959 treaty.[101] In June 2013, Egyptian politicians discussed in a televised meeting the possibility of using force to protect their interests in the Nile.[102]

While the 1959 treaty does seem to portray valid international law, it is not recognized or respected by any other states located in the Nile River Basin besides Egypt and Sudan.[103] Ethiopia, Tanzania, Rwanda, Kenya, and five other African states view the 1929 and 1959 treaties as colonial relics.[104] When the 1929 treaty was signed it was between the British government, on behalf of its colonies, and Egypt. The British government has since been replaced by independent regimes that are now in control. This treaty is no longer representative of the needs of the independent upstream nations that now have significant demand and justifiable claim to Nile water.

Similarly, the 1959 Nile Waters Agreement was made between just Egypt and Sudan. The 1959 treaty divided the water flow completely between Sudan and Egypt while failing to consider any potential demand of the states within which the Nile originates.[105] As up-stream nations have developed in the post-colonial era, they have tolerated the 1959 agreement mainly due to the fact that while Sudan and Egypt are dry and arid, up-stream nations have other water resources.[106]

However, as up-stream states have continued to develop and grow in terms of population and economy, their needs for water and energy producing infrastructure have grown as well. Ethiopia, for example, now contains the largest population in the Nile Basin at over 99.4 million people.[107] This Population is continuing to grow at an alarming rate, with annual population growth over 3%, Ethiopia's population is expected to reach 278 million people by 2050.[108]

With such incredible anticipated population growth, Ethiopia is focused on developing its economy so that the current and future population can be removed from the state of poverty that currently exists. 2012 estimates show that 39% of Ethiopia's population lives

[101] William Davison; Ahmed Feteha, *Ethiopia Rejects Egypt Proposal on Nile as Dam Talks Falter*, (2014), *available at* https://perma.cc/UY3A-QMPT.

[102] *Id*.

[103] *Id*.

[104] *Id*.

[105] Kefyalew Mekonnen, *The Defects and Effects of Past Treaties and Agreements on the Nile River Waters: Whose Fault Were They?*, *available at* https://perma.cc/9QEW-MPMT (last visited Dec. 5, 2014).

[106] *Id*.

[107] CIA World Factbook, *Ethiopia*, *supra* note 96.

[108] *U.S. Projected to Remain World's Third Most Populous Country through 2050*, U.S. Census Bureau, (June 27, 2011), https://perma.cc/KYS8-H8N7.

below the poverty line.[109] In order to simply maintain this ratio, Ethiopia will need to see considerable economic growth. The necessary growth is occurring. From 2011 to 2013, Ethiopia's GDP increased by nearly 17% from $101.8 million USD to $118.2 million USD.[110] However, maintenance of the 39% poverty rate should not be considered acceptable. If population growth projections are accurate and Ethiopia simply maintains its rate of poverty—a feat that would require massive economic growth—by 2050 more than 100 million Ethiopians could be living below the poverty line. In order to remove its current and future citizens from poverty, projects like the Grand Renaissance Dam are essential to the creation of jobs and the support of agricultural and industrial growth.

While the prospective rate of population growth in Ethiopia is alarming, other Nile Basin States also expect massive population increases over the coming decades. Sudan's population is expected to double from 35.4 million to 77.1 million by 2050.[111] Additionally, South Sudan, Rwanda, and Kenya all expect to see their populations double while Tanzania, Burundi, and Uganda anticipate that their populations will nearly triple by 2050.[112] In comparison, Egypt is anticipated to have the lowest growth of all Nile states from 86.9 million to 121.8 million in 2050.[113] This huge increase in population in the up-stream states of the Nile Basin will continue to test Egypt's claim to water. Water collection projects are likely to occur more frequently in the near future, and Egypt's claim to 66% of the Nile's water will soon become impossible to enforce.

b. Solutions in Action, The Nile Basin Initiative and the Nile Basin Cooperative Framework Agreement

As the nations of the Nile River Basin rise independently from their colonial roots, interests have begun to change and the 1959 division of water solely between Egypt and Sudan is widely regarded as unreasonable. Due to the unreasonableness of the colonial era treaty, in 1999 the Nile Basin Initiative (NBI) was founded. The NBI describes itself as:

[109] The World Factbook, *Population Below Poverty Line,* Central Intelligence Agency, *available at* https://perma.cc/2TJ9-DLN5 (last visited Dec. 4, 2015).

[110] *Id*.

[111] Population Pyramids of the World from 1950 to 2100, *Sudan 2050*, populationpyramid.net, https://perma.cc/LZ3Y-XMKJ (last visited Dec. 10, 2015).

[112] *Id*. (select Rwanda, Kenya, Burundi, and Uganda).

[113] *Id*. (select Egypt).

> [A] regional intergovernmental partnership that seeks to develop the River Nile in a cooperative manner, share substantial socio-economic benefits and promote regional peace and security. It was launched on 22nd February 1999 by Ministers in charge of Water Affairs in the riparian countries namely Burundi, DR Congo, Egypt, Ethiopia, Kenya, Rwanda, South Sudan, The Sudan, Tanzania, and Uganda. Eritrea participates as an observer. NBI provides riparian countries with the first and only all-inclusive regional platform for multi stakeholder dialogue, information sharing as well as joint planning and management of water and related resources in the Nile Basin.[114]

In theory, the NBI should have provided a forum for dialogue regarding the assets of the Nile Basin. By giving all nine states representation and a seat at the hypothetical table in talks, a future of development and economic success seemed imminent. Unfortunately for the NBI, success of the initiative would prove to be anything but simple. Egypt remains the most economically, politically, and militarily stable nation in the Nile basin. In 2013, Egypt's GDP (272 billion USD) was two times larger than the second largest economy in the basin (Ethiopia, 131 billion USD).[115] Due to the vast difference in state resources, progress through the NBI has been slow and difficult to come by.

In 2010, the first major step for the upper basin states to utilize the resources of the Nile was started with the Nile Basin Cooperative Framework Agreement.[116] This agreement has best been explained as a first step to counter and undo the hegemonic control of the Nile's water by Egypt and Sudan. The historic control of the Nile by Egypt and Sudan has caused a situation where 85% of North and South Sudan's populations are dependent on the Nile for survival[117] and 98% of Egypt's population lives in the Nile River Valley.[118] Additionally, the Nile River

[114] The Nile Basin Initiative, *About Us*, NileBasin.org, https://perma-archives.org/warc/EC8R-Y6NK/http://www.nilebasin.org/index.php/about-us/nile-basin-initiative (last visited Dec. 5, 2015).

[115] *See Ethiopia*, *supra* note 93.

[116] Abadir M. Ibrahim, *The Nile Basin Cooperative Framework Agreement: The Beginning of the End of Egyption Hydro-Political Hegemony*, 18-2 Mo. Envtl. L. & Pol'y Rev. 283 (2011), *available at* https://perma.cc/UFN2-KXK7.

[117] Osman El-Tom Hamad & Atta El-Battahani, *Sudan and the Nile Basin*, 67 Aquatic Sciences 28 (2005).

[118] Abraham Kinfe, *Nile Opportunities: Avenues Toward a Win-Win Deal,* pg. 18 (2004).

provides 96% of Egypt's renewable water.[119] Due to Egypt's reliance on the Nile's water, the Cooperative Framework Agreement is considered a national security concern by the Egyptian government.[120]

Arguably, the most contentious issue regarding the Nile Basin Cooperative Framework Agreement and the development of water resources by the Up-stream Nile states is whether the agreements made during the colonial era are still valid. If the 1929 and 1959 treaties were found valid, they would affect the capabilities of all up-streams states to provide for their populations and develop economically. The problem with finding these treaties valid is the reality that they were made under colonial control of now sovereign countries. The main legal argument against these treaties is the doctrine of *rebus sic stantibus* which has been embodied in the Vienna Convention on the Law of Treaties, providing that: "a state can terminate the application of a treaty if a fundamental change of circumstance occurs."[121] While "change of circumstances" is not clearly defined by the Vienna Convention, one would think that the emergence of sovereign states from 19th century colonial rule would constitute enough of a significant circumstance to dismiss the treaties.

Six Nile Basin States: Kenya, Uganda, Burundi, Ethiopia, Tanzania, and Rwanda, have already signed the Nile Basin Cooperative Framework Agreement and the Democratic Republic of Congo is expected to sign soon.[122] Meanwhile Egypt and Sudan have refused to acknowledge the treaty. Egypt has refused to re-negotiate the colonial era treaties in any way so long as such renegotiation could harm their access to the Nile's water.[123] While the agreement wouldn't directly diminish Egypt's water claim, it would open the door for up-stream states to receive some right to the water. Article 5 of the agreement clearly states that, "Nile Basin States shall, in utilizing Nile River System water resources in their territories, take all appropriate measures to prevent the causing of significant harm to other Basin States."[124] The agreement also

[119] Magdy Hefny and Salah El-Din Amer, *Egypt and the Nile Basin*, pg. 67 (2005).

[120] Gebre Degefu, *The Nile, Historical, Legal, and Developmental Perspectives*, pg. 150 (2003).

[121] Abadir Ibrahim, *The Nile Basin Cooperative Framework Agreement: The Beginning of the End of Egyption Hydro-Political Hegemony*, *passim*, *available at* https://perma.cc/UFN2-KXK7 (last visited Dec. 5, 2014). *See also*: Detlev F. Vagts, *Rebus Revisited: Changed Circumstances in Treaty Law*, 43 Colum. J. Transnat'l L. 459, 471—75 (2005).

[122] Ashenafi Abedje, *Nile River Countries Consider Cooperative Framework Agreement*, (2011), *available at* https://perma.cc/E63M-4L7L.

[123] *Id*.

[124] State Information Service, *Cooperative Framework Agreement (CFA)*, (2014), *available at* https://perma-archives.org/warc/9L4V-5EPM/http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?ArtID=53982#.VyA0NvkrLIV.

revolves around the principles of cooperation, sustainable development, and equitable and reasonable utilization. [125] Despite these tenants and language, Egypt refuses to cede any of its control over the Nile's water and has sustained that it is willing to militarily defend its security in water if necessary.[126]

According to Egypt's water resources and irrigation minister, the agreement is essentially asking Egyptians to "leave their culture and go live in the desert."[127] Article 14 of the agreement calls for Nile Basin States to work together in a spirit of cooperation so that all states can achieve and sustain water security.[128] Even with provisions as favorable to Egypt's national security as Article 14, Egypt has said that if passed the Nile will not be able to meet their water needs after 2017.[129] In regards to Egypt's threats of military action, the former executive director of the Nile Basin Initiative has said: "The seven countries don't want to fight Egypt because of water. And there is no need for Egypt to fight other countries because of water. They cannot fight against seven countries. Better for them is cooperation. That is, join the six countries which have signed the cooperative framework agreement,"[130] While this quote is not a threat, it shows the self-realized strength of developing up-stream states of the Nile basin. They are diminishingly afraid of Egypt and as a whole recognize Egypt's reliance on water from the Nile. However, they also need to utilize the resources of the Nile for their own development and long-term economic viability.

The apparently impending conflict in the Nile basin seems to be a direct result of the fact that the lower basin states cannot survive without the waters of the Nile. Egypt and Sudan are both arid countries without any other water resources besides the Nile and its tributaries. Egypt's feeling of being backed into a corner is a legitimate result of the threat to their ability to exist as a nation, however the needs of upper basin states can also not be ignored. Ethiopia, with its growing population and massive poverty, should be able to use some of the Nile to its benefit. Unfortunately, the Nile Basin Cooperative Framework Agreement has been developed in an international environment without any mutually accepted legal precedent. The colonial treaties upon which Egypt and Sudan rely are not recognized by the developing up-stream states and have little functioning authority in the Nile River basin.

[125] *Id*.

[126] Abedje, *supra* note 122.

[127] Interview, *Ethiopian PM warns Egypt off Nile war*, REUTERS, (Nov. 23, 2010), *available at* https://perma.cc/5ZMB-WRPZ.

[128] State Information Service, *Cooperative Framework Agreement (CFA)*, *supra* note 124.

[129] Abedje, *supra* note 122.

[130] *Id*.

c. The Future of Water Rights in the Nile Basin

The enormous lack of widely recognized precedent in the international legal environment surrounding the Nile Basin will require some creative solutions in order to prevent war and protect the fair and equal rights of all Nile River states. It is Egypt's position that the Nile Basin Cooperative Framework Agreement is principally a counter hegemonic move disguised as a treaty.[131] For this reason, Egypt and Sudan did not even send representatives to the document's signing.[132] In order for progress to be made in regards to the Cooperative Framework Agreement or another treaty, Egypt would need to abandon its colonial era treaties that are not recognized by other Nile Basin states.

An ideal arrangement for the Nile Basin States will be hard to develop, Egypt refuses to abandon its colonial era claim to the Nile while up-stream states are rapidly developing requirements for use of the same water. In order to make concessions, Egypt will require reassurance that its interests will be preserved and that up-stream states will respect their ancient right to the Nile. Upstream states, primarily Ethiopia, need to find a way to reassure Egypt that they will be able to maintain industrial and agricultural use of the Nile without a threat to their national security arising. Convincing Egypt of this may be harder than it seems.

As has been previously mentioned, the population in the Nile basin is set to explode. The current basin population of 383.5 million is on track to surpass 880 million people by 2050.[133] This population growth will make the Nile River basin one of the most densely populated areas on the planet and just a small percentage of the actual population growth is occurring within Egypt. Egypt's fear is that once up-stream states begin utilizing the Nile for irrigation, hydroelectric energy, and drinking water, their ability to sustain their own current economy and mild growth will vaporize with the exploding populations. From the Egyptian point of view, Ethiopia with its booming population, growing economy, and Grand Renaissance Dam, poses the largest threat to the continuance of modern Egypt.

As the source of 85% of the Nile's water, one could argue that Ethiopia is entitled to massive control over that waters use. For instance, in North America, the Colorado River is mainly divided and used by the United States and Mexico only receives minimal flow for irrigation purposes in the Mexicali Valley. While a North American model of

[131] *Id*. at 312

[132] *Id*.

[133] United Nations, Department of Economic and Social Affairs, Population Division. World Population Prospects (2012), *available at* https://perma.cc/2BXL-R8UK.

upstream water rights may look like the best option for Ethiopia, there are several distinct differences between The Colorado and Nile basins.

The first major difference between the Colorado and the Nile is the status of downstream states. In the Colorado basin, U.S. management projects of the Colorado had long been underway before any interest in the water by Mexico arose. Until 1944 when the water treaty with Mexico was signed, the United States had simply divided the entirety of the Colorado River amongst themselves with no regard to the impact downstream.[134] This situation is vastly dissimilar to the Nile because Egypt was itself a state for thousands of years prior to any recognizable sovereign government in the up-stream Nile colonies. Because of this reality, Egypt—and to an extent Sudan—were able to develop agriculture and industry reliant upon the Nile River while up-stream states were under colonial rule. This has created an economy in downstream states completely reliant upon the continued flow of the Nile.

The second major difference between the Colorado and Nile River basins is the access to water by downstream states. In Egypt and Sudan, the Nile River represents the only major water source in the country to the extent that 96% of the water in Egypt comes from the Nile.[135] In Mexico, the Colorado's natural path only travels for about 50 miles before meeting the Pacific Ocean and the Mexican watershed constitutes a tiny fraction of the total water resources of Mexico.[136] These differences in geography and other available resources create a dissimilar situation. While the U.S. can reasonably dominate control of the Colorado, upstream states of the Nile, such as Ethiopia, literally hold the lifeblood of Egypt in their hands.

Due to these differences, the situation surrounding the Nile will need to be solved with original methods. Ethiopia, for example, has other water resources besides the Nile River. Perhaps if in signing a treaty Ethiopia is required to maintain a specific high volume of flow into Sudan from the Blue Nile while remaining allowed to utilize dams and reservoirs for hydro-electric power generation, Egypt can be appeased. However this solution would require significant compromise due to the fact that Ethiopia certainly should be allowed to use water from the Nile for agriculture and industrial development, concessions must be made by both sides in order to maintain a peaceful basin. Since Ethiopia is home to 85% of the Nile's total flow, perhaps a meager 15% of the total flow of the Blue Nile could be used by Ethiopia so long as they guarantee adequate releases into Sudan.

[134] Umoff, *supra* note 36.

[135] Magdy Hefny and Salah El-Din Amer, *Egypt and the Nile Basin*, pg. 67 (2005).

[136] Map, *Mexican River Basins*, *available at* https://perma.cc/7P6L-8DDS (last visited on Dec. 5, 2014).

Regarding the White Nile, perhaps a similar solution could be reached. If states surrounding Lake Victoria, the principle source of the White Nile, were to agree amongst themselves a guaranteed release from Uganda's Owen Falls Dam into South Sudan, then they could divide and use their fair share of the water in the Lake's watershed.[137] This way, so long as Sudan and Egypt were guaranteed certain flow from Lake Victoria the states surrounding Lake Victoria (Uganda, Rwanda, Kenya, Burundi, DRC, and Tanzania) could divvy up the remaining share. By dividing the interests in this way the White Nile and its tributaries could be functionally used by both upstream and downstream states. Again however, this would require major concessions by Egypt who would have to give up their colonial right to 66% of the river's water. Through this kind of necessary negotiation a favorable outcome could be found for the entire basin.

The lone remaining problem is use of water that originates in South Sudan. While South Sudan is currently without strong government and in the midst of Civil War, perhaps the Nile Basin Initiative could represent the South Sudanese rights to Nile water until a resolution is found.[138] South Sudan is home to vast swamp regions surrounding the White Nile, if the NBI is able to protect the swamps and respect South Sudan's interests for when they emerge from civil war, a resolution could have successful lasting effect.

There are some benefits for Egypt by allowing Ethiopia and Uganda to store water and control releases based on agreed upon amounts. For one, Egypt currently controls water releases from Lake Nasser behind the Aswan Dam to account for seasonal differences in flow. A major problem with water storage in Egypt and Sudan is the relative nature of Egyptian and Sudanese climate. Located in extremely arid regions, evaporation is high. By allowing water to be stored in places such as the Ethiopian Highlands and Lake Victoria, massive amounts of evaporated water could be saved annually.[139] This solution is similar to Mexico being allowed to store water in Lake Mead and Lake Powell so they can increase efficiency of water storage. This increase in efficiency could help to protect Egypt's interest in the Nile's water and allow for more water to be used by up-stream states.

[137] Abedje, *supra* note 122.

[138] Nicholas Kulish, *New Estimate Sharply Raises Death Toll in South Sudan*, (2014), *available at* https://perma.cc/GYJ2-RXRA (last visited Dec. 15, 2015).

[139] United Nations University, *The Nile River*, *available at* https://perma.cc/GG4F-QUEA (last visited Dec. 5, 2014).

IV. Conclusion

The Nile and Colorado Rivers are two very different rivers on continents with completely contrasting political climates. The United States is a developed nation and despite its problems, Mexico has established government, industry, and infrastructure. In comparison, the Nile Basin is relatively undeveloped. Aside from Egypt, countries in the basin are just now developing infrastructure and self-sufficient economies. These differences are the cause of different forms of conflict. While the Colorado River's problems are currently mainly ecological; the Nile's issues concern the survival and/or development of nine different nations.

In both cases, the developed nations along the lengths of these rivers need to make concessions. In order to restore the Colorado back to its original natural state, the United States must find a way to lessen the impact of dams. In order for Nile Basin states to coexist, Egypt needs to make concessions and work with the developing up-stream states to find an equitable and fair division of water. While the Nile Basin Initiative is a start, it is yet to get any kind of international agreement or treaty to carry any weight. The Nile Basin Cooperative Framework Agreement represents a strong start. The agreement signifies a regional step away from the colonial treaties that have been signed by Sudan and Egypt without consideration to any other states in the basin.

In order to find a solution in the Nile Basin, Egypt and Sudan are going to need to deal with some harsh realities. They are completely dependent on the mercy of up-stream states to provide them with water. Threatening military action will not solve their problems. By working with other states through the NBI, Egypt can best position itself through cooperation with other nations to remain viable. Angering the nations that essentially control your water supply is a tactic that won't succeed when the other Nile Basin states present a unified front. If Egypt and Sudan can swallow pride and work with the other states on the Cooperative Framework Agreement to guarantee releases from both the Blue and White Nile Rivers, then a future for the Nile and its states can begin to be cultivated.

Behind Closed Curtains: The Exploitation of Animals in the Film Industry

Juliet Iacona*

I. Introduction

Animals are a critical component of modern-day film. In addition to adding a sense of realism to movies, animals serve a variety of roles depending on what the particular script requires. They depict loving pets, resilient partners roaming into battle, and companions of fearsome foes. Frequently, the script requires an animal to be killed or injured in a movie. For some of us, this causes us more grief than witnessing human death or suffering. This may be partly because we are somewhat desensitized to human death in movies, but also partly because animals are so defenseless and innocent that there is usually no reason any harm should come to them. Especially in the context of film, animals do not choose to "act."

We watch these movies that depict animal death or suffering and are ultimately glad that it is just a movie and it is not "real." Nevertheless, in the back of our minds we cannot help but wonder if the animal was actually harmed during the making of the film. As the credits start to roll, we are all relieved and can breathe a sigh of relief when we see the "No Animal Was Harmed" disclaimer which confirms in our minds that the animals are alright. But can we breathe this sigh of relief? Were the animals actually harmed? Can we trust this declaration at the ending of the film? Recent investigations bring this into doubt, as this paper will explore.

a. Issues

The main issue regarding animal use in entertainment is that animals do not *choose* to be on camera in the same sense that a human *chooses* to be an actor.[1] As a result, any perceived discomfort or pain is real on the part of the animal. More than just being placed in

* Michigan State University College of Law, Class of 2016, *magna cum laude*.

[1] Margo DeMello, Animals And Society: An Introduction To Human-Animal Studies 337 (Colombia University Press 2012).

uncomfortable positions, animals have been subjected to intentional acts of cruelty simply to get a shot in a movie or to get a reaction from the animal that the director wants to incorporate into the film. Additionally, animals have been negligently injured or killed as a result of deficient care during the filming process.

How is this allowed to occur? Firstly, there are no clear laws—federal or state—that specifically regulate animal usage in the film industry. Secondly, applicable laws that do exist—namely, anti-cruelty laws—are not vigorously enforced. This is partly because of a lack of prosecutorial interest in pursuing such cases, but also largely because these violations happen behind closed doors and therefore never get reported. Thirdly, the non-profit group that does supposedly monitor animal activity—the American Humane Association (AHA)—in movies has come under scrutiny for its failure to recognize animal injury and death in films, its misleading "certification" system, its failure to rigorously follow its own established "guidelines," and its interdependent relationship with Hollywood.

The basis of this problem is that there is a societal mentality that animals are here to fulfil the needs of humans. This seems to be the basis of most issues in regard to animal welfare. However, especially in the context of entertainment—where there is no *necessary* benefit from the exploitation of animals—this mentality needs to change.

b. Three-Fold Solution

In order to provide animals with more protection in filming, this paper will propose a three-fold solution to the current crisis. Firstly, I will propose an amendment and regulation to the Animal Welfare Act that provides specific procedures and rules for utilizing animals in movies. This law would regulate the application process to use animals in filmed media, the conditions the animals are required to be kept in during the filming process, the types of individuals required to be in attendance to monitor the health of the animals, etc. This regulation would impose penalties and fines for intentional and negligent acts of harm toward animal actors in filmed media productions.

Secondly, in conjunction with creating specific federal regulations to govern this area, power would be delegated to the United States Department of Agriculture (USDA) to create a government group that is legally responsible for monitoring animal activity on the set of every film. Because this group will be legally responsible for enforcing this new law, it will not have the problem that the AHA currently has with being accountable to Hollywood as it will not rely on Hollywood for funding. To avoid non-profit groups like the AHA having contractual ties with the film industry, this new government group would have the exclusive legal rights with respect to monitoring animal involvement in movies.

Thirdly, also related to creating specific federal regulations, I would propose limiting direct animal involvement in movies by requiring some proportional amount of filming that looks to alternative ways to incorporate animals. Under this solution, the actual film time that animals may be used would be limited according to a variety of factors, such as: the projected length of the film, the estimated risk of harm to the animals based on the conditions of the set, the familiarity of the animal with actions production is requesting the animals to do, etc. This equation would be determined by an agent of the federal government who has expertise relating to animal welfare. In some instances, this agent may determine that no live animal may be used for the specific film. If there is remaining time after the consideration of the factor-based formula, it will be encouraged to replace live animal action with alternative visuals. This can include technology based alternatives—such as animatronics, CGI, and costumed actors—or non-technology based alternatives—such as filming animals in their natural habitats undisturbed by an artificial set, using stock footage of existing events, or even writing animals out of the script.

II. The Landscape

a. Justifying Animal Use in Entertainment

The most fitting place to start a discussion about animals in the film industry would be to highlight the current societal mentality that justifies why it is considered acceptable to use animals in the first place. The primary rationalization is that animals are considered property.[2] As a result, a mentality forms that human interests should be prioritized above animal interests and animals are therefore expected to fulfill specific purposes for humans.[3] Under this logic, why should humans not be able to use animals in movies in whatever way they see fit?

This "property" rationalization is the same justification that people used to defend slavery and the historical treatment of women.[4] People need an excuse to alleviate their cognitive dissonance in treating people and animals in certain ways. They need to justify in their mind why exploiting animals is tolerable. The actual classification as property

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[2] *See* Lorraine L. Fischer, *"No Animals Were Harmed … ": Protecting Chimpanzees from Cruelty Behind the Curtain*, 27 Hastings Comm. & Ent L.J. 405, 408 (2005) [hereafter Fischer]. Fischer coins this mentality as the "speciesist" perspective and asserts that "it justifies a level of cruelty in proportion to an animal's degree of dissimilarity to humans instead of using a more practical approach that contemplates an animal's ability to suffer, or, his inherent value."

[3] *Id.* at 422.

[4] *Id.* at 410-11.

is not the primary issue here. It is the attitude associated with that property status that needs to be changed so animals will not continue to be used and abused for mere human entertainment.[5]

b. History of Animal Actors

There are some glamorous examples of pampered animal actors. In 1919, a German dog named "Rin Tin Tin" was brought to America by American pilot Lee Duncan.[6] Rin Tin Tin went on to become America's first canine movie star, appearing in 25 motion pictures and earning almost $5 million dollars. [7] Similarly, in the 1940's a collie named "Lassie" rose to fame and made more money than most actors at the time.[8] Looking at these widely known examples in isolation seems to beg the question why animal use in entertainment would ever be considered a bad thing. After all, the animals are apparently making top dollar and people seem to love them! However, behind closed curtains, the instances where animals are negligently and intentionally harmed during filming completely outnumber the relatively sparse instances where the animal is actually well cared for.

Horses seemed to have received the brunt of intentional abusive treatment in the film industry. The horse is the classic symbol of the American Western.[9] Horses are used to metaphorically embody strength, beauty, and power. However, their use is plagued by abuse and neglect. In her book *West of Everything: The Inner Life of Westerns,* Jane Tompkins meticulously describes what horses went through in the filming of Westerns:

[5] *Id.* Although animals lack a "human" component—as Fischer articulates—which could eventually deflate the current inferior attitude toward animals, as it did in the case of African-Americans and women, this is not the only way to justify the humane and respectful treatment of animals. Left to its own devices, society will form group biases, as we have already seen. If society will not respect animals inherently, we need uniform federal law that will form a stance on the issue and will create a new mentality regarding the treatment of animals in movies, as this paper will propose.

[6] 1 Entertainment Law 3d: Legal Concepts and Business Practices § 8:49 [hereafter § 8.49]

[7] *Id.*

[8] *Id.*

[9] *See* Jane Tompkins, West of Everything: The Inner Life of Westerns 106-07 (1993). Jane Tompkins explains that "[t]he persistent borderline cruelty to horses is not an epiphenomenon but integral to the work Westerns do" because "[t]he cruelty meted out to horses is an extension of the cruelty meted out to men's bodies and emotions…"

> Horses are regularly whipped by stage drivers and wagoneers, forced up steep hills and down sharp ravines, driven through flooding rivers and into quagmire. They pull heavy loads in the hot sun. They are spurred and whipped by posses and escaping bandits, shot at by practically everyone—thieves, murderers, good guys, cavalry, Indians. They are frequently wounded and killed. They are forced to jump through the plate-glass windows of banks, ridden into churches and courthouses, across wooden sidewalks, and through burning buildings. They are caught in the middle of gunfights and ridden into barren places where they must go without water or food or shelter. What horses endure in Westerns is very much like what heroes endure, except *that they aren't acting voluntarily and can't defend themselves or run away.*[10]

What seems to be specific to Western movies—as opposed to other types of films—is that horses were commonly intentionally injured or killed for the sake of a take. The most disturbing example of this comes from the 1939 film *Jesse James.* In that film, a horse was physically forced onto a slippery platform in order to ensure it would fall 70 feet off a cliff to its death.[11] Forty years later it seemed not much had changed when in the 1979 move *Heaven's Gate*, a horse was euthanized after explosives were intentionally placed underneath its saddle.[12]

Although Westerns are notorious for their abusive treatment of horses, they are not the only types of films in which horses were killed or injured.[13] Horses are often used to make period films more historically accurate.[14] These types of films usually require a large number of horses to do so.[15] Instead of these horses being well-cared for in the process of shooting the film, they have been treated as disposable—as evidenced by the number of horse causalities these types of films have.[16] For example, in the 1959 film *Ben-Hur*, nearly 100 horses were killed during production.[17]

[10] *Id.* at 97 (emphasis added).

[11] Gary Baum, *Animals Were Harmed*, The Hollywood Reporter (2013), https://perma.cc/Y3WS-CG6D (last visited April 27, 2015).

[12] § 8:49 *supra* note 6.

[13] *See generally* Kelly Chase, *Horses in Film – Abused for Entertainment?*, The Horse Fund (July 14, 2004), https://perma.cc/WZ38-BKDV (discussing the use of horses in several types of film).

[14] *See Id.*

[15] *See Id.*

[16] *See Id.*

[17] Baum, *supra* note 11.

However, horses are not the only animals that have been unlucky during the filming of movies.[18] In the 1980 film *Any Which Way You Can*, Clint Eastwood's orangutan sidekick Clyde went into cardiac arrest after being beaten by his trainer for being inattentive.[19] He subsequently died a month later.[20] This is just one example of an animal being abused by the very person that is supposed to ensure its safety—the trainer. As evidenced by the example with Clyde the orangutan, much of the animal abuse in the film industry is kept behind the curtain.

c. Hays Office and the Screen Actors Guild

In 1930, the Motion Picture Association of America (MPAA)[21] adopted the Production Code, which articulated industry moral guidelines to be applied to motion pictures.[22] This code was known as the Hays Code after William H. Hays, the president of the MPAA at the time.[23] In response to the public outcry that resulted from the cruel and surprising killing of a horse in *Jesse James*[24] the MPAA granted

[18] *See generally* Fischer, *supra* note 2 (focusing on the use of chimpanzees in the entertainment industry).

[19] *Id.* at 416 & n.49 (quoting Performing Animal Welfare Society, *Earth and Animal Resources: Animals in Movies and Television*, https://perma.cc/57BB-WVJ4 (last visited Jan. 24, 2004)).

[20] *Id.* Fischer explains her perspective of why chimpanzees and other great apes are inappropriate to use in entertainment:

> However, it is not this multitude of similarities to humans in and of itself that makes chimpanzees and other great apes deserving of the right to be free from exploitation in the entertainment industry. The right stems from the fact that the treatment and training of chimpanzees in the entertainment industry parallels the evils of slavery and inflicts on chimpanzees the same kind of cruelty that slavery inflicted on African-Americans. Exploitation in the entertainment industry mirrors slavery because these animals experience life in much the same way humans do, so much so that if something would be cruel or detrimental if done to a human then it would be cruel if done to a chimpanzee.
>
> *Id.* at 412-13.

[21] The MPAA was originally founded in 1922 as the Motion Pictures Producers and Distributors Association, and was later rebranded as the Motion Picture Association of America. Nathalie De Choudens Baez, *This Book Is Not Yet Rated: Age Ratings in the Literary Market vs. Minors' First Amendment Right to Receive Information*, 33 Cardozo Arts & Ent. L.J. 473, 481 (2015).

[22] Jon M. Garon, Entertainment Law, 76 Tul. L. Rev. 559, 650 (2002).

[23] *History of the MPAA,* Motion Picture Association of America, https://perma.cc/H57V-SPB4 (last visited February 29, 2016).

[24] *See supra* text accompanying note 11.

the AHA legal rights to monitor animals during production and to set guidelines for animal treatment.[25] Subsequent to this film, section 12 of the Motion Picture Production Code provided:

> In the production of motion pictures involving animals the producer shall consult with the authorized representative of the American Humane Association, and invite him to be present during the staging of such animal action. There shall be no use of any contrivance or apparatus for tripping or otherwise treating animals in any unacceptably harsh manner.[26]

However, the Hays Code was replaced with the modern Code and Rating Administration in 1968 because of censorship issues.[27] With the dissolution of the Hays Office, production companies were no longer required to abide by the AHA's guidelines and regulations it set to ensure animal safety.[28] Because these companies were not legally bound to cooperate with the AHA, they frequently refused to allow the AHA access to their sets.[29] This occurred in the making of *Heaven's Gate*[30] where a horse was ultimately euthanized after explosives were put underneath its saddle.[31] In addition to accidentally blowing up a horse with dynamite, the AHA also "accused the production [of *Heaven's Gate*] of killing … four horses, … bleeding … horses from the neck, disemboweling cows, … staging … cockfights, and decapitating a chicken."[32] Similar to how the film *Jesse James* prompted the MPAA to adopt section 12 of the production code granting the AHA the legal right to monitor films where animals would be used, the cruelty in *Heaven's Gate* prompted Hollywood to once again join hands with the non-profit group.[33] In 1980, the AHA was granted sole legal authority for monitoring the treatment of animals through a clause in the Screen Actors Guild (SAG) producer contract. [34]

[25] Chase, *supra* note 13.

[26] Murray Schumach, The Face on The Cutting Room Floor: The Story of Movie and Television Censorship 285 (1964) (quoting the Motion Picture Association of America, Motion Picture Production Code, Application 12 (1956)).

[27] Garon, *supra* note 22, at 656.

[28] Chase, *supra* note 13.

[29] *Id.*

[30] *See Supra* text accompanying note 12.

[31] Chase, *supra* note 13.

[32] Judy Molland, *5 Shocking Stories of Animal Abuse in Movies*, Care2 (Feb. 26 2013), https://perma.cc/R4QU-BAF4.

[33] *See* Chase, *supra* note 13.

[34] Fischer, *supra* note 2, at 418.

d. The American Humane Association

The AHA was formed in 1877 for the purpose of protecting animals and children.[35] It is the leading animal welfare organization in regard to monitoring the "humane" treatment of animals during filming.[36] Although there are multiple similar animal welfare organizations, the AHA is the only one with any type of legal right to oversee production, as articulated in the Screen Actors Guild contract.[37]

The organization has a film and TV unit that runs a certification program called "No Animals Were Harmed." [38] The AHA has published a 127-page packet entitled "Guidelines for the Safe Use of Animals in Filmed Media," which provides specific and detailed directions and procedures regarding how animals should and should not be used during filming. Although the AHA's guidelines are relatively extensive, they are permissive rather than mandatory[39], in addition to being internally contradictory. For example, although one of the AHA's "basic principles" is that "[a]ny scene depicting harm *must* be simulated[40]," chapter 1 of its guidelines provides in bolded language:

> If, upon review of the script, American Humane Association believes there to be any dangerous animal action, American Humane Association will *strongly encourage* simulating the action through the use of computer-generated images (CGI), animatronics or fake animal doubles to minimize the risk of injury to animals.[41]

So which one is it? Moreover, although the AHA has a set of basic principles it supposedly follows—including that "[n]o animal will be killed or injured for the sake of a film production," and that "American Humane Association will not allow any animal to be treated inhumanely

[35] American Humane Association, https://perma.cc/AW8Y-39BA (last visited February 29, 2016).

[36] § 8.49 *supra* note 6.

[37] *See Guidelines for the Safe Use of Animals in Filmed Media*, American Humane Association (June 2009 edition), p. 4, at https://perma.cc/T87N-8KNV (last visited April 27, 2015).

[38] American Humane Association *supra* note 35.

[39] Fischer, *supra* note 2, at 419.

[40] *Guidelines for the Safe Use of Animals in Filmed Media*, *supra* note 37, (emphasis added). *See also* "American Humane Association *encourages* the use of animal substitutes for live animals when scenes call for the depiction of dangerous actions." *Id.* at 19. (emphasis added).

[41] *Id.* at 15 (emphasis added).

to elicit a performance"[42]—the entire manual is a set of "guidelines." With that in mind, what are the consequences for production for failing to comply with these guidelines? In 1997, California granted the AHA law enforcement powers to arrest or ticket violators of anti-cruelty laws.[43] However, there is no history of the AHA actually utilizing this power. In contrast, it flaunts a 99.98 percent safety rating with regard to animals monitored by AHA representatives.[44] This number has come under scrutiny as internal critics believe it is inflated by the inclusion of high volumes of insects, it does not account for animals harmed in transit or at a holding facility, it does not have any statistical grounding, and it is just made up for PR purposes.[45] In addition to doubts as to the enforcement of these guidelines, only 50 percent of animal action is actually monitored by the AHA, with the other half of productions declining to participate for a variety of reasons.[46]

How this process actually starts is that if production plans to use an animal, pursuant to the SAG contract, it is responsible for contacting the AHA.[47] It should supply the AHA with a copy of the script, the names of animal handlers and veterinarians, the location and types of film sets, and script changes if applicable.[48] Moreover, in order to comply with the federal Animal Welfare Act (AWA)[49], production needs to obtain the appropriate permits in order to use animals not supplied by a USDA-certified animal supplier.[50] Because using an animal[51] in filmed media

[42] *Id.* at 6.

[43] Fischer, *supra* note 2, at 420; *see also* Second Amended Complaint at *4-5, Casey v. American Humane Ass'n, No. BC497991, 2013 CA Sup. Ct. Pleading LEXIS 190, (Cal. Jul. 30, 2013), [*and*] "American Humane Association and American's Certified Animal Safety Representatives will uphold all applicable anti-cruelty laws." AHA Guidelines, *supra* note 27, at 6.

[44] Baum, *supra* note 11, at 8.

[45] *Id.*

[46] *Id.* at 9.

[47] *Guidelines for the Safe Use of Animals in Filmed Media supra* note 37, at 5. *See also*, *Id.* at 8 and 29 (noting that the AHA guidelines apply to film, television, and music videos, and that reality programs are non-SAG and therefore notifying the AHA is not *required* though encouraged).

[48] *Id.* at 9.

[49] 7 U.S.C. § 2131.

[50] *Guidelines for the Safe Use of Animals in Filmed Media supra* note 37, at 8 ("Most animals used in 'exhibition,' including motion pictures, are covered by the federal Animal Welfare Act (AWA). The AWA requires the 'exhibitor' to have the appropriate USDA and state permits."); American Humane Association Film & TV Unit, 1, https://perma.cc/8L85-YKMK (last visited April 27, 2015).

[51] 7 U.S.C. § 2132(g) (defining "animal" as "any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal … .") Contra *Guidelines for the Safe Use of Animals in Filmed Media supra* note 37 at 6 (defining "animal" as "any sentient creature, including birds, fish, reptiles and insects."). Some animals under the AHA definition do not need permits pursuant to the AWA definition.

constitutes "exhibition" under the AWA[52], production needs to either apply for a permit to use a specific animal or apply for a waiver if it plans on using a pet on a one-time basis.[53] Although the AHA alleges it supports the humane treatment of animals, page 16 of its guidelines provides:

> American Humane Association *encourages* productions to request USDA inspection reports from owner compounds and training facilities prior to contracting their animals for production, and to reject those suppliers who have recent and/or repeated incidents of animal abuse and/or neglect or other USDA violations related to animal care and treatment.[54]

Why is ensuring that the source of the animal is legitimate merely encouraged as opposed to mandated? If the AHA is specifically contracted with Hollywood, why are all it guidelines simply permissive? The answer is that the AHA is dependent on, and accountable to, the film industry.[55] Although the AHA has the expertise in regard to how animals should be treated, its guidelines seem to require the AHA representatives to defer to production. For example, "If American Humane Association determines that there has not been an appropriate amount of time for acclimation between the animals and species prior to filming, American Humane Association may *request* that scenes involving different animals be filmed separately."[56] A request has the potential to be denied, so who has the real power here?

After production obtains the necessary permits and provides the AHA with preliminary documentation, the AHA is supposedly monitoring the animals from pre-production stages to post-production stages. The AHA Guidelines provide *encouraged* instructions on housing, training, socialization, transportation, etc.[57] Before filming starts, the AHA is on set overseeing pre-production training and conditioning of animals.[58] Moreover, the AHA claims it will determine whether housing

[52] 7 U.S.C. § 2132(h) ("The term 'exhibitor' means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation … .")

[53] American Humane Association *supra* note 35.

[54] *Guidelines for the Safe Use of Animals in Filmed Media supra* note 37, at 16.

[55] Baum, *supra* note 11.

[56] *Guidelines for the Safe Use of Animals in Filmed Media supra* note 37, at 17 (emphasis added).

[57] *See generally Id.* at 17-24.

[58] *Id.* at 17.

facilities for the animals are sufficient and sanitary.[59] During filming, the AHA "must witness all filming with animals in order to properly document their use."[60] In regard to individual animals, they must be checked daily for any injury or potential illness and also must be given rest equal to or greater than their time working on set.[61] Additionally, AHA representatives "shall inspect working areas prior to each day's rehearsal or filming to identify hazards … ."[62] In regard to what happens to animals after filming, the AHA Guidelines do not provide any specific instruction except that wild animals "must be … safely returned to their habitat after filming."[63]

Significantly, at the end of production of a movie the "American Humane Association's Film & TV Unit must screen the finished product prior to its release in order for it to qualify for American Humane Association's end-credit disclaimer/sign-off letter and/or rating."[64] The AHA has seven ratings: Monitored: Outstanding; Monitored: Acceptable; Monitored: Special Circumstances; Monitored: Unacceptable; Not Monitored: Production Complaint; and Not Monitored.[65] If the AHA determines that a production should be certified as Monitored: Outstanding, it will be allowed to use the end credit disclaimer "No Animals Were Harmed."[66] The AHA maintains a website for the "No Animals Were Harmed" program that catalogs all the productions that use its services, the accompanying rating the AHA gave it after filming was completed, and a movie review.[67] Because the AHA's logo and disclaimer language is trademarked, only productions that use its services and are awarded with the end-credit disclaimer may use it or address the treatment of animals during filming.[68]

Although the AHA purports to diligently protect animals during filming, they have received criticism and doubt regarding how much their label means at the end of a film. [69] On the one hand, this label may mislead people into thinking the animals were not harmed at all during filming. [70] This is because the label does not take into account animal treatment off set and because there are instances where animals

[59] *Id.* at 18.

[60] *Id.* at 20.

[61] *Id.* at 21-22.

[62] *Id.* at 33.

[63] *Id.* at 19.

[64] *Id.* at 10.

[65] *Id.*; *see also Certification Definition,* No Animals Were Harmed, https://perma.cc/KJ5E-X39M (last visited April 27, 2015).

[66] No Animals Were Harmed, *supra* note 65.

[67] American Humane Association *supra* note 35.

[68] *Guidelines for the Safe Use of Animals in Filmed Media supra* note 37, at 11

[69] § 8.49 *supra* note 6.

[70] *Id.*

are abused and it is concealed. On the other hand, motion pictures have displayed the disclaimer at the end of the film without the AHA actually monitoring the animals.[71] Other criticisms with the AHA are that it simply does not do enough—"[s]pecifically, the AHA promotes guidelines instead of demanding compliance with rules, it uses an ambiguous rating system, it has not strictly monitored the use of its disclaimer, and it suffers from poor funding and improper staffing."[72]

In addition to the AHA, The Performing Animal Welfare Society (PAWS), the People for the Ethical Treatment of Animals (PETA), and the American Society for the Prevention of Cruelty to Animals (ASPCA) also fight for more humane conditions for animal actors.[73] However, none of these listed groups have any legal rights relating to monitoring animals during filming like the AHA does. Even these other animal organizations doubt the reliability of the AHA's "No Animals Were Harmed" label. PETA seems to be most openly against the AHA and takes the stance that the group's "seal of approval is extremely misleading to filmmaker and audiences alike" because the group "does not monitor the living condition of animals on and off set and fails to file complaints when animals are mistreated."[74]

e. The "Luck" Lawsuit

The AHA is currently under close scrutiny for its lax oversight of animal action during productions. There have been several recent instances were animals have been cruelly killed or injured during movies and television programs that the AHA supposedly monitored. What initially brought the AHA under the microscope were reports about the cancellation of HBO's horse-racing drama *Luck* in 2012 after four horses were killed. [75] Not only did the AHA receive negative publicity for the death of those horses, but a former employee of the AHA—Barbara Casey—filed a lawsuit against the AHA, HBO, and Stewart Productions for wrongful termination.[76] This lawsuit opened Pandora's Box as Casey made numerous allegations regarding the AHA's failure to properly monitor and ensure animal safety during filming of various productions.

[71] *Id.*
[72] Fischer, *supra* note 2, at 419.
[73] § 8.49 *supra* note 6.
[74] *Animal Actors*, PETA, https://perma.cc/DYB7-4MBP (last visited April 27, 2015).
[75] Baum, *supra* note 11.
[76] *Casey v. American Humane Ass'n*, No. BC 497991, ¶ 10 (CA Superior Ct. July 30, 2013).

Casey was the former Director of Production of the AHA's Film and Television Unit.[77] In her complaint, Casey alleged she was terminated from the AHA in 2012 because of her efforts and attempts to ensure the safety of the horses used in production.[78] Specifically, she alleged that her employment was terminated "in order to prevent her from reporting the Production Defendants' violation of animal abuse and cruelty laws and/or in retaliation for her efforts in reporting same…"[79]

Casey purported that because the AHA is financially dependent on Hollywood to survive, it creates a conflict of interest.[80] Moreover, she alleges that the "AHA uses press releases, movie reviews and other public relations tools to enhance its own image while riding the coattails of Hollywood productions."[81] Essentially, she contends that the AHA does things to appease major, influential people to receive funding—namely, concealing animal injury and death.[82] Specifically with *Luck*, Casey alleged that HBO controlled the method of animal handling—as opposed to the AHA—and that it had a complete disregard for animal safety.[83] Instead, they were concerned with financial gain and continued funding.[84] Casey provides multiple pictures of injured and dead horses from the *Luck* set and also pictures from other productions. With regard to *Luck*, she specifically lists all the instances of animal abuse and cruelty observed by the AHA—including drugging horses to perform, using underweight and sick horses unsuited for work, and intentionally misidentifying horses so humane officers could not track their medical histories.[85]

Casey goes on to describe how the AHA has frequently concealed animal deaths and injuries in a variety of other movies and productions. She references the HBO production *Temple Grandin*, a Proctor & Gamble commercial, and the recent films *Life of Pi*, the *Hobbit: an Unexpected Journey,* and *War Horse*.[86]

In response to Casey's lawsuit and complaints from animal rights activists after reports surfaced about *Luck*, the *Hollywood Reporter* did an investigation into AHA's tightknit relationship with Hollywood.[87] The article references multiple confidential, internal AHA memos and notes which provide information about animal injuries during productions that

[77] *Id.* at ¶ 10.
[78] *Id.* at ¶ 24-25.
[79] *Id.* at ¶ 25.
[80] *Id.* at ¶ 11.
[81] *Id.* at ¶ 12.
[82] *Id.* at ¶ 14.
[83] *Id.* at ¶ 17-18.
[84] *Id.* at ¶ 18.
[85] *Id.*
[86] *Id.* at ¶ 14.
[87] *See* Baum, *supra* note 11.

still received the "No Animals were Harmed" credit at the end of their films. These internal notes referenced the movies: *Eight-Below*, *Life of Pi*, *Pirates of the Caribbean, Failure to Launch*, *Son of the Mask*, and *There will be Blood.* Specifically, the notes said that the tiger that played "Richard Parker" in *Life of Pi* almost drowned[88]; 27 animals were killed or injured in *The Hobbit*[89]; a chipmunk was stepped on and killed in *Failure to Launch*; a dog was punched in the diaphragm in *Eight-Below*; and fish were killed during unprotected sea explosions in the *Pirates of the Caribbean*, etc.[90]

The *Hollywood Reporter* investigation also discussed a Kmart commercial, the movies *Flicka*, *Everlasting Courage*, and the *Chronicles of Narnia: Prince Caspian* as productions that the AHA monitored yet animals were still injured or killed.[91] In the Kmart commercial, a 5-foot-shark died after it was put in a small inflatable pool.[92] In the movie *Flicka*, the AHA cited two incidents of animal harm which resulted in the film not receiving the "No Animals Were Harmed" credit, but still having credit that the AHA monitored animal action. [93] Moreover, in the *Chronicles of Narnia*, horses were removed from production as a result of being overworked and underfeed; however, the movie still received the "No Animals Were Harmed" credit.[94]

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[88] *Animals Were Harmed*, https://perma.cc/GDD8-PLKY (Apr. 7, 2011). Gina Johnson, a safety representative with the AHA, sent an internal email that said:

> Things here have been … well, weird. The worst was that last week we almost fucking killed King in the water tank. This one take with him just went really bad and he got lost trying to swim on the side. Damn near drowned. Thierry was finally able to snag him with a catch rope and drag him over to the side. I will tell you in more detail when we talk. I think this goes without saying but DON'T MENTION IT TO ANYONE, ESPECIALLY THE OFFICE! I have down-played the fuck out of it. As a result though we are not doing anymore swimming with the tigers. Everything else will be shot in the compound.

[89] *See American Humane Association Calls Animal Deaths on 'The Hobbit' Unacceptable; Renews call to Extend Monitoring Off the Set as Well as On*, American Humane Association, https://perma.cc/JC6S-PVJX (Nov. 19, 2012). In responding to the animal cruelty during the making of *The Hobbit*, AHA CEO Robin Ganzert said, "We are currently only empowered to monitor animal actors while they are working on production sets…[w]e do not have either the jurisdiction or funding to extend that oversight to activities or conditions off set or before animals come under our protection." *Id.* Statements like this confirm the notion that the AHA Guidelines are overall permissive.

[90] Baum, *supra* note 11, at 3.

[91] *Id*. at 8.

[92] *Id.*

[93] *Id.* at 3.

[94] *Id.* at 14.

In February of 2014, Casey dropped her claims against Defendants HBO and Stewart Productions.[95] However, she kept her claims against the AHA, which denied her allegations as untrue.[96] In late 2014, Casey reached an undisclosed settlement with the AHA and dismissed her case.[97] In the same year, Casey started a new nonprofit group called Movie Animals Protected (MAP) to monitor animal welfare on film and TV sets. [98] MAP's stated mission is to "protect [animal actors] and ensure they are treated both humanely and compassionately."[99] To distinguish itself from the AHA, and to surpass the AHA's current protocols, MAP claims it will create specific guidelines for live events and reality shows, issue statements when animal deaths occur, conduct risk assessments for animal stunts, and its overseeing services will also cover animal housing and transportation (as opposed to just on-set action).[100] As admirable as this new organization may be, like the AHA, MAP works by "encourag[ing] voluntary compliance" as opposed to mandating anything specifically.[101] Moreover, despite "all of its reformist striving, MAP has chosen to rely on the same fundamental funding structure as the AHA."[102] Without any truly *objective* program that mandates specific treatment for animal actors and proscribes real consequences for noncompliance, the fear is that MAP and similar current and future nonprofits will just not be enough to ultimately ensure animal safety on set.

Based on the failures and inadequacies of the AHA, there really does not seem to be any reliable meaning behind a credit at the end of a film that claims that "No Animals Were Harmed." We cannot leave the theater feeling convinced that the animals are alright. Although the concept of the AHA is commendable and effective in theory, in practice, having it accountable directly to those who enlist its services means that the AHA is not objective. Instead, it is influenced by the pressures of the film industry.

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[95] Austin Siegemund-Broka, *Hollywood Docket: 'Luck' Horse Deaths Lawsuit Settled*, The Hollywood Reporter (Dec. 9, 2014, 4:21 PM), https://perma.cc/YT9P-85HC.

[96] *Id.*

[97] *Id.*

[98] Katie Bascuas, *New Nonprofit Hopes to Bolster Animal Safety in Movies,* Associations Now (2014), https://perma.cc/HDR2-C9MG (last visited February 29, 2016).

[99] *About Us*, Movies Animals Protected, https://perma.cc/Q6D8-YFG7 (last visited February 29, 2016).

[100] Gary Baum, *New Animal Welfare Group Forms to Challenge American Humane Association (Exclusive)*, The Hollywood Reporter (2014), https://perma.cc/QW3V-U4BD (last visited February 29, 2016).

[101] Movies Animals Protected, https://perma.cc/PX3A-6P73 (last visited February 29, 2016).

[102] *Id.*

f. Current Absence of Statutory Protections for Animals in Filmed Media

The Animal Welfare Act (AWA) is the federal law that regulates the treatment of animals in certain circumstances—those being, research, exhibition, and transport.[103] The United States Department of Agriculture is the agency charged with promulgating standards consistent with the AWA[104]. Although those who make movies with animals are considered "exhibitors" pursuant to 7 U.S.C. § 2132(h)—as they exhibit animals to the public for compensation—the AWA does provide any specific guidance for using animals in filmed media above requiring the applicable licenses and permits.

Moreover, there are not state statutes which directly account for regulating the humane treatment of animals in filming. The only things that we can rely on for accountability for animals being harmed in filmed media is monitoring by the AHA—if the production so choses to enlist its help—and the enforcement of state animal anti-cruelty laws. Although some states have broad anti-cruelty laws,[105] which should ideally make prosecution of animal exhibitors and dealers easy enough, there are a few practical problems that deter these statutes from having a substantial effect.

The leading problem is that many violations of the anti-cruelty laws do not actually get reported because the cruelty happens behind closed doors. As evidenced by the practices of the AHA, much of the animal abuse is covered up and never exposed to the public. Because there is no government body that has the statutory authority to monitor animal safety on film sets, we are left with the AHA as the only voice that can report animal cruelty during film productions. Unfortunately, because of the infrastructure of the organization and its symbiotic relationship with Hollywood, the AHA does not report or exercise its

[103] *See* 7 U.S.C § 2131 *et seq* (2014).

[104] *See* 7 U.S.C. § 2143 (2014).

[105] California has one of the toughest, and most inclusive, anti-cruelty laws in terms of what is considered cruelty and the punishment for such cruelty. *See* Cal. Penal Code § 597 (2012). Subsection (d) provides:

> A violation of subdivision (a), (b), or (c) is punishable as a felony by imprisonment pursuant to subdivision (h) of Section 1170, or by a fine of not more than twenty thousand dollars ($20,000), or by both that fine and imprisonment, or alternatively, as a misdemeanor by imprisonment in a county jail for not more than one year, or by a fine of not more than twenty thousand dollars ($20,000), or by both that fine and imprisonment.

granted law enforcement powers. Secondly, many anti-cruelty statutes are not very comprehensive and they do not impose major penalties[106], which in effect perpetuates the mentality that violations of these laws are not serious. Thirdly, animal cruelty cases are not the top prosecutorial interest and therefore do not receive proper attention.[107] Moreover, not many states allow a private right of action to address these criminal statutes.[108] As a result of all these factors, the anti-cruelty laws are not consistently and persistently enforced.

Additionally, many productions film movies internationally in order to circumvent U.S. animal anti-cruelty laws. For example, during the making of the movie *The Grey*—which was filmed in Canada—production allegedly used four wolf carcasses during filming.[109]

Although it appears that the AHA has attempted to make improvements and changes to the "No Animals Were Harmed" program in response to the recent criticism it has received—such as creating a Scientific Advisory Committee to review its current guidelines, hiring a respected veterinarian to head the program, posting positions for licensed veterinarians to serve as safety representatives, and implementing a policy to start a third-party investigation whenever an animal is seriously injured or killed on set[110]—these measures will simply not be enough to ensure animals are adequately protected. The primary problems with the AHA are its inability to monitor animals offset, its inherently permissive guidelines, and its dependent relationship on the industry that funds it. Although these internal improvements might increase animal safety on film sets in some regards, uniform law needs to be created that will address and regulate the issue more comprehensively.

[106] *See 2012 U.S. Animal Protection Laws Rankings*, Animal Legal Defense Fund (2012), https://perma.cc/P6EX-DPFU (last visited April 27, 2015) (ranking the top "worst" states in the nation for animals as New Mexico, South Dakota, Iowa, North Dakota, and Kentucky for a lack of felony provisions, lack on increased penalties for habitual offenders, inadequate protection for activity such as animal fighting, lack of law enforcement authority delegated to humane officers, etc.).

[107] Fischer, *supra* note 2, at 437.

[108] *See e.g., Kautzman v. McDonald*, 621 N.W.2d 871, 878 (N.D. 2001) (noting that anti-cruelty statutes did not provide basis for private right of action) *and Animal Legal Def. Fund v. Mendes*, 160 Cal. App. 4th 136, 72 Cal. Rptr. 3d 553, 559 (2008) (holding that anti-cruelty statute did not allow for private right of action).

[109] *See* Help Animals in Movies, https://perma.cc/6DQJ-35QA (last visited April 27, 2015). The Help Animals in Movies (HAM) site contains a letter from a representative of the AHA that expresses that although there was a Certified Animal Safety Representative, the film did not actually receive the "No Animals Were Harmed" end-credit certification.

[110] *American Humane Association Responds to The Hollywood Reporter*, PRNewswire (2013), https://perma.cc/5KFB-ZJ9D (last visited April 27, 2015).

III. My Solution

Because animals are regularly exploited during the process of making a movie, the organization that is supposed to monitor their treatment has failed to do so diligently, and there are minimal statutory protections for these animals, major changes need to be made. I propose an intertwined three-part solution that takes into account how the law should reflect using animals in filmed media, how and by whom animal treatment during productions should be monitored, and under what circumstances animals can be filmed.

a. Modification of the AWA and Licensing Regulation

Firstly, there should be an amendment to the current AWA that specifically labels filmed media producers and representatives as exhibitors. Currently, it is required to obtain a permit pursuant to the AWA to use certain animals in filmed media, as described previously. However, this requirement is by implication as opposed to anything that is specifically articulated in the act itself. Because of the absence of explicit language, it becomes unclear what—if any—regulations are applicable to animals in filmed media. Specifically, 7 U.S.C. § 2132(h)—which defines the term "exhibitor"—should be amended as follows (see **added language**):

> The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, an owner of a common, domesticated household pet who derives less than a substantial portion of income from a nonprimary source (as determined by the Secretary) for exhibiting an animal that exclusively resides at the residence of the pet owner, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary; **additionally, such term includes filmed media productions such as movies, television programs, documentary films, music videos, commercials, and reality-programming[111], as may be determined by the Secretary.[112]**

In addition to amending the definition of an exhibitor under section 2132, section 2133 governing "Licensing of dealers and exhibitors" should be amended to specifically reference a comprehensive process for applying to the USDA for a license to use an animal in filmed media. The provision should be amended as followed (see **added language**):

> **(1) Except as provided in subsection 2**, the Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title: Provided, that no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of this title: Provided, however, That any retail pet store or other person who derives less than a substantial portion of his income (as determined by the Secretary) from the breeding and raising of dogs or cats on his own premises and sells any such dog or cat to a dealer or research facility shall not be required to obtain a license as a dealer or exhibitor under this chapter. The Secretary is further authorized to license, as dealers or exhibitors, persons who do not qualify as dealers or exhibitors within the meaning of this chapter upon such persons' complying with the requirements specified above and agreeing, in writing, to comply with all the requirements of this chapter and the regulations promulgated by the Secretary hereunder.
>
> **(2) In regard to filmed media productions, the Secretary shall issue temporary film licenses" (TFL) to such exhibitors upon specific application and notification pursuant to subpart A of the Animal Welfare Regulations.**

[111] Part of the goal of this new law will be to extend protection to animals for filmed media not currently protected under the Screen Actors Guild contract—such as in reality-programming.

[112] The language of the definition of "exhibitor" in the corresponding regulation—9 C.F.R. § 1.1—should also be amended to reflect the modified AWA definition.

In accordance with modified section 2133 of the AWA, 9 C.F.R § 2.1 ("Requirements and application") should be revised to address the special situation of obtaining a license for animals in filmed media. Specifically, provision (a)(4)[113] should be added, which would provide the following:

> (4) Any person operating or intending to operate as an exhibitor for filmed media productions must have a valid "temporary film license" (TFL). A person seeking a TFL shall apply on an "Animals in Filmed Media Notification Form" which is furnished by the United States Department of Agriculture Film Division (USDA-FD). The applicant shall provide information pertaining to:
>
> (i) The quantity and species of animals requested for production;
> (ii) A description of the source of these animals;
> (iii) A description of all scenes animals will partake in including the specific action each animal will do;
> (iv) A detailed plan how production plans to house and care for each animal off set;
> (v) A plan to return animals to their original source or to another approved source subsequent to the termination of filming;
> (vi) The location of all filming during production;
> (vii) An estimated duration of production of the filmed media; and
> (viii) A plan to incorporate animal alternatives in the filmed media production to reduce live animal action, including, but not limited to: Computer-Generated Imagery, animatronics, costumed actors, stock footage, filming animals in natural habitats, etc.
>
> In addition to providing the above information, the applicant shall attach a script of the filmed media production to the Animals in Filmed Media Notification Form. The applicant shall file the completed application form with the Secretary of the USDA-FD. At the Secretary's discretion, a TFL shall be granted to the applicant for the period of time the Secretary determines is permissible as determined by a variety of factors. The applicant shall receive an "Approved TFL Form" which outlines the specific conditions for which animals may be filmed. Depending on the scope of the production, the TFL may be renewed at intervals set by the discretion of the Secretary. See "Subpart J – Code for Welfare of Animals in Filmed Media Productions" for specific regulations regarding the USDA-FD's role in overseeing and monitoring animal action in filmed media.

[113] There should be a phrase prefacing Subsection (a)(1) which says, "Except as provided in subsection (a)(4), any person…."

There are a few things to note with this proposed regulation. Firstly, I propose the creation of a "Film Division" subset of the USDA. For all intents and purposes, this agency would replace the AHA as the legal authority—under federal law—that would monitor animal activity during filmed productions. The major impetus behind the formation of this agency is to create a group that is not accountable to the film industry. As such, the USDA-FD will have the exclusive authority to monitor animal action in such productions. Secondly, the Approved TFL Form will provide the applicant-exhibitor with a temporary license to use animals in a certain filmed production contingent upon the conditions set forth in the form. More specifically, this form will limit direct animal involvement based on a variety of factors—risk and danger to the animals being the most prevalent considerations—and encourage animal alternative filming to account for requested time that was not granted or requested action for the animal to participate in that is prohibited. Thirdly, Subpart J of the Animal Welfare Regulations will provide more comprehensive procedures related to the functioning of the USDA-FD, the USDA-FD certification process for filmed media productions, the cost of mandated services of the USDA-FD, and the penalties for violations of this subpart.

b. Alternatives to Live Action Animal Filming

In regard to alternatives to live animal action filming, there are a few different things production can do to account for scenes where animals are prohibited by the USDA-FD. With the constant advances in technology and the massive budgets of Hollywood movies, alternatives to live animal action should be more than manageable. Such alternatives include: animatronics, computer-generated imagery (CGI), using previous stock footage, filming animals in their natural habitats, costumed actors and writing animals out of scripts.[114]

Animatronics are robotic devices that give an inanimate object lifelike characteristics. These are prevalent at theme parks and have

[114] *See* Animals in Film and Television, https://perma.cc/AN6T-HCG2 (last visited April 27, 2015).

been used in movies as special effects. For example, remember the film *Jaws*? Jaws was a 3,000 pound plastic, mechanical shark.[115] Similarly, many of the dinosaurs in *Jurassic Park* were also robotic devices.[116] The list goes on to include *King Kong, E.T., Terminator*, etc.[117] All of these examples represent popular movies that were not hindered by their failure to use a real animal. Although these are all admittedly older movies, again, with the rise in technology potentially these robots could become even more life-like.

CGI is the recent trend in movies where scenes that are not possible to create naturally are produced via digital technology.[118] Many movies utilize CGI to make things look more real and believable. Using stock footage and previously tapped events can also be an option—the goal is to film animals in their natural habits and environments without disturbing them and thus exploiting them for mere entertainment.[119] Moreover, there is always the option to write animals out of the scripts all together if they are not essential to the story.

Another alternative to live animal filming on set is utilizing the services of GreenScreen Animals (GSA). GSA is a company monitored by the AHA that specializes in animal footage.[120] The company was formed in 2008 and has received positive press since its inception.[121] Essentially, GSA takes stills and videos of animals inside a studio in front a green screen which allows the background of the video or still to be manipulated.[122] GSA can film animals for a specific purpose for clients or provide clients with previously taken stills or video.[123] This

[115] Charles Q. Choi, *Top 7 Animatronic Beasties in Film*, Live Science (2010), https://perma.cc/GW8Y-9DKP (last visited April 27, 2015).

[116] *Id.*

[117] *Id*

[118] *See* Chris Palmer, Shooting in the Wild: An Insider's Account of Making Movies in the Animal Kingdom 114 (2010) "The use of computer-generated imagery (CGI) allows filmmakers not only to alter existing images drastically but also to create realistic scenes without using any actual footage."

[119] Chris Palmer Shooting in the Wild 111 (Sierra Club Books, 2010). This book highlights how filming animals in their natural habitats may also pose an ethical problem at times because of the "lack of consistent, rigorous regulations concerning wild and exotic animals." This issue seems to largely focus on raising or capturing wild animals for the *purpose* of "natural" filming. This is just something to be aware of and take into consideration for any animal alternative filming that would be encouraged by the proposed USDA-FD. A regulation addressing this specific issue—permissible alternative filming for wild animals—seems it should also be incorporated into my proposed Subpart J.

[120] GreenScreen Animals, https://perma.cc/9YDA-AE6B (last visited April 27, 2015).

[121] *Id.*

[122] *Id.*

[123] *Id.*

footage can then be incorporated into a film without endangering the people or animals involved because filming is done in a controlled setting. Moreover, it can be used in multiple formats for a variety of purposes. Recently, GSA is credited with providing footage of deer and raccoons for the 2014 movie *Gone Girl*.[124] In regard to using live animals, this seems to be one of the safest ways to incorporate them without the actual animal having to be on the set of a filmed media production.

As the GSA will also fall under the category of "exhibitors" pursuant to my proposed revised definition in the AWA, it will also have to be licensed to deal with animals. Moreover, it will no longer be monitored by the AHA, but instead by the USDA-FD. Because the GSA will be regularly renewing its license to photograph and video animals for compensation purposes, it seems fair that it should not be required to pay the same fee as any production using an animal—and the services of the USDA-FD—for a limited purpose and duration. Instead, it can be charged a pro-rated fee or a tax which the government will collect. This fee from the GSA in conjunction with collectable fees that filmed media productions will be required to pay for the required services of the USDA-FD will fund and support the functioning and enforcement power of the agency.

c. Subpart J—Code for Welfare of Animals in Filmed Media

Incorporating procedures to specifically regulate animal activity in filmed media productions should highlight the spirit of the current AHA Guidelines with the major difference being that these procedures should be mandatory as opposed to merely encouraged. In creating these regulations, it would be helpful to consider what other countries have done in terms of regulating animal activity in filmed media.

New South Wales (NSW) in Australia has a mandatory code of practice for the welfare of animals in films and theatrical performances that has existed since 1990. [125] NSW's Code is referenced and attached to its *Prevention for Cruelty to Animals (General) Regulation 2006*, section 17 of which provides as follows:

[124] *GreenScreen Animals Footage Featured in "Gone Girl,"* PRNewswire (2014), https://perma.cc/WHL7-U9LU (last visited April 27, 2015).

[125] *Code of Practice for the Welfare of Animals in Films and Theatrical Performances,* New South Wales Department of Primary Industries, https://perma.cc/L43F-KMVX (last visited April 27, 2015) [hereinafter NSW Code]; *see also Code of Practice for the Welfare of Film Animals,* State Government of Victoria Department of Environment and Primary Industries, https://perma.cc/SDH4-9VEV (last visited April 27, 2015) (the Australian state of Victoria has a similar code).

> A person must not use an animal in connection with the production of a film or theatrical performance, or cause or permit an animal to be used in connection with the production of a film or theatrical performance, otherwise than in accordance with the relevant Code of Practice.[126]

I propose that we use NSW's system as a model by creating a similar code of welfare for animals in filmed media. The first provision in the relevant Animal Welfare Regulation—Subpart J—would provide:

> A person must not use an animal in connection with the production of any filmed media, or cause or permit an animal to be used in connection with the production of any filmed media, otherwise than in accordance with the relevant Code for Welfare of Animals in Filmed Media Productions.

In addition to this provision, I propose that Subpart J should provide comprehensive regulations for how animals should be treated in filmed media and the USDA-FD's role in monitoring animal action. NSW's code includes sections on general principles for animal use, legal considerations, planning for use of animals, management of animals, maintenance of sets, special considerations, veterinary care, the prohibition of sedation and anesthesia of animals, training of animals, and definitions.[127] All these section seem relevant for instituting a similar code in the United States. Some of the key provisions in the NSW Code that I propose could be modified or incorporated for the purposes of an American Code, include:

> 2. General Principles
> ***
> 2.2 Ultimate responsibility for ensuring the welfare of the animals and compliance with this Code rests with the Producer or the Producer's authroised agent, whether such person is on the set or not.
> ***
> 2.8 Producers must ensure the welfare of animals is always given priority over continuing of filming or performing.
> ***
> 3. Legal Considerations
> ***

[126] NSW Code *supra* note 125.
[127] *Id.*

> 3.2 Officers appointed under the Prevention to Cruelty to Animals Act have legal authority to attend any set and must be allowed access at all times when animals are being used. Officers of the NSW National Parks and Wildlife Service have similar legal authority in relation to native fauna.
> ***
> 4. Planning for use of animals
> ***
> 4.5 … the attendance and input of a consulting veterinarian, who is knowledgeable in the animal(s) being used, is required …
> ***
> 5. Management of animals
> 5.1 Animals shall be maintained and transported in a manner that provides proper and humane care and complies with all other relevant Codes of Practice.[128]
> 5.2 Animals must receive food and water consistent with their needs.
> 5.3 Proper shelter must be provided for all animals. Large animals and wildlife accustomed to the environment of outdoor sets may be kept on the set if arrangements are suitable. Animals kept under confined conditions should be exercised regularly in accordance with their needs.
> 5.4 Any animal that is not accustomed to the environmental conditions of a set should be held, as far as possible, under conditions with which it is familiar and in which it is not distressed, and must be familiarised with the set conditions prior to performing.
> ***
> 5.9 Each animal should be inspected at least once daily by an experienced and competent person.
> ***
> 6. Maintenance of sets
> 6.1 Sites for sets should be inspected before use every day by an experienced animal trainer or handler (or veterinary surgeon) to ensure that they are free of obstacles or hazards which may injure animals.
> ***
> 8. Veterinary Care
> ***

[128] *Id.* "All other relevant Codes of Practice" would be changed to say "the Animal Welfare Act."

> 8.4 The consulting veterinary surgeon, or the consulting animal trainer or handler, when no consulting veterinary surgeon has been engaged, shall have the authority to give instructions to the Producer or the authroised agent of the Producer regarding the use, care, treatment and welfare of animals on a set, including the authority to stop a scene if the welfare of animals in considered to be in danger.

Any new regulations would represent a combination of ideas from the AHA Guidelines and the NSW Code. My proposal entails creating regulations that would set procedures for what and how the USDA-FD will monitor animal action on set—similar to how the AHA has a set of guidelines it supposedly follows in its monitoring of animal action—but also describe the legal responsibilities of the production team in regard to their treatment of animals—similar to provisions in the NSW Code. Moreover, these regulations would describe the process of getting USDA-FD certified and the consequences of failing to notify the USDA-FD of animal action:

> Any filmed media production intended to be viewed and dispersed in the United States that involves the use of live animals in any capacity is required to be monitored by the USDA-FD and certified subsequent to the termination of filming. Failure to notify the USDA-FD prior to filming of the filmed media production that animals will be used will be a felony punishable by no more than one year in jail and/or a fine of no more than $20,000. Representatives of the USDA-FD will review the final version of the film, prior to release, to verify that no animals were killed or injured during production. If the USDA-FD approves the filmed media production, it will be "USDA-FD certified," which will be expressed in the opening credits of the filmed media production. If the filmed media production has any uncured citations for negligent acts or committed any intentional acts of cruelty during the process of filming, the opening credit of the filmed media production must reflect that animals were injured or killed on the relevant number of occasions.

Lastly, Subpart J should provide the consequences and penalties for violations of the Code. Specifically, the Code should denote penalties for intentional and negligent actions taken against performing animals. An 'intentional action' should be defined as "any action taken or failed to be taken by a member of a filmed media production for the purpose of injuring or killing a performing animal in pursuance of the filmed media production." A 'negligent action' should be defined as "any action taken or failed to be taken by a member of a filmed media production which results in injury or death of a performing animal not in direct pursuance of the filmed media production." Essentially, intentional acts would include killing or injuring an animal for the purpose of filming a scene or beating an animal for the purpose of making it perform. A negligent act would be accidently killing or injuring an animal on set or off set because of improper care or disregard of the animals' safety.

In regard to penalties, the structure and content of the California anti-cruelty law, as described above, should be incorporated in these regulations because it currently provides one of the toughest anti-cruelty laws in the country. However, because accidents do happen, agents of the USDA-FD should have the discretion to give production a citation for a negligent act which would also give them the opportunity to cure the defect. However, three or more citations during one filmed media production should together create the inference that an intentional act of cruelty was committed and give rise to a federal felony. There are no reasons why animals should be made to suffer for our mere entertainment and therefore we need laws that reflect that mentality.

IV. Conclusion

The significant difference between a human actor and an animal actor is that the former voluntarily assumes that role where the latter has no choice in the matter. Although we all love to see our favorite animals depicted on film, we sometimes do not realize that they suffer very real discomfort and pain for the sake of our mere entertainment. Although there is a nonprofit group given the contractual right to monitor animals on production sets, there are not actual laws that protect these animals. The absence of such accountability leaves the AHA accountable only to Hollywood. The recent criticisms and doubt about the services of the AHA has taken away any meaning to the end credit that "No Animals Were Harmed."

In order to change the mentality of using animals in filmed media, I propose modifying the AWA and its associated regulations to specifically denote filmed media productions as exhibitors and provide comprehensive regulations for how animals should be treated on and off set during such production. In addition, I propose the creation of a sub-agency—the USDA Film Division—to replace the efforts of the AHA. Lastly, I propose that any allocation of time production requests to utilize animals be limited by a number of factors at the agency's discretion. This would include encouragement of alternative means of using animals in production that can be more technology based. Implementing this three-part solution would be a step in the right direction for animals to be respected and not exploited in the entertainment industry.

Utility Air Regulatory Group v. Environmental Protection Agency: the Apotheosis of Implicit Bias in the Supreme Court of the United States of America Against Environmental Interests and Their Advocates

Jason W. Jutz*

I. Introduction: Setting the Stage for Implicit Bias

"So confident am I in the intentions, as well as wisdom, of the government, that I shall always be satisfied that what is not done, either cannot, or ought not to be done."[1] While I have a rather great respect for Thomas Jefferson, on this occasion, I do not share his view … . I take particular note of the epic failure by the Supreme Court of the United States to uphold the law and, subsequently, aid or vindicate environmental interest in the efforts to protect the health, safety, and welfare of citizens of the United States, choosing instead to favor business and national security interests to the detriment of the environment—our habitat and home. Scholar and author, Dan Farber, describes this as a conflict between "tree huggers" and "bean counters."[2]

This note argues that the Supreme Court decision in Utility Air Regulatory Group v. Environmental Protection Agency ("UARG"), 134 S. Ct. 2427 (2014), propagates a culture of implicit bias, focusing on the bias of the United States Supreme Court against environmental interests and their advocates; a bias that results in a "stacked deck."[3] This stacked deck takes the form of narrowed access to the court and heightened standards for environmental interest advocates once they

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[1] The Writings of Thomas Jefferson (Andrew A. Lipscomb & Albert Ellery Bergh eds., Library ed. vol. 2 1903); *see also Thomas Jefferson Quotes*, https://perma.cc/3Y7H-HHMM (last visited Sept. 20, 2014).

[2] Daniel A. Farber, Eco-Pragmatism: Making Sensible Environmental Decisions in an Uncertain World 39-52 (1999); *see also* Douglas A. Kysar & James Salzman, *Environmental Tribalism*, 87 Minn. L. Rev. 1099, 1102 (2003).

[3] *See generally* Erik Figlio, *Stacking the Deck Against "Purely Economic Interests": Inequity and Intervention in Environmental Litigation*, 35 Ga. L. Rev. 1219 (2001).

enter the arena, and lowered standards for states or business interests to combat environmental interest groups, even the Environmental Protection Agency.

This note attacks this implicit bias in three methodical steps, each in the form of a discrete section. Section II reviews the UARG decision. Section III discusses the impacts of the UARG decision on today's environmental interests, including implications on the State of Hawai'i, a unique state regarding environmental issues, both in the state's unique relationship with the environmental and how the courts have reacted to cases involving environmental interests. The final section suggests some options for addressing the issue of implicit bias against environmental interests, such as creating Federal Environmental Courts.

Before moving forward, it is important to contextualize the societal stigmas stereotypically applied to environmental interests and their advocates, because, as this article will argue, it is these stigmas that lead to the implicit bias against environmental interests. It is well established that environmental interests are stigmatized and labeled;[4] even courts appear to unconsciously use these labels for environmental advocates—despite the gross mis-categorization of the individuals that comprise the environmental groups.[5] In a University of Toronto survey conducted on 400 Americans, it was found that there is negative opinion of political activists, including environmentalists.[6] When people were asked about their feelings towards activists, they referred to environmentalists as "tree-huggers" and "hippies."[7]

The researchers reported that negativity "plays a key role in creating resistance to social change."[8] The experts also found that a majority of participants were not in favor of either associating themselves or adopting the behavior of "typical" activists, as they are considered "militant" and "eccentric."[9] This has an even greater impact

[4] *See Americans View Environmentalists and Feminists as 'Tree Huggers' and 'Man-Hating, Toronto Study*, [sic] University Herald (Sept. 27, 2013, 9:21 AM), https://perma.cc/UX5U-YWTA [hereinafter "Americans View Environmentalists"].

[5] Christopher D. Stone, *Is Environmentalism Dead?*, 38 Envtl. L. 19, 44 (2008) ("[S]ome share of the public probably connects the [environmental interests] movement to the sixties and seventies, and thus to flaky hippies and impractical, preachy idealists. But there is considerable evidence undercutting claims that environmental activism is associated with markers of 'elitism,' such as income and education. Support for environmental causes appears to be strikingly broad and populist.").

[6] *Americans View Environmentalists*, *supra* note 4.

[7] *Id.* ("The findings have been published in the European Journal of Social Psychology."); *see also* Nadia Y. Bashir, et. al, *The ironic impact of activists: Negative stereotypes reduce social change influence*, Eur. J. Soc. Psychol. 43, 614-26 (2013). These findings were based on a survey of a relatively small sample of 400 Americans.

[8] Bashir, *supra* note 7, at 614.

[9] *Id.*

on society; impacting how we pursue public policy and dictating the prioritization of environmental needs. As renowned political scientist Lytnon Caldwell wrote:

> Americans … have seldom seen environment … as an expression of anything in particular. They have seldom thought of it as a general object of public policy. Their readiness to control the environment for particular purposes has not been accompanied by recognition of a need for comprehensive environmental policies.[10]

II. Utility Air Regulatory Group v. Environmental Protection Agency: An Exercise of Judicial Activism Against Environmental Interests

Everyone has an interest in protecting the environment,[11] including the EPA. In an effort to meet its mandate under the Clean Air Act ("the Act"), the EPA implemented a series of agency actions between 2009-10.[12] These actions were designed to regulate greenhouse gas ("GHG") emissions under the Act.[13] The Act specifies that sources of pollution must obtain permits based on the volume of pollutants they emit.[14] Unfortunately, "GHGs … are emitted at a much greater volumes than conventional air pollutants."[15] Consequently, a discrepancy emerged between regulation of GHG emissions, which, at the levels required by the Act, "would have increased the number of permitted sources at least a hundredfold."[16] To address the discrepancy, the EPA implemented the "Tailoring Rule" to adjust the "statutory permitting thresholds set out in [the Act]."[17] The impetus for the UARG controversy was the implementation of the Tailoring Rule.[18]

[10] Environmental Politics and Policy: Theories and Evidence 1 (James P. Lester ed., Duke Univ. Press 2d ed. 1995) (quoting Lynton K. Caldwell, 1963).

[11] *See* Bennett v. Spear, 520 U.S. 154, 165 (1997).

[12] *See* Utility Air Regulatory Group v. Environmental Protection Agency, 134 S. Ct. 2427, 2436-37 (2014) [hereinafter "Utility Air Reg"].

[13] *Id.* at 2437.

[14] *See* 42 U.S.C. § 7545.

[15] Matthew R. Oakes, *Questioning the Use of Structure to Interpret Statutory Intent: A Critique of Utility Air Regulatory Group v. EPA,* 124 Yale L.J. Forum 56, 56 (2014).

[16] *Id.*

[17] *Id.*

[18] *See* Utility Air Reg, 134 S. Ct. at 2438.

a. Background—the Clean Air Act and Why the EPA Acted

The EPA, acting in accordance with the Act,[19] recently established standards for emissions of GHGs from motor vehicles.[20] Greenhouse gases are substances that contribute to global climate change.[21] Congress adopted the Act to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[22]

In UARG, the Court was presented with the question of whether it was permissible for the EPA to determine that motor-vehicle GHG regulations automatically triggered permitting requirements under the Act for stationary sources that emit GHGs.[23] That is, whether the same permitting requirements for motor vehicle GHG emissions could be applied to industrial facilities. As the Court notes, the Act "imposes permitting requirements on stationary sources, such as factories and power plants."[24] The "Prevention of Significant Deterioration" ("PSD") provisions "make it unlawful to construct or modify a major emitting facility ("MEF") in any area to which the PSD program applies without a permit."[25] An MEF is a stationary source of pollutants that has the potential to emit at least 250 tons of any air pollutant per year.[26] For certain types of pollutants the threshold drops to 100 tons per year.[27]

[19] *See* 42 U.S.C. §§ 7401–7671q.

[20] *See* Utility Air Reg, 134 S. Ct. at 2437.

[21] *Id.* at 2539.

[22] 42 U.S.C. § 7401(b)(1).

[23] *See* Utility Air Reg, 134 S. Ct. at 2438.

[24] *Id.*

[25] *Id.* at 2431; *See* 42 U.S.C. §§ 7475(a)(1), 7479(2)(C).

[26] *See* Utility Air Reg, 134 S. Ct. at 2431; 42 U.S.C § 7479(1) ("The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.").

[27] 42 U.S.C. § 7479(1).

To qualify for a PSD permit, facilities must "comply with emissions limitations that reflect the best available control technology for each pollutant subject to regulation under the Act."[28] Facilities seeking to qualify for a PSD permit must comply with emissions limitations that reflect the "best available control technology [("BACT")] for each pollutant subject to regulation under [the Act]."[29] In addition, Title V of the Act makes it unlawful to operate any "major source," wherever located, without a permit.[30] "A 'major source' is a stationary source with the potential to emit 100 tons per year of 'any air pollutant.'"[31]

In response to *Massachusetts v. Environmental Protection Agency* ("Mass v. EPA"),[32] the EPA adopted GHG emission standards for new motor vehicles, making "stationary sources … subject to the PSD program and Title V on the basis of their potential to emit greenhouse gases."[33] In response to its acknowledgment that "requiring permits for all sources with greenhouse-gas emissions above the statutory thresholds would radically expand those programs and render them unadministrable[,]" the EPA "tailored" the programs "to accommodate greenhouse gases by providing, among other things, that sources would not become newly subject to PSD or Title V permitting on the basis of their potential to emit greenhouse gases in amounts less than 100,000 tons per year."[34]

The Supreme Court pronounced four substantive holdings. First, GHG emissions cannot be the sole basis for subjecting an industrial facility to permitting requirements under PSD or Title V of the Act.[35] Second, adjusting established GHG emission levels from the Act at which stationary source's become subject to permitting requirements is not within the EPA's authority.[36] Third, the EPA "may not treat [GHGs] as a pollutant for purposes of defining [an MEP] … ."[37] Finally, the "EPA's decision to require BACT for [GHGs] emitted by sources otherwise subject to PSD review is … a permissible interpretation of the statute under *Chevron*."[38]

[28] *See* Utility Air Reg, 134 S. Ct. at 2435 (internal quotation marks omitted).

[29] 42 U.S.C. § 7475(a)(4).

[30] *See* Utility Air Reg, 134 S. Ct. at 2435; 42 U.S.C § 7661a(a).

[31] *See* Utility Air Reg, 134 S. Ct. at 2431; 42 U.S.C. §§ 7661(2)(B), 7602(j).

[32] 549 U.S. 497 (2007).

[33] Utility Air Reg, 134 S. Ct. at 2437.

[34] *Id.*

[35] *Id.* at 2442.

[36] *Id.* at 2444.

[37] *Id.* at 2446.

[38] *Id.* at 2448.

b. The Upshot of the Decision: SCOTUS Recognizes the EPA's Authority to Regulate Greenhouse Gases

Some scholars argue the decision marked a small victory for the EPA.[39] Despite striking down the EPA's regulatory solutions, "UARG is a significant victory for the EPA … because the Court recognized the Agency's authority to regulate GHGs in the first place, and because it ultimately allowed the EPA to regulate ninety-seven percent of the GHG emissions the Agency had proposed to control under the EPA's Tailoring Rule."[40] In reaching this result and by focusing on congressional intent, "the Court held that GHG emissions could not trigger certain permitting requirements because GHGs are not properly considered "air pollutants" in the context of some programs under the Act."[41] "In trying to determine what Congress intended in an unanticipated factual setting, the Court created an interpretive precedent that is not meaningfully constrained."[42]

However, the Court's restriction on the powers of the EPA, which contradicts the underlying purpose of the agency, undermines the checks and balances built into the U.S. Constitution "in a very disturbing way."[43] All of this appears to be in the name of spite, as the decision is one in a long line of decisions involving regulations designed to protect the environment—in this case, requiring permitting to ensure those emitting substantial GHGs are doing so under the supervision of regulatory authorities (i.e., the EPA) and that they are taking appropriate steps to minimize the detrimental impact on the environment—that defies logic and reason and controverts precedent, simply to undermine environmental interests, choosing instead the interests of business.

c. The Role of Massachusetts v. E.P.A.

"The Court's majority has made clear its solid support for the landmark *Massachusetts v. EPA* decision authorizing EPA to regulate [GHGs]."[44] In *Mass. v. EPA*, states, local governments, and

[39] *See* Oakes, *supra* note 15, at 56-57 (2014) ("In Utility Air Regulatory Group v. Environmental Protection Agency, the Supreme Court struck down the EPA's regulatory solution. Nonetheless, UARG is a significant victory for the EPA—both because the Court recognized the Agency's authority to regulate GHGs in the first place, and because it ultimately allowed the EPA to regulate ninety-seven percent of the GHG emissions the Agency had proposed to control under the EPA's Tailoring Rule.").

[40] *Id.*

[41] *Id.* at 57.

[42] *Id.*

[43] *See* Oakes, *supra* note 15, at 62.

[44] Howard A. Learner, *Emerging Clarity on Climate Change Law: EPA Empowered and State Common Law Remedies Enabled*, 44 Envtl. L. Rep. News & Analysis 10744, 10744 (2014).

environmental organizations brought suit against the EPA regarding an order "denying a petition for rulemaking to regulate [GHG] emissions from motor vehicles under the Act."[45] In that case, a group of private organizations (later joined by the state of Massachusetts) petitioned the EPA to regulate gas emissions from cars, specifically in coastal areas to protect against climate change.[46]

In an opinion written by Justice Stevens, the Supreme Court held that the Act authorized the EPA to regulate GHG emissions from cars.[47] In order to do so, the EPA must first form a scientific judgment "that such emissions contribute to climate change."[48] Additionally, the Court held that the EPA could "avoid taking further [regulatory] action [regarding GHG emissions] only if it determines that [GHGs] do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do."[49]

d. The Applicable Part of the Clean Air Act

The Act states that "[n]o MEF on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies[.]"[50] There are two notable exceptions.[51] The first exception involves permitting requirements.[52] Subsection one (1) states an MEF may be constructed in a protected area if "a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part[.]"[53] The second exception is the BACT exception.[54] Under subsection four (4), a proposed facility may be constructed in a protected area, if it "is subject to the best available control technology for each pollutant subject to regulation under [the Act] emitted from, or which results from, such facility[.]"[55]

The statute also specifies that "[a]fter the effective date of any permit program approved or promulgated under this subchapter, it shall be unlawful for any person to violate any requirement of a permit issued under this subchapter, or to operate an affected source, a major source, any other [enumerated] source … , or any other stationary source in a

[45] Mass. v. E.P.A., 549 U.S. at 497.

[46] *Id.* at 497, 505.

[47] *Id.* at 528.

[48] *Id.*

[49] *Id.* at 533.

[50] 42 U.S.C. § 7475.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

category designated (in whole or in part) by regulations promulgated by the Administrator … which shall include a finding setting forth the basis for such designation, except in compliance with a permit issued by a permitting authority under this subchapter.[56] The Administrator is also empowered to "promulgate regulations to exempt one or more source categories (in whole or in part) from [these] requirements … if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements."[57]

An MEF is defined as a "stationary source[ ] of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant[.]"[58] Covered stationary sources are extensive.[59] The statute also covers "any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant."[60] Major emitting facilities do not include state-exempted facilities, whether new or modified, used for nonprofit health or educational institutions.[61]

Additionally, the statute uses the word "commenced," as applied to construction of an MEF, to mean "the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations[.]"[62] It also indicates that the owner has either "begun, or caused to begin, a continuous program of physical on-site construction of the facility[.]"[63] Alternatively, the owner may have simply "entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time."[64]

Other pertinent terms include: "necessary preconstruction approvals or permits," which means "those permits or approvals, required by the permitting authority as a precondition to undertaking [previously enumerated activities]"; and "construction," which includes the modification of any source or facility ("when used in connection with any source or facility").[65]

[56] *Id.* § 7661a (some parentheticals omitted).
[57] *Id.*
[58] *Id.* § 7479.
[59] *See* 42 U.S.C § 7479(1).
[60] *Id.*
[61] *Id.*
[62] *Id.* § 7479(A)(2).
[63] *Id.*
[64] *Id.*
[65] *Id.* § 7479(B)-(C).

III. Examples of Cases or Controversies Involving Environmental Interest that Support an Argument that Implicit Bias Exists in the Supreme Court

This section provides snapshots of some cases that lend weight to the argument that implicit bias against environmental interests exists in our judicial system. This bias is effectuated by narrowing access to the judicial system and manipulating standards so that, once an environmental claim enters the system, the deck is essentially stacked against them.

Jamon Jarvis, a practitioner, argued that courts have extended exceptions for businesses and states beyond functional necessity and, as a result, that "courts have over-protected the government and its discretionary functions."[66] In this vein, the first two supplemental cases explore the duty to warn. As Jarvis points out, "over-protection is partially enacted through the Court's willingness to classify the EPA's failure to warn of ascertained environmental hazards as within the discretionary function exception."[67] The weight of this argument is based on the imbalance between "purely economic interest compared to environmental interests in environmental litigation."[68]

The other substantial problem is establishing standing to bring the claim in the first place.[69] The subsequent subsections briefly explores landmark cases regarding the process of establishing standing for environmental interest groups and advocates in the federal judiciary, contrasting that with more sympathetic states, like Hawai'i, which have embraced a more environmentally conscious public policy and ideology. The final subsection peeks into an area of research that explores the disparate impact on environmental interest groups compared to businesses when arguing before the federal judiciary.

a. Relaxing the Duty to Warn: Lack of Enforcement and Willful Negligence; Lowering the Standards for Government Interests

Two recent cases show how courts have reached different results when applying the discretionary function exception to a governmental failure to warn citizens of detected environmental hazards.[70]

[66] Jamon A. Jarvis, *The Discretionary Function Exception and the Failure to Warn of Environmental Hazards: Taking the "Protection" Out of the Environmental Protection Agency*, 78 Cornell L. Rev. 543, 572 (1993).
[67] *Id.*
[68] *See* Figlio, *supra* note 3.
[69] Jarvis, *supra* note 66, at 549-50.
[70] *Id.*

i. Lockett v. U.S.

In *Lockett v. United States*, the EPA played a different role than in *Mass. v. EPA* or in *UARG*. The EPA was sued by neighbors of a scrap reclamation operation for failing to warn them that PCB levels exceeded acceptable levels.[71] "The EPA had known for eight years that the level of PCBs exceeded safe levels."[72] A 1981 site visit conducted by the state inspector of the scrap reclamation site owned by Carter Industrial, Inc. revealed dangerous PCB levels.[73] Testing of an oil puddle on the property showed PCB levels of 560 parts per million—"over ten times the accepted level[.]"[74] "After being notified of these results, the EPA concluded that there was insufficient evidence of contamination of the site and took no action."[75] Three years later, the state inspector returned and tested numerous areas on the property revealing "levels of 31 and 167 ppm from ground surrounding old transformers, 131 ppm from the main driveway of the property, and 2,340 ppm-almost 47 times the accepted level established by the EPA-taken from an alley just off the property."[76] Despite these findings, the EPA again decided "the evidence of contamination was insufficient to take any action upon the site[,]" though they did order further monitoring of the site.[77] It was only after an additional site inspection, which revealed "PCB levels "as high as 90,000 ppm, [that] the EPA ordered an emergency cleanup and issued advisory notices to the local media and the residents of the area surrounding the Carter site."[78]

The plaintiffs' 1988 suit accused the EPA of negligently failing to warn them of the PCB levels on the Carter site and[79] that the EPA had "fail[ed] to exercise reasonable care to prevent or at least decrease the risks from continued exposure to PCBs" after the 1981 test of the site.[80] The district court granted the government's motion for summary judgment "based on the discretionary function exception."[81] According to the district court, the EPA's conduct was "based on economic, social and political policy considerations within the discretionary function exception, and not solely on scientific considerations."[82]

[71] Lockett v. U.S., 938 F.2d 630, 631 (1991).
[72] Jarvis, *supra* note 66, at 549-50.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] Lockett, 938 F.2d at 632.
[80] *Id.*
[81] *Id.*
[82] *Id.*

Citing Berkovitz v. United States, 486 U.S. 531 (1988), Jarvis notes "the EPA's decision not to warn was the type of discretion that the exception protected."[83]

The Sixth Circuit upheld the decision on appeal.[84] The court of appeals specifically rejected the argument that the EPA had a duty to warn after detecting PCB hazards, even where they could potentially affect persons in the area.[85] As Jarvis notes:

> The court claimed that the relevant statutory and regulatory scheme involving PCB hazards granted the EPA discretion, providing the EPA with a range of action following the detection of an environmental hazard. Specifically, the court found this discretion in a portion of the Toxic Substance Control Act (TSCA), which governs the use of PCBs, and which instructs the EPA administrator to consider "the environmental, economic, and social impact" of action taken under the Act.[86]

Additionally, "since the EPA had discretion in its response to the tests at the Carter site, the EPA's response was the type of discretion the exception intended to protect."[87]

Dissenting, Judge Edwards "disagreed with the court's holding that notifying the public of the hazard was a matter of choice for the EPA."[88] Edwards supported additional regulatory language stating that the EPA "will seek stringent penalties in any situation in which significant dispersion of PCB's occurs due to a violation."[89] Jarvis interprets Judge Edwards' dissent as claiming that, "even if the government does have discretion to warn the public, the type of discretion the EPA exercised was not grounded in political, economic, or social policy, as required by *Berkovitz*, and therefore was not protected by the exception."[90] In sum, Judge Edwards believed that the EPA had failed to introduce sufficient evidence that public policy considerations justified its failure to warn.[91]

[83] Jarvis, *supra* note 66, at 549-50.
[84] Lockett, 938 F.2d at 639.
[85] *Id.*
[86] Jarvis, *supra* note 66, at 549-50.
[87] *Id.*
[88] *Id.*
[89] Lockett, 938 F.2d at 641 (Edwards, J., dissenting).
[90] Jarvis, *supra* note 66, at 552.
[91] *Id.*

ii. Dube v. Pittsburg Corning

A similar factual situation led to a different result in *Dube v. Pittsburgh* Corning.[92] In *Dube*, the daughter of a Navy shipyard worker contracted mesothelioma after exposure to asbestos fibers carried home on her father's work clothes.[93] The claims was settled with the asbestos manufacturer, and the plaintiff then sought damages from the U.S. government "for failing to warn" the workers and their families of the asbestos hazards in the work environment.[94] The trial court found the government had assessed the risk and, in fact, negligently failed to warn the workers and their families of the asbestos dangers.[95] Additionally, the trial court found the negligence proximately caused the daughter's injury, but held the government immune from liability under the discretionary function exception.[96]

On appeal, the First Circuit reversed the district court, concluding, "[T]he Navy's failure to warn domestic bystanders of the risks associated with exposure to asbestos dust is not 'of the nature and quality that Congress intended to shield from tort liability.'"[97] The court rejected the argument that naval regulations mandated a governmental duty to warn the workers and their families, but held that the government had negligently failed to warn of the danger.[98] "The discretionary function exception did not protect this negligent discretion."[99]

According to the First Circuit, the discretionary function exception is a narrow exception applicable only to actual decisions based on public policy.[100] A public policy decision never existed in *Dube*.[101] "The government never decided to forgo warning domestic bystanders. . . ."[102] The government "simply failed to do so."[103] The court concluded, "[I]t is difficult to imagine the Navy justifying a decision not to issue a simple warning to domestic bystanders of such potentially devastating danger, based on economic or other policy grounds."[104] In Jarvis' words, "[t]hese two cases illustrate the confusing and ambiguous line plaintiffs

[92] Dube v. Pittsburg Corning, 870 F.2d 790 (1989).
[93] *Id.* at 792.
[94] *Id.*
[95] *Id.* at 791-92.
[96] Jarvis, *supra* note 66, at 552.
[97] Dube, 870 F.2d at 801.
[98] *Id.*; *see also* Jarvis, *supra* note 66, at 553.
[99] Jarvis, *supra* note 66, at 553.
[100] Berkovitz v. United States, 486 U.S. 531 (1988); *see* Jarvis, *supra* note 67, at 553 (1993).
[101] *See* Jarvis, *supra* note 66, at 553.
[102] Dube, 870 F.2d at 796.
[103] *Id.* (internal parenthetical omitted).
[104] *Id.* at 800.

must walk when seeking to hold the government liable for failing to warn of environmental hazards."[105]

> Both cases appear to present situations in which the government negligently failed to warn affected parties, an action not clearly based upon any policy issue. Both cases, however, reached different results through similar application of the discretionary function exception.[106]

In a Seventh Circuit case, *Cisco v. United States*, the court also held that the EPA had broad discretion.[107] In that case, the EPA was sued for a failure to warn members of several households that dirt used as residential landfill had been contaminated with dioxin.[108]

b. Standing: Making it Nearly Impossible to Advocate for Environmental Interest; Lujan v. Defenders of Wildlife & Sierra Club v. Morton

There is a litany of cases that illustrate the door is closing on environmental interests. It appears that the main thrust of the narrowing is to limit environmental interest groups' ability to establish standing to make the claim. As discussed above, *Mass v. EPA* has a significant effect on the holding in UARG.[109] *Mass v. EPA* essentially opened the door for states to challenge environmental regulations.[110] Other cases have made it more difficult for environmental interest groups to achieve standing.[111]

One of the more impactful decisions regarding standing was *Lujan v. Defenders of Wildlife*.[112] In that case, a group of "organizations dedicated to wildlife conservation" filed "suit against the Secretary of the Interior, seeking a declaratory judgment that the new regulation … err[ed] as to the geographic scope [of a specific provision of the Endangered Species Act] and an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation."[113] The Court held that the "respondents lack[ed] standing to bring th[e]

[105] Jarvis, *supra* note 66, at 553.
[106] *Id.*
[107] Cisco **v.** United States, 768 F.2d 788 (7th Cir. 1985).
[108] *Id.*
[109] *See* Utility Air Reg, 134 S. Ct. at 2427.
[110] Mass v. EPA, 549 U.S. at 536-37.
[111] *See generally* Christopher Warshaw & Gregory E. Wannier, *Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 5 Harv. L. & Pol'y Rev. 289 (2011).
[112] *See Id.* at 303-07.
[113] Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992).

action[,]"[114] as they had failed to prove the three elements of injury in fact, a causal connection between the injury and the conduct complained of, and a likelihood that the injury will be "redressed by a favorable decision."[115]

The Court noted, "[T]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."[116] However, the Court went on to reason that:

> the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured. To survive the Secretary's summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents' members would thereby be "directly" affected apart from their " 'special interest' in th[e] subject."[117]

The effect of the Court's holding was to limit access to the courts for environmental interest advocates who did not suffer a direct and concrete injury.[118] Warshaw and Wannier note there is actual flexibility in the standing doctrine.[119] More interesting are their findings on the treatment of directly regulated parties and parties that are 'merely' adversely affected, noting that an almost equal percentage of cases brought by businesses and environmental advocacy groups were dismissed for lack of standing.[120] However, they also note that dismissals for regulated-industries claims *tripled* in the wake of *Lujan*.[121]

Another case of note regarding standing for environmental interest advocates is *Sierra Club v. Morton*.[122] The controversy arose from a permit that was issued for development of a Walt Disney Enterprises project near Sequoia National Park.[123] The Sierra Club argued it had standing based on its "special interest in the conservation and sound maintenance of the national parks, game refuges, and forests

[114] *Id.* at 578.
[115] *Id.* at 560–61 (alteration in original) (citations omitted).
[116] *Id.* at 562–63 (alteration in original) (citations omitted).
[117] *Id.* at 562-63.
[118] *See* Warshaw & Wannier, *supra* note 111, at 316.
[119] *See id.*
[120] *Id.* at 320 (internal quotation marks omitted).
[121] *Id.* at 309.
[122] Sierra Club v. Morton, 405 U.S. 727 (1972).
[123] *Id.* at 729.

of the country."[124] The Court found that the Sierra Club lacked standing because it "failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development."[125] The Sierra Club failed to indicate anywhere "in the pleadings or affidavits … that its members use[d] Mineral King for any purpose, much less that they use[d] it in any way that would be significantly affected by the proposed actions of the respondents."[126]

As Warshaw and Wannier point out,

> Despite the fact that it rejected the Sierra Club's standing argument, the Court's requirement of an injury in fact established a very modest barrier for plaintiffs. Indeed, the Court stated that the Sierra Club could have established an injury in fact by showing that some of its members used the area around the proposed park for recreational purposes.[127]

The Court noted that Sierra Club members may have been able to successfully argue they suffered an injury related to "aesthetic, conservational, and recreational as well as economic values" due to the construction of the park.[128] Apparently after the ruling, the Sierra Club amended and resubmitted its complaint alleging its members "used the area near the planned park for recreational purposes, and the Club was granted standing."[129]

One of the most resounding repercussions of the decision was Justice Douglass dissent.[130] Justice Douglass wrote:

> The critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public

[124] *Id.* at 730.
[125] *Id.* at 735.
[126] *Id.*
[127] Warshaw & Wannier, *supra* note 111, at 292.
[128] Morton, 405 U.S. at 738.
[129] Warshaw & Wannier, *supra* note 111, at 292.
[130] Christopher T. Burt, *Procedural Injury Standing After Lujan v. Defenders of Wildlife*, 62 U. Chi. L. Rev. 275, 277 (1995) ("Justice Douglas aptly characterized the ambiguity that has traditionally surrounded the law of standing when he warned in 1970 that "[g]eneralizations about standing to sue are largely worthless as such.").

> concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. This suit would therefore be more properly labeled as *Mineral King v. Morton*.[131]

Nonetheless, the reality is that the doctrine of standing remains "the irreducible constitutional minimum" of proving an injury in fact, which is concrete and particularized, and actual or imminent, "a causal connection between the injury and the conduct complained of," and the likelihood "that the injury will be 'redressed by a favorable decision.'"[132] While these elements of standing are widely accepted, it is clear that the rigid adherence and application restricts accessibility to the courts, especially for environmental interest groups, regardless of the merits of the claim.[133] Based on the disparate impact, this alone supports a strong argument that there is implicit bias against environmental interest advocates.

c. Standing for Environmental Interest in Hawai'i: Looking through the Lens of the Hawai'i Superferry EIS Case

During 2004-2007, the State of Hawai'i attempted to establish inter-island travel in cooperation with Hawai'i Superferry, Inc. ("HSF").[134] The Department of Transportation ("DOT") approved plans to move ahead with the HSF project, despite concerns about environmental impact,[135] especially concerns involving mid-ocean collisions with humpback whales,[136] when it declared improvements to the Kahului harbor facility fell within a categorical exemption under Hawai'i Administrative Rule § 11-200-8(a).[137]

[131] Morton, 405 U.S. at 741-42 (citations omitted).

[132] Lujan, 504 U.S. at 560-61.

[133] *See* Burt, *supra* note 130.

[134] Dan Nakaso, *Hawaii law sets conditions, clears way for Superferry*, USA Today, Nov. 6, 2007, at A14.

[135] Mark Niesse, *Opponents attempt to stop Superferry*, Honolulu Star-Bulletin, Mar. 5, 2007, at A5.

[136] Derrick DePledge, *Hawaii Superferry conditions finalized*, Honolulu Advertiser, Nov. 6, 2007, at B1.

[137] Haw. Code R. § 11-200-8 (LexisNexis 2015) ("Chapter 343, HRS, states that a list of classes of actions shall be drawn up which, because they will probably have minimal or no significant effect on the environment, may be declared exempt by the proposing agency or approving agency from the preparation of an environmental assessment provided that agencies declaring an action exempt under this section shall obtain the advice of other outside agencies or individuals having jurisdiction or expertise as to the propriety of the exemption. Actions declared exempt from the preparation of an environmental assessment under this section are not exempt from complying with any other applicable statute or rule.").

The Sierra Club (amongst other groups) brought suit against the DOT and HSF for failure to require an environmental impact assessment, let alone carry one out.[138] Specifically, the Sierra Club was seeking injunctive relief to prevent the project from moving forward pending an environmental assessment.[139] A substantial part of the decision hinged on the Sierra Club's ability to establish standing.[140]

Hawai'i has a unique perspective on standing in cases pertaining to environmental concerns.[141] Hawai'i has adopted a three part test to determine if the injury may be addressed by the court.[142] The court describes this as a shift, easing standing requirements for cases involving environmental concerns:

> this court's opinions have (1) moved from 'legal right' to 'injury in fact' as the ... standard ... for judging whether a plaintiff's stake in a dispute is sufficient to invoke judicial intervention, (2) from economic harm ... to inclusion of 'aesthetic and environmental well-being' as interests deserving of protection, and (3) to the recognition that a member of the public has standing to ... enforce the rights of the public even though his or her injury is not different in kind from the public's generally, if he or she can show that he or she has suffered an injury in fact.[143]

In the HSF case, the Hawai'i Supreme Court found that the Sierra Club had established standing; that they "suffered both threatened injuries under either a traditional injury-in-fact test or procedural injuries based on a procedural right test."[144] Implementing such a test at the national level would likely go a long way to correcting for implicit bias and explicit barriers to environmental interest claims in the federal judicial system.

[138] Sierra Club v. Dep't of Transp., 115 Haw. 299, 304 (Haw. 2007).

[139] *Id.* at 312.

[140] *Id.* at 318-24.

[141] *Id.* at 320 (noting "the appellate courts of [Hawaii] have generally recognized public interest concerns that warrant the lowering of standing barriers in ... cases ... pertaining to environmental concerns") (quoting Mottyl v. Miyahira, 95 Haw. 381, 393 (Haw. 2001)).

[142] Sierra Club v. Dep't of Transp., 115 Haw. 299 at 320.

[143] *Id.* (internal citations omitted).

[144] *Id.* at 328 ("The threatened injury in fact is due to DOT's decision to go forward with the harbor improvements and allow the Superferry project to operate at Kahului harbor without conducting an EA. Similarly, the procedural injury is based on the various interests Appellants have identified that are threatened due to the violation of their procedural rights under HEPA. Appellants have also demonstrated that the threatened substantive injuries and procedural injuries were caused by Appellees and may be redressed by this court.").

The holding in the HSF case illustrates unique values in Hawai‘i. Under the state Constitution,

> [e]ach person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.[145]

In drafting the state constitution, the legislature clearly valued the environment.[146] The legislature went out of its way "to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations."[147] These are some of the values that make Hawai‘i special. There is a strong argument that the rest of the nation should follow suit.

In summary, the cases discussed above are merely the tip of the iceberg. The litany of cases continues. For a more complete catalogue of environmental interest cases, see *Restoring What's Environmental About Environmental Law in the Supreme Court*.[148] For a more detailed assessment of the Hawai‘i Superferry, see *The Environmental Assessment: Issues Surrounding the Exclusion of Projects Significantly Affecting Hawai'i's Fragile Environment*.[149]

[145] Haw. Const. art. XI, § 9.

[146] Haw. Rev. Stat. § 343-1 (West 2015) ("[T]he quality of humanity's environment is critical to humanity's well being, that humanity's activities have broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.").

[147] *Id.*

[148] Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. Rev. 703 (2000).

[149] Jordon J. Kimura, *The Environmental Assessment: Issues Surrounding the Exclusion of Projects Significantly Affecting Hawai'i's Fragile Environment*, 10 Asian-Pac. L. & Pol'y J. 168, 180 (2008).

d. The Disparate Impact of Restricted Access to the Courts: Weighing Environmental and Business Interest

Focusing again on the national plane and the federal judiciary, there is apparent "doctrinal malleability" in standing for business cases as compared to environmental cases.[150] "Many scholars have argued" and at least one study has shown that ideology has a significant impact on the implementation of the standing doctrine between these two classes of cases.[151]

The strict standing doctrine as applied in *Lujan* became a "procedural weapon that gave judges a new tool for eliminating cases they did not like."[152] Conversely, the doctrinal malleability has led to a split "in the outcome of standing cases for business plaintiffs."[153] The split hinges on panels with Democratic and Republican majorities.[154] Prior to the *Lujan* decision, courts dismissed almost exactly the same percentage of business cases due to lack of standing.[155] After *Lujan*, Democrat–dominant panels increased their rate of dismissal compared to Republican panels, which "kept their rate of standing dismissals relatively unchanged."[156] This data, and Warshaw and Wannier's ultimate conclusion is that the strict standing doctrine has not affected the ability of environmental interests to "get their day in court." However, this conclusion is contradicted by evidence from cases such as the Hawai‘i Superferry case, where judicial ideology or public policy has strongly influenced the court. The HSF case provides an example of a court that is more lenient and permits environmental interest groups to make their case. Nationally, the trend is in the opposite direction.[157]

While not directly related to the judiciary, this tension between business and environmental interests is evidenced in the political arena. Of particular note is the tightrope that politicians have to walk when discussing environmental issues. For instance, in Virginia's recent gubernatorial race, one candidate was heard calling climate change "a scientific fact" in the same speech in which they stated that EPA regulations to curtail emissions "go too far."[158] This contradiction "highlights the increasingly narrow line [politicians] must walk to satisfy

[150] Warshaw & Wannier, *supra* note 111, at 317-18.

[151] *See id.* at 303.

[152] *Id.* at 317.

[153] *Id.*

[154] *Id.* at 318.

[155] *Id.* at 317-18

[156] *Id.*

[157] 33 Charles Alan Wright & Charles H. Koch, Federal Practice and Procedure §8413 (1st ed. 2006).

[158] Jenna Portnoy, *Democrats Try to Balance Environmental and Business Interests in Virginia*, Washington Post (Sept. 13, 2014), https://perma.cc/85PJ-47MM.

environmentalists and campaign donors without alienating business interests."[159] These statements seems analogous to the line judges have to walk in determining the permissibility of environmental cases.

IV. Repercussions of Utility Air Regulatory Group v. Environmental Protection Agency: the Environmental Protection Agency's Response; what to expect in the future regarding Environmental Interests

Having explored the general narrowing of accessibility to the courts, and the unique perspective of the Hawai'i state courts, this section turns to the implications of the UARG decision. It focuses on the implications of overly restricting the EPA's ability to regulate on the behavior of state governments and the EPA's reaction to the holding in *UARG*.

a. The Effects of Replacing the EPA's Statutory Interpretation

One of the criticisms of the EPA which the Court stated in its opinion was that the EPA had "promulgat[ed] a rule that would 'bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization.'"[160] The Court then "proceeded to enact an interpretation with similarly dramatic implications of its own accord and without clear doctrinal benchmarks."[161] In *Questioning the Use of Structure to Interpret Statutory Intent: A Critique of Utility Air Regulatory Group v. EPA*, Matthew Oakes argues that the decision may have deleterious effects and that it was an abuse of the Court's power in violation of the "system of checks and balances established by the Constitution."[162]

According to Oakes, "[t]here are two substantive reasons why we should be wary of the Court's [decision]."[163] The first concern, Oakes argues, is the justification for the interpretation that the Court chose—namely that narrowing the meaning of "major emitting facility" was the most sensible approach, given that it did less violence to the statutory structure."[164] In contrast, Justice Scalia argued the EPA was required

[159] *Id.*

[160] Oakes, *supra* note 15, at 62 (quoting Utility Air Reg, 134 S.Ct. at 2427, 2444).

[161] *See* Oakes, *supra* note 15, at 62.

[162] *Id.*

[163] *Id.* at 61.

[164] *Id.* (footnotes omitted).

to interpret the term "any air pollutant" to "denote less than the full range of pollutants covered by the Act-wide definition."[165] Other options remain aside from a court striking down "impermissible statutory interpretations advanced by agencies," as dictated under *Chevron*.[166] However, the Court should only endeavor to interpret congressional intent itself in the rarest of situations.[167]

The second reason to be wary is that it is unclear that the Court's interpretation should have won out in *UARG*.[168] According to Oakes, the *UARG* Court had four options when reviewing the Tailoring Rule.[169] First, the Court could "force EPA to follow the [Act]'s unworkable numerical limits, thereby putting pressure on Congress to amend the framework it created."[170] Second, it could "recognize [EPA's] administrative authority to adjust explicit numerical limits consistent with the Agency's interpretation of congressional intent."[171] The third option was to "review the statutory framework and other indicia of congressional intent and, if appropriate, invalidate EPA's approach without establishing a single path forward, leaving it to EPA to propose an alternative."[172] The final alternative was to "conclusively interpret the statute, foreclosing other potential Agency interpretations."[173] The Court ultimately "seemed to conclude that the absurd results flowing from regulation based on the statutory language were analogous to statutory ambiguity, and that some interpretation was therefore appropriate."[174]

b. Atlas' "Race to the Bottom": Incentivizing Non-Conformance to the Clean Air Act and the EPA's Inability to Enforce its own Regulations

As mentioned below, politicians and arguably judges are impacted and influenced by these economic interests.[175] This tension essentially equates to a war of interests: those of state environmental enforcers and those of the EPA, the latter of which "are more vulnerable to pressures from elected officials or interest groups, pleas of economic

[165] Utility Air Reg., 134 S.Ct. at 2446 n.8.

[166] *See* Oakes, *supra* note 15, at 61.

[167] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (relying on *extensive* legislative history to interpret congressional intent); *see also* Oakes, *supra* note 15, at 61.

[168] Oakes, *supra* note 15, at 61.

[169] *Id.* at 60.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* at 61.

[175] *See infra* Section IV(d).

hardship from violators, enforcement budget constraints, and too-close relationships between regulators and regulated entities."[176] States have "an inherent economic interest in creating a hospitable business climate compared to other states."[177] Consequently, "a state might use weaker environmental enforcement to make itself more attractive to industry" at the expense of environmental concerns.[178]

Mark Atlas, a prolific environmental attorney and advocate, fears that, without "a primary theoretical rationale for federal environmental regulation, … states might 'race-to-the-bottom' in environmental standards."[179] "'Race-to-the-bottom' refers to a progressive relaxation of state environmental standards, perhaps motivated by interstate competition to attract industry, that reduces social welfare below levels that would exist [otherwise] … ."[180]

According to Atlas, states were considering "imposing[ ] *smaller* penalties on environmental law violators to encourage industries to locate in their states."[181] EPA even reported that "states were hesitant to take strong enforcement actions against violators for fear of losing business."[182] Furthermore, "the quantities of violations and penalties do not necessarily indicate how many should have resulted from adequate enforcement," as states shirk their responsibilities to report back to the EPA.[183] "[L]ow numbers could reflect either lackluster enforcement or stringent enforcement that deterred violators or serious offenses."[184] State shirking appears to be facilitated by the EPA's limited ability to monitor state enforcers; "only a few percent of state inspections of regulated facilities are followed up annually by EPA inspections of the same facilities to check the accuracy of the state's findings."[185] Atlas concludes by noting that EPA is understaffed as it is and that it lacks credibility to enforce its own regulations.[186]

[176] Mark Atlas, *Enforcement Principles and Environmental Agencies: Principal-Agent Relationships in a Delegated Environmental Program*, 41 L. & Soc'y Rev. 939, 942 (2007).

[177] *Id.*

[178] *Id.*

[179] *Id.* (citations omitted).

[180] *Id.* (citations omitted).

[181] *Id.* (emphasis added) (citing Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom?"*, 48 Hastings L.J. 271 (1997)) (based on claims of "substantial percentages of small survey samples of various government and interest group officials").

[182] Atlas *supra* note 176, at 942.

[183] *Id.* at 943 (emphasis omitted).

[184] *Id.*

[185] *Id.*

[186] *Id.*

In the wake of the *UARG* decision, lax standards, accompanied by lax enforcement strongly indicates that violations of the Act are liable to increase, negatively impacting our environment and going against the very purpose and intent of the Act. If Atlas is correct, then states will continue to incentivize interests that are completely contrary to preservation of the environment, solely in the name of economics.

c. The EPA's Reaction

In reaction to the UARG decision, the EPA issued a memorandum.[187] The memorandum noted the issues addressed by the Supreme Court, including the "Tailoring Rule" and the "Timing Decision."[188] It also noted that the Court held the EPA may not treat GHGs "as an air pollutant for purposes of determining whether a source is a major source required to obtain a [PSD] or title V permit."[189] The EPA expressed its commitment to examining the implications of the Supreme Court's decision, "including how the EPA will need to revise its permitting regulations and related impacts to state programs."[190]

The memorandum indicated that the EPA intended to act consistently with its understanding of the decision, that it would continue with a modified application process for permits under the Tailoring Rule "Step 2," and provided "preliminary guidance in response to several questions regarding ongoing permitting requirements for 'anyway sources'."[191]

d. The Emerging Law of Climate Change is Becoming Clearer

Ultimately, scholars seem to concur that, if nothing else, the *UARG* decision is making it easier to predict how courts will treat cases or controversies involving environmental interests.[192] According to one such scholar:

> The U.S. Supreme Court's series of climate change and other Clean Air Act decisions authorize the EPA to advance its standards-setting process, and provide general

[187] Memorandum from Janet G. McCabe, Acting Assist. Adm'r, Office of Air & Radiation, EPA, & Cynthia Giles, Assist. Adm'r, Office of Enf't & Compliance Assurance, EPA, to Reg'l Adm'rs, Regions 1-10, EPA (July 24, 2014), https://perma.cc/Z43Z-69L6.

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *See generally* Learner, *supra* note 44.

> deference to EPA's implementation of [the Act] and other statutory programs. The Court is sending a clear message … to restrain judicial activism.[193] Likewise, federal and state courts are opening the door for plaintiffs to assert state common law tort remedies.[194]

As Howard Learner notes, the picture is becoming clearer for "litigators, federal and state environmental regulatory agencies, businesses, … and … economic and environmental interests, environ-mental and public health advocates, and the broader public."[195] It seems to be clear that the door is shutting on environmental interests and wide open for states and business interests to challenge the EPA or other regulatory groups working on behalf of environmental interests.[196]

V. Possibilities for Minimizing Implicit Bias Against Environmental Interests

Perhaps the strongest argument for correcting the implicit bias against environmental interests in the federal judiciary is the creation of federal environmental courts.[197] Other nations and states have implemented environmental courts. The benefits of these courts are that it alleviates pressure from civil and criminal courts and allows all of the affected courts to focus more keenly on the areas of law in which they would practice.[198] Consequently, all officers of the court end up being

[193] *Id.*

[194] *Id.*

[195] *Id.* at 10745.

[196] *Cf.* Learner, *supra* note 44, at 10746 (arguing that the Court has given deference to the EPA: "In UARG, the Court did hold that EPA overreached and exceeded its discretion in one particular respect on the [GHG] emission standards. Rare are the cases like UARG, however, in which EPA's interpretation rises to the level of multiplying by a very large factor a number that is clearly stated in the statute. The Court granted certiorari on only that one limited issue among the array sought by petitioners who were dissatisfied with the D.C. Circuit's opinion in Coalition for Responsible Regulation, Inc. v. EPA. In that decision, the D.C. Circuit, among other things, upheld EPA's Endangerment Finding on the harmful health impacts of [GHG] emissions and upheld EPA's Tailpipe Rule setting [GHG] standards applicable to motor vehicles. In UARG, the Court stated that it "granted six petitions for certiorari but agreed to decide only one question: Whether EPA permissibly determined that its regulation of [GHG] emissions from new motor vehicles triggered permitting requirements under [the Act] for stationary sources that emit [GHGs].").

[197] *See generally* Scott C. Whitney, *The Case for Creating a Special Environmental Court System*, 14 Wm. & Mary L. Rev. 473 (1973).

[198] *See, e.g.*, Brian J. Preston, *Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study*, 29 Pace Envtl. L. Rev. 396 (2012).

better suited, zealous advocates for their clients or for the establishment in general.[199] A couple of prime examples of whether this has been effective are Australia and New Zealand.

Throughout a legislative process to "introduce planning measures and development conditions designed to ensure adaptation to climate change impacts," many cases have come before environmental courts.[200] "The decisions in these cases contribute to a growing body of climate change law dealing with the permissible scope of adaptation strategies at the local level."[201]

Because the cases are environmental in nature, the environmental courts are better suited to hear them. An example of an environmental case is in Australia is *Charles & Howard Pty Ltd v Redland Shire Council*, which involved "an application to fill land that was approved by the Redland Shire Council subject to a condition requiring works to be undertaken only in an area above the 1-in-100-year flood level."[202]

Specialized courts are not a new phenomenon.[203] The United States Tax Court is a prime example of a specialized court that has been successful.[204] Additionally, such a court facilitates the expertise alluded to above.[205] Additionally, such a court would provide for uniformity and consistency in the decisions.[206]

Whitney's comparative study focuses on the successes and failures of the tax court.[207] He concedes that "[e]nvironmental issues are probably more complex and specialized than tax issues, and hence courts having special expertise appear to be highly desirable, if not absolutely necessary."[208] Additionally, as Whitney notes, we have reached a point of crisis based on workload, "which could be relieved to some extent by assigning the large and increasing volume of uniquely time-consuming environmental cases to these special courts."[209] More importantly to the instant matter is that the courts would then be able to focus on purely environmental issues and deliberate over and adjudicate the matters purely in the interests of law to the exclusion of any form of bias.

[199] *See also id.* at 422-24.

[200] Jacqueline Peel, *Climate Change Law: The Emergence of a New Legal Discipline*, 32 Melb. U.L. Rev. 922, 952 (2008).

[201] *Id.*

[202] *Id.*

[203] Whitney, *supra* note 197, at 475.

[204] *Id.* at 476.

[205] *Id.*

[206] *Id.*

[207] *Id.* at 486.

[208] *Id.* at 522.

[209] *Id.*

One final, but very important point from Whitney's article is that "Supreme Court review should be narrow."[210] While Whitney claims this is "so as to reduce the workload and assure expertise,"[211] SCOTUS' role must be minimized because they are probably the biggest part of the problem when it comes to implicit bias against environmental interest groups. Whitney's proposed structure would also "likely avoid the conflicting decisions … which presently exist to a serious degree in environmental matters."[212] "Such a system of environmental courts would be likely to function more expeditiously than regular courts and maximize public confidence in the soundness and promptness of environmental decisions."[213]

VI. Conclusion

This note has attempted to highlight behavior of the federal judiciary that indicates there is implicit bias restricting the access of environmental interest groups to federal courts. Most recently, this bias was evidenced by the Supreme Court of the United States in the *UARG* decision, which manipulated the statutory interpretation doctrine known as the *Chevron* test. Effectively, *UARG* highlights how bias in the judiciary narrows access to the courts and stacks the deck against environmental interest groups.

Even if the groups' claims pass the threshold test of standing and are heard, there is a theme throughout the judiciary, especially at the Supreme Court, to hold in favor of business or national security interest at the expense of our environment—often without reason. The courts appear to be willing to manipulate legal doctrines purely for the sake of spite.

Much of this bias may be due to sociological, ideological, or political factors. As sociological studies have indicated, environmentalists and environmental groups are often associated with labels or stigmas such as "hippies" and "tree-huggers." Despite being a mis-categorization, these stigmas in turn likely hinder the efforts of the advocates. Additionally, there is a strong argument that ideology plays a distinct role in pre-determining the outcome of a case. Finally, judges, like politicians, are susceptible to the political winds.

The cases at issue brought to light the strict standard for standing that is applied nationally and contrasted it with the more lenient standard in Hawai'i—another illustration of the effects of ideology on the outcome of cases. There are many more cases that show the same recurring themes.

[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.*

Finally, this note attempted to highlight a plausible alternative to the current system that might help resolve the issue of implicit bias against environmental interest groups in the federal judiciary. Implementation of a federal environmental court system would allow for even-handed, unbiased adjudication of cases and controversies arising from environmental disputes. It would facilitate more expertise in the area, while alleviating pressure on the other courts.

While this appears to be a solid solution, the state of Hawai'i seems to have achieved sound balance in adjudicating environmental matters simply based on its constitutional provisions and under the guidance of the legislature. A shift in ideology may be all we need to eradicate the implicit bias against environmental interest groups.

The Evolution of Consumption Horse Slaughter in the United States: An Analysis of the Safeguard American Food Exports Act

Rebecca Quinn Dolan*

I. Introduction

Horse slaughter for human consumption is widely viewed as an inhumane practice by Americans, who overwhelmingly value equines as companion animals and consider them to be an inappropriate food source.[1] While horsemeat has been consumed by some cultures for centuries, U.S. horses have never been farmed for consumption.[2] Despite the potential toxicity of horsemeat to humans, it remains a delicacy in many countries, and the continuing demand for it in Europe and Asia fuels the ever present slaughter industry. Approximately 160,000 horses are slaughtered each year, or one percent of the domestic horse population.[3] While Congress has effectively outlawed horse slaughter in the US through the annual appropriations process by limiting the funding of inspections of slaughter facilities, the practice has not been explicitly outlawed. Proponents of horse slaughter argue that more horses will be abandoned and neglected if domestic slaughter were outlawed, and that slaughter plants stimulate local economies, while opponents of the practice view it as inhumane, environmentally problematic, and an ineffective means of addressing overbreeding and irresponsibility.[4]

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[1] *Myths and Facts Regarding Horse Slaughter*, ASPCA (2015), https://perma.cc/ZGA4-M7RR.

[2] *Id.* at 3. Other cultures including many indigenous tribes have always viewed horse slaughter as inhumane.

[3] *Id.* This figure is down from the 345,700 horses killed in the US alone in 1990, but is still both noteworthy and problematic. Most U.S. horses going to slaughter are Quarter Horses and some Thoroughbreds; many have raced or were bred for racing. *See also* Jerry Finch, *Horse Slaughter: the Truth Revealed, Part One—History*, Habitat for Horses (Aug. 5, 2012), https://perma.cc/LP4K-4Q8Y.

[4] Joe Drape, *Racetrack Drugs Put Europe Off U.S. Horse Meat*, N.Y. Times, (Dec. 8, 2012), https://perma.cc/85ZB-4KQY.

The issue of consumption horse slaughter has been a concern of citizens and legislators alike for decades at local, state, and federal levels, reflecting the importance of horses as companions of cultural and historical significance and as an unfit food source from a public safety perspective. Regulation has taken different forms, including ballot initiatives, appropriations bills and amendments, and state and federal legislation. Because appropriations are reviewed annually and no federal legislation has passed which explicitly bans the practice, the existence and scale of the industry has fluctuated over time. It is within this backdrop that the Safeguard American Food Exports Act (SAFE Act) is currently pending before Congress.[5] If passed, the Act would prohibit the slaughter of horses in the United States for human consumption and the export of live horses to other countries for slaughter.

Bipartisan support for the SAFE Act is rooted in the afore-mentioned concerns surrounding public health risk and the inhumane nature of horse slaughter.[6] Many horses are given substances throughout their lives that are dangerous and potentially deadly to humans.[7] Nonetheless, the horse slaughter industry—horses exported from the United States to Canada and Mexico for slaughter—remains vital and the market for horsemeat subsists internationally. However, concerns about toxicity and slaughter practices have resulted in more stringent export and import policies, including a European Union ban on the import of horsemeat from Mexico, which became effective January 1, 2015, and reflects growing international awareness.[8] European countries still import horsemeat from other countries, including Canada, and Mexico continues to export its horsemeat to Asian countries. This said, the SAFE Act would only regulate domestic slaughter for human consumption and the export of horses from the United States for slaughter purposes, effectively ending United States participation in the practice.

Concerns about the SAFE Act's enforceability inevitably loom large, as outsourcing for slaughter to Mexico and Canada has increased, since appropriations bills have effectively stymied the slaughter

[5] H.R. 1942, 114th Cong. (2015); S. 1214, 114th Cong. (2015).

[6] *Safeguard American Food Exports (SAFE) Act*, Animal Welfare Institute, https://perma.cc/3CF9-HALL (last visited Apr. 1, 2016). "The U.S. Food and Drug Administration currently bans the presence of 379 common equine drugs in animals slaughtered for human consumption. However, there is no procedure in place to ensure that American horses, sold to slaughterhouses and killed for human consumption, are free of these FDA-banned substances."

[7] *Id.*

[8] ASPCA, *supra* note 1.

industry in the United States.[9] While the export of horses would remain permissible for non-slaughter purposes, meaning the risk of exportation under false pretenses is possible, the threat of False Claims violations would likely curb the export-slaughter practice in a meaningful way, rendering the Act enforceable. A component of the required documentation for the export of live horses, the origin health certificate, includes a description of purpose for shipment, i.e., slaughter or non-slaughter; because this documentation must be endorsed by the government and is submitted to the government, any false statements can give rise to violation(s) of the federal False Claims Act ("FCA"). And, with a civil penalty of up to 10,000 dollars per false claim, it is unlikely that sellers and transporters, who would have to defraud the government in order to illegally export horses for slaughter, would continue to export in any meaningful way post imposition of the SAFE Act.[10]

Section one of this paper aims to provide a brief history of horse slaughter legislation, and section two explains and analyzes the pending SAFE Act. Section three defines the export process for horses, which has bearing on potential False Claims violations, and section four examines the enforceability of the proposed legislation from the lens of the False Claims Act (FCA), evaluating the relative strengths and weaknesses of potential claims—i.e., the deterrent effect of the threat of civil penalties on one hand and the risk of failing to meet the FCA's "knowing" standard on the other. There are likely cases where violations could be difficult to detect; however, compliance must be predicted against the typical profile of kill buyers and sellers whose businesses could not sustain the penalties of their association with the slaughter pipeline. Thus, part five concludes with some thoughts about what passage of the SAFE Act would mean for the international horsemeat market and ultimately advocates for its passage.

[9] In 2007, there was a 49 percent increase in Canadian horse imports for slaughter from the United States. In the same year, "the industry produced nearly $77 million worth of horsemeat, an increase of 33 per cent over 2006. In 2012, the Canadian horsemeat exports were valued at nearly $90 million." *Fast Facts on Horse Slaughter in Canada,* Humane Soc'y Internat'l Canada, https://perma.cc/65HT-F53F (last visited Nov. 10, 2015).

[10] Individuals who would likely present False Claims would include sellers who sell directly to individuals abroad for slaughter and misstate the purpose for export on required documentation or transporters who knowingly participate in the fraudulent export through filling out similar paperwork. Most horses are bought by "kill buyers" who are the middlemen between the sellers and slaughterhouses. It should be noted that horses are not only bought, but also stolen and often acquired under false pretenses and quickly moved across U.S. borders. Stolen Horse International estimates that "60% of horses stolen are killed at slaughter plants." *Horse Slaughter Fact Sheet*, Horse Fund, https://perma.cc/3UM5-MGE4 (last visited Nov. 14, 2015).

II. The Evolution of Horse Slaughter Legislation in the United States

Congress, States, and United States courts have debated the issue of horse slaughter for human consumption since the mid-1990s.[11] On November 3, 1998, California voters passed Proposition 6, the Prohibition on Slaughter of Horses and Sale of Horsemeat for Human Consumption Initiative, which banned slaughter of horses and mules and the sale of horsemeat for human consumption in California.[12] The initiative also prohibited sending horses out of the state for consumption-slaughter in other states and "horse" was "defined as any horse, pony, burro, or mule."[13] Violations established under the ballot measure included felony and misdemeanor criminal penalties.

On February 14, 2002, Maryland Representative Connie Morella introduced "The American Horse Slaughter Protection Act," the first bill specifically prohibiting horse slaughter in the United States, but the Act did not become law.[14] The Act would have prohibited the slaughter of horses for human consumption and would have banned both the trade and transport of horsemeat and live horses intended for human consumption. It provided for civil and criminal penalties up to 5,000 dollars or imprisonment for up to one year. Convicted persons unable to post bond would have horses confiscated and placed in an animal rescue facility or euthanized.

In 2005, House and Senate funding limitations on slaughter facilities effectively banned horse slaughter.[15] Under the appropriations amendment, federal funding could not be used for inspections—salaries or expenses—of horse slaughter facilities.[16] These limitations were renewed annually until 2011 when inspection defunding was excluded from appropriations. Following the funding limitation ban on inspections, in February of 2006, the United States Department of

[11] Finch, *supra* note 3. Note that "the 1990s were a relative boom time for the American economy. This allowed recreational horse ownership to increase at 3% to 5% per year, meaning that the kill buyers were forced to bid against recreational horse buyers flush with cash." *Id*.

[12] Leslie Potter, *A Timeline of Horse Slaughter Legislation in the United States*, Horse Channel (Mar. 2012), https://perma-archives.org/warc/SQ7V-8P97/http://www.horsechannel.com/horse-resources/horse-slaughter-timeline.aspx.

[13] California Proposition 6, Prohibition on Slaughter of Horses for Human Consumption (1998).

[14] H.R. 3781, 107th Cong. (2002).

[15] Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, Pub. L. No. 109–97, § 794, 119 Stat. 2120, 2164 (2005).

[16] *Id.*

Agriculture (USDA) issued regulation CFR 352.19, which allowed any slaughterhouses in existence to pay for their own inspections.[17]

In September of 2006, the House passed the "American Horse Slaughter Prevention Act," which, like the proposed SAFE Act, banned the sale and transport of American horses for slaughter for human consumption; however, the Senate bill did not make it through committee.[18] With a similar fate, in January of 2007, the "American Horse Slaughter Prevention Act" was reintroduced by Representative Janice Schakowsky (D-IL), but the legislation never moved to a vote.[19]

On January 19, 2007, the U.S. Court of Appeals for the Fifth Circuit upheld a section of the Texas Agriculture Code, which banned the sale, transfer, or possession of horsemeat for human consumption and made it an offense to transfer horsemeat to a person one "knows or should know intends to do [the abovementioned] prohibited activities."[20] While Texas slaughterhouses argued that the Federal Meat Inspection Act[21] preempted the Texas state anti-horse slaughter law, the Court held that they could "find no indication that Congress intended to prevent states from regulating the types of meat that can be sold for human consumption."[22]

In March of 2007, the U.S. District Court for the District of Columbia vacated the regulation which allowed horse slaughterhouses to pay USDA officials for horsemeat inspections because of a failure to consider the environmental impacts of the program under the National

[17] 9 CFR § 352.19, Ante-Mortem Inspection and Applicable Requirements, Jan. 2012.

The regulation provided in pertinent part: "An official establishment that wishes to slaughter horses can apply for voluntary ante-mortem inspection according to § 352.3. Such establishments shall pay the applicable base time, overtime, and holiday rates for ante-mortem inspection in accordance with § 352.5. Such ante-mortem inspection shall be made in pens on the premises of the establishment at which the horses are offered for slaughter in accordance with § 309.1(b), and such establishments also shall comply with all applicable provisions of §§ 352.8 and 352.9."

[18] H.R. 503, 109th Cong. (2006). The Act proposed to amend the "Horse Protection Act," "to prohibit the shipping, transporting, moving, delivering, receiving, possessing, purchasing, selling, or donation of horses and other equines to be slaughtered for human consumption, and for other purposes."

[19] H.R. 503, 110th Cong. (2007).

[20] Empacadora de Carnes de Fresnillo v. Curry, 476 F.3d 326, 333 (5th Cir. 2007).

[21] 21 U.S.C. § 601 (2006).

[22] Empacadora, *supra* note 19. Just after this decision, in March of 2007, the Dallas Crown Slaughterhouse was shut down. Under NEPA (42 U.S.C. § 4331), agencies must consider environmental consequences before executing regulations with substantial environmental effects, conducting an Environmental Assessment (EA) and issuing an Environmental Impact Statement (EIS) to report their findings to the public.

Environmental Policy Act (NEPA).[23] As a result, USDA inspectors were immediately removed from the Cavel International slaughterhouse in Illinois.[24] In May of 2007, the slaughter of horses for human consumption was officially banned in Illinois by Governor Rod Blagojevich, but Cavel was able to continue its slaughter practices during the course of its legal challenge, which was unsuccessful.[25] After much push back from Cavel, in September 2007, the U.S. Court of Appeals for the Seventh Circuit held the Illinois ban to be constitutional, which resulted in the closure of the last horse slaughterhouse in the United States.[26] Just as the Fifth Circuit concluded in early 2007, the Seventh Circuit also found the prohibition did not cause a preemption problem (through the FMIA), nor trigger a dormant Commerce Clause.[27] Parallel to these closings and the effective end of horse slaughter for consumption in the U.S., exports for slaughter from 2006 to 2010 "increased by 148 and 660 percent to Canada and Mexico, respectively."[28]

Until September 2011, Congress had continued to prohibit federal funding for inspections of horse slaughter plants and horsemeat.[29] In November 2011, Congress passed its agricultural appropriations bill for 2012, which similarly excluded the ban on funding for inspections.[30] However, in April 2013, the White House's 2014 budget proposal was released, and a prohibition against federal funding of horsemeat inspections was once again enacted.[31] As of December 2015, the funding ban was renewed for the 2015 fiscal year, but no law banning the practice itself or regulating exportation of horses for slaughter has been passed.[32] As a result of the effective "bans" on horse slaughter through the defunding of inspections, horses are exported to Canada and

[23] Humane Soc'y of the U.S. v. Johanns, No. 06 Civ. 2652007 WL 112040 (D.C. 2007).

[24] *Id.*

[25] 225 Ill. Comp. Stat. Ann. 635 / 1.5 (West 2007). The Illinois Horse Meat Act made it unlawful for any person in the state either "to slaughter a horse if that person knows or should know that any of the horse meat will be used for human consumption,"or "to import into or export from this State, or to sell, buy, give away, hold, or accept any horse meat if that person knows or should know that the horse meat will be used for human consumption."

[26] Cavel Int'l, Inc. v. Madigan, 500 F.3d 551 (7th Cir. 2007).

[27] *Id.* The Texas ban was very similar to the Illinois ban and identical legal challenges by slaughterhouses were advanced unsuccessfully.

[28] GAO-11-228, *Horse Welfare: Action Needed to Address Unintended Consequences from Cessation of Domestic Slaughter* (June 22, 2011), https://perma.cc/22S6-URJZ.

[29] Potter, *supra* note 12. The 2011 Senate Appropriations Bill included funding for horsemeat inspections.

[30] *Id.*

[31] *Id.*

[32] Potter, *supra* note 12.

Mexico for slaughter and then supplied to European countries and other parts of the world for human consumption.[33] It should be emphasized that the ban does not explicitly outlaw horse slaughter for human consumption and that horse owners could still slaughter horses for their own consumption so long as they do not sell the meat, which would require USDA inspection.[34]

Proponents of horse slaughter argue that careful inspections of slaughterhouse operations and humane processing are more important than banning the practice—a "necessary evil"—which will result in outsourcing of slaughter on an unregulated and potentially even more abusive basis to countries whose policies and perception of the issue are different from those in the United States.[35] They also claim that horse slaughter is economically beneficial in its creation of jobs and point to reports of rising levels of investigations for horse neglect and abandonment since the 2007 close of domestic slaughterhouses.[36] Proponents also point to the nutritional value of horsemeat, which is high in protein and low in fat, arguing that it is a good and healthy alternative to cattle and pigs in which the U.S. market might like to indulge.[37]

On the other hand, opponents of horse slaughter argue that the practice is inhumane for horses whose nature and temperament is not conducive to slaughter practices, which often require multiple blows to the head.[38] They also cite popular dislike for horse slaughter and the public perception that horses are companion animals in our culture.

[33] Drape, *supra* note 4.

[34] 21 U.S.C. 603. Pub. L. 109-97, § 794, 119 Stat. 2120, 2164.

Pertinent language: "*None of the funds made available in this Act may be used to pay the salaries or expenses of personnel to—*

1. Inspect horses under section 3 of the Federal Meat Inspection Act;
2. Inspect horses under section 903 of the Federal Agriculture Improvement and Reform Act of 1996.

[35] Americans Against Horse Slaughter (AAHS), *Horse Slaughter Truth Deception*: *Truth and Deception,* https://perma.cc/HKD5-UCQQ (last visited Apr. 15, 2016). These interest groups argue that horse slaughter allows us to responsibly eliminate old, diseased, neglected, and starved horses. USDA surveys report that over 90 percent of horses slaughtered are in good or excellent health and the fact that slaughterhouses reject sick, thin, or injured horses at the border, leaving them to die, evidences the fact that it is a different and healthy population that is actually slaughtered for horsemeat—a population which could be used in many different and more humane ways.

[36] GAO 11-228, *supra* note 28, at 18.

[37] Paula Parisi, *The Pros and Cons of Horse Slaughter*, The Equestrian News (Aug. 1, 2009), https://perma-archives.org/warc/K3PJ-PVCT/http://reviewshow.biz/2016/02/15/the-pros-and-cons-of-horse-slaughter/.

[38] Drape, *supra* note 4.

In 2012, a national poll found that 80 percent of Americans supported banning horse slaughter and recent studies have found that the absence of horse slaughter for human consumption in the United States does not actually contribute to increasing numbers of abandoned and homeless horses.[39] Alternatives to slaughter exist through adoption programs, rescue organizations, retirement homes, and sanctuaries; old or sick horses could be euthanized by a veterinarian. Overbreeding could also be addressed as a cause of a continuing cycle of unwanted horses; if there was no profitable way to get rid of unwanted horses, breeders wouldn't be so carefree at the beginning of the process and cycle.[40] In fact, abuse and neglect cases actually went down after the closing of major U.S. slaughterhouses; when California banned slaughter for human consumption in 1998, it saw a decrease in abuse cases through 2001 and when Cavel was closed in Illinois, it also saw a decrease in abuse and neglect cases.[41]

Opponents of the practice also point to the toxicity of horsemeat and the need to protect citizens from consumption. Because horses in the United States are not raised for food, but rather for racing and companionship, they are given drugs throughout their lives that are unfit and sometimes even deadly for humans. An estimated 10 to 15 percent of horses sent for slaughter were once used for racing and, most importantly, given toxic, performance-enhancing drugs.[42] From a macro-level perspective, opponents assert that property values, local economies, and the environment surrounding slaughterhouses are suppressed when plants are permitted to exist and operate. Lastly, they maintain that most slaughterhouse jobs are given to undocumented workers anyway and that recent episodes of abandonment can actually be attributed to Mexican and Canadian rejection of horses based on their being unfit for slaughter.

Within this context, Congress has been unable to pass a law that explicitly addresses the issue of horse slaughter in the United States or its policies regarding export. Nevertheless, representatives within Congress were motivated to write and sponsor a new version of the SAFE Act in 2015 after decades of movement, but no resolution on the issue.

[39] ASPCA, *supra* note 1.

[40] AAHS, *supra* note 35 ("The American Quarter Horse Association (AQHA) is the biggest offender with regard to overbreeding in the horse industry. Interestingly, the Quarter horse is also the most slaughtered, with 70 percent of them being slaughter-bound, as per 2010 statistics from the USDA. The AQHA promotes a self-destructive business model of breeding as many horses as possible and disposing of those that don't meet predetermined criteria, thereby contributing to the inhumane treatment of horses and the slaughter industry.").

[41] *Horse Slaughter Fact Sheet*, *supra* note 10.

[42] Drape, *supra* note 4.

III. Safeguard American Food Exports Act

The SAFE Act was introduced in April 2015 by Representatives Frank Guinta (R-N.H.), Jan Schakowsky (D-Ill.), Vern Buchanan (R-Fla.), and Michelle Lujan Grisham (D-N.M.).[43] The Act was motivated by values and concerns related to the humane treatment of horses and, most notably, the toxicity of horsemeat consumption to humans. Congressional findings outlined in the Act include the following: (1) horses are not raised for our consumption; (2) horses are "frequently treated with substances that are not approved for use in horses intended for human consumption and equine parts are therefore unsafe"; and (3) consumption of parts of a horse "raised in the United States likely poses a serious threat to human health and the public should be protected from these unsafe products."[44] More specifically, the act prohibits domestic horse slaughter for human consumption as well as the export of live horses intended for consumption-slaughter.[45]

Unlike some prior unsuccessful legislation, the SAFE Act focuses less on concerns relating to horse welfare and more on the dangers associated with human consumption of horsemeat. Regardless, the potential benefits to both humans and horses that would flow from passage of the Act are apparent. The Act does not include language relating to enforcement or specify penalties for violations and is extremely open-ended in this respect; however, the Act would operationally viable as efforts to circumvent could result in violations of additional federal laws.

IV. The Export Process

Passage of the SAFE Act would not affect the existence or practices of slaughter abroad—in Mexico or Canada; however, it would curb United States participation in the practice and ideally ensure that horsemeat does not come from U.S. horses. By banning domestic slaughter, the United States would not be participating directly in the practice, and by banning the export of United States horses for consumption slaughter, the United States would not be indirectly providing a source for the international horsemeat market.

While each country has its own rules regarding import that often exceed those the United States has for export, the USDA's Animal and Plant Health Inspection Service (APHIS) has issued rules and

[43] H.R. 1942, 114th Cong. (2015).

[44] *Id.* at § 2(4).

[45] *Id.§3.*

regulations, 9 CFR 88, governing the transport of horses for slaughter[46] and the USDA requires limited paperwork be completed and accompany horses being exported. These regulations are enforced by the APHIS and state officials; under the rules, liability for owners or shippers, as well as inspecting veterinarians who falsify documents, including test charts, may be found.[47] The rules also require the owner/shipper to include a "statement of fitness to travel at the time of loading, which will indicate that the equine is able to bear weight on all four limbs, is able to walk unassisted, is not blind in both eyes, is older than 6 months of age, and is not likely to give birth during the trip."[48]

Under 9 CFR 91.3, "all animals intended for exportation by land to Mexico or Canada shall be accompanied from the State of origin of the export movement to the border of the United States by an origin health certificate."[49] The health certificate must certify that the "animals were inspected within the 30 days prior to the date of the movement of the animals for export, and were found to be healthy and free from evidence of communicable disease and exposure thereto."[50] Additionally, the certificate must be "endorsed by an authorized APHIS veterinarian in the State of origin" and must "include any test results added by such authorized APHIS veterinarian."[51] The health certificate must also "individually identify the animals in the shipment as to species, breed, sex, and age, and, if applicable, shall also show registration name and number, tattoo markings, or other natural or acquired markings."[52] Lastly, "the origin health certificate shall include all test results, certifications, or other statements required by the foreign country of destination."[53]

[46] GAO 11-228, *supra* note 28, at i. According to the GAO Report, enforcing transport regulations is difficult for several reasons: "First, among other management challenges, the current transport regulation only applies to horses transported directly to slaughtering facilities. In addition, GAO found that many owner/shipper certificates, which document compliance with the regulation, are being returned to USDA without key information, if they are returned at all. Second, annual legislative prohibitions on USDA's use of federal funds for inspecting horses impede USDA's ability to improve compliance with, and enforcement of, the transport regulation. Third, GAO analysis shows that U.S. horses intended for slaughter are now traveling significantly greater distances to reach their final destination, where they are not covered by U.S. humane slaughter protections. With cessation of domestic slaughter, USDA lacks staff and resources at the borders and foreign slaughtering facilities that it once had in domestic facilities to help identify problems with shipping paperwork or the condition of horses before they are slaughtered."

[47] *Id.*

[48] *Id.* Certificates are subject to review by the USDA.

[49] Inspection and Handling of Livestock for Exportation, 9 C.F.R § 91 (1998).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

This said, the U.S. has relatively minimal requirements for animals to be exported to other countries, specifically and almost ironically for export for Canada or Mexico by land.[54] The requirement that has the most bearing on the enforceability of the SAFE Act is the international health certificate, which must be obtained from an accredited veterinarian.[55] Several health forms exist that may qualify once endorsed, including several USDA forms; all typically require disclosure of the owner/shipper of the horse(s), the recipient, certification that transporting rules under 9 CFR 88 have been met, and the name of the auction/seller where the horse was purchased or acquired ("name and address of place of origin"), among other items.[56] State Veterinary Service (VS) offices' endorsement of health certificates mark the final review of export information and accompanying documents and officials verify the accuracy of the information provided and that the animal satisfies the importing country's requirements; most countries require federal endorsement of the documents as part of their import process and the U.S. requires the VS endorsed health certificate as part of its export regulations.[57]

Canada requires submission of the VS 17-140 or the VS 17-145 forms for importation in addition to numerous certification statements relating to the health of the horse and CFIA (veterinary) inspection of horses at its border.[58] This is to ensure that the horses are "healthy" for slaughter; however, depending on the border, horses may or may not be unloaded and, consequently, the veterinary evaluation is often limited in scope and ability to ensure the horses are healthy.[59] Mexico requires the VS Form 17-6 health certification statements and microchips.[60] At both the Canadian and Mexican borders, horses are often rejected for failing to meet import requirements or because they are injured.[61] As a result,

[54] U.S. Customs and Border Protection, *Exporting Animals from the U.S. to Other Countries*, U.S. Department of Homeland Security, https://perma.cc/6DNT-DVTX (last updated Dec. 11, 2015).

[55] *Id.*

[56] *See IRegs for Animal Exports*, United States Department of Agriculture, https://perma.cc/5R3A-N64Y (Feb. 26, 2016).

[57] *See Animal and Animal Product Export Information*, United States Department of Agriculture, https://perma.cc/96JB-3L5Q (Aug. 7, 2015).

[58] *Import Health Requirements of Canada for Horses From the United States of America,* United States Department of Agriculture, https://perma.cc/AC9H-NBDB (last visited Apr. 13, 2016).

[59] Animals' Angels, How Does a Slaughter Horse Cross the Border? (last visited Mar. 31, 2016), https://perma.cc/S5RM-QYFL (follow "How Does a Slaughter Horse Cross the Border?" hyperlink).

[60] *Mexico*, U.S. Dep't of Agric., Animal & Plant Health Inspection Serv. (Apr. 2016), https://perma.cc/5LWJ-XAB3.

[61] Ironically, deserted horses who are unfit for slaughter contribute to the homelessness that proponents of slaughter claim the practice addresses. *See* Animals' Angels, *supra* note 59.

horses are often left in pens where they are initially unloaded for their kill buyers to pick up; often the horses are either not picked up, left to die in reject pens by the kill buyers who have no investment in them anymore, or left on the United States side of the border.[62] Most importantly, what all forms share in common is the requirement that the consigner and consignee be identified with a name and address, that the place of origin be listed with an address, and that the "purpose of shipment" be noted or checked off.[63] Consigners sign the form certifying the information is true.

V. Enforceability of the Safe Act and the FCA

The domestic ban of horse slaughter under the SAFE Act would effectively abrogate the need for annual appropriations amendments banning funding for slaughterhouse inspections and salaries. It would also eliminate the risk of new USDA regulations, which could circumvent possible appropriations' funding bans, such as the one that was vacated in 2007 for failing to comply with NEPA. Theoretically, absent an appropriations ban in any given year, a valid Environmental Impact Statement under NEPA could permit slaughterhouses to pay for USDA inspections and continue to operate; however, if the SAFE Act was controlling, no work-around such as the slaughterhouse-pays rule could be enacted.

The USDA requires that horses being exported from the United States be accompanied by an official health certificate that is issued by a certified veterinarian; example certificates include the VS Form 17-140 or 17-145 ("United States Origin Health Certificates"), depending on whether the horses are from a single consigner, are from the same premises of origin, and are consigned to the same destination.[64] The Animal and Plant Health Inspection Service (APHIS), an agency under the umbrella of the USDA, also requires that transport regulations be met for horses intended for slaughter, including the VS Form 10-13 ("Owner/Shipper Certificate Fitness to Travel to a Slaughter Facility.")[65] VS user fees are assessed for USDA-APHIS endorsement of health certificates and a fee

[62] *See id.*

[63] *See Module 8: International Movement of Horses*, National Veterinary Accreditation Program, U.S. Dep't of Agric. (July 2012), https://perma.cc/F8L4-BTHZ.

[64] *E.g.*, U.S. Dep't of Agric., Animal & Plant Health Inspection Serv. Veterinary Servs., Tex. Exp. Section, Export of Horses from the United States to Canada (Aug. 2014), https://perma.cc/94JA-KYHC. Usually, the consignor signs the certificate authenticating the information he/she is submitting with the horse(s) for export.

[65] U.S. Dep't of Agric, Animal, and Plant Health Inspection Serv, VS10-13 (2010), https://perma.cc/B42P-FPGE.

schedule, which distinguishes slaughter versus non-slaughter horses, exists.[66] These fees apply to each health certificate and, as of October 1, 2012, the cost for each slaughter animal moving to Canada or Mexico was 56 dollars.[67] This fee does not apply to export health certificates "prepared for endorsement completely at the site of the inspection by an APHIS veterinarian in the course of performing inspection or supervision services for the animals listed on the certificate."[68]

Currently, the USDA does not take responsibility "for the reliability of affidavits issued for horses originating in the U.S." and audits reflect incomplete or inaccurate documents.[69] At present, horse slaughter in the United States for human consumption is neither illegal nor is its export; however, if the SAFE Act were passed, it is possible that the government would take more seriously the validity of documents endorsed, processed, or submitted for export, since incomplete or inaccurate information could relate to violation of the law. Falsification of forms, which are reviewed by state VS offices and by federal border control, could create liability under the FCA, which makes it illegal to falsify statements to the government.[70] The FCA provides, in pertinent part, that:

> (a)(1) Any person who—(A) knowingly presents, or causes to be presented, [to an officer or employee of the United States Government or a member of the Armed Forces of the United States] a false or fraudulent claim for payment or approval; (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim [paid or approved by the Government]; (C) conspires to [defraud the Government by getting a false or fraudulent claim paid or approved by the Government]; … or (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the

[66] 9 CFR § 130.20(b)(1) (user fees for endorsing export certificates).

[67] *Id.*

[68] 9 CFR § 130.20(c).

[69] *Mexican Horse Meat Banned by EU*, Journal of the American Veterinary Medical Association (Jan. 28, 2015), https://perma.cc/3H29-ELLT. The United States is much stricter with its criteria and enforcement for importation. It is possible that less concern has been given to the completion and enforcement of export documents because the practice (exporting for slaughter) has not been illegal and the animals are leaving the country so they become someone else's problem.

[70] 31 U.S.C. § 3729.

> Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, … plus 3 times the amount of damages which the Government sustains because of the act of that person … . (b) For purposes of this section—(1) the terms 'knowing' and 'knowingly'– (A) mean that a person, with respect to information—(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information; and (B) require[s] no proof of specific intent to defraud.[71]

Claimants "knowingly" make false statements when they have actual knowledge that the information they are providing is false or when they act in "deliberate ignorance of the truth" or when they act in "reckless disregard of the truth or falsity of the information."[72] Proof of specific intent to defraud the government is not required; because the person submitting the false claim does not have to have actual knowledge that the claim is false, shippers or transporters of horses submitting false documentation could be on the hook for submitting fraudulent export documents in addition to veterinarians if or when they misrepresent health evaluations or kill buyer middlemen and consigners who would seek health certificates under false pretenses to send horses across the border for slaughter.[73]

The federal government retains the power to enforce the FCA against individuals who defraud it through submission of false or fraudulent claims.[74] While the government recovers tens of billions of dollars annually from cases it prosecutes under the FCA, the majority of FCA complaints are filed by private individuals who may, under the Act's "qui tam" provision, bring an action on behalf of the federal government.[75] Parties may receive 15-25 percent of the proceeds from the action when the government intervenes in the lawsuit and may receive whatever amount the court deems reasonable when the government does not intervene.[76] Within the context of the proposed SAFE Act, concerned citizens could report the actions of kill buyers who they "catch" at some stage in the slaughter pipeline or the government itself could take action where it saw or suspected fraud; while government action is less likely than private action in the form of a "qui tam" action, both possibilities

[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] 31 U.S.C. § 3730 (b). Any individual or entity with evidence of fraud may file an action.
[76] *Id.*

would create risk for individuals wishing to operate within the legal framework of the SAFE Act. Nonetheless, "qui tam" plaintiffs can shed light on actions of which government agencies such as the USDA could be unaware due to limited resources of time and funding.

While veterinarians, for example, would not necessarily be in violation of the FCA for issuing a valid health certificate (post passage of the SAFE Act) to someone who brings in a horse for export, any false information they input based on what they are told from a consigner, particularly where multiple horses are being evaluated, could bring them within reach of the FCA under the "deliberate ignorance of the truth" standard.[77] Likewise, where shippers or transporters may be different from the consigners who have sold and seek to export horses for slaughter, liability could be found for deliberately ignoring the falsity of the information (the fraudulent origin health certificate) that they submit along with the horse at border crossing. Because there is not a substantial profit to be made in this industry and by this export process, it is unlikely that these transporters would be unaware of where the horses are actually going once they have crossed the border. If the industry was more lucrative, perhaps transporters would drop the horses off to another middle man who would then take them to a slaughter facility, thereby protecting the actual border crossing transporter who submits the forms and horse from knowledge and potential liability. However, this is not the case; on a basic level, transporters know what forms accompany the animals they transport and where they are taking the animals so if there were clear inconsistences that would amount to violation of the SAFE Act, they could be ostensibly liable.

The group that has the greatest potentially liability for FCA violations would be the consigners who possess title to the horses that they then sell to slaughterhouses. They are the ones responsible for procuring of the health certificate, signing it, and certifying the validity of the information within it. As mentioned, in order to continue to export horses for slaughter, they would have to lie about their purpose and, in doing so, face the most direct liability under the FCA for their fraud. But for their actions, veterinarians would not be requested, with or without knowledge, to export issue health certificates that are untrue and transporters would not have slaughter-bound horses to move.

In sum, the FCA's penalties present potential kill buyers, sellers, and transporters with formidable risk should they submit false export paperwork, and the threat of an FCA action alone would create a

[77] 31 U.S.C. § 3729. In other words, someone requesting origin health certificates for export for 20 to 30 horses at a time who have just been purchased at auction should raise eyebrows such that validating the false information provided by the exporter without questioning the situation could amount to conscious disregard for the truth.

huge disincentive for these individuals to falsify their documents. Kill buyer consigners often haul other livestock, including cattle and pigs, across United States borders for slaughter and maintain small, bonded businesses. Because most are not solely in the business of moving horses for slaughter, it is unlikely that the "risk" of FCA action would be worth the "reward" of getting away with fraudulent submissions and making the current limited profit on slaughter-bound horse sales. And, because each horse must meet the aforementioned export requirements, it is possible that kill buyers and transporters could face multiple actions if transporting more than one horse for slaughter under false pretenses, giving rise to hefty fines of 5,000 to 10,000 per false claim.[78] Thus, it is likely that these potential civil and criminal penalties under the FCA would deter individuals from risking exposure and possible loss of their entire business since horse slaughter is often just one piece and, on average, buyers will only spend 28 to 34 cents per pound or rarely more than 350 dollars for a 1000 pound horse, which doesn't yield profit near what potential fines could be.[79] Usable meat is only sold for 20 to 30 dollars per pound as horses do not yield much meat by virtue of their physique; as long as this is the case, slaughterhouses will never pay much more than they do now for their horses because they are for profit businesses.[80]

While transporters who present health certification export documentation at border crossings should be concerned about potential liability under the FCA post imposition of the SAFE Act—for "causing [a false statement about the purpose of export] to be made,"[81] it is less likely that the government would elect to prosecute this population over the buyers who intentionally and knowingly would prepare the horses and documents for submission. Given that ignorance of the law is no excuse and that the knowledge standard under the FCA is extremely broad, sellers and transporters alike would not have a valid or viable defense on which to hang their hats. Unsophisticated parties participating in the slaughter pipeline certifying or submitting false documents would theoretically face liability regardless.

[78] 31 U.S.C. § 3729(a)(1)(G). (Given that more than one horse is exported to a slaughterhouse at any given time, fines could and would add up to tens of thousands of dollars and would quickly make the practice commercially worthless.).

[79] *See Animal Welfare Institute Testifies Before Congress in Favor of New Bill Containing Criminal Penalties for Horse Slaughter*, Animal Welfare Institute, (July 31, 2008), https://perma.cc/QC6F-X6CA; *The Grim Facts—Horsemeat and What It's Worth*, The Ethics of Equine Rescue (May 16, 2013), https://perma.cc/8T2N-LDZW; GAO-11-228, *supra* note 28 ("Available data show that horse prices declined since 2007, mainly for the lower-priced horses that are more likely to be bought for slaughter."). Declining prices would indicate even less of a chance that individuals would be willing to jeopardize their livelihood over diminishing rates of return.

[80] *Id.*

[81] 31 U.S.C. § 3729.

Because each horse requires its own health certification, it would be dangerously obvious for kill buyer consigners to take horses in the volume that would be required to generate a profit (in the manner in which they currently operate) to get certified and the pattern of shipping dozens of horses at a time would likely be indicia of a slaughter purpose. Obtaining certificates from multiple venues for purchased horses to avoid suspicion would be too costly and time consuming.

Moreover, the fact that most Americans are against horse slaughter for human consumption does not bode well for kill buyers and transporters looking to stay under the radar and falsify their purpose for export. Opponents of slaughter routinely attend auctions and document the actions of kill buyers, sometimes even intercepting them.[82] They also publish lists of "known kill buyers" based on documents available to the public and information gathered from Freedom of Information Act requests.[83] Within this backdrop, the risk for "qui tam" actions would be high, as opponents are eager to see the SAFE Act passed or at least enforced in a meaningful way.

Also, the importing countries of Canada and Mexico have become more concerned about the unfit character of horsemeat originating in the United States, and the European Union's refusal to import horsemeat from Mexico undoubtedly has suppressed the export market to some extent.[84] An EU report found that 87 percent of horses slaughtered in Mexico actually originated in the U.S.; if Mexico cannot rely on demand from Europe for the meat it processes, its demand for horses from the U.S. would inevitably decrease.[85] This growing skepticism about the fitness of horsemeat, in turn, indicates that it may not be worth the potential "trouble" of getting caught where the demand for horses and the prices slaughterhouses are willing to pay for the questionable meat are dwindling.

While the deterrent effect of potential FCA liability appears strong enough to significantly thwart the slaughter pipeline and render the SAFE Act enforceable, the ease of the horse export process by land to Canada and Mexico and the limited paperwork required by the

U.S. should be highlighted. At present, the export process can happen so quickly that horses are already moved across the border and slaughtered before concerned individuals within the U.S. realize

[82] Parisi, *supra* note 37. One would think that obtaining as many horses as possible for as little cost as possible would trigger suspicion about purchasers' purpose.

[83] Mary Nash, *Known Killer Buyers*, Mary's Nash's Horse Meat Website, https://perma.cc/GDW5-KHF3 (last visited Nov. 14, 2015).

[84] *Mexican Horse Meat Banned by EU, supra* note 69.

[85] *Id.* at 2.

what has happened and can do anything about it.[86] One horse owner in Oklahoma reported a sale of two horses she thought were not going to slaughter; when she sought the contact information for the buyers so that she could send their breeding certificates, she learned that the horses had already been slaughtered in Mexico.[87] Given that health certificates only require some information about horses' origins, mostly dealing with the consigner, the real teeth behind the SAFE Act lie in its deterrent effect, when coupled with the FCA.[88]

Enactment of regulations, coupled with passage of the SAFE Act, could present the strongest scenario for enforceability. Exporting horses from the U.S. to any country, including Mexico or Canada, by sea requires a license, which includes an application with a section certifying that no horse is being exported for slaughter.[89] While health certification forms include a purpose of shipment section, no such certification exists within these forms. Bolstering requirements for land export to resemble the requirements for sea export would ensure that entities seeking to violate the SAFE Act would explicitly give rise to FCA liability.

A possible amendment, including penalties for violations, could enhance the deterrent effect of the legislation. Sponsors could look to the language included in Representative Morella's 2002 "American Horse Slaughter Prevention Act" for guidance.[90] There, civil and criminal penalties were up to $5,000 dollars and the possibility of imprisonment for up to one year.[91] Explicit penalties would lessen the chances that there would be any confusion or doubt relating to the enforceability of the SAFE Act.

[86] *Horse Slaughter Brochure*, Animal Welfare Institute, at 3, *available at* https://perma.cc/NPM8-P8ME (last visited Nov. 14, 2015).

[87] *Id.* at 10.

[88] 17 C.F.R. § 754.5 (2016). Nothing about the export process or health certification form(s) is tedious or detailed. The existence of the SAFE Act is what threatens the process—not anything about the process itself.

[89] *Id.* Horses for export by sea: "(1) License applications for the export of horses by sea for the purposes of slaughter will be denied. (2) Other license applications will be approved if BIS, in consultation with the Department of Agriculture, determines that the horses are not intended for slaughter. You must provide a statement in the additional information section of the application certifying that no horse under consignment is being exported for the purpose of slaughter. (3) Each application for export may cover only one consignment of horses." 15 CFR § 754.5 (2016).

[90] American Horse Slaughter Prevention Act, H.R. 3781, 107th Cong. § 6(a) (2002).

[91] *Id*.

VI. Conclusion

Passage of the SAFE Act would not only advance the issue of horse welfare, but would also address health and safety concerns relating to the potential toxicity of horsemeat coming from U.S. horses. An overwhelming majority of Americans oppose horse slaughter for human consumption and both State and Federal efforts to eradicate the practice and industry have taken place for several decades. This opposition is rooted in the belief that horses are companions and not a food source, as well as in the idea that the practice of horse slaughter is inhumane.[92] While this is not the rationale that underpins the SAFE Act, which instead underlines potential toxicity concerns, it should be highlighted that passage of the Act would come with popular support and would satisfy many different interest groups, all of whom support the Act for different reasons, but share the same end goal of its enactment.

The threat of FCA violations following passage of the SAFE Act would likely curb U.S. horse slaughter exports in a meaningful way and render the Act enforceable. The potential financial penalties stemming from FCA violations would be too steep for consigners to justify the risk of continuing to export horses for consumption slaughter. In fact, given that each misrepresentation or misstatement gives rise to a new False Claim, potential penalties would be exponentially greater than the ultimate profits made from the business to begin with.[93] Consigners and transporters would not want to risk losing their entire business and livelihood by engaging in risky and illegal behavior in one aspect of it.

The effect of the SAFE Act would significantly impact the international horsemeat market. Given that most horsemeat in this market comes from U.S. horses who have been exported and subsequently slaughtered, removing the ability to legally export them would severely curtail the international supply of horsemeat. Recent studies testing fresh and frozen ground meats sold in the U.S. discovered mislabeling and the presence of horsemeat in products that were listed as bison and

[92] *See Unwanted Horses and Horse Slaughter FAQ,* American Veterinary Medical Association, https://perma.cc/QZ4B-FK5L (last visited Apr. 10, 2016). More humane alternatives exist for "disposal" of unwanted horses. After all, only one percent of our domestic horse population is sent to slaughter each year. Surely, the abovementioned uses for unwanted horses could absorb this population. Even humane euthanasia performed by a licensed veterinarian would be better than the "captive bolt" and other cruel slaughter protocol to which horses are subjected. Act, in practice, it is not always successful. While the "captive bolt" can be a humane form of euthanasia according to the Humane Methods of Slaughter Act, in practice it is not always successful.

[93] 31 U.S.C. § 3729. $5,000 to $10,000 (FCA penalties), multiplied by the number of horses impermissibly exported for consumption slaughter, would amount to a huge penalty.

lamb.[94] Thus, while U.S. laws and values related to horse slaughter and consumption of horsemeat may differ from those of other countries, decreasing the supply of horsemeat originating from the U.S. would at least minimize the chances that U.S. horsemeat could be present in food.[95]

The pending SAFE Act is distinguishable from prior federal legislation because of its focus on health and safety concerns rather than animal welfare considerations. Nonetheless, its application would achieve both ends. Passage of the Act would eliminate the need for annual appropriations amendments and reflect a legal status for consumption horse slaughter that is consistent with and reflective of American culture and values.

[94] Sheri Ledbetter, *Chapman University Research on Meat Species Shows Mislabeling in Commercial Products,* Chapman University (Aug. 2015), https://perma.cc/PG6W-G6BU. This article explains no horsemeat was found in beef products. This issue of contamination touches on FDA regulations regarding American's rights to know the ingredients contained in the food products they buy and consume and while it is not the subject of this paper, passage and enforcement of the SAFE Act would likely ensure that Americans do not buy mislabeled food products.

[95] This is of paramount importance due to the aforementioned toxicity concerns in horses coming from the United States.

Lies, Damned Lies, and Michigan Animal Shelter Statistics: Problems and Solutions

Stacy A. Nowicki. PhD, JD*

I. Introduction

a. Which animal shelters in Michigan do the best job?

The Michigan Pet Fund Alliance ("MPFA") presents Michigan animal shelters with awards based on their "save rates," the number of animals adopted or returned to owner as a percentage of a shelter's total intake.[1] These calculations are based on annual shelter reports from the Michigan Department of Agriculture and Rural Development.[2] The Barry County Animal Shelter received the 2013 award for Most Improved Open Admission Shelter with a 36% improvement in its "save rate" between 2012 and 2013.[3] The Humane Society and Animal Rescue of Muskegon County received the Most Improved Limited Admission Shelter, improving its "save rate" by 47.93% between 2012 and 2013.[4]

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[1] *2013 Save Rate Report and Awards*, Michigan Pet Fund Alliance, https://perma.cc/ACM4-FRPU (last visited July 14, 2015).These awards include Outstanding Open Admission Shelters with the Best Save Rate (small, medium, and large categories), Most Improved Open Admission Shelter, Outstanding Limited Admission Shelter with the Greatest Number of Adoptions, and Most Improved Limited Admission Shelter. *Id.* MPFA defines an "Open Admission" shelter as "[a]ccepting all strays even if full and accepting or making arrangements for owner surrender when full." *2013 Save Report*, Michigan Pet Fund Alliance 6 (2013), http://perma.cc/52NT-GWXU. MPFA defines a "Limited Admission" shelter as "[o]nly accepting animals when space is available at the shelter or in foster homes, selecting animals for intake." *Id*.

[2] *2013 Save Rate Report and Awards*, *supra* note 1.

[3] *Id*. MPFA calculated the Barry County Animal Shelter "save rate" as 70.11% in 2013, up from 34.11% in 2012.

[4] *Id*. MPFA calculated the Humane Society and Animal Rescue of Muskegon County "save rate" as 46.51% in 2012 and a 94.44% in 2013.

These improvements are remarkable. For a shelter to improve its "save rate" by 36% or nearly 48% in one year certainly should be commended. According to the 2013 MPFA Save Report, 25 shelters in Michigan achieved a "save rate" of 100% or better, with Carol's Ferals achieving a "save rate" of 217.17%.[5] These shelters also seem to be doing an outstanding job adopting out animals, returning them to their owners, or transferring them to other organizations.

However, there is something about these statistics that does not seem logical. How did the Humane Society and Animal Rescue of Muskegon County improve its "save rate" by nearly 48% in one year? What does it really mean when a shelter has a "save rate" of over two hundred percent? Further, the "save rate" indicates only the percentage of animals not euthanized, and does not reflect the animals remaining in the shelter or in foster care, who are still at risk for euthanasia.[6]

For statistics to be meaningful, they must be based on accurate and reliable data. It is also useful to know where the data came from, who interpreted it, and how it was interpreted.[7] In the case of Michigan's animal shelter statistics, the numbers upon which the MPFA awards are based, the data does not seem to be telling a complete story. Michigan law mandates all licensed animal shelters to collect certain data and report annually to the state.[8] However, there are no data collection standards for shelters to follow. Since this data is not collected in a uniform way, there is no reliable mechanism to compare shelters to each other, or to show trends over time.

Reliable data could improve the lifesaving potential of shelter and rescue organizations.[9] Shelter intakes, adoptions, and euthanasia rates

[5] *Id.* at 5. The MPFA calculations allow shelters to achieve a save rate over 100% if animals taken in during the previous year are adopted during the reported calendar year. *Id.* at 6. MPFA are doing a similar calculation to what the American Society for the Prevention of Cruelty to Animals (ASPCA) call "Naked Data." Naked Data clarifies what numbers are representing, and when an increase or decrease is reported, what the change is compared to. For example, the ASPCA would calculate a live release rate as the number of all live releases in one year divided by all live intakes in that year. This way the number of live releases (adoptions, transfers, and returns to owner) is compared to the number of animals taken in by the shelter for a given time frame. Emily Weiss, *I Still Like My Data Naked,* ASPCA Professional Blog, (Mar. 5, 2015), https://perma.cc/3SRK-8YXD. However, the MPFA allows calculations that do not conform to one calendar year; animals are counted who are intakes in one calendar year and adopted out in another. *See 2013 Save Report,* supra note 1, at 6..

[6] *Live Release Rate and Animals At Risk*. ASPCA Pro. https://perma.cc/HR4H-59H9 (last visited Dec. 4, 2015).

[7] Hunter Whitney. Data Insights: New Ways to Visualize and Make Sense of Data, 12 (2013)

[8] Mich. Comp. Laws § 287.339(a) (1969).

[9] Emily Weiss, et al. *Community Partnering as a Tool for Improving Live Release Rate in Animal Shelters in the United States*, 16 J. Applied Animal Welfare Sci. 221, 223 (2013).

are key indicators in assessing whether shelters are meeting community needs.[10] Good data can also identify animal welfare trends as well as which animals are at higher risk for entering shelters in the first place.[11] Frequent data collection may enable shelters to be proactive rather than reactive to animal issues,[12] and good statistical information on animals entering and exiting shelters would facilitate shelter program planning, evaluation, and budgeting.[13] Without complete and accurate data, it is not possible to track local or national trends, or to compare shelters or programs to each other.[14] A lack of data also means researchers must work with limited information, and donors experience difficulty tracking the impact of their contributions.[15] Missing or incomplete data, especially data without context, drives public misperception and negative media attention about animal shelter issues, such as euthanasia.[16] Without good data, it is also difficult to understand fully the extent of the homeless pet problem in the United States as well as the risks and contributing factors to animal welfare, euthanasia, and relinquishment.[17]

[10] *Id*. at 222.

[11] Kevin Morris and Davie L. Gies, *Trends in Intake and Outcome Data for Animal Shelters in a Large U.S. Metropolitan Area, 1989-2010,* 17 J. Applied Animal Welfare Sci. 59, 70-71 (2014).

[12] *Id*.

[13] Stephen Zawistowski, et al. *Population Dynamics, Overpopulation, and the Welfare of Companion Animals: New Insights on Old and New Data,* 1 J. Applied Animal Welfare Sci. 193, 195 (1998); John Wenstrup and Alexis Dowidchuk, *Pet Overpopulation: Data and Measurement Issues in Shelters*, 2 J. Applied Animal Welfare Sci. 303, 304 (1999).

[14] Weiss, et al., *supra* note 9, at 222.

[15] Wenstrup & Dowidchuk, *supra* note 13, at 304.

[16] *2014 U.S. Shelter Pet Report*, PetSmart Charities 1, 4 (2014), https://perma.cc/33HR-P266 (indicating survey participants underestimated the number of pets euthanized annually); *Pet Adoption & Spay/Neuter: Understanding Public Perceptions by the Numbers,* PetSmart Charities 1, 9 (Nov. 27, 2012), https://perma.cc/J8BK-5BRU (noting that the public underestimates the scope of the euthanasia issue); *Pet Adoption Survey Infographic,* Best Friends Animal Society (2012), https://perma.cc/VR5P-LYNB (stating that nearly 28% of Americans surveyed believe an animal can stay at a shelter until adopted). Further, during the U.S. recession starting in about 2007, anecdotal evidence suggests many people abandoned their pets rather than relinquish them to a shelter, where they perceived the euthanasia rate was high. *See* Stacy A. Nowicki, *Give Me Shelter: The Foreclosure Crisis and its Effect on America's Animals*, 4 Stanford J. Animal L. & Pol'y 97, 102-03 (2011). During the recession, media outlets, humane organizations, and veterinarians reported a rise in economic euthanasia during foreclosure crisis despite the lack of national data to support that assertion. *Id.* at 112.

[17] Paul C. Bartlett, et al. *Rates of Euthanasia and Adoption for Dogs and Cats in Michigan Animal Shelters*. 8 J. Applied Animal Welfare Sci. 97, 98 (2005); *Position Statement on Data Collection and Reporting*, ASPCA, https://perma.cc/96L6-P93Q (last visited Dec. 4, 2015).

This article analyzes Michigan's law mandating data collection for licensed animal shelters in the state. Part II presents an overview of animal shelter data collected in the United States. Part III presents a short history of Michigan's law. Part IV introduces the problems with Michigan's data collection and reporting, examines each of these problems in turn, and presents state and national solutions. Finally, Part V examines administrative processes for improving Michigan's animal shelter data collection.

II. Animal Shelter Data and Statistics in the United States

There is no uniform data collection method for animal shelters in the United States.[18] Community shelters or private rescue organizations may collect data and calculate statistics for their own use, though some collect them to comply with state or local law. However, since these data are not collected in a standard way, there is no reliable way to compare shelters to each other nationwide. It is impossible to gather or interpret national, regional, or often local trends in shelter data.

a. National Animal Shelter Data and Statistics

Attempts to collect national data on animal shelters in the United States have proven difficult.[19] The American Humane Association ("AHA") collected national data with surveys mailed to selected animal shelters in 1985, 1986, 1987, 1988, and 1990.[20] With this data, the AHA estimated the numbers of animals received from shelters nationally.[21] However, these surveys evaluated a small number of existing shelters, and the reports used to generate these estimates tended to come from larger shelters, possibly causing an overestimation in these statistics.[22]

The National Council in Pet Population Study and Policy ("NCPPSP") collected survey data from 1994 through 1997.[23] The NCPPSP gathered the names of over 5,000 shelters and "requested

[18] Andrew N. Rowan, *Shelters and Pet Overpopulation: A Statistical Black Hole*, 5 Anthrozoös 140 (1992); *see also* Zawistowski, et al., *supra* note 13, at 195.

[19] Wenstrup & Dowidchuk. *supra* note 13, at 304.

[20] Zawistowski, et al., *supra* note 13, at 195.

[21] *Id*.

[22] *Id.* at 196; Rowan, *supra* note 18, at 142.

[23] *The Shelter Statistics Survey, 1994-1997*, Nat'l Council on Pet Population Study and Pol'y, https://perma.cc/3G55-VSPX (archived by the Wayback Machine on February 28, 2014); s*ee also* Janet M. Scarlett, *Interface of Epidemiology, Pet Population Issues and Policy,* 86 Preventive Veterinary Medicine 188, 192 (2008); Linda K. Lord, et al. *Demographic and Needs Assessment Survey of Animal Care and Control Agencies*, 213 J. Am. Med. Veterinary Ass'n 483 (1998).

the number of dogs and cats entering the shelter[] through animal control, owner relinquishment[,] or other methods."[24] It also gathered "the number of dogs and cats exiting shelters through adoption, owner reclamation, euthanasia, … [and] other methods.[25] The data this survey gathered are an interesting snapshot of some shelters in the U.S., but are not a random sampling of shelters and cannot be extrapolated to represent shelters in the U.S. generally.[26]

"Leaders in the animal welfare field met in 2004 in an attempt … to provide animal welfare organizations guidance on how to collect consistent data."[27] This meeting resulted in the Asilomar Accords, a set of standardized definitions and a uniform way for animal shelters to collect data.[28] Only a few shelters and communities throughout the United States participate in the program, and no new data seems to have been aggregated on the Asilomar Accords website since 2011.[29] However, Maddie's Fund, a nonprofit focused on animal adoptions, education, research, and grantmaking, makes data until 2013 available on their website based on the Asilomar Accords.[30] Maddie's Fund gathers this data is from over 600 animal welfare organizations around the United States.[31] Though data from 600 animal welfare organizations seems like a good amount of data, the most recent participant list on its website (May 2015) only includes data from 12 Michigan shelters in two counties (Oakland and Calhoun) and 10 shelters in Illinois, all in Chicago.[32] Some individual shelters, such as the Oregon Humane Society, appear to continue collecting data according to Asilomar standards and making them available on their websites.[33] Though helpful for specific organizations, data from various unconnected sources do not allow for easy comparison among shelters or for an investigation of trends.

Currently both the American Society for the Prevention of

[24] *The Shelter Statistics Survey, supra* note 23.

[25] *Id*.

[26] *Id*.

[27] Weiss, et al., *supra* note 9, at 223.

[28] The Asilomar Accords, https://perma.cc/X2GY-ZMYM (last visited Mar. 30, 2016).

[29] *Organizations Participating in the Asilomar Accords*, Asilomar Accords, https://perma.cc/HF8C-NYWT (last visited Dec. 4, 2015).

[30] *Searchable Database to Compare Community Lifesaving*, Maddie's Fund, https://perma.cc/WK8E-V798 (last visited Dec. 4, 2015).

[31] *Id.*

[32] *Shelter List by State and Community*, Maddie's Fund , https://perma.cc/HSY2-SQ9T (last visited Dec. 4, 2015). For context, in 2013 there were 166 shelter reports collected from licensed shelters in Michigan alone. *Animal Shelter Report*. Michigan Department of Agriculture and Rural Development, https://perma.cc/WK8E-V798 (last visited Dec. 4, 2015).

[33] *Life-Saving Statistics,* Oregon Humane Society, https://perma.cc/4UXN-KJNR (last visited Dec. 4, 2015).

Cruelty to Animals and the Humane Society of the United States both offer data on animal shelters, euthanasia, and adoption on their websites.[34] However, neither site offers their sources for these numbers or the collection method, much less any more granular data by state or region. PetPoint, a company offering a data reporting system to animal shelters, reports aggregate data monthly from data entered by shelters into its Web-based system.[35] However, these reports include only shelters that use the PetPoint system, [36] and it is unclear what standards shelters use to input data into the database.

b. State Animal Shelter Data and Statistics

There were a handful of regional studies of animal shelters in particular states during the 1990s.[37] The *California Sheltering Agencies Survey* in 1991, *Iowa Federation of Humane Societies Animal Shelter Survey in* 1992, *Report on Washington State Animal Shelter Statistics* by the Progressive Animal Welfare Society in 1994, *Animal Intake and Disposition Summary* from the New Jersey Department of Health in 1994, and two surveys in Massachusetts in 1995 and 1996 all provided insight on particular states or communities as well as some comparison data.[38] However, these studies were isolated and not replicated, providing an interesting snapshot in a state at a particular time rather than information about trends, either locally or nationally.

Limited resources, a lack of training, and varying data collection systems hamper data collection for animal shelters.[39] To date, only nine states other than Michigan have collected or continue to collect at least some animal shelter data and make it publicly available via the Web.[40]

[34] *Pet Statistics,* ASPCA, https://perma.cc/2X36-SBUB (2015). *U.S. Pet Ownership and Shelter Statistics*. Humane Society of the United States, https://perma.cc/4DDV-TQWJ (last visited Dec. 4, 2015).

[35] *Industry Data* , PetPoint Reports. https://perma.cc/GY8W-JF7A (last visited Dec. 4, 2015).

[36] *PetPoint Report: May 2015*, PetPoint Reports, https://perma.cc/HR4K-A78W.

[37] Zawistowski, et al., *supra* note 13, at 195.

[38] *Id*.; Linda K. Lord, et al. *Demographic and Needs Assessment Survey of Animal Care and Control Agencies*, 213 J. Amer. Med. Veterinary Ass'n 483, 487 (1998), Rowan, *Shelters and Pet Overpopulation: A Statistical Black Hole*, 5 Anthrozoös 140 (1992).

[39] Weiss, et al., *supra* note 9, at 222.

[40] *Local Rabies Control Activities—2013 LRCA Report*, California Department of Public Health, https://perma.cc/FV76-TSTH (last visited Dec. 4, 2015); *2013 Shelter Stats*, Colorado Information Marketplace, https://data.colorado.gov/Agriculture/2013-PACFA-Summary-of-Shelter-Statistics/7zpp-rtqd (last visited Dec. 4, 2015); *Animal Population Control Program*, Connecticut Department of Agriculture, https://perma.cc/Y5YA-RHMY (last visited Dec. 4, 2015); *Shelter Survey Results for the State of Maine*, Department of Agriculture, Conservation and Forestry, https://perma.cc/KRT5-B4T5 (last visited Dec. 4, 2015); *Spay and Neuter Grants Program,* Maryland.gov, https://perma.cc/Z5E4-EF65 (last visited Dec. 4, 2015); *Zoonotic Disease Unit*, State of New Jersey Department of Health, https://perma.cc/S4AN-FR7B (last visited Dec. 4, 2015); *Animal Section Inspection Reports*, North Carolina Department of Agriculture & Consumer Services, https://perma.cc/XQE3-EN9A (last visited Dec. 4, 2015); *SPCA of Texas*, SPCA.org, https://perma.cc/6ZPY-DKF9 (last visited Apr. 4, 2016); *Online Animal Reporting*, Virginia Department of Agriculture and Consumer Services, https://perma.cc/5M7H-5RF4 (last visited Dec. 4, 2015).

[41] California Health and Safety Code Sec. 121690(e); Colorado Revised Statutes 35-80-107; Kevin N. Morris, et al. *Trends in Intake and Outcome Data for Animal Shelters in Colorado, 2000 to 2007,* 238 J. Amer. Med. Veterinary Ass'n 329, 329 (2011); Delaware Title 16, Chapter 30, § 3007F; State of Maine. Department of Agriculture, Conservation and Forestry, Division of Animal Health and Industry. 01-001 CMR Chapter 701: Rules Governing Animal and Welfare. 1C: Records. https://perma.cc/BCN7-FWJQ; Md. Code, Agric., § 2-1602(h). https://perma.cc/3LTL-CRXF; MCL 287.339a.

[42] *2012 New Mexico Shelter Survey*, Animal Protection of New Mexico, https://perma.cc/Z7WC-VCPH; *Survey of Ohio Animal Shelters*, The Ohio State University College of Veterinary Medicine, https://perma.cc/4QTR-65P5; *2014 Annual Report,* Vermont Humane Federation, https://perma.cc/88R9-GPJ9; *Animal Population Survey*, Washington Federation of Animal Care and Control Agencies, https://perma.cc/3K94-4R2D.

[43] *Online Animal Reporting*, *supra* note 40.

[44] California Health and Safety Code Sec. 12690(e); *Local Rabies Control Activities—2013 LRCA Report, supra* note 40.

[45] Cal. Code Regs. tit, 17, § 2606.4(a)(4).

[46] *Colorado Information Marketplace*, https://perma.cc/8CT4-Q9M2 (last visited Dec. 4, 2015); *Forms and Publications*, Colorado Department of Agriculture, https://perma.cc/FRU6-MCHJ (last visited Apr. 7, 2016).

At least six states (California, Colorado, Delaware, Maine, Maryland, and Michigan) require data collection from animal shelters by statute,[41] and at least another four states (New Mexico, Ohio, Vermont, and Washington) have had third parties collect data.[42] The format for reported data also varies widely. Virginia uses a sophisticated search engine to report data,[43] but most states simply post PDF reports.

Further, each state collects and reports data differently. Since 1987, the California Department of Public Health requires each county in the state to maintain a rabies control program.[44] This information is available on the California Department of Public Health website from 2004 through 2014. The California Code of Regulations requires that local officials responsible for dog or rabies control within a city or county make quarterly rabies control activities reports to the California Department of Public Health ("CDPH") through the local health officer.[45] Colorado makes shelter data available on a searchable website as well as PDF files.[46] Connecticut's Department of Agriculture has made one annual report from 2013 available on their website as a PDF

file,[47] and some general data is available from between 1990 and 2007.[48] This report aggregates data from the state Animal Population Control Program and not from various shelters around the state. Delaware law requires all animal shelters in the state to keep records on intake, euthanasia, adoptions, reclamations, transfers, and other information.[49] These data must be reported quarterly on each shelter's website, but no entity summarizes and disseminates this data.

Maine makes shelter survey information available on their website since 2011 by year.[50] Every "pet shop, shelter, kennel and boarding kennel" in Maine is required to be licensed by the state and also submit these data according to the Code of Maine Rules.[51] Maryland has quarterly reports available through a search of the Maryland Department of Agriculture website, but no other easily accessible data.[52] The Maryland survey began in January 2014 pursuant to state law and is part of larger legislation aimed at creating a spay/neuter fund for the state.[53] New Jersey's state website includes a form with which shelters and pounds can report data on the amount of dogs and cats impounded, adopted, redeemed, and euthanized by year.[54] New Jersey also offers annual Animal Intake and Disposition surveys with annual data by county spanning 2004 to 2014.[55]

Animal Protection of New Mexico published shelter surveys in 2008 and 2012.[56] These surveys cover intake, adoptions, euthanasia, euthanasia method, and shelter demographics (number of shelter staff,

[47] *Animal Population Control Program*, *supra* note 40; *Animal Population Control Program*, Connecticut Department of Agriculture (2012), https://perma.cc/AMH3-CXB6; *Animal Population Control Program*, Connecticut Department of Agriculture (2010), https://perma.cc/G5SS-5FHF.

[48] *Animal Control Statistics, Graph Version*, Connecticut Department of Agriculture, https://perma.cc/LZW2-86TK (last visited Dec. 4, 2015).

[49] Del. Code. Ann. tit. 16, Chapter 30, § 3007F. Originally passed as Senate Bill 280 (2010), amending Del. Code. Ann. tit. 3, Chapter 80, § 8007.

[50] *Shelter Survey Results for the State of Maine*, *supra* note 40.

[51] 01-001-701 Me . Code R. § I(C) (LexisNexis, 2014), *available at* https://perma.cc/BCN7-FWJQ.

[52] *Spay and Neuter Grants Program*, *supra* note 40.

[53] Md. Code Ann., Agric., § 2-1602(h) (West, 2013); General Assembly HB 767, 2013 Sess., at 1 (Md. 2013), *available at* https://perma.cc/BKK3-RJWS.

[54] *Shelter/Pound Annual Report,* New Jersey Department of Health, Animal Population Control Program, *available at* https://perma.cc/CU59-8R55 (last visited Apr. 7, 2016).

[55] *Zoonotic Disease Unit*, New Jersey Department of Public Health, https://perma.cc/S4AN-FR7B (follow the annual summary hyperlinks listed under "Shelter/Pound Intake and Disposition Survey") (last visited Dec. 4, 2015).

[56] *2012 New Mexico Shelter Survey*, *supra* note 42; *2008 New Mexico Shelter Survey*, Animal Protection of New Mexico (May 23, 2008), https://perma.cc/NXC6-FUX7.

animal control officers, kennels, and budget). North Carolina makes animal shelter reports from 2001 through 2015 available through its Department of Agriculture and Consumer Services website.[57] These reports present information by county, including each shelter's total operating expenses, cost per animal handled, number of animals taken into each shelter, adopted out, returned to owner, or euthanized. Ohio has only two shelter surveys are available, from 1996 and 2004, conducted by The Ohio State University College of Veterinary Medicine in collaboration with the Ohio County Dog Wardens Association and the Ohio Federated Humane Societies.[58] These reports are more robust than any other state. They include aggregate intake and disposition numbers for animals in shelters, but also include detailed analyses of the agencies themselves (county dog wardens, humane societies, and municipal animal control) regarding funding, staffing, and needs assessments.

Texas conducted a pilot survey of animal care and control data in 2000.[59] There are also summaries available on the Web for 2001, 2002, and 2003.[60] None of these reports appear on the Texas state website, and they are very generic, focusing on the agencies' staffing, funding, and services, though they do include some very basic data on intakes for cats, dogs, and other animals.

A 2014 report from the Vermont Humane Federation ("VHF") mentioned that the VHF conducted annual shelter surveys.[61] The report includes aggregate data from 2013. There is no official survey from the state, and no other reports available online from VHF. Virginia offers

[57] *Animal Shelter Reports*, North Carolina Department of Agriculture & Consumer Services Veterinary Division Animal Welfare Section, https://perma.cc/R4G5-3KW5 (last visited Apr. 4, 2016).

[58] *Ohio Survey Reports*, *supra* note 42.

[59] *Summary of Animal Care and Control Statistics in Texas: Pilot Survey 2000*, Texas Department of Health. Zoonosis Control Division, *available at* https://www.dshs.state.tx.us/idcu/health/zoonosis/animal/control/shelters/information/summaries/summary2000.pdf.

[60] *Summary of Animal Care and Control Statistics in Texas: Survey 2001*, Texas Department of Health. Zoonosis Control Division, *available at* https://www.dshs.state.tx.us/idcu/health/zoonosis/animal/control/shelters/information/summaries/summary2001.pdf; *Summary of Animal Care and Control Statistics in Texas: Survey 2002*, Texas Department of Health. Zoonosis Control Division, *available at* https://www.dshs.state.tx.us/idcu/health/zoonosis/animal/control/shelters/information/summaries/summary2002.pdf; *Summary of Animal Care and Control Statistics in Texas: Survey 2003*, Texas Department of Health. Zoonosis Control Division, *available at* www.dshs.state.tx.us/WorkArea/DownloadAsset.aspx?id=23975.

[61] *2014 Annual Report, supra* note 42. A Vermont Humane Federation report from 2012 is available through the Internet Archive, aggregating data from 2010 and 2011. *2012 Annual Report*, Vermont Humane Federation (2012), https://perma.cc/YVX4-NP9W (archived by the Wayback Machine on Aug. 25, 2014).

shelter data from 2004 through 2014 through a searchable website.[62] The site includes rescue agencies, humane societies, city facilities, and county facilities. The reports include the number of stray animals, seized animals, bite cases, animals surrendered by owner, and animals received from another Virginia agency. It also includes the number of animals reclaimed by owners, adopted, transferred in or out of state, died in facility, and euthanized.

No state-sponsored reporting exists in West Virginia. However, the West Virginia Veterinary Board joined the Federation of Humane Organizations of West Virginia to begin collecting intake data in 2013.[63] Currently, shelter statistics for 2015 are available on the Federation of Humane Organizations of West Virginia website.[64] In Washington, the Washington Federation of Animals Care and Control Agencies conducts an annual survey of animal shelters and rescue groups.[65] The report is the only one conducted in the state. It is available to member agencies for free, but nonmembers are charged $50 for access.

In Michigan, all licensed animal shelters are required to collect information and report annually to the state.[66] This seems like a useful tool to track the numbers of animals entering shelters, being adopted from shelters, and euthanized. However, there are many problems with the data collection and reporting, making these statistics unreliable.

III. Michigan's Animal Shelter Reporting Law

By 1997, over 200,000 dogs and cats reportedly were euthanized annually in Michigan's private and public animal shelters.[67] Michigan's legislature recognized the plight of shelter animals with a law requiring animal shelters to spay or neuter animals before making them available for adoption.[68] This law, proposed in February 1997 as House Bill No. 4239, passed both chambers of Michigan's legislature by May of the same year and went into effect on January 1, 1998.[69] The purpose of the law was to help reduce the pet population through mandatory sterilization at Michigan animal shelters and prevent spending millions

[62] *Online Animal Reporting, supra* note 40.

[63] *Statistics*, Spay Neuter Assistance Program West Virginia, https://perma.cc/G5MZ-P5BQ (last visited Feb. 10, 2016).

[64] *2015 WV Pet Facts and Statistics*, Federation of Humane Organizations of West Virginia, https://perma.cc/V9GU-H42M (last visited April 7, 2016).

[65] *Animal Population Survey*, *supra* note 42.

[66] Mich. Comp. Laws § 287.339(a) (1969).

[67] Senate Fiscal Agency, H.B. 4239 (S-1): First Analysis, Animal Sterilization, at 1 (Apr. 28, 1997), *available at* https://perma.cc/62PX-M82D.

[68] *Id*. at 2.

[69] House Bill 4239 (1997), *available at* https://perma.cc/K6KP-K4L4. This bill amends Public Act 287 of 1969, Mich. Comp. Laws § 287.331—287.339.

of dollars of private donations and public funds on housing, caring for, and euthanizing animals.[70]

As part of the animal sterilization law, registered animal shelters in Michigan are required to maintain written statistics on dogs, cats, ferrets, and other animals that come in to and go out of each shelter.[71] Specifically, MCL 287.339a states:

> An animal control shelter or animal protection shelter shall maintain written records on the total number of dogs, cats, and ferrets under 6 months of age, the total number of dogs, cats, and ferrets 6 months of age and older, and all other animals received, returned to owners, adopted to new owners, sold, or transferred with or without remuneration to any person, the number of adopted dogs, cats, and ferrets that were altered, the number of adopted dogs, cats, and ferrets that were not altered, and the number of dogs, cats, and ferrets euthanized annually, and shall annually provide a copy of these statistics to the department, by March 31 of the year following the year for which the statistics were compiled.

The law applies to entities requiring an animal shelter license, including municipalities and other organizations that hold and care for homeless animals.[72] The law does not apply to breeders or researchers because they are exempt from the licensing requirement,[73] and rescue organizations that operate solely via foster homes are excused since they are exempt from licensing as well.[74] The penalty for not submitting a report is a $1000 fine, revocation of a shelter's license, or both.[75] The Michigan Department of Agriculture and Rural Development ("MDARD") is responsible for both licensing shelters and collecting this data.[76]

[70] Senate Fiscal Agency, H.B. 4239 (S-1): First Analysis, Animal Sterilization, *supra* note 67.

[71] Mich. Comp. Laws § 287.339a (1969).

[72] The law refers to these entities as "animal control shelters" or "animal protection shelters." An "animal control shelter" is a facility operated by a municipality to hold and care for stray animals, surrendered animals, and animals "that are otherwise held due to the violation of a municipal ordinance or state law." Mich. Comp. Laws § 287.331(e) (1969). An "animal protection shelter" is operated by an individual or nonprofit organization for the care of homeless animals. Mich. Comp. Laws § 287.331(f) (1969).

[73] Mich. Comp. Laws § 287.339 (1969).

[74] *Michigan Animal Shelter License Details & FAQ*, Michigan Department of Agriculture and Rural Development, https://perma.cc/HB6R-GVR7 (last visited Dec. 4, 2015).

[75] Mich. Comp. Laws § 287.339(b)(1969).

[76] *Michigan Animal Shelter License Details & FAQ*, *supra* note 74.

On the surface, it seems logical to collect numbers on intakes, adoptions, euthanasia, and other data in animal shelters. These numbers could provide information on shelter workload, costs, and one might also extrapolate the effectiveness of spay neuter programs from this data. Also, since there is no national program to systematically count shelter intakes, adoptions, or euthanasia, the data does not exist elsewhere. However, Michigan's data are not collected in a systematic way. There are no guidelines as to how to count or what to count. This leads to dirty data, and the calculated statistics are less useful than they could be. Specifically, Michigan's statistics suffer from five issues: frequent flyers, the multiplication problem, the New Year's Eve celebration, trap-neuter-return, and secret euthanasia.

IV. Michigan's Animal Shelter Data

The Animal Shelter Annual Report Form that Michigan licensed shelters submit to the state separates animals into categories: dogs, cats, ferrets, and "other."[77] The "other" category is reserved for animals other than the above, including any "mammal except for livestock as defined in 1937 PA 284, MCL 287.121 to 287.131, and rodents."[78] These categories are further broken down into animals less than six months of age, and animals six months of age or older.[79]

The report form asks for the total number of each category of animal (dog, cat, ferret, other) received into the shelter in the previous year.[80] It also asks for the total number of each category of animal returned to owners in the previous year.[81] It asks for the number of altered and unaltered animals in each category that were adopted to new owners in the previous year.[82] The form asks for the number of live shelter animals sold and the number of animals legally transferred to "allowable entities" in the previous year.[83] Finally, the form asks for the number of animals per category that were euthanized, both shelter animals and owner requested.[84]

[77] *Id.* at "Animal Shelter Annual Report Form" hyperlink.

[78] Mich. Comp. Laws. § 287.331(d) (1969); *See, generally* Mich. Comp. Laws. § 287.121(b) (1969) ("livestock" includes "horses, ponies, mules, cattle, calves, swine, sheep, poultry, privately owned cervids, ratites, aquaculture species, and goats.").

[79] *Michigan Animal Shelter License Details & FAQ*, *supra* note 74 (follow "Animal Shelter Annual Report Form" hyperlink).

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*; *See also* Mich. Comp. Laws § 287.338(a)(7) (1969). ("Transfers are allowed only to shelters registered with the Michigan Department of Agriculture and Rural Development, law enforcement agencies, or service dog organizations.").

[84] *Michigan Animal Shelter License Details & FAQ*, *supra* note 74 (follow "Animal Shelter Annual Report Form" hyperlink).

a. The Frequent Flyer Problem

Jake is a dog taken into an animal shelter. Abby adopts him, but cannot keep him and returns Jake to the shelter. Barry adopts Jake. How many intakes and adoptions does the shelter count?

This is the Frequent Flyer Problem. Since Michigan offers no standard on what information to count in this situation, some shelters may count this animal as one intake and two adoptions. Some may count him as two intakes and two adoptions. An animal also could be adopted out of one shelter and returned to another, which then adopts the animal out to a different owner. This same animal would then be counted twice as two different adoptions by two different shelters.

One complicating factor is the question of what these numbers are meant to count. They do not accurately count the number of individual animals adopted since the same animal may be counted multiple times. However, if the purpose of collecting this number is to document the overall number of adoptions, without regard to which animals are being adopted, then the current system is working to some extent.

Another issue is that shelters have varying return policies and may count animals as "intakes" differently depending on when they are returned. Some shelters may not consider an animal a "return" if it has been over a certain period of time since adoption.[85] For example, the Michigan Humane Society allows adopters 60 days to return pets for a refund, but adopters from Michigan's Humane Society of Livingston County can only return an animal within two weeks of adoption for a refund.[86] These shelters might count all returns as new intakes, or they might only count them as new intakes after their return policy ends. There is no standard in Michigan regarding how to count animals returned to shelters.

To date, it is not evident that any state counts frequent flyers as a separate number in their shelter data. Part of the issue is that some shelters do not communicate with each other about intakes, adoptions, or euthanasia. That is, if a dog is adopted out of one shelter and later relinquished to a different shelter, there is no way for the receiving shelter to know that that dog came from the original shelter unless that information is disclosed by the person relinquishing the animal.

[85] Emily Weiss, *Getting Naked Together*. ASPCA Pro, (Nov. 18, 2010), https://perma.cc/4JGP-VHW4 (using the issue of shelters' varying definitions of a "return" as an example of how animal welfare groups are getting closer to speaking the same language about data).

[86] *Michigan Humane Society Certified Pre-Owned Cats: Multi-Point Inspection*, Michigan Humane Society, https://perma.cc/35DV-A6GV (last visited Dec. 4, 2015); *See also* Adopt a Pet, Humane Society of Livingston County, https://perma.cc/R8VV-6ELP (last visited Dec. 4, 2015).

The only way to combat the Frequent Flyer Problem is for shelters to share information with each other. This would also require that animals are identifiable even if they are strays, or are relinquished to a shelter without information about their backgrounds. National microchip databases such as those available from the American Animal Hospital Association could help identify strays or pets relinquished to shelters, if the animals were microchipped.[87] The United States does not require microchipping nationally, but states such as New York and California have introduced bills mandating microchipping,[88] and some local governments such as Los Angeles County have ordinances requiring microchips for pets.[89] However, many European Union states like Switzerland, Portugal, and Italy, require microchipping for pets[90] and several countries, such as Belgium and France, have national identification databases.[91] Microchips for dogs will be compulsory in England as of 2016.[92] The European Union requires microchipping for cats, dogs, and ferrets in order to cross borders.[93] Mandatory identification for pets is the first step in creating a pet identification database; registration of owner information is also essential.[94] Some have

[87] *AAHA Universal Pet Microchip Lookup*, American Animal Hospital Association, https://perma.cc/VZ6E-X2LG (last visited Dec. 4, 2015).

[88] New York State Assembly Bill 1677(introduced Jan. 10, 2007), *available at* https://perma.cc/3LBL-YTPL; California SB 702 (introduced Feb. 18, 2011), *available at* https://perma.cc/G79Y-U49V.

[89] Los Angeles, California, Municipal Code § 10.20.185. ("All dogs over the age of four months must be implanted with an identifying microchip. The owner or custodian is required to provide the microchip number to the department, and shall notify the department and the national registry applicable to the implanted chip, of a change of ownership of the dog, or a change of address or telephone number.").

[90] *Identification and Registration*, CARODOG.COM, https://perma.cc/82AU-LV3H (last visited Dec. 4, 2015); *See* JoAnna Lou, *Mandatory Microchips*, THE BARK (Feb. 13, 2013), https://perma.cc/DJ7H-BKK8; *Portuguese Government Taps RFID Microchips for Mandatory Pet Identification Project*, GOVERNMENT TECHNOLOGY (July 28, 2014), https://perma-archives.org/warc/GHW8-4CDN/http://www.govtech.com/wireless/Portuguese-Government-Taps-RFID-Microchips-for.html.

[91] *Identification and Registration*, *supra* note 90. *See also* Paolo Dalla Villa, et al., *Pet Population Management and Public Health: A Web Service Based Tool for the Improvement of Dog Traceability,* 109 Preventive Veterinary Med. 349 (2013). (Even in countries without a central national identification database, regional databases may be integrated to show real-time data.).

[92] *Dogs in England Must be Microchipped from 2016*, BBC News, (Feb. 6, 2013), https://perma.cc/63SB-Z4CR.

[93] Regulation (EU) No 576/2013, https://perma.cc/58WC-5VBN; *See also Movement of Pets (Dogs, Cats and Ferrets)—Non-Commercial Movement within the EU*, European Commission, https://perma.cc/QQA9-TQ98 (last visited Apr. 7, 2016).

[94] Linda K. Lord, et al., *Characterization of Animals with Microchips Entering Animal Shelters*, 235 J. Amer. Veterinary Med. Ass'n 160 (2009).

expressed concerns with microchips in animals, citing studies where growths or cancerous tumors have appeared at a microchip site on dogs and cats.[95] However, other identification methods are possible, such as tattoos or tags. Only through pet identification and communication, would animal shelters in Michigan (or the United States for that matter) be able to combat the Frequent Flyer problem.

b. The Multiplication Problem

Pippa is a dog taken into an animal shelter. A few days later, Pippa has a litter of healthy puppies. How many intakes does the shelter count?

This is the Multiplication Problem. Pregnant animals enter and have litters in the shelter. Without guidance, some Michigan shelters could count this as one animal taken in and several animals adopted out. Others may count this as several animals taken in, once the mother has her litter.

Counting animals born at a shelter as a separate number could alleviate this problem. Maine's shelter survey, for instance, counts dog and cat intakes in several categories: stray, surrendered, transferred in, and born at shelter.[96] Similarly, Maryland's animal control shelter survey also includes a section for "other live intakes (impounds, births, etc.)" counted separately from intakes of animals at large, owner relinquishments, and transfers from another agency.[97] The statistics could supply a state with one measurement of the success of its spay/neuter program.

c. The New Year's Eve Celebration

Kai is a dog taken into an animal shelter on December 31, 2014 and adopted on February 2, 2015. How does the shelter count Kai in its statistics for the year beginning January 1, 2015?

This is the New Year's Eve Celebration. The Michigan Animal Shelter Annual Report form asks shelters to submit the total number of

[95] *See generally Scientific Evidence*, Animal Adverse Microchip Reactions, https://perma.cc/474E-ZMMT (citing several studies, including M. Vascellari, E. Melchiotti and F. Mutinelli, *Fibrosarcoma with Typical Features of Postinjection Sarcoma at Site of Microchip Implant in a Dog: Histologic and Immunohistochemical Study*, 43 Vet. Pathol. 545 (2006); M.K. Daly, et al. *Fibrosarcoma adjacent to the site of microchip implantation in a cat*, 10 J. Feline Med. & Surgery 202, 205 (2008).

[96] *Shelter Survey Results for the State of Maine*, *supra* note 40.

[97] Jane Mallory, *Analyses of Quarterly Survey Data from Animal Control Shelters /Animal Care Facilities in Maryland - Second Quarter 2014: Apr. 1 to June 30*, Maryland Department of Agriculture 12 (July 20, 2015), https://perma.cc/Z264-BXCL.

animals "received into the shelter last year" (the year before the shelter report is compiled).[98] Though this may seem clear enough, one could interpret the animals in the shelter on January 1 as received in that year since Michigan offers no definition of "received." Some shelters may take into account the animals that were carried over from one year to the next, and some may not. That is, some could start counting at zero on January 1, and some could include the number of animals in the shelter from the previous year. This number, then, is not an accurate representation of the number of animal intakes a Michigan shelter might have in a given year.

This problem could be alleviated in one of two ways. The first way is to ask shelters to count the number of animals in the shelter carried over from the previous year as a separate number. The second way would be for shelters to count the number of new intakes in a given year, rather than the number of physical animals. Either way, Michigan would benefit from definitions of "received," "intakes," or whatever other language it chooses to use.

California does something similar with their Local Rabies Control Activities ("LRCA") Annual Report. California's LRCA Annual Report asks counties to count the number of domestic dogs received by local animal control authorities.[99] Further, the report asks counties to separately count the number of dogs and cats in the shelters that are carried over from the previous year as well as the number of dogs and cats carried over to the next year.[100] Other states count animals in similar ways. Colorado's reporting form asks for a beginning inventory in a given reporting year, and its reports also provide an ending inventory.[101] Virginia also counts the number of animals "on hand" in a shelter on January 1 as well as the number on December 31 of each reporting year.[102]

One national solution is the Basic Data Matrix developed by the National Federation of Humane Societies.[103] The matrix includes explanations for each data category to reduce confusion and ensure

[98] *2014 Animal Shelter Annual Report Form*, Michigan Department of Agriculture and Rural Development, https://perma.cc/7URN-JX8A.

[99] *Local Rabies Control Activities 2014 Annual Report*, *supra* note 40.

[100] *Id.*

[101] *Pet Animal Care Facilities Act Animal Shelter and Rescue Annual Reporting Form*, Colorado Department of Agriculture, *available at* https://www.colorado.gov/pacific/sites/default/files/Yearly%20Shelter%20Rescue%20Reporting%20Form.pdf; *2013 PACFA Shelter Outflow Statistics*, Colorado Department of Agriculture, https://data.colorado.gov/d/rxx2-2x2m?category=Agriculture&view_name=2013-PACFA-Shelter-Outflow-Statistics (last visited Dec. 4, 2015).

[102] *Online Animal Reporting*, *supra* note 40.

[103] *National Federation of Humane Societies Basic Data Matrix*, ASPCA PRO, https://perma.cc/NC4D-QPFG (last visited Apr. 7, 2016).

uniform data collection. For example, the matrix includes a category for beginning animal count (and date) and ending animal count (and date), eliminating the New Year's Eve Celebration problem.[104]

d. Trap Neuter Return

A shelter traps Gunther, a feral cat. They neuter him and return him to his feral colony via their Trap Neuter Return program ("TNR"). Does the shelter count Gunther as an intake?

TNR programs are "an increasingly popular alternative to mass euthanasia" for feral cat populations.[105] These programs humanely trap feral cats that are anesthetized, sterilized, and then returned to their habitats.[106] The idea behind TNR is to reduce the free-roaming cat and pet population by spaying and neutering animals who would otherwise reproduce, cause environmental and public health issues, and end up in shelters.[107]

Since Michigan offers no definition of "received," shelters could count animals in the TNR program as intakes even though their intent was not to adopt them but rather to return them to their environments. This could inflate the number of intakes on a shelter's report, and therefore their calculated "save rate." One way to alleviate this problem would be to have a separate category for TNR animals. This way the state could also track how many animals participated in TNR programs, and which areas of the state participate in TNR most heavily or lightly. Since there is no state-sponsored TNR program in Michigan, this data might be useful to track the numbers of stray and feral animals in various areas of the state, indicating which areas might need TNR more than others.

To date, no state lists TNR data as a separate category on their state animal shelter report. Colorado's shelter form specifically asks shelters to include TNR cats as intakes with all other cats.[108] It also asks shelters to count TNR cat dispositions as "returned to owner," again

[104] *Id.*

[105] Jennifer L. Wallace & Julie K. Levy, *Population Characteristics of Feral Cats Admitted to Seven Trap-Neuter-Return Programs in the United States,* 8 J. Feline Med. & Surgery 279 (2006).; J.K. Levy, N.M. Isaza, & K.C. Scott, *Effect of High-Impact Targeted Trap-Neuter-Return and Adoption of Community Cats on Cat Intake to a Shelter,* 201 Veterinary J. 269 (2014).

[106] *Id*.

[107] Julie K. Levy, David W. Gale, & Leslie A. Gale, *Evaluation of the Effect of a Long-Term Trap-Neuter-Return and Adoption Program on a Free-Roaming Cat Population,* 222 J. Amer. Veterinary Med. Ass'n 42 (2003); J.K. Levy, N.M. Isaza, & K.C. Scott, *Effect of High-Impact Targeted Trap-Neuter-Return and Adoption of Community Cats on Cat Intake to a Shelter*, 201 Veterinary J. 269 (2014).

[108] *Pet Animal Care Facilities Act Animal Shelter and Rescue Annual Reporting Form, supra* note 101.

conflating the number of TNR cats with other cats.[109] However, the Basic Data Matrix includes an intake category for "stray/at large" in which TNR cats could be counted, and an outcomes category of "returned to field" that would also encompass TNR cats.[110] This eliminates the problem of TNR animals being counted with animals in other categories and also serves as a way to track TNR numbers.

It is possible that other states direct shelters to report TNR animals differently than other intakes, but that information is not available in the reports themselves. In any case, Michigan does not distinguish between intakes for TNR and intakes that result in adoption, euthanasia, or reclamation, so some shelters may count all of these categories as intakes, and some may not.

e. Secret Euthanasia

Greta is an ill, old cat whose owners cannot afford vet care. The local shelter offers low-cost euthanasia as a community service. Greta's owners take her to the local shelter and ask them to euthanize her. Does the shelter report her euthanasia in their data? If so, how?

Sometimes owners come in to shelters not to give up their pets for adoption, but to request euthanasia.[111] Some Michigan shelters, such as the Michigan Humane Society or the Humane Society of West Michigan, do offer low cost owner-requested euthanasia services for ill animals who cannot be rehabilitated.[112] The Michigan Animal Shelter Annual Report asks for data on euthanasia in shelters, but does not specify whether to report all euthanasia or to exclude owner-requested euthanasia.

Some shelters may be reluctant to report owner-requested euthanasia at all, even in the same category as all "other" euthanasia. Shelters may want to minimize their euthanasia numbers in order to elevate their "save rate."[113] One way to do this is by not reporting euthanasia performed at an owner's request, rationalizing that the animal is not formally an "intake" and therefore not counted as a

[109] *Id.*

[110] *National Federation of Humane Societies Basic Data Matrix*, *supra* note 103.

[111] Philip H. Kass, et al., *Understanding Animal Companion Surplus in the United States: Relinquishment of Nonadoptables to Animal Shelters for Euthanasia*, 4 J. Applied Animal Welfare Sci. 237, 246 (2001).

[112] *Pet Euthanasia*, Michigan Humane Society, https://perma.cc/AS6J-9BW5 (last visited Dec. 4, 2015); *Low Cost Euthanasia*, Humane Society of West Michigan, https://perma.cc/L99X-K7XP (last visited Dec. 4, 2015).

[113] Kim Russell, *What Happened to Spitz the Cat?*, WXYZ.com (July 3, 2015, 7:00 AM), https://perma.cc/D7M4-Q9GZ (reporting an incident where a shelter was accused of recording an owner-requested euthanasia to inflate their save rate).

statistic. Excluding owner-requested euthanasia from the shelter data is one way for shelters to minimize their euthanasia rate, but in doing so these euthanasia's are not counted anywhere.

Inconsistency among shelter policies for euthanasia and differing definitions of "owner requested" euthanasia among shelters may also skew this data. For example, a woman in Oakland County, Michigan surrendered her cat, Spitz, to the Oakland County Animal Shelter.[114] She disclosed that Spitz marked his territory and fought with other cats.[115] The shelter staff felt Spitz was unadoptable because of his behavioral issues and euthanized him.[116] Spitz's owner states that the shelter recorded Spitz's euthanasia as "owner requested," and an animal advocacy group accused the shelter of doing so to inflate their "save rate."[117] Spitz's owner said she would not have surrendered him if she had known the shelter would euthanize him.[118] This situation seems to be rife with miscommunication. The shelter has a written policy on what makes an animal adoptable, but does not make the policy public.[119] In addition, the shelter revised their relinquishment form after this incident, requiring relinquishers to sign a document requesting euthanasia if an animal is unadoptable, [120] indicating that their previous intake form was likely unclear.

Further, the way Oakland County Animal Shelter kept data could have muddied the waters. The Oakland County August 2015 Intake and Disposition document shows that the shelter keeps internal data on owner requested euthanasia in two ways: "owner requested—immediate euthanasia," and "owner requested—post admittance euthanasia."[121] Depending on the how Spitz's intake was handled and the criteria for these data categories, this situation could have been correctly recorded as an owner-requested post-admittance euthanasia. The shelter's August 2015 report indicates that "animals surrendered by their owner for the purpose of adoption that later become too sick or too aggressive to be adopted are also classified as owner requested euthanasia" and that people relinquishing their pets are informed of the euthanasia policy, but it is unclear whether this wording was included on this report before

[114] *Id*.

[115] *Id*.

[116] *Id*.

[117] *Id*. (the shelter's director stated that the shelter does not euthanize enough surrendered animals to impact their save rate).

[118] *Id*.

[119] *Id*.

[120] *Id*.

[121] *Pet Adoption Statistics*, Oakland County, Michigan. https://www.oakgov.com/petadoption/Pages/Statistics.aspx (last visited Dec. 4, 2015).

or after Spitz's experience.[122] However, these data categories beg the question of why an animal who becomes unadoptable after admittance is counted as "owner requested euthanasia" rather than "untreatable" or "unhealthy" if the condition only becomes evident after intake. Michigan Animal Shelter Annual Report does not distinguish between "immediate" and "post-admittance" owner-requested euthanasia, the numbers of each would be conflated on the MDARD report anyway.

Another issue that distorts statistics is that some shelters are required to take all animals relinquished to them, and others are not. Government-run shelters are "open access" and must take all animals that come in, whereas "no-kill" shelters can limit intakes.[123] Further, shelters that euthanize are often are the recipients of animals that have been turned away from no-kill organizations.[124] For instance, a shelter operated by a nonprofit rescue might transfer their unadoptable animals to the local municipal or county shelter. The government-operated shelter must take these animals, and will probably euthanize them after confirming they are unadoptable. This would count as a transfer to an "allowable entity" for the nonprofit, but as several new intakes and euthanasias for the government shelter. These issues distort reported euthanasia rates, and therefore "save rates."

[122] The shelter's August 2015 statistics report defines "owner requested immediate euthanasia" as "Dog/cat surrendered by their owner for the purpose of euthanasia, some reasons include geriatric, severe illness or injury, aggressive behavior, etc. It should be noted however, that before an animal is euthanized because of an owner request, that animal is examined by our veterinary staff. If after the veterinary exam it is determined that euthanasia is not called for, the animal may be treated for any injury/sickness and is then placed in our general population and would become eligible for adoption." The report also defines "owner requested post admittance euthanasia" as "Dog/Cat surrendered by their owner for the purpose of adoption that later become too sick or too aggressive to be adopted are also classified as owner requested euthanasia. In those cases, when admitted, the owner is advised of the OCAC/PAC euthanasia policy. After being advised of the euthanasia policy, the owner signs a document that requests staff to follow policy and procedure in place and to give their pet a humane euthanasia if/when it becomes necessary." *August 2015 Intake and Disposition*, Oakland County, Michigan 3, https://perma.cc/3FUF-4WR. The shelter intake document in place when Spitz was surrendered to the shelter (July 2015) is no longer available online, and the Internet Archive did not keep a copy of this document prior to August 2015. The current Oakland County Intake and Disposition document (February 2016) has been changed to omit "owner requested post admittance euthanasia." *February 2016 Intake and Disposition*, Oakland County, Michigan 3, https://www.oakgov.com/petadoption/Pages/Statistics.aspx.

[123] Greg Allen, *No-Kill Shelters Save Millions of Unwanted Pets—But Not All of Them,* All Things Considered, National Public Radio, (Dec. 31, 2014), https://perma.cc/96HW-LVSV.

[124] Maryland's shelter report notes that "facilities that do carry out euthanasia often are the recipients of animals that have, for whatever reason, been turned away from no-kill shelters." Mallory, *supra* at note 97.

A recent situation at Detroit Animal Control offers one example of the media reporting MDARD data without this context and creating public misperception. The shelter made the news for its treatment of a dog in its shelter.[125] For several weeks animal advocate groups had been concerned about the number of animals euthanized at the shelter.[126] News stories addressing both of these issues focused on the number of animals euthanized at the shelter and compared Detroit's data to the statewide average, using numbers reported by the shelter to MDARD.[127] Detroit's municipal shelter is one that cannot turn away animals.[128] The media used MDARD shelter data to show the high euthanasia rate at Detroit Animal Control, but no news story mentioned that the shelter was an "open access" shelter mandated to take in every relinquished animal, which surely influenced their "save rate."

There is nothing in the Michigan statute or Michigan Animal Shelter Annual Report that makes a distinction among reasons for euthanasia or distinguishes shelters that are required to take in animals. Other states make the distinction between owner-requested euthanasia and other euthanasia more clear. For example, Colorado's survey asks shelters to count owner-requested euthanasia in the "other" column for both intake and dispositions, separating this number from euthanasia for other reasons but not counting it as its own category.[129]

Maryland's quarterly reports include the state's survey form, which records owner requested euthanasia for cat and dog intakes.[130] However, though shelters record the number of intakes that are owner-requested euthanasia, "many facilities will not euthanize a surrendered animal if it has been evaluated by the staff and medical team to be sound,

[125] Gus Burns, *Animal Welfare Groups to Release Video of 'Horrific' Conditions in Detroit Animal Shelter,* Mlive.com, (July 12, 2015), https://perma.cc/XUY6-N3A3.

[126] Mark Hicks, *Rescue Groups Seek Detroit Animal Control Reform*, Detroit News, (June 13, 2015), https://perma.cc/P85Q-4Y37; Christy Strawser, *Thousands Sign Petition to Shut Down Detroit Animal Control, Claiming it Kills 95 Percent of Dogs,* CBS Detroit, (June 18, 2015), https://perma.cc/82H3-HWVQ.

[127] Burns, *Animal Welfare Groups*, *supra* note 125; Hicks, *supra* note 126; Strawser, *supra* note 126.

[128] Detroit, Michigan—Code of Ordinances §6-3-3 states that "The Animal Control Shelter shall capture, impound, and harbor all stray animals, and all animals owned or harbored contrary to the provisions of this chapter." Further, Detroit, Michigan—Code of Ordinances §6-3-4 sates that "Whenever a dog, cat, ferret, or other animal is delivered, left, or impounded at the Animal Control Shelter, the shelter shall make a record of such receipt," suggesting that Detroit Animal Control is responsible for all strays, impounded animals, and animals surrendered to the shelter. Detroit, Mi., Code of Ordinances §6-3-3, https://perma.cc/2KTB-XUWP.

[129] *Pet Animal Care Facilities Act Animal Shelter and Rescue Annual Reporting Form*, *supra* note 101.

[130] Mallory, *supra* note 97.

treatable, rehabilitatable, and adoptable."[131] Therefore the number of intakes that count as owner-requested euthanasia and actual number of animals euthanized at the owner's request are different. The form also asks for disposition numbers for animals that come in as "euthanasia—at owner's request" and "euthanasia—all other than owner's request." Euthanasia "at owner's request" includes cases where the animal is ill and untreatable, and humane euthanasia is the only option.[132]

The Basic Data Matrix also separates "owner-intended euthanasia" (euthanasia of pets whose owner brought the pet to the shelter with the intent of utilizing euthanasia services) from "shelter euthanasia" for all other reasons.[133] As a practical matter, it would be difficult if not impossible to really enforce whether a particular shelter reported owner-requested euthanasia. But differentiating between owner-requested and other euthanasia on the Michigan Animal Shelter Annual Report Form is a start, and may encourage shelters that are shy to report euthanasia numbers because of public perception.

The more granular this data, the more potentially useful they are. That is, one can determine the kinds of animals shelters are euthanizing and why. Maryland's reports include reasons for euthanasia such as severe behavioral problems that prevent adoption, poor and untreatable medical conditions, court-ordered euthanasia, and animals not adopted in the allotted time.[134] However, it lumps these all together in a category called "euthanasia—all other than owner request," so it is not possible to know which reasons are the most prevalent.[135] Clarifying whether an animal is surrendered to a shelter and euthanized due to illness or behavior problems could provide a better understanding of the scope of the pet overpopulation problem in the United States.[136]

V. Administrative Process

Michigan shelter data as they are collected now are too inconsistent to be useful. However, there are several administrative solutions MDARD could use to provide definitions and guidance to shelters, helping them report more consistent data. Both the logistics of providing guidance to shelters and the content of the guidance are critical.

[131] *Id*.

[132] *Id.*

[133] *National Federation of Humane Societies Basic Data Matrix*, *supra* note 103.

[134] Mallory, *supra* note 97.

[135] *Id.* at 12.

[136] Kass, *supra* note 111, at 247.

a. Logistics

First, Michigan needs criteria that detail how shelters collect and report data. These criteria could be as simple as instructions included on the statistical reporting sheet that clarify how to count intakes, adoptions, and other categories. There are three ways MDARD could establish these criteria: rules, guidelines, and interpretive statements or instructions.

i. Rules

A "rule" is "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency… ."[137] Rules require publication, public hearings, and agency review.[138] MDARD has the authority to create administrative rules and regulations by participating in the administrative rulemaking process.[139] The agency has done so for various other aspects of the statutes it enforces, such as the humane treatment of animals in shelters.[140]

A proposal for rulemaking can originate from MDARD, boards or commissions, advisory committees, or the public.[141] MDARD could implement rules that more formally standardize data collection for animal shelters within Michigan, clarifying the statute that mandates shelter reporting. Unfortunately, the statute's language is unclear, making it difficult to determine what the legislature intended. For instance, the statute refers to shelters recording annually "the total number of dogs, cats, and ferrets under 6 months of age," and "the total number of dogs, cats, and ferrets 6 months of age and older," but the language of the statute is not specific about whether the shelter should count the animals taken in the previous year or not (hence the New

[137] Mich. Comp. Laws § 24.207 (1969).

[138] Chris Shafer & Karl Benghauser, *The Need for Agency Discretion: The Agency's View,* 74 Mich.B.J. 284 (1995).

[139] Mich. Comp. Laws § 287.332 (1969); Mich. Comp. Laws § 24.201 (1969), *et seq*.

[140] Mich. Admin. Code R. 285.151.1—285.151.41 (1969).

[141] Mich. Comp. Laws § 24.238 (1969) (stating that a person may request an agency to promulgate a rule); Mich. Comp. Laws § 24.205(7) (1969) (stating that a "person" means "an individual, partnership, association, corporation, limited liability company, limited liability partnership, governmental subdivision, or public or private organization of any kind other than the agency engaged in the particular processing of a rule…."); *see also* MCL Administrative Rules Process in a Nutshell, *available at* https://perma.cc/2LSG-Q2U6.

Year's Eve Celebration problem).[142] Though rules translate statutes into "specific standards and requirements that are understandable, practicable, reasonably comprehensive, and enforceable,"[143] MDARD cannot create a rule contrary to legislative intent. Rules have other disadvantages. The rulemaking process is time-consuming, requiring public hearings, publication, and agency review.[144] Rulemaking is further "fraught with compromise" because it must take into account the viewpoints of opposing groups, and rules are difficult to change for these same reasons.[145]

However, a "rule" does not include a "form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory."[146] These non-rules give MDARD more flexible alternatives for establishing data collection criteria.

ii. Guidelines

A "guideline" is "an agency statement or declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person."[147] Guidelines do not require a hearing or legislative approval, and are not published in the Michigan Administrative Code.[148] Creating guidelines would be a less complicated way for MDARD to create standards and requirements for data collection.

However, MDARD may not adopt a guideline in lieu of a rule.[149] The Michigan Supreme Court established that "the preferred method of policymaking is the promulgation of rules" because during the rulemaking process those affected by them have an opportunity to participate in the decision making.[150] When a guideline is binding it effectively becomes a rule, especially when the guideline affects the rights of the public.[151]

[142] Mich. Comp. Laws § 287.339a (1969).
[143] Shafer & Benghauser, *supra* note 138, at 285.
[144] *Id*.
[145] *Id*.
[146] Mich. Comp. Laws § 24.207(h) (1969).
[147] Mich. Comp. Laws § 24.203(7) (1969).
[148] Mich. Comp. Laws § 24.224 *et seq.*; *see also supra* note 138, at 285.
[149] Mich. Comp. Laws § 24.226 (1969).
[150] Detroit Base Coal. for Human Rights of Handicapped v. Dep't of Soc. Servs., 431 Mich. 172, 185 (1988).
[151] County of Delta v. Mich. Dep't of Natural Res., 118 Mich.App. 458, 468 (1982) (stating that "The rights of the public may not be determined, nor licenses denied, on the basis of unpromulgated policies").

If MDARD guidelines simply provide standards for data collection and do not significantly change the operations or rights of licensed animal shelters, it is unlikely these guidelines would be interpreted as rules. However, if MDARD declined to create guidelines, there is a third option: instructions or interpretive statements.

iii. Interpretive Statements or Instructions

If MDARD chose to establish explanations and definitions that do not have the force of law, the agency could simply add instructions or interpretive statements on its data collection form. The Michigan Supreme Court explained interpretive statements as "the interpretation of ambiguous or doubtful statutory language which will be followed by the agency unless and until the statute is otherwise authoritatively interpreted by the courts."[152] Instructions or interpretive statements are exempt from the rulemaking process.[153] MDARD has already expanded data collection on the animal shelter data collection form without formal rulemaking; for instance, Michigan's statute does not say anything specifically about owner requested euthanasia, yet this category appears on the data collection form. Interpretive statements would be the easiest and most flexible way for MDARD to establish criteria for the collection of animal shelter data in Michigan.

b. Content

The content of a data collection form is key to collecting useable data. If MDARD were to revise the data collection form, through whatever administrative method it chose (rules, guidelines, instructions or interpretive statements), it could benefit from a combination of state and national data collection solutions.

First, MDARD should include clear definitions for terms on the reporting sheet, such as what "received into the shelter" means. As discussed above, Maryland's reports state that many of its shelters will not euthanize a surrendered animal if staff determines the animal is "sound, treatable, rehabilitatable, and adoptable."[154] This begs the question of what "sound, treatable, rehabilitatable, and adoptable" mean, requiring standard definitions. Shelters have varying definitions of "adoptable," and the shelter PAWS Chicago asserts that they have heard of shelters "calling a black dog 'unadoptable' because there were too many black dogs at the

[152] Clonlara, Inc. v. State Bd. of Educ., 442 Mich. 230, 241 (1993) (*quoting* 1 Cooper, *State Administrative Law*, pp 174–175).
[153] Mich. Comp. Laws § 24.207(h) (1969).
[154] Jane Mallory, *supra* note 97.

shelter that day."[155] Another complication is that some adoptable dogs may develop behavior issues due to the stress of living in a shelter,[156] and without other context a shelter may label them as "unadoptable."[157] However, some guidance is available. The Asilomar Accords offers definitions of these and other terms,[158] and Maddie's Fund offers a guide to the Asilomar Accords definitions that further refines them, taking into account animal behavior outside a shelter and care "typically provided to pets by reasonable and caring pet owners/guardians in the community."[159]

MDARD should also revise the shelter data form as suggested in Part IV above to include elements of the Basic Data Matrix and other state data collection methods to create a more useful data set. Michigan shelters should also consider contributing to this Shelter Animals Count, a nonprofit dedicated to "creating standardized reporting and definitions for shelter statistics including intake, adoptions, return-to-owner, transfers, euthanasia and shelter deaths" on a national level.[160] It invites shelters from around the United States to contribute data to build "objective, unbiased database" of shelter statistics locally and nationally.[161] The data it collects is available free on its website, and can be manipulated over several data points (geography, intakes and outcomes by type, and the like). Only with accurate data across the country will the problems faced by animal shelters be better understood and overcome.

VI. Conclusion

The lack of accurate animal shelter data is typical nationwide. As evidenced in Part II, data is available for only a few states in the U.S. The states that collect statistical data have similar issues to Michigan. For instance, California does not differentiate between owner-requested euthanasia and all other euthanasia, and New Jersey's report does not

[155] *Defining No Kill,* PAWS Chicago, https://perma.cc/8NYA-L9PF (last visited Dec. 4, 2015).

[156] C.E. Part, et al., *Physiological, Physical, and Behavioural Changes in Dogs (Canis Familiaris) When Kennelled: Testing the Validity of Stress Parameters,* 133 Physiology and Behavior 260 (2014); H.D. Denham, et al., *Repetitive Behaviour in Kennelled Domestic Dog: Stereotypical or Not?* 128 Physiology and Behavior, 288 (2014).

[157] Emily Weiss, *Home-able*, ASPCA Blog, (Jan. 29, 2015), https://perma.cc/CQ4D-HL9N.

[158] *Definitions*, Asilomar Accords, https://perma.cc/2B6Y-ZP8V (last visited Dec. 4, 2015).

[159] *A Guide to the Asilomar Accords Definitions,* Maddie's Fund, https://perma.cc/N37W-MVFV.

[160] Shelter Animals Count, https://perma.cc/W8D2-SV5G (last visited Dec. 4, 2015).

[161] *What Can Data Do For You?* Shelter Animals Count, https://perma.cc/FAL3-MBQG (last visited Dec. 4, 2015).

establish whether animals in the shelter December 31 are counted on January 1 of the next year.[162] No state shelter report tackles the Frequent Flyer problem, as there is no mandatory identification system in place for pets in the United States. The lack of data in most states, and the lack of uniform data in the states that do collect them, hamper shelters' ability to work to their greatest lifesaving potential. Though this article focused on issues specific to Michigan's shelter data collection, the solutions offered here can be applied to shelter data collection nationwide.

On the other hand, should shelter data be available at all? Euthanasia is difficult for shelter workers as well as the public, often requiring guilt-management strategies for workers providing euthanasia and pet-owners relinquishing their pets.[163] Shelters experience high turnover rates for workers with euthanasia responsibilities.[164] These statistical reports and the negative social focus on euthanasia rates could encourage shelters to inflate adoption numbers and deflate euthanasia numbers.[165] Michigan's data collection form also does not allow for fair comparisons as it does not distinguish between shelters that choose which animals they take and shelters mandated to take all animals (a situation recognized by the MPFA when bestowing awards; MPFA calls each shelter to determine their intake policy since it is not stated on the MDARD form).[166] And shelters may be reluctant to keep data for fear that they may be used against them.[167]

[162] *Local Rabies Control Activities (LRCA) Annual Report*, California Department of Public Health (2012), https://perma.cc/K9CX-Q7CK; *Shelter/Pound Intake and Disposition Surveys 2004-2013*, New Jersey Department of Public Health. Infectious and Zoonotic Disease Program, https://perma.cc/8K5G-ARE9 (last visited Dec. 4, 2015).

[163] *See* Stephanie S. Frommer and Arnold Arluke, *Loving Them to Death: Blame-Displacing Strategies of Animal Shelter Workers and Surrenderers*. 7 Soc'y & Animals 1 (1999); Benjamin E. Baran, et al., *Euthanasia –related Strain and Coping Strategies in Animal Shelter Employees,* 235 J. Amer. Veterinary Med. Ass'n 1 (2009); Charlie L. Reeve, et al., *The Caring-Killing Paradox: Euthanasia-Related Strain Among Animal-Shelter Workers,* 35 J. Applied Soc. Psychology 119 (2005); Vanessa Rohlf & Pauleen Bennett. *Perpetration-induced Traumatic Stress in Persons Who Euthanize Nonhuman Animals in Surgeries, Animal Shelters, and Laboratories*, 13 Soc'y & Animals 201 (2005).

[164] Steven G. Rogelberg, et al., *Impact of Euthanasia Rates, Euthanasia Practices, and Human Resource Practices on Employee Turnover in Animal Shelters,* 230 J. Amer. Veterinary Med. Ass'n 1 (2007).

[165] Russell, *supra* note 113 (documenting an accusation against the Oakland County Animal Shelter for recording the euthanasia of surrendered animals as "owner requested" in order to inflate the shelter's save rate); Mark Hicks, *supra* note 126; Christy Strawser, *supra* note 126 (showing the media's use of MDARD data without context in negative reports about Detroit Animal Control).

[166] "Each shelter was telephoned and asked their status as to Open Admission or Limited/Closed Admission." *2013 Save Report*, *supra* note 1.

[167] Staci Veitch, *Show Your Impact: Why Shelters Should Keep Statistics,* Petfinder.com, https://perma.cc/GZ96-HFU2 (last visited Dec. 4, 2015).

Ultimately, the benefits to animals and society as a whole should supersede these fears. Accurate and reliable shelter data are necessary in order to evaluate our progress in combating the pet overpopulation problem.[168] Data can also help prove a shelter or program's effectiveness, focus programs, and help shelters with effective budgeting.[169] Accurate and reliable data could also create a better public understanding of shelter operations and issues such as euthanasia.[170] Good data could reinforce the idea that animals are a beneficial part of society, such as a pet's often positive effect on human health,[171] and that the pet overpopulation problem deserves attention.[172] Knowing the gaps in data collection is the first step in remedying the data problem. This isn't just a matter of celebrating which shelters "do the best job." For the welfare of shelter animals, good data can be lifesaving.

[168] Paul C. Bartlett, Andrew Bartlett, Sally Walshaw, and Stephen Halstead, *Rates of Euthanasia and Adoption for Dogs and Cats in Michigan Animal Shelters,* 8 J. Applied Animal Welfare Sci. 103 (2005); *Position Statement on Data Collection and Reporting*, ASPCA, https://perma.cc/23ZV-A6SU (last visited Dec. 4, 2015); Kass, *supra* note 111, at 247; Elizabeth A. Clancy and Andrew N. Rowan, *Companion Animal Demographics in the United States: A Historical Perspective*, *in* The state of the animals II: 2003 9, 15 (D.J. Salem & A.N. Rowan, eds., 2003), *available at* http://animalstudiesrepository.org/sota_2003/5/.

[169] John Wenstrup *supra* note 13.

[170] *Id*.

[171] For instance, several studies conclude that pets can be beneficial to human health. *See* Ann M. Toohey and Melanie J. Rock, *Unleashing Their Potential: A Critical Realist Scoping Review of the Influence of Dogs on Physical Activity for Dog-Owners and Non-Owners,* 8 Int'l J. Behavioral Nutrition & Physical Activity 46 (2011); A.M. Toohey, et al., *Dog-Walking and Sense of Community in Neighborhoods: Implications for Promoting Regular Physical Activity in Adults 50 Years and Older,* 22 Health & Place 75 (2013); Allen R. McConnell, et al., *Friends with Benefits: On the Positive Consequences of Pet Ownership,* 101 J. Personality & Soc. Psychology 1239 (2011); Deborah L. Wells, *The Effects of Animals on Human Health,* 65 J. Soc. Issues 523 (2009). *But see* Harold Herzog, *The Impact of Pets on Human Health and Psychological Well-Being: Fact, Fiction, or Hypothesis?* 20 Current Directions in Psychological Science 236 (2011); June McNicholas, *et al*., *Pet Ownership and Human Health: A Brief Review of Evidence and Issues,* 331 BMJ 1252 (2005); Glenn N. Levine, *et al.*, *Pet Ownership and Cardiovascular Risk: A Scientific Statement from the American Heart Association,* 127 Circulation 2353, 2359-2360 (2013), *available at* https://perma.cc/QW9L-VJTP (stating that "it cannot be determined with confidence whether the reduction of CVD [cardiovascular disease] risk factors with pet ownership is merely associative or causative, although there are plausible psychological, sociological, and physiological mechanisms for causation for many of the associations, particularly dog ownership and increased physical activity.").

[172] *2014 U.S. Shelter Pet Report*, *supra* note 16.

Justifying Force Against Animal Cruelty

Ross Campbell*

Three defenses can be made to justify force against animal cruelty

I. Introduction

Lord Erskine, a chancellor of England in the nineteenth century and famous animal lover, once came across a man beating his horse and objected to the abuse. After the man exclaimed "[c]an't I do what I like with my own," Erskine smacked him with his stick and replied "[a]nd so can I—this stick is my own."[1] Besides being an anecdote that would endear Erskine in the minds of activists for many years to come, this scenario evokes a curious question so far unanswered in the law: just how far are ordinary people allowed to go to prevent animal abuse? Can they use force—and if so—how much? Could one even kill to save the life of a nonhuman?[2] These thoughts evoke issues of public policy and precedent that are more ambiguous than one might expect. However, in light of the shocking nature and unfortunate prevalence of animal abuse in the United States, reasonable accommodations to concerned bystanders should be discussed.[3]

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[1] Richard D. Ryder, Animal Revolution 83–84 (1989).

[2] A comprehensive discussion of exculpatory defenses for people who kill on behalf of their companion animals is taken up in Justin F. Marceau, *Killing for Your Dog*, 83 Geo. Wash. L. Rev. 943 (2015). Professor Marceau deftly characterizes an important aspect of this problem, noting that "[t]he breadth of deadly force, as currently defined, as well as the law's treatment of initial aggressors, are core concerns not only for a pet defense, but also in any context where the question of who may use force and how much force is permitted are at issue." *Id.* at 947. This paper expands on Professor Marceau's contributions, and discusses a third-party permission for bystanders to use force to protect nonhumans generally.

[3] To get a sense of the scale of this problem—every year, organizations like the Massachusetts Society for the Prevention of Cruelty to Animals reportedly process more than five thousand cruelty complaints. *See* Arnold Arluke & Carter Luke, *Physical Cruelty Toward Animals in Massachusetts, 1975-1996*, 5 Society & Animals 195 (1997). As of now, there is scant national data on the frequency of animal abuse. However, in 2014, the FBI announced that it would begin to include these cases in their annual Uniform Crime Report. *See* Scott Heiser, *Tracking Animal Crimes Data in the FBI's Uniform Crime Reporting (UCR) Program—A Huge Step Forward*, Animal Legal Defense Fund Blog (Sept. 17, 2014), https://perma.cc/GST2-E4TD.

The reasonable use of force to protect another is justified in nearly all jurisdictions,[4] and will ordinarily act as a complete defense to a criminal charge. Only cabined by proportionality and necessity, the common sense of this right has made it a stable feature of modern criminal defenses.[5] Without this permission, faith in the law would surely falter, for no sensible system could expect bystanders to wait on the government when faced with inhumane and anti-social acts.[6] As the Massachusetts Supreme Court once observed, "it is hardly conceivable that the law of … any jurisdiction[] should mark as criminal those who intervene forcibly to protect others; for the law to do so would aggravate the fears which lead to the alienation of people from one another."[7] Thus, transferring justified self-defense to third parties is a crucial stop-gap for those situations where police lack the opportunity or inclination to help. It also keeps the social compact that the law does not punish individuals who act otherwise reasonably.[8]

With these purposes in mind, this paper seeks to arm defendants with plausible legal theories to extend this privilege should they use force to protect nonhumans from cruelty.[9] Though judges and legislators have little to say on this point,[10] arguments can and should be made

[4] *See* Paul H. Robinson et al., 2 Crim. L. Def. § 133 (2009) (collecting cases and statutes).

[5] *See, e.g.*, United States v. Grimes, 413 F.2d 1376, 1379 (7th Cir. 1969) ("At common law, the reasonable use of force in defense of another was generally a defense to a charge of assault."); People v. Goetz, 497 N.E.2d 41, 48 (N.Y. 1986) (discussing history of defense of others in New York).

[6] *See, e.g.*, Robert Post, *Law and Cultural Conflict*, 78 Chi.-Kent L. Rev. 485, 486 (2003) ("The law commonly understands itself as enforcing the commonsense of the community, as well as the sense of decency, propriety and morality which most people entertain." (internal quotation marks omitted)). Similarly, Professors Josh Bowers and Paul H. Robinson note that "[a] criminal law with liability and punishment rules that conflict with a community's shared intuitions of justice will undermine its moral credibility." Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 Wake Forest L. Rev. 211, 217 (2012).

[7] Com. v. Martin, 341 N.E.2d 885, 891 (Mass. 1976).

[8] *See* Marceau, *supra* note 2, at 949–50 ("To the extent our criminal laws 'embody extant moral norms, the possibility of conflict between moral and legal duties is eliminated,' which is important for the long-term credibility and proper functioning of the criminal justice system. (citing Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625, 649 (1984)).

[9] Recently a man was fatally shot after trying to confront a man who was brutalizing a dog. One can wonder if a widely recognized permission to use force under such circumstances—without being considered an initial agressor—could change the course of such tragedies. *See* John Matuszak, *Man Killed Defending Dog, Police Say*, The Herald Palladium (Dec. 12, 2016, 5:00 AM), https://perma.cc/QG7W-DKXW.

[10] Recent cases have only touched the edges of this debate. For example, a man was recently convicted of murder, though later acquitted on retrial on a theory of self-defense and defense of property, where he was suspected of killing a trespasser in retaliation for that trespasser shooting his cats for target practice. *See* John Monk, *In Retrial, Man Found Not Guilty of Murder in Shooting Death of Off-duty Deputy,* The Beaufort Gazette (Oct. 27, 2009), https://perma.cc/98T7-WKUX. Also, under slightly different facts, an elderly man was recently taken into custody after he stabbed his neighbor in a dispute over the neighbor's dog attacking his cats. *See Elderly Man Stabs Neighbor Over Cats and Dogs*, CBS Los Angeles, (Apr. 2, 2011), https://perma.cc/8WUR-7WCH.

to uncover this third-party permission, regardless of the species of the victim. Good Samaritans and the better angels of our nature should be shielded in a just system. Further, empowering more people to protect animals in this fashion should generate greater visibility for the plight of nonhumans and deeper discussion of their treatment under the law.

In light of recent legal and social developments, there is room for cautious optimism on how this exculpation defense could be received. More and more, nonhumans are regarded as objects of moral concern—as of the writing of this paper, an order to "show cause" has been issued in a habeas proceeding for captive chimpanzees,[11] trusts have been recognized for the benefit of nonhumans,[12] and a plethora of federal and state laws demonstrate concern for their destiny and quality of life.[13] As such, there should be air in the room for judges to make progressive statements on the status of other animals.[14] Beyond simply punishing the abuser, protecting their defenders from criminal prosecution seems a fair start.[15]

To get a handle on its best underwriter, this paper analyzes this defense under different theories and tackles possible challenges in turn. Part I thus offers an account of the *status quo* and how a defense of other animals should fare under a strict property regime. Part II offers a different account by questioning the continued vitality of this regime on two points—the dated historical foundations for considering animals "property" under the common law, and the incoherence it brings to

[11] *See* Nonhuman Rights Project, Inc. v. Stanley, No. 152736/2015 (N.Y.S. Apr. 20, 2015) (order to show cause). For a discussion of the implications of this order, *see* Eugene Volokh, *Chimpanzee Almost Gets Habeas Corpus—And in Any Event the Nonhuman Rights Project Gets a Court Hearing*, Wash. Post (Apr. 22, 2015), https://perma.cc/4QPU-UMJL.

[12] *See* Uniform Trust Code § 110(c) (2010) ("A person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in Section 408 or 409 has the rights of a qualified beneficiary under this [Code].").

[13] *See infra* Part II.

[14] *See* Lenore E. Walker, Terrifying Love: Why Battered Women Kill and How Society Responds 279 (1989) ("It is extremely difficult for any judge, whose job is to uphold a particular social order, to rule against the prevailing norms of the system.").

[15] *Cf.* Marceau, *supra* note 2, at 945 (stating that for his paper, "[r]ather than focusing purely on criminalizing the abusers, it considers whether the law should do more to protect defenders of animals").

modern statutes that showcase different values. At the very least, this Part demonstrates that bystander intervention against animal cruelty should not be treated only as a defense of property. This discussion also lends to arguments that most jurisdictions already implicitly acknowledge a limited form of legal personhood for nonhumans, bolstering a third-party permission to defend them from abuse. With this exchange in hand, Part III concludes with analysis of how a residual justification of "necessity" may also permit bystanders to use force against animal abusers without needing to resolve the legal status of nonhumans, while also addressing its limitations.

Even if a formal advance in type—from "property" to legal "person"—is not feasible today, understanding the full context of this debate should allow an advocate to assure judges that a shift in degree is already underway, and a limited right to defend nonhumans would only internalize and reflect this change.[16] The alternative warrants critical inspection.

II. Defense of Other Animals as "Property"

For a defense of other animals to become fully available against charges of assault, manslaughter, or even murder, the biggest hurdle to clear is the status of nonhumans as "property" under the common law.[17] The right to use force to defend property from interference is far more limited than the right to defend other persons—deadly force is ordinarily never justified in defense of property.[18] Take for example the New York statute:

[16] *See* Walker, *supra* note 14, at 239 (noting how judges are typically wary of "newfangled defenses").

[17] *See* Amie J. Dryden, *Overcoming the Inadequacies of Animal Cruelty Statutes and the Property-Based View of Animals*, 38 Idaho L. Rev. 177, 178 (2001) (arguing that the failure of the law to provide adequate protection to nonhumans stems from their common-law status as "property," and that "[a]s property, animals logically lack 'rights.'"); *see also* Gary L. Francione, Animals, Property, and the Law 24 (1995) ("The property status of animals dominates the way in which the political and legal system think about nonhumans.").

For cases dealing with the use of force to defend property in nonhumans animals, *see, e.g.*, Com. v. Beverly, 34 S.W.2d 941, 942 (Ky. 1931) (discussing use of deadly force to defend chickens from theft); State v. Terrell, 186 P. 108 (Utah 1919) (deadly force to defend rabbits).

[18] *See* Note, *Justification for the Use of Force in the Criminal Law*, 13 Stan. L. Rev. 566, 568 (1961) ("Thus a property owner must surrender his property rather than inflict serious harm in its defense."); *see also* Paul H. Robinson & Michael T. Cahill, Criminal Law 331 (2d ed. 2012) ("[A]ll American criminal codes bar the use of deadly force solely to defend property … ."); Marceau, *supra* note 2, at 981 ("The doctrines of self-defense or defense of others as currently constructed will never apply to justify a killing done in defense of animals.").

> A person may use physical force, *other than deadly physical force*, upon another person when and to the extent that he or she reasonably believes such to be necessary to prevent or terminate what he or she reasonably believes to be the commission or attempted commission by such other person of larceny or of criminal mischief *with respect to property* other than premises.[19]

This caveat should be a comfortable feature of criminal law, as it might seem odd to enforce property rights over human life.[20] The only slight exceptions to this limitation are those situations where the defender's use of non-deadly force is itself met with deadly force, allowing a response in kind,[21] and in states where deadly force is permitted in defense of a dwelling.[22] In the first instance, it is conceivable that using moderate force to defend a companion animal or livestock could escalate—as discussed *infra*, there is a significant link between animal abuse and violence against humans—and therefore permit one to effectively use deadly force to prevent animal abuse. In the second case, the permission is far narrower, and hardly lends to the situation of the bystander (which is the focus of this paper).

Issues begin to crop up as one considers what amount of force is truly permissible, and does not tend towards *deadly*.[23] Though commonly conceived as "[v]iolent action known to create a substantial risk of causing death or serious bodily harm,"[24] it is important to note

[19] N.Y. Penal Law § 35.25 (McKinney 2004); *see also* Robinson, *supra* note 4, at § 134.

[20] *See* Marceau, *supra* note 2, at 979; Robinson & Cahill, *supra* note 18, at 303 (noting that the "commitment to proportionality—such as valuing human life, even that of a law breaker, over property interests—is the mark of a civilized society").

[21] *See, e.g.*, Model Penal Code § 3.06(3)(d)(ii)(A) (1985).

[22] *See, e.g.*, Colo. Rev. Stat. Ann. § 18-1-704.5 (West 2013). However, as Professor Catherine Carpenter has noted, this theory often dovetails with self-defense. *See* Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 Marq. L. Rev. 653, 665 (2003) ("As an exception to the generalized duty to retreat, the Castle Doctrine sits at the intersection of two distinct but interrelated defenses: defense of habitation and self-defense. Defense of habitation is primarily based on the protection of one's dwelling or abode, and stems from the common law belief that a man's home is his castle.").

[23] *See* Marceau, *supra* note 2, at 969–78, for an in-depth discussion of this issue; *see also*, Note, *supra* note 18, at 573 ("Special problems are involved in classifying force as deadly or nondeadly for purposes of justification.").

[24] Black's Law Dictionary (10th ed. 2014) (the dictionary continues "[g]enerally, a person may use deadly force in self-defense or in defense of another only if retaliating against another's deadly force"). *Id.* Similarly, Black's Law Dictionary describes non-deadly force as "[f]orce that is neither intended nor likely to cause death or serious bodily harm; force intended to cause only minor bodily harm." *Id.*; *see also*, N.Y. Penal Law § 10.00(11) (McKinney 2009) ("'Deadly physical force' means

that intent does not figure into this definition. Therefore, a purpose to simply discourage someone from harming property and a confidence that one's methods would leave an attacker mostly unscathed are irrelevant to this analysis. Courts have also construed the amount of force that creates a substantial risk of serious bodily harm with surprising breadth—a forceful headlock,[25] a strike to head with a walking stick[26] or pool cue[27] could potentially subject one to charges of manslaughter. As Professor Justin F. Marceau summarizes the issue, "[u]sing nearly any object to inflict injury, even to parts other than the head or torso, can be deadly force. Even the use of one's fists could, in certain circumstances, constitute deadly force."[28] This ambiguity—when push comes to shove comes to *deadly force*—may have a chilling effect and prevent assistance to nonhuman animals, as anything less than the threat of serious injury may be ineffective as a deterrent.[29]

Finally, it is unclear to what extent there is a third-party permission to be found in statutes dealing with defenses of property. Though many on their face would seem to imply bystanders, for example the New York statute simply refers to "a person," the common law origins of this defense suggest this privilege is limited to property owners:

> The common law gave *property owners* the right to use reasonable force when necessary to protect *their property* from interference. One of the major functions of this defense at common law was its application in prosecutions for homicide: it *enabled the owner* to fight in protecting his property without being deemed an "aggressor," thus preserving other grounds upon which he might justify his conduct.[30]

physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury."); People v. Vasquez, 148 P.3d 326, 328–29 (Colo. App. 2006) (collecting state statutes and case law).

[25] *See* Com. v. Walker, 820 N.E.2d 195, 200 (Mass. 2005) (concluding that whether a headlock constitutes deadly or non-deadly force is a question of fact for the jury).

[26] *See* People v. Cleveland, 504 N.Y.S.2d 900, 901 (N.Y. App. Div. 1986) (Boomer, J., dissenting) ("Whether the walking stick was capable of causing serious bodily injury or death was a question of fact for the jury, not a matter of law.").

[27] State v. Sutfin, No. 91AP-305, 1991 WL 224536, at *2 (Ohio Ct. App. Aug 29, 1991) ("Although appellant inflicted only minor injuries upon David Slobodnik, the results could have been fatal. The relevant test is whether the force used creates a substantial risk of causing death. The facts of this case indicate that hitting someone in the head with a pool cue does create a substantial risk of causing death.").

[28] Marceau, *supra* note 2, at 976.

[29] *Id.* at 970; *see also*, Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 Am. U. L. Rev. 11, 36, 53 (1986) (discussing how victims of domestic abuse, limited to non-deadly force, often have no real means of defending themselves—"[o]ne must suffer nondeadly harm if use of deadly force would be the only way to avoid it").

Nevertheless, some states do indeed allow bystanders to use limited force in defense of another's property. For example, Wisconsin privileges certain third-parties to use non-deadly force to defend another's property under circumstances where that intervention could be reasonably believed to be necessary and the original owner would be similarly justified.[31] Minnesota also appears to provide a similar defense without requiring a specific relationship to the property owner.[32] This "defense of another's property" only appears rarely, perhaps due to the unlikely prospect of individuals sticking their neck out to protect others, much less their possessions.[33] Given the ambiguous reach of this defense, and its limitations for both property owners and third-parties to the vagaries of "non-deadly" force, a fully realized third-party permission to use force to defend other animals should be found elsewhere.

[30] Note, *supra* note 18, at 568 (emphasis added).

[31] Wis. Stat. Ann. § 939.49(1)-(2) (West). Note, however, that this justification is limited to the property of "a member of his or her immediate family or household or a person whose property the person has a legal duty to protect, or is a merchant and the actor is the merchant's employee or agent." *Id.* § 939.49(2). For cases discussing this defense, *see* State v. Wardell, 568 N.W.2d 651 (Wis. Ct. App. 1997); State v. Kuhnke, 514 N.W.2d 725 (Wis. Ct. App. 1993); State v. Jensen, 447 N.W.2d 539 (Wis. Ct. App. 1989).

[32] Minn. Stat. Ann. § 609.06, subd. 1 (4) provides that "reasonable force may be used upon or toward the person of another without the other's consent when … used by any person in lawful possession of real or personal property, or by another assisting the person in lawful possession, in resisting a trespass upon or other unlawful interference with such property."

See also, Model Penal Code § 3.06(1)(a)(ii)(A) (1985) (permitting force "to prevent or terminate an unlawful entry or other trespass upon land or a trespass against or the unlawful carrying away of tangible, movable property, provided that such land or movable property is, or is believed by the actor to be, in his possession *or in the possession of another person* for whose protection he acts"); Arteaga v. State, 757 S.W.2d 158, 159 (Tex. App. 1988) (allowing defendant to put forth and testify on defense of another's property).

Compare Restatement (Second) of Torts § 86 ("Defense Against Intrusion on Third Person's Land or Chattels") (Am. Law Inst. 1965), and *Id.* at § 110 ("Assisting Third Person in Recapture of Chattel").

[33] *See, e.g.*, the infamous case of Kitty Genovese who was murdered in front of thirty-eight witnesses who not only failed to help, but did not even phone the police. Harold Takooshian, *The 1964 Kitty Genovese Tragedy: What Have We Learned?*, Psychology Today (March 24, 2014), https://perma.cc/C56W-8Q64. Considered a classic case of the "bystander effect," where individuals essentially feel a diluted sense of responsibility to help others when other bystanders are present—it also speaks to the general reluctance to sacrifice one's safety and comfort for another.

III. Defense of Other Animals as "Persons"

Roughly conceived, items of property have no rights against legal persons.[34] Thus, property law is often regarded as "a set of legal relations between persons governing the use of things."[35] The division between property and persons has often been criticized for lacking logical consistency—thus inanimate objects such as ships and corporations have been treated by the law as "persons" while human beings, such as slaves and married women, have been relegated to a certain "property" status until relatively recently.[36] The importance of transcending this line cannot be understated—"[t]he consequence of this classification is that legally recognized people have rights and property does not."[37]

Nonhumans occupy an uncertain space in this binary scheme. If rights can be conceived as "a moral trump card that cannot be disputed,"[38] they could in some ways be regarded as rights-holders—among other things, nonhumans enjoy indisputable protection in every state from malicious acts of cruelty.[39] In this way they resemble persons, in that they have interests which merit legal protection.[40] However, this right often only extends against "unnecessary" suffering,[41] suggesting a property status as nonhumans are used for food and biomedical research.

This paper does not attempt to settle this divide. However, it describes a certain niche of personhood carved out for nonhumans. Regardless of whether anti-cruelty legislation recognizes the inherent value of other animals or simply operates to benefit human society, this statutory scheme should inform the interpretation of justification defenses. In this way, nonhumans should be considered legal persons insofar as third-parties seek to enforce their rights against malicious abuse.

[34] Derek W. St. Pierre, *The Transition From Property to People: The Road to the Recognition of Rights for Non-Human Animals*, 9 Hastings Women's L.J. 255, 257 (1988); Jeremy Waldron, The Right to Private Property 27 (1988).

[35] Bruce A. Ackerman, Private Property and the Constitution 27 (1977).

[36] *See* St. Pierre, *supra* note 34, at 255–56; David S. Favre & Murray Loring, Animal Law 21 (1983).

[37] St. Pierre, *supra* note 34, at 257.

[38] James M. Jasper & Dorothy Nelken, The Animal Rights Crusade 5 (1992).

[39] *See* Henry Cohen, Cong. Research Serv., State Statutes Prohibiting Cruelty to Animals (1992).

[40] *See* Francione, *supra* note 17, at 253 (1995) ("To label something property, is, for all intents and purposes, to conclude that the entity so labeled possesses no interests that merit protection and that the entity is solely a means to the end determined by the property owner.")

[41] *See* St. Pierre, *supra* note 34, at 259; *see also* Taub v. State, 296 Md. 439 (1983).

To support this conclusion, this part addresses the status of other animals as "property" under the common law, its foundational assumptions, and how, at the very least, the statutory and common law "defense of property" scheme is inapplicable to defending nonhumans from abuse.

a. Historical Foundations for Treating Nonhumans as Property

> We have assigned ourselves, alone … the status of "legal persons." On the other side of that wall lies the legal refuse of an entire kingdom … . They are "legal things." Their most basic and fundamental interests … are intentionally ignored, often maliciously trampled, and routinely abused. Ancient philosophers claimed that all nonhuman animals had been designed and placed on this earth just for human beings. Ancient jurists declared that law had been created just for human beings. Although philosophy and science have long since recanted, the law has not.[42]

Steven M. Wise, in his provocative book *Rattling the Cage*, describes how many nonhuman animals are "trapped in a universe that no longer exists"—one purportedly designed solely around human needs where "the ocean tides were designed to move our ships" and "pigs were created for us to eat."[43] Though modern science has made such notions laughable, this "teleological anthropocentrism"[44] has largely been immune to the overtures of facts.

The impulse, lacking better information, to ascribe agency and purpose to our surroundings is strong.[45] Similarly, it is convenient to describe our domination of other animals as simply part and parcel to a preordained natural order. The animal kingdom has filled our stomachs, protected our bare skin from the elements, and at least in dogs, given us steadfast companions against the brunt of the natural world—thus, on a cursory glance of history and our current habits, exploitation of nonhumans may just appear manifest destiny.

[42] Steven M. Wise, Rattling the Cage: Toward Legal Rights for Animals 4 (2000).

[43] *Id.* at 9.

[44] *Id.* at 13; *see also* Robert S. Brumbaugh, *Of Man, Animals, and Morals: A Brief History*, *in* On the Fifth Day: Animal Rights and Human Ethics 8 (Acropolis Books Ltd. 1978).

[45] *See* Fritz Heider & Marianne Simmel, *An Experimental Study of Apparent Behavior*, 57 Am. J. Psychol. 243 (1944); *see also* Justin L. Barrett & Amanda H. Johnson, *The Role of Control in Attributing Intentional Agency to Inanimate Objects*, 3 J. Cognition & Culture 208 (2003); Daniel Dennett, Breaking the Spell: Religion as a Natural Phenomenon (2007).

Without the technology or literacy to understand other animals, it may also seem rational to deemphasize their interests and moral status. Concern is often tied to visibility, and nonhumans have long had to pantomime their hopes and desires. However, the mode of ritually ignoring the shared experiences of living beings across species lines, and the moral implications arising therefrom, is becoming increasingly problematic—from what lofty heights do *homo sapiens* peer when elephants mourn their dead and pigs can play computer games?[46]

Despite the vaunted role of the law in American society as "rational, objective, and principled"[47] the notion of other animals as categorically different from humans has endured in our legal system. This is probably due to the fact that a wellspring of the common law, religion and philosophy, have not ordinarily given much thought to the plight of other animals—thus the Biblical commandment that "thou shalt not kill" has been interpreted as only concerning humans.[48] By better understanding these origins, more potent arguments can be made to challenge judges and lawmakers to expand their imagination on the rights of other animals and those who fight on their behalf. One of the most persistent ideas from these sources, and what has been chief in marginalizing the interests of nonhumans throughout history, is their cultural and legal status as "property."

The creation of property rights in nonhumans is speculated to have occurred around the beginning of the Neolithic Period, 11,000 B.C.E., when selective breeding was used to make various wild animals into domestic ones such as sheep and cattle.[49] By the Bronze Age, these animals "made up a major fraction of human wealth."[50] Little can be said about how property in domestic animals was justified or maintained during prehistoric times, though Professor Robert Ellickson has explained that "[t]o incentivize husbandry of livestock, members of prehistoric bands had to create a system of informal property rights in tame animals."[51] This theory stands to reason, given the high risks and effort in domesticating wild animals. Nevertheless, it is also likely that prehistoric society felt little reason to justify this practice.[52]

[46] *See* Natalie Angier, *Do Animals Grieve Over Death Like We Do?*, N.Y. Times (Sept. 2, 2008), https://perma.cc/ER9E-UKUE; *see also 'Tales' Of Pig Intelligence, Factory Farming And Humane Bacon*, NPR (May 5, 2015, 5:59 PM), https://perma.cc/4Q49-R3TB.

[47] George Wright & Maria Stalzer Wyant Cuzzo, The Legal Studies Reader: A Conversation & Readings about Law 260 (2004) (discussing this perception).

[48] *See* Wise, *supra* note 42, at 18.

[49] *See* Robert C. Ellickson, *Stone-Age Property in Domestic Animals: An Essay for Jim Krier*, 2 Brigham-Kanner Property Rights Conf. J. 1, 1 (2013).

[50] *Id.*

[51] *Id.*

[52] *See* Wise, *supra* note 42, at 10.

The earliest historical (or written) discussion of property in nonhumans can be found in ancient Mesopotamian cuneiform texts dating as far back as 1920 B.C.E. These texts primarily dealt with providing remedies for harms either inflicted by or to cattle, and reinforces the property status of these animals. Their value relative to humans is also readily implied, given the meticulous description of the exchange rate between human and nonhuman life.

Of particular interest is the different dispute resolution models of the Code of Hammurabi and Judaic law. For example, Section 251 of the Law of Hammurabi, circa 1728 B.C.E, provided that if an individual's ox was a habitual gorer and they were notified of such by local authorities, they were bound to pay one-half mina of silver when that ox gored a free-man. In contrast, Section 21:29 of the Covenant Code of Exodus, circa 1250 B.C.E., provided that under the same circumstances, the ox and its owner would be put to death. This remedy scheme reflects and foretells the stark difference between the *law and economics* attitude of the early Mesopotamians towards property in nonhumans—which did not emphasize any special cosmic role for human beings—and the religious beliefs of the early Hebrews who held humanity at the pinnacle of creation.[53] In Western culture and jurisprudence, the Judaic model would appear to have won out.

A deep study of the Bible is far from necessary to get a sense of these beliefs—from the get-go in the Book of Genesis, the God of Abraham commands humans to "[b]e fruitful and multiply and fill the earth and *subdue* it, and have *dominion* over the fish of the sea and over the birds of the heavens and over every living thing that moves on the earth."[54] In the unlikely event that the words "subdue" and "dominion" are ambiguous, God later clarifies in the same Book that "[t]he fear of you and the dread of you shall be upon every beast of the earth and upon every bird of the heavens, upon everything that creeps on the ground and all the fish of the sea. Into your hand they are delivered. Every moving thing that lives shall be food for you. And as I gave you the green plants, I give you everything.[55] Expanding on the fungibility of nonhumans, the Bible also often portrays animal sacrifice as a gesture of good-will and piety.[56]

[53] *See id.* at 31.

[54] *Genesis* 1:28 (English Standard Version) (emphasis added).

[55] *Genesis* 9:2–3 (English Standard Version).

[56] *See, e.g.*, *Genesis* 8:20–22 (English Standard Version).

Despite this narrative and the historical trajectory of certain Biblical interpretations being adopted by common law judges, the Bible and Christian theology should not be considered a dead letter for nonhuman rights. Thus the Bible also urges: "[f]or what happens to the children of man and what happens to the beasts is the same; as one dies, so dies the other. They all have the same breath, and man has no advantage over the beasts, for all is vanity." *Ecclesiastes* 3:19. Many other passages

To complete the picture, early Christian theologians incorporated Greek and Roman stoic philosophy and its relatively low regard for the status of nonhumans. The early Greeks treated animals as mere objects, best demonstrated by their use as a form of currency or tokens to brag celestial favor—for colorful examples, in the *Iliad* and the *Odyssey*, Homer described a cauldron as valued at twelve oxen and a woman at four;[57] Socrates last words were famously "Crito, we ought to offer a cock to Asclepius. See to it, and don't forget."[58]

Roman law, which has had an outsize impact on the Western law on Property, distinguished between persons, things, and actions—beings that lacked free will (such as nonhumans in Roman thought) were often considered things subject to the rights of persons.[59] Famously, Plato and

are suggestive of broad protections for nonhumans in the Judeo-Christian tradition. *See Exodus* 23:5 ("If you see the donkey of one who hates you lying down under its burden, you shall refrain from leaving him with it; you shall rescue it with him."); *see also*, *Proverbs* 31:8 ("Open your mouth for the mute, for the rights of all who are destitute."); *Matthew* 6:26 ("Look at the birds of the air: they neither sow nor reap nor gather into barns, and yet your heavenly Father feeds them. Are you not of more value than they?"); *Psalm* 36:6 ("Your righteousness is like the mountains of God; your judgments are like the great deep; man and beast you save, O Lord."); *Isaiah* 66:3 ("He who slaughters an ox is like one who kills a man; he who sacrifices a lamb, like one who breaks a dog's neck; he who presents a grain offering, like one who offers pig's blood; he who makes a memorial offering of frankincense, like one who blesses an idol. These have chosen their own ways, and their soul delights in their abominations"); *Psalm* 145:9 ("The Lord is good to all, and his mercy is over all that he has made."); *Genesis* 1:21 ("So God created the great sea creatures and every living creature that moves, with which the waters swarm, according to their kinds, and every winged bird according to its kind. And God saw that it was good."); *Luke* 12:6 ("Are not five sparrows sold for two pennies? And not one of them is forgotten before God.").

In this vein, some have adapted Christian theology to accommodate nonhuman interests—the foremost, Andrew Linzey, an Anglican minister and Oxford theology professor, has interpreted the call of Jesus in *Matthew* 25:31–46 to give comfort to "the least of these my brothers and sisters" to include other animals. *See* Andrew Linzey, Animal Rights: A Christian Assessment of Man's Treatment of Animals 70 (1976); *see also* Bruce Friedrich, *The Church of Animal Liberation: Animal Rights as "Religion" Under the Free Exercise Clause*, 21 Animal L. 65, 92–94 (2014) (discussing Linzey and the approach of faith-based animal liberationists); Andrew Linzey, Animal Theology 36 (1994) ("[A]nimals constitute a special category of moral obligation, a category to which the best perhaps only, analogy is that of parental obligations to children.").

Therefore, a dismissal of Abrahamic religion as typical to oppressive attitudes on nonhumans would be overly simplistic.

[57] Wise, *supra* note 42, at 31.

[58] Colin Wells, *The Mystery of Socrates' Last Words*, 16 Arion 137 (2008).

[59] Wise, *supra* note 42, at 31–32. Wise goes on to note that "the legal right of a human to deprive animals (both animal and domesticated) of their lives and natural liberties was thought to be so natural and was so ingrained in Roman thought that it was always assumed and never justified." *Id.* at 32.

Aristotle formalized these notions in a body of thought characterized as the *scala naturae* or "Great Chain of Being," which ordered all life on a ladder according to its level of sentience—thoughtless amoeba near the bottom, and highly rational humans far above.[60]

Later, this stitchwork—old Testament values, Stoic philosophy, and Roman Law—came to inform the intellectual context in which English, and eventually, American judges ruled on the status of nonhumans.[61] Thus, in *Geer v. Connecticut*, the Court recognized that:

> When man … brings any such animals under his control and subject to his use, he acquires to that extent a right of property in them … . This is a generally recognized doctrine, acknowledged by all states of Christendom. It is the doctrine of law, both natural and positive. The Roman law, as stated in the Digest, cited in the opinion of the majority, expresses it as follows: 'That which belongs to nobody is acquired by the natural law by the person who first possesses it.'[62]

b. From History to Common Law Habit

With a view that the world was made for humans, the law inevitably followed. In the common law, other animals are either considered *ferae naturae* ("wild") or *domitae naturae* ("tame")—both are considered legal things or property of their controller (whether an individual or the state) rather than persons with intrinsic values protected by "rights."[63] Though anti-cruelty legislation existed as early as 1641 in the Massachusetts Bay Colony, and cruelty against animals was punishable in the common law, these restrictions mainly sought to protect property rights rather than dignity.[64]

It is ultimately for the reader to decide whether the above stands as good source material for a just legal order. So far, whether out of ignorance or inertia, judges have largely passed this ideological torch. Thus one modern legal treatise, *Salmond on Jurisprudence*, echoes the Roman jurist Hermogenianus who once claimed "[h]ominum causa omne jus constitum" ("all law was established for men's sake")[65] and

[60] *See generally* Arthur O. Lovejoy, The Great Chain of Being: A Study of the History of an Idea (Harvard University Press 1960).

[61] *See* Wise, *supra* note 42, at 42.

[62] 161 U.S. 519, 539 (1896).

[63] *See* George Seymour, *Animals and the Law: Towards a Guardianship Model*, 29 Alt. L. J. 183 (2004); Cathy Okren, Torts and Personal Injury Law 297 (2014).

[64] Beth Ann Madeline, Comment, *Cruelty to Animals: Recognizing Violence Against Nonhuman Victims*, 23 Haw. L. Rev. 307, 309 n.8 (2000); Francione, *supra* note 17, at 34 (1995). See also discussion on legal welfarism *infra* p. 17.

[65] Dig. 1.5.2 (Hermogenianus, Epitome of Law, book 1) (Theodor Mommsen, Paul Krueger, and Alan Watson, eds., University of Pennsylvania Press 1985).

explains, "[t]he law is made for men and allows no fellowship or bonds of obligation between them and the lower animals."[66]

This reasoning can also be seen in a recent appellate case where habeas relief was denied to a chimpanzee. The judge comfortably cited the lack of "reciprocity" and fellowship between humans and chimpanzees as sufficient reason to deny these beings "the fundamental right to liberty protected by the writ of habeas corpus," despite examples of humans lacking the same fitness being quite common.[67] Also, by essentially demanding fellowship solely on human terms, this opinion inevitably seems to draw from the assumptions of the "Great Chain of Being" and the categorical exclusions rehearsed from Judea to Rome.

Today, these old notions of human superiority before the law, often described as "legal welfarism," continue to inform the treatment of nonhumans (albeit with a dash of progess—at least some nonhuman interests are given a nod).[68] This model proposes that the protection of animals should be weighed against the value of their use to humans—essentially "that it is morally acceptable, at least under some circumstances, to kill animals or subject them to suffering as long as precautions are taken to ensure that the animal is treated as 'humanely' *as possible*."[69] Denoting animals as property comfortably furthers this scheme, for the "fundamental premise of property law is that animals, as property, cannot have rights that stand against human owners, and legal regulations regarding animals facilitate the most efficient exploitation by the owner."[70]

[66] P.A. Fitzgerald, Salmond on Jurisprudence 300 (1966).

[67] People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 998 N.Y.S.2d 248, 251 (2014). Professor Laurence H. Tribe seized on this stingy definition of legal personhood in his recent amicus brief on behalf of the petitioners in this case, noting that it would likely exclude third-trimester fetuses, children, and comatose adults, all of whom enjoy legal protections. *See* Brief of Laurence H. Tribe as Amicus Curiae supporting Petitioners, People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 26 N.Y.3d 942 (2015) (No. 518336). The judge responds to this potential criticism by noting "[t]o be sure, some humans are less able to bear legal duties or responsibilities than others. These differences do not alter our analysis, as it is undeniable that, *collectively*, human beings possess the unique ability to bear legal responsibility. Accordingly, nothing in this decision should be read as limiting the rights of human beings in the context of habeas corpus proceedings or otherwise." *See* Lavery, 998 N.Y.S.2d at 251 (emphasis added). Nevertheless the judge does not seem to offer a convincing account of why rights should be assigned in this "collective" manner. Further, it is conceivable that highly intelligent beings, such as the chimpanzees in question, could observe core duties to human beings (e.g., a duty to not unduly interfere with another's physical autonomy), and be given reciprocal rights.

[68] *See* Madeline, *supra* note 64, at 328.

[69] Francione, *supra* note 17, at 6 (emphasis added).

[70] Lewis F. Petrinovich, Darwinian Dominion: Animal Welfare and Human Interests 202–03 (1999). Animals in the wild can nevertheless be considered property of the State, as "the State has unfettered power to reduce wild animals to ownership, and the result is that wild animals are routinely exploited." Steven White, *Wild Law and Animal Law: Commonalities and Differences*, *in* Wild Law-In Practice 250 (Michelle Maloney & Peter Burdon eds., 2014).

As such, the legal treatment of nonhumans has not divorced itself from ancient Roman traditions and largely ignores what modern scientists and philosopher have long known: species diversity is not the result of some preordained hierarchy, but felicity and adaptation to different environments.[71] As Charles Darwin explained, "[t]here is no fundamental difference between man and the higher mammals in their mental faculties … . [t]he difference in mind between man and the higher animals, great as it is, certainly is one of degree and not of kind."[72] Yet anyone who considered legal relations between species would find obfuscation of this simple fact in rote citation to earlier precedent, Abrahamic cosmology, and arcane Latin phrases. In this regard, as with many others, "to a truly astounding degree the law is rooted in the past."[73] This habit is understandable for judges and lawyers, given the relative ease of invoking tradition over making legal theories from whole cloth. But as Steven M. Wise properly notes, "when we borrow past law, we borrow the past."[74]

When it comes to nonhumans, budding lawyers are steeped in this history. The first case many first-year law students read in their course on Property law will likely be none other than *Pierson v. Post*,[75] a quaint dispute between two hunters laying claim to the same fox, and both trying to "appropriat[e] the animal to his individual use."[76] One hunter had tracked and worn down the fox for many hours, only to have another kill and snatch it away at the last moment. Thus, the court was faced with the issue of how people came to acquire property rights in beasts *feræ naturæ*, and most importantly, at what point the law entitled them to exclude others from similar possession. Eager to elevate this folksy squabble into something more rarified, the judges benefit the newly initiated with a sweeping discourse, drawing from such hoary sources as Justinian, Pufendorf, and Grotius.[77]

[71] *See* Wise, *supra* note 42, at 21 (discussing Darwinian revolution).

[72] Charles Darwin, The Descent of Man 72, 80 (1871).

[73] Alan Watson, Legal Transplants: An Approach to Comparative Law 95 (1993).

[74] Wise, *supra* note 42, at 24.

[75] Pearson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

[76] *Id.* at 178.

[77] *See id.* at 177–80. Justice Livingston, in droll dissent, expressed a more contemporary method of resolving such disputes:

> "This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone, all

For present purposes, the case illustrates how the common law and legal academy honor and perpetuate human dominion over other animals, either by "actual corporeal possession" (i.e., grabbing or killing) or mere pursuit.[78] Though the majority recognized the "natural liberty" of nonhumans, the accident of birth meant these animals could be transformed into possessions by being properly "wounded, circumvented or ensnared."[79] One can only wonder how a well-meaning saboteur would have been handled in this case—one who saw fit to snatch the fox from both parties and preserve its liberty. They would have likely been sued by both parties for conversion of chattel; not a second thought would likely have been spared for arguments about the rights of the fox itself, namely, a keen interest in keeping its pelt.

This case is therefore emblematic of intellectual capture in the common law. In *Pierson*, it is taken as a given that the fox was property waiting to be acquired or "occupied," like an abandoned car or vacant lot. This is the regime, the worldview that has largely dominated the social and legal treatment of animals over the past four thousand years—that animals are often measures of wealth and a means to human ends. Many are accustomed to this way of thinking, without having to go to law school and read cases like *Pierson*.

The normal expediency of using nonhumans to our ends has likely led legal institutions to slant their interpretation of all texts—whether legal, philosophic, or religious—to justify giving less protection to other animals. For purposes of creating a third-party permission to defend nonhumans, one would hope that exposing the dated assumptions underlying this narrative would lead judges to reconsider the logic, if not justice, of allowing "property" in nonhumans. Some have even argued that the rationale behind this treatment recalls those ignominious reasons for subjugating Africans to slavery and property status—the "Curse of Ham" from the Bible,[80] physical and cultural differences,[81] and flawed scientific rhetoric that proposed that some Africans were "born

> of whom have been cited: they would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor Reynard would have been properly disposed of, and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of Diana." *Id.* at 180 (Livingston, J. dissenting).

[78] *Id.* at 177.

[79] *Id.* at 179.

[80] This story describes how Noah, to punish Ham, cast his son Canaan away and cursed him: "a servant of servants shall he be to his brothers … ." *Genesis* 9:25 (English Standard Version).

[81] St. Pierre, *supra* note 34, at 263–64.

weak in body and mind," and therefore destined for slavery.[82] On some level, if it seems abhorrent to reduce humans to slavery on this theory—much of which appealed to an account that they were "animalistic" or nonhuman[83]—it might also seem strange to continue to treat other intelligent beings as property for being other, or "nonhuman."[84]

In conclusion, the impulse to regard the use of force to prevent animal abuse as merely a "defense of property" should be reconsidered in light of this problematic past. There is no compelling scientific or moral basis to treat nonhumans under the same regime as ordinary household goods. Building on this pause, and lending to arguments from statutory interpretation, a scheme that gives other animals certain rights should suggest they are a form of legal person, or at least something more than disposable property. This statutory framework is taken up in the following section.

c. Emerging Protections for Nonhumans Suggest Limited Personhood

How the law treats other animals is largely a symptom of social norms rather than reasoned principles. Thus in *Mullaly v. People*,[85] when faced with the question of whether stealing a dog qualified as larceny, the court noted that the archaic treatment of dogs as "base," and below even the status of property, was "wholly inapplicable to modern society" and therefore the law could punish their theft.[86] This decision, one author has observed, "was not so much a limitation on their status as an advance from an older regime where they were something less."[87] A leap from property to something more rights-protective should also be natural if culture calls for it. On review of the cobbled reasoning behind the common law treatment of other animals as property, a judge may be more amenable to developing new ideas on the rights of nonhumans. At the very least, they should cast a skeptical eye on those who relegate other animals to perpetual thinghood.

[82] *Id.* at 264; *see also* Paul Finkleman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 Chi.-Kent. L. Rev. 1009, 1022 (1993).

[83] St. Pierre, *supra* note 34, at 263.

[84] Of course, the eradication of slavery and enlightenment on race could also just as easily represent solidarity in the human identity, speaking little to the benefit of nonhumans. This analogy has also been criticized for needlessly appropriating the identity and suffering associated with human slavery for progessive ends—a step back for moving forward, if you will.

[85] Mullaly v. People, 86 N.Y. 365 (1881).

[86] *Id.* at 366–69.

[87] Logan Martin, Comment, *Dog Damages: The Case for Expanding the Available Remedies for the Owners of Wrongfully Killed Pets in Colorado*, 82 U. Colo. L. Rev. 921, 927 (2011).

By now, there should hopefully be some consensus that property law is an ill-fit for governing living things.[88] Throughout history, this regime has strained, trying to square the circle that while ownership entails a broad right to dispose of property as one wishes, the capacity to suffer imposes certain moral limits on that right. Thus, Peter Singer, in launching his famous utilitarian arguments for "animal liberation," borrowed from Jeremy Bentham's thoughts on the matter: "The question is not, Can [animals] reason? nor Can they talk? But, Can they suffer?"[89] A few have gone so far as to compare the ownership of animals to slavery.[90]

The push for protecting nonhumans for reasons other than managing property rights can be best understood in the greater context of the humanitarian movement of the nineteenth century. This movement sought to benefit the helpless and more marginalized sections of society.[91] In 1866, the New York legislature established the American Society for the Prevention of Cruelty to Animals ("ASPCA"), an organization tasked with investigating animal abuse and enforcing relevant legislation.[92] The ASPCA's founder Henry Bergh was also instrumental in pushing for greater legal protections for children,[93] evincing the inclusive social and moral attitudes of the time.

Carrying this spirit in a speech to the House of Lords, Lord Erskine argued that anti-cruelty legislation was necessary to protect animals from the kind of "ferocious cruelty" that "harden[s] the heart against all the impulses of humanity."[94] Likewise, in America, anti-cruelty legislation began to be interpreted by courts as not only a method of conserving property, but as being "founded upon a high moral principle, which

[88] Oddly enough, despite their status as property, "[t]hroughout history laws have permitted animals to be prosecuted and executed for various crimes, such as mangling a child or being possessed by the devil." Petrinovich, *supra* note 70, at 205.

[89] Catie Lowder, *The Case for Animals as the Property of Humans*, *in* People, Property, or Pets? 28 (Purdue University Press 2006); Peter Singer, Animal Liberation (1975) (noting that "[t]he capacity for suffering and enjoyment is a prerequisite for having interests at all").

[90] *See* Alice Walker, *Forward* to Marjorie Spiegel, The Dreaded Comparison: Human and Animal Slavery 13, 14 (1996) ("The animals of the world exist for their own reasons. They were not made for humans any more than black people were made for whites or women for men.").

[91] *See* Andrew Linzey, Why Animal Suffering Matters: Philosophy, Theology, and Practical Ethics 152 (Oxford University Press 2009).

[92] *See* David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800s*, 1993 Det. C.L. Rev. 1, 13–16 (1993).

[93] *See* Tammy Kiter, *Henry Bergh: Angel in Top Hat or the Great Meddler?*, New-York Historical Society (March 21, 2012), https://perma.cc/83PN-XG33.

[94] *Lord Thomas Erskine's Speech to the House of Lords* (May 15, 1809), *in* Cobbett's Parliamentary Debates 1804-1812, at col. 556, 565–66 (U.K.: Parliament 1809).

denounces the wanton and unnecessary infliction of pain, even upon animals created for the use of man."[95] These opinions spoke to the notion that prohibiting "cruelty" has no basis in property—for example, could anyone be considered cruel to their chair or favorite mug?[96] Instead, these acts could more properly understood as an "offence against public morals," a notion that speaks to the intrinsic value of animals or at least an aim to prevent patterns of violence.[97]

Today, every state has some form of animal cruelty legislation.[98] The federal government, through such laws as the Animal Welfare Act,[99] has also demonstrated a commitment to improving the lot of nonhumans. Notably, a majority of states no longer reference the property status of animals as the basis for their protection. For example, California's anti-cruelty law (§597) punishes those who maliciously and intentionally harm a "living animal."[100] Other areas of law have also progressed in their treatment of nonhumans—tort damages have been recently awarded for harm to companion animals, despite the typical restriction of such damages in the case of personal property.[101]

What these statutes and their underlying reasoning demonstrate is the erosion of property in animals as an absolute value that trumps broader social justice and utilitarian goals. Thus, "[a]lmost all modern anticruelty laws forbid the unjustified or malicious killing of certain

[95] *See* State v. Avery, 44 N.H. 392 (1862); *see also* Grise v. State, 37 Ark. 456 (1881), which found that in needless killing of an animal "[t]he misdemeanors attempted to be defined may be as well perpetrated upon a man's own property as another's, or upon creatures, the property of no one"; *see also*, Stephens v. State, 65 Miss. 329, 331 (Miss. 1888) ("Laws and the enforcement or observance of laws for the protection of dumb brutes from cruelty, are, in my judgment, among the best evidences of the justice and benevolence of men.").

[96] *See* Madeline, *supra* note 64, at 314.

[97] For the nineteenth century, at least, the former reason may be overstated. *See*, *e.g.*, Francione, *supra* note 17, at 123 ("[M]ost courts agree that these statutes are intended to prevent humans from acting cruelly toward one another and regard cruel treatment of animals as leading to cruel treatment of humans … . [T]he purpose of the statutes is to improve human character and not to protect animals.").

[98] *See* United States v. Stevens, 533 F.3d 218, 223 (3d Cir. 2008), *cert. granted*, U.S. 1181 (2009) (collecting animal protection statutes).

[99] Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (1999) (enacted "(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment; (2) to assure the humane treatment of animals during transportation in commerce; and (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen"). *Id.* § 2131.

[100] *See* Madeline, *supra* note 64, at 314.

[101] *See* Campbell v. Animal Quarantine Station, 632 P.2d 1066 (Haw. 1981); *see also*, Johnson v. Wander, 592 So. 2d 1225, 1226 (Fla. Dist. Ct. App. 1992).

animals."[102] This understanding allows for novel ideas for animal liberation and defense outside of the strict property regime—such as the use of force on behalf of nonhumans being subject to abuse.[103] Therefore even without resolving the ultimate purpose of these laws, whether for the benefit of humans, other animals, or both—there is much to argue against treating nonhumans only as objects, and their defenders as busybodies, or worse, criminals. The common statutory "defense of persons" should therefore include other animals. Either by the right of the bystander or the victim, reasonable force should be allowed to vindicate anti-cruelty laws and their vision of justice.

d. Formal Personhood: Advancing Through the Great Writ

Of course, a more formal recognition of legal personhood for nonhumans would obviate much of this discussion, and make a defense of other animals all the more clear. There may be cause for optimism here. The classification of nonhumans as "property" is showing its age. As noted above, there are currently laws on the books and judicial opinions that cut against this reductive description, even though nonhumans have yet to formally spring out of its trappings. In addition, there should also be common sense intuitions about the strangeness of governing living things under the same legal regime that regulates inanimate objects such as sofas and kitchen appliances. Finally, legal welfarism, and other theories that perpetuate the "Great Chain of Being" by putting a premium on human interests over the suffering of other animals, appear unsatisfying in light of modern understanding of species diversity and animal minds.

In the project of creating a defense of other animals in the criminal law, the importance of establishing a form of personhood for nonhumans is extraordinarily important, for "it is through the law that persons, variously figured, gain or lose definition, become victims of prejudice or inheritors of privilege."[104] It is certainly a privilege to be the object of justified defense. It is also fundamental that "persons have a right not to be used as means without their consent."[105] Understanding

[102] Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law's Role in Prevention*, 87 Iowa L. Rev. 1, 35 (2001).

[103] *But see* Wise, *supra* note 42, at 44 ("Every American jurisdiction eventually passed anticruelty statutes. But judges often assumed that the statutes incorporated the biblical transcendence of human over nonhuman animals and that their purpose was to protect human moral, not animal bodies.").

[104] Colin Dayan, The Law Is a White Dog - How Legal Rituals Make and Unmake Persons xi (2011).

[105] *See* Dana Nelkin & Samuel Rickless, *The Relevance of Intention to Criminal Wrongdoing*, Crim. L. & Philos. (forthcoming) (manuscript at 12), *available at* https://perma.cc/ZX9Q-C3YU.

the value of legal personhood in establishing greater rights for other animals, the Nonhuman Rights Project ("NhRP") has embarked on a mission to convince courts to declare that certain nonhumans such as great apes and cetaceans are "persons" by utilizing tools such as the ancient writ of *habeas corpus* to contests the legality of their captivity.[106] Because of its implications to building escape velocity from the property regime, a short discussion of the recent success of this particular strategy follows.

In a watershed moment for the NhRP,[107] Judge Barbara Jaffe of the New York State Supreme Court (New York County) issued an Order to Show Cause in the habeas corpus case of two chimpanzees detained for experimental research, forcing Stony Brook University to appear in court and offer a legally sufficient reason for holding the chimpanzees.[108] Though Judge Jaffe ultimately denied habeas relief, she invoked the constraint of recent precedent in a state appellate court, and not principle, going on to say "[e]fforts to extend legal rights to chimpanzees are … understandable; some day they may even succeed."[109] She also cited cases expanding rights for same-sex couples, *Obergefell v. Hodges*[110] and *Lawrence v. Texas*,[111] to note that liberties should not be constrained by who enjoyed them in the past, and that "times can blind us to certain truths."[112]

The most remarkable feature of this case is that the NhRP lawyers were not simply laughed out of court—Judge Jaffe prepared a

[106] Some of the core questions that the Nonhuman Rights Project proposes to challenge courts on include: (1) Is there anything inherent in legal personhood that would limit it to human beings? Or to particular kinds of human beings? (2) What are the meanings and legal significance of dignity and autonomy? Is there anything inherent in either or both that should legally limit them to human beings? (3) Do fundamental legal rights exist? What are the sources of fundamental legal rights? What are the purposes of fundamental legal rights? What interest should fundamental legal rights protect? (4) What is equality, and is there anything about it that limits it to human beings? *Exploring the Legal Case*, Nonhuman Rights Project, https://perma.cc/S699-AJYD.

[107] From their website: "The Nonhuman Rights Project is the only civil rights organization in the United States working to achieve actual LEGAL rights for members of species other than our own. Our mission is to change the legal status of appropriate nonhuman animals from mere 'things,' which lack the capacity to possess any legal right, to 'persons,' who possess such fundamental rights as bodily integrity and bodily liberty." Nonhuman Rights Project, https://perma.cc/S369-UPYP.

[108] *See* Nonhuman Rights Project, Inc. v. Stanley, No. 152736/2015 (N.Y.S. Apr. 20, 2015) (order to show cause).

[109] Nonhuman Rights Project, Inc., v. Stanley, 16 N.Y.S.3d 898, 914–18 (N.Y. Sup. Ct. 2015).

[110] 135 S.Ct. 2584 (2015).

[111] 539 U.S. 558 (2003).

[112] Stanley, 16 N.Y.S.3d at 917.

thirty-three page opinion and treated their claims quite seriously. As the life of the law is experience,[113] it should come as no surprise that this recognition tracks a growing consensus that these animals have a place in civil society, and that they should therefore be guaranteed dignities under the law.[114]

Though the common law of New York has yet to recognize full legal personhood for nonhumans, three features of this case loom large and may embolden other judges to push forward: (1) the Order to Show Cause suggests a limited habeas right in nonhumans, without having to first determine that they are legal "persons"; (2) a human or corporation had "standing" to sue on behalf of nonhumans without having to allege an injury to human interests,[115] and (3) Judge Jaffe found that legal personhood is a matter of public policy, rather than strict biology.[116]

On this last and arguably most important point, Judge Jaffe expounded that "the parameters of legal personhood … will not be focused on semantics or biology, or even philosophy, but on the proper allocation of rights under the law, asking, in effect, who counts under our law."[117] Thus, despite this loss, the lead lawyer in the case confidently noted that in the common law tradition, "That's One Small Step for a Judge, [is] One Giant Leap for the [NhRP]."[118]

As this case wends its way through the courts and into public consciousness, legal personhood for some nonhumans may actually be on the horizon. The NhRP's strategy to obtain common law habeas relief for nonhumans capitalizes on the "great flexibility and vague scope" of the writ,[119] and could find purchase in the coming years as protection for nonhumans becomes a stronger norm. Even now, convincing

[113] Taken from the observation of Oliver Wendell Holmes, Jr., that "[t]he life of the law has not been logic; it has been experience," and that the "law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." Oliver Wendell Holmes, Jr., The Common Law 1 (1923).

[114] *See, e.g.*, a recent Gallup poll that indicated that thirty-two percent of American believe that humans and other animals should have equal rights, sixty-eight percent thought that nonhumans deserve protection but ultimately should be used for human ends, while three-percent felt that nonhumans deserved no protections as they were "just animals." Tanya Lewis, *Should Animals Have the Same Rights as People?*, CBSNEWS (May 26, 2015, 10:26 AM), https://perma.cc/9P74-KMP4.

[115] On this issue, one author has noted that "the doctrine of legal standing is an important factor that can exclude animals from legal rights," for without it, humans cannot advocate for their interests in a court of law. Petrinovich, *supra* note 70, at 204.

[116] These factors are discussed, and partially derived from the outline in Steven M. Wise, *That's One Small Step for A Judge, One Giant Leap for the Nonhuman Rights Project*, Nonhuman Rights Project (Aug. 4, 2015), https://perma.cc/XBJ4-GVY2.

[117] Stanley, 16 N.Y.S.3d at 912.

[118] Nonhuman Rights Project, *supra* note 116.

[119] People ex rel. Keitt v. McMann, 273 N.Y.S.2d 897, 900 (1966) (internal quotation marks and citation omitted).

arguments are being made that the appellate decision that bound Judge Jaffe misrepresented the basic role of the common law writ—Professor Laurence H. Tribe, in a recent *amicus* brief, contends that the purpose of the writ is to "allow courts of competent jurisdiction to consider arguments challenging restraint or confinement as contrary to governing law," and that "New York courts have long allowed such challenges even when other areas of law did not recognize the underlying substantive rights at issue."[120] At the very least, when figures such as Professor Tribe feel the need to spill ink and enter the fray, things are probably far from settled.

IV. Defense of Other Animals as "Necessity"

As detailed above, there should be room for debate on whether a third-party permission to use force to defend nonhumans should be considered a "defense of property," and thus circumscribed to the point of being nearly ineffective, or considered a broader permission to use force in defense of other persons. Faced with the historical context under which nonhumans have been relegated to the legal status of property, a judge may be more receptive to arguments that this condition is amenable to change. Further, in light of the inroads made by anti-cruelty legislation, tort law, and the NhRP through their habeas petitions, a judge could reasonably construe statutes that provide exculpation for a defense of property (such as iPhones) to exclude nonhumans.

What is not clear is whether nonhumans should therefore occupy a separate space in the law, between "property" and "persons" where justified force could be described in terms of a necessity defense, or if they should ultimately be considered "persons" for the purposes of their protection from cruelty. One judge has noted this vagueness, claiming that "a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property."[121] This section probes the appeal of using a necessity defense where it appears that a judge will not likely address this issue and rule on the scope of nonhuman rights.

Criminal defenses, like prohibitions, have a normative effect on behavior and describe a shared moral consensus.[122] Thus, an exculpation defense for those who use force on behalf of nonhumans should either be

[120] *See* Brief for the Petitioner, Nonhuman Rights Project, Inc., v. Lavery, 26 N.Y.3d 942 (2015) (No. 518336).

[121] Corso v. Crawford Dog & Cat Hosp., Inc., 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979) (The judge later continued that "[t]o say it is a piece of personal property and no more is a repudiation of our humaneness").

[122] *See* Marceau, *supra* note 2, at 948–52 ("Just as the definition of a crime tells us what conduct is prohibited, the scope and range of a particular defense—e.g., defense of others or self-defense—informs us when we may or should engage in certain conduct."); *see also* Paul H. Robinson, Criminal Law: Case Studies & Controversies 452 (2d ed. 2008).

seen as encouragement for this behavior, or as simply restating common values on what acts deserve punishment.[123]

The spirit of this incentive structure, though often exemplified by justification defenses, resolves in the catch-all of "necessity." Necessity defenses operate on a similar premise to justification, essentially arguing a defendant's conduct was a lesser evil to the crime charged.[124] This defense has been formulated in various ways by state legislatures and courts.[125] Professor Robinson, in his treatise on criminal law defenses, provides a fairly accessible version:

> Lesser Evils. Conduct constituting an offense is justified if:
>
> 1. any legally-protected interest is unjustifiably threatened, or an opportunity to further such an interest is presented; and
> 2. the actor engages in conduct, constituting the offense,
>   a. when and to the extent necessary to protect or further the interest,
>   b. that avoids a harm or evil or furthers a legal interest greater than the harm or evil caused by actor's conduct.[126]

It should be uncontroversial to argue that nonhumans have a "legally protected interest" in bodily integrity and autonomy, vis-à-vis anti-cruelty legislation, that is "unjustifiably threatened" when they are subjected to malicious forms of abuse. The use of force—up to and including a deadly amount—may also be necessary to protect this interest and act as a lesser evil.

[123] *See* Note, *supra* note 18, at 566 ("Any attempt to formulate the principles of a modern criminal law involves an appraisal of the kinds of behavior which society should attempt to discourage, and which it is possible to discourage … . Although these concerns pervade the criminal law, they are particularly important in evaluating behavior which, otherwise criminal, is intended to protect interests to which society gives at least a limited sanctity. This aspect of the criminal law, commonly called justification, presents the question of how much force a person should be allowed to use in defending such interests.").

[124] Compare the descriptions in State v. Leidholm, 334 N.W.2d 811, 814 (N.D. 1983) ("A defense of justification is the product of society's determination that the *actual existence* of certain circumstances will operate to make proper and legal what otherwise would be criminal conduct"), with State v. Sahr, 470 N.W.2d 185, 189 n.1 (N.D. 1991) ("When the necessity defense applies, it justifies an accused's criminal conduct so that the accused is not guilty of the crime charged, or so that the seriousness of the accused's offense is reduced.").

[125] *See* Robinson, et. al, *supra* note 4, at § 124 n.1. The necessity defense is recognized in roughly half of all American jurisdictions.

[126] *Id.*; *see also* Sahr, 470 N.W.2d at 190 (recommending Professor Robinson's formulation).

Defending nonhumans from cruel acts should be considered socially desirable, and a valuable objective of the criminal law. People who abuse animals are at a higher risk of using violence against other human beings—in a study of violent criminals, twenty-five percent of male and thirty-six percent of female offenders reported committing animal abuse in the past, while forty-eight percent of convicted rapists and thirty percent of convicted child molesters reported instances of childhood animal abuse.[127] Further research has concluded that forty-three percent of perpetrators of mass school shootings (1988–2012) had previously abused animals.[128] Cruelty against animals is also closely-linked to domestic abuse—nearly ninety-percent of homes with violence against spouses or children also had incidences of animal cruelty.[129] All of this data perhaps speaks to the basic intuition enunciated by the German philosopher Arthur Schopenhauer, that "[c]ompassion for animals is intimately connected with goodness of character; and it may be confidently asserted that he who is cruel to animals cannot be a good man."[130]

Though there may be some difference of opinion as to what qualifies as "cruel"—for example, there is an active debate on whether crating dogs is inhumane[131]—the kind of abuse that would likely provoke

[127] *See* A. William Ritter, Jr., *The Cycle of Violence Often Begins with Violence Toward Animals*, 30 Prosecutor, Jan./Feb. 1996 (also noting that "[while] society has traditionally compartmentalized acts of violence—separating definitions of child abuse from domestic violence or street violence or cruelty to animals[,] [e]vidence is mounting that violent acts are not separate and distinct, but part of a cycle. The forces and influences that foster violence toward humans and animals spring from the same roots.").

[128] Arnold Arluke & Eric Madfis, *Animal Abuse as a Warning Sign of School Massacres: A Critique and Refinement*, 18 Homicide Studies 7–22 (2014). The authors noted that these perpetrators usually targeted those animals heavily anthropomorphized in mainstream culture, such as cats and dogs, and abused them in an up-close manner. Therefore the authors emphasized that in discussing the connection between animal abuse and violence against humans, the kind of abuse done by serial killers and mass shooters differs from that committed by other kinds of violent criminal.

[129] *See* Charles Siebert, The Animal-Cruelty Syndrome, N.Y. Times (June, 11, 2010), https://perma.cc/M8EP-FCQY; *see also* Douglas F. Gansler, *First Strike: The Violence Connection*, The Humane Society of the United States 3 (2008) ("Animal cruelty in domestic violence situations often significantly worsens the abusive situation because women are more likely to stay in the relationship with their abuser out of fear of leaving their companion animal"), https://perma.cc/ASP3-DDYA.

Compare Catherine A. Faver & Elizabeth B. Strand, *Domestic Violence and Animal Cruelty: Untangling the Web of Abuse*, 39 J. Soc. Work Educ. 237, 240 (2003) ("Adams[] and Flynn[] have argued that a patriarchal culture which gives men power over women, children, and animals is at the root of family violence.").

[130] Arthur Schopenhauer, On the Basis of Morality 223 (1965).

[131] *See, e.g.*, Daniel Estep & Suzanne Hetts, *Dogs in Crates-Cruel or Natural*, Animal Behavior Associates, https://perma.cc/VFT8-XMQD.

a bystander to action, such as a recent case where a man bound a dog and set it on fire,[132] should lead many to consider forceful intervention as necessary. In that particular case, the animal control officer that arrived at the scene explained in shock that "I can't even begin to comprehend why somebody would do something like this. I don't think any of us can … . If a person's capable of taking a living, breathing animal and torturing it in this manner, what else are they capable of doing?"[133] The law should understand the emotions that these scenes provoke and find reasonable ways to manage and channel them.

In light of these findings, it seems reasonable to assume that if people are allowed to use reasonable force to protect animals from abuse, this could prevent similar violence from spreading to human victims in the future, and also at the actual scene of animal cruelty, where uncontested completion of such crimes may cause extreme emotional distress and indiscriminate violence against the abuser.[134] This focus on the violent acts themselves as the proper object of the criminal law—rather than myopically focusing on the identity of the victim—seems a fair response to the pattern of violence demonstrated between animal abuse and other crimes.[135] Also, as a matter of efficiency, bystander intervention seems like a low-cost enhancement to the current regime that largely relies on *post-hoc* enforcement of animal cruelty laws.[136]

Thus there is an objective harm in animal abuse that transcends the debate over the intrinsic value of nonhumans or their status as "persons" or "property." Animal abuse fosters violent tendencies and generates other social costs. Even without granting other animals legal personhood, their needless suffering should also strike most as

[132] *Man Accused of Setting Dog on Fire Pleads Guilty*, ABCNEWS (Nov. 2, 2015, 1:33 PM), https://perma.cc/ZU7D-NGRL; *cf.* State v. Witham, 876 A.2d 40 (Me. 2005) (finding that statute that punished "depraved indifference to animal life or suffering" was not unconstitutionally vague, as reasonable person could determine that defendant's actions (holding dropped cat carrier out of truck window and then running over the carrier) manifested total lack of concern for the death or suffering of an animal).

[133] *Man Accused of Setting Dog on Fire Pleads Guilty*, *supra* note 132.

[134] For a comprehensive discussion of the link between these crimes, see Rebecca L. Bucchieri, *Bridging the Gap: The Connection Between Violence Against Animals and Violence Against Humans*, 11 J. Animal & Nat. Resource L. 115 (2015); *cf.* Martin, 341 N.E.2d at 891 n.9 (1976) ("It has been suggested also that cases in which the justification of third-person defense might be available have been tried on a footing of preventing crime."). One also need not look far into the commentary on these stories to a get a sense of the outrage, and the threats promised against animal abusers.

[135] *See generally*, Madeline, *supra* note 64 (discussing appeal of this view).

[136] Some have also noted that enforcement of these laws is inconsistent—and that "[o]ften only the most egregious cases of abuse will be prosecuted vigorously, leaving many animals suffering from varying degrees of abuse and neglect unprotected." *See* Dryden, *supra* note 17, at 179.

reprehensible and a proper object of exculpatory defenses. Finally, this evil could may be better avoided by allowing third-parties to use force against its perpetrators, given the lack of meaningful enforcement of anti-cruelty laws.[137]

The next pertinent question in crafting a necessity defense is how to properly balance the harm of using force—tending towards violent confrontation—with the evil of animal cruelty. Though certainly a start, limiting third-parties to non-deadly force would likely make this defense ring hollow.[138] Given the tendencies of animal abusers, one could imagine a push or knock to the torso doing little to dissuade them.[139]

On the other end of the spectrum, this defense would not likely cover intentional killing or *murder*, as the law is loath to wade into the comparative value of human lives.[140] Though killing an animal abuser may certainly save others from violence, this is ultimately a speculative—and likely improper—exercise of discretion for ordinary citizens. Acting to kill or substantially injure animal abusers also obviously runs counter to the proposed goal of protecting these individuals from themselves and the vigilantism of others.

The balance of harms already sanctioned by anti-cruelty legislation focuses this inquiry. These laws seemingly prioritize nonhumans (or at least common decency) over sadism, and allow certain harms to befall animal abusers. After all, police officers are empowered to use coercive force against such crimes, and the justice system can strip animal abusers of their liberties. Therefore where bystanders also use an amount of force reasonably calculated to deter cruelty to other animals, they should conform to this balance of harms, and could be said to act out of *necessity*.

With this in mind, some forms of unintentional deadly force could also plausibly fall under a necessity defense. A knock to the head may be the appropriate amount of force to prevent animal abuse, despite the fact that it may cause a substantial risk of bodily harm. Some bystanders, by way of physical infirmity, may simply have no choice

[137] *See* Bucchieri, *supra* note 134, at 122 (discussing how animal abusers, if actually prosecuted, are nonetheless given light sentences or still allowed to own animals).

[138] See discussion *supra*, part I.

[139] However, if the abuser responded and escalated the amount of force, this could very well allow the third-party to use deadly force. Recall the story of the man who tried to confront an animal abuser to stop brutalizing a dog and was himself shot twice in the chest.

[140] *See, e.g.*, Regina v. Dudley and Stevens, 14 Q.B.D. 273 at 275 (Queen's Bench Division 1884) (disfavoring defense of necessity in case of cannibalism); *see also* Francione, *supra* note 17, at 20–22 (discussing defense). However, if nonhumans are conceded legal personhood, this question should be revisited.

but to threaten an animal abuser with a stick or other weapon—if they are not permitted to act with such force, there could be the unsettling outcome of animal abusers being able to kill them in self-defense. It does not seem too remarkable, or beyond prevailing social norms, to imagine someone threatening an abuser with great force and seeming justified. How the law treats these reactions—by censure or encouragement—will speak volumes. All the more reason to get it right.

Ultimately, a jury should balance these apparent harms to the abuser and the evils of their attempted crime—the negative effects on public morality, the rehearsal aspect and tendency of this behavior to cause future violence, and perhaps even the emotional damage and outrage it provokes in the observer. After this exercise, some form of third-party permission should be considered appropriate. At the very least, bystanders should be able to threaten reasonable force without themselves being subject to criminal liability and forfeiting their right to self-defense.

In sum, a necessity defense could allow reasonable interventions, including deadly force, on behalf of nonhumans. It also has the benefit of using utilitarian arguments, familiar to the values of legal welfarism, to justify protecting nonhumans regardless of their status as "persons" or "property" before the law. Therefore, where the other defenses discussed above seem unavailing, a defendant should draw on the necessity of their actions in light of the public harms to be avoided.

V. Conclusion

Justifying force against animal cruelty can take several paths. The most certain treatment would fall under a "defense of property." However, this theory of defense lacks clarity in the amount of permitted force and whether third parties could get involved in the first place. This may create a chilling effect on desirable interventions, or cause seemingly unjust results in the punishment of well-meaning bystanders.

A "defense of persons" theory seems plausible and holds greater promise as a third-party permission. There are reasonable arguments that nonhumans should no longer be classified as property. History and the law have never provided compelling arguments for this distinction. Further, anti-cruelty legislation at least provides a limited form of personhood that good Samaritans could take advantage of. Therefore, as a matter of principle—or merely statutory construction—a defense of other animals from cruelty could be treated as an intervention on behalf of other persons, permitting a greater range of force.

A "defense of necessity" also provides a worthwhile alternative, as defending nonhumans from abuse may prevent patterns of violence from spreading, among other benefits. Reasonable action, perhaps even deadly force, could be allowed under this theory depending on the context of the crime and the availability of other means to prevent it. In the end, the moral outrage felt by the bystander might be given the benefit of the doubt against the sadistic impulses of the abuser. In this regard, as in many others, the law should reflect and nurture shared values.

Equine Liability Statutes: Are the Courts Moving in the Wrong Direction?

Bruce Mandeville*

I. Introduction and Background

This paper will focus on cases heard in five different state Supreme Courts (Connecticut, Michigan, New Jersey, Ohio, and Texas), all involving equine-related injuries, and on those courts' application and interpretation of the Equine Liability Statutes (ELA).[1] Forty-six states have enacted some form of Equine Liability Statutes,[2] which generally apply to those equine injury cases wherein inherent risk is deemed to be the cause of the injury.

Most ELAs are essentially similar in structure, though some variation may be seen from state to state. The first section of the ELA often contains definitions, among them the important definition of "inherent risk." This definition includes the unpredictability of an equine's reaction and the risk of a participant acting negligently and not being able to control his or her horse. This section of the statutes is discussed below, under the heading **The Importance of Inherent Risk.** In the ELA definition section "an equine activity" is also defined, whereas "a spectator" may not be (in CT, MI, OH, TX it is not, while

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[1] Equine Liability Acts (also known as Equine Activity Liability Acts, EALA) have been enacted to curb frivolous litigation, discussed under Purpose of ELA.

[2] Julie I. Fershtman, *Animal Law: The Michigan Equine Activity Liability Act: Are We Galloping in Circles?* 92 Mich. B.J. 22, 22 n.4 (2013) ("As of July 2013, all states except California, Maryland, Nevada, and New York have enacted some form of an equine activity liability statute. All of them differ but many share common characteristics.")

in NJ it is defined). Another section of the ELA usually outlines the limited liability (also referred to as immunity to liability, or simply the immunity section) offered to sponsors, professionals, and others for equine injuries caused by an inherent risk. This is followed by the exceptions to immunity which usually include the following: (1) providing faulty tack, (2) mismatching horse to rider and not engaging in a suitable equine activity, (3) not fixing or warning of a dangerous latent condition of the land, (4) willfully or wantonly disregarding participant safety, or (5) intentionally injuring the participant (MI and NJ add "a negligent act" to the exceptions). There is often a section that requires professionals and sponsors to post warning signs about the risks involved in equine activities.

Courts have interpreted the ELA in various ways, some broadly, and others have ignored the statute altogether. The first section of this paper, **Case Descriptions**, outlines five recent Supreme Court decisions that involve equine related injuries from five different states. This paper argues that the equine industry will be better served with a national consistent approach to equine related injuries, while recognizing and accepting that states view and approach negligence differently. The second section of this paper explores the **ELA and the Common Law** and how the courts have applied the law. A factor in the inconsistent application of the ELA could be the courts' understanding of how strict liability applies to equine situations, explored under the heading **ELA and Strict Liability**. This paper discusses the history of strict liability and offers the conclusion that abolishing strict liability nationally in equine activities would be a positive step for the industry. This would avoid the courts' misapplication of the doctrine.

For a clearer understanding of the factors involved in equine inherent risk (which is the basis for all ELAs), this paper then describes the **Horse's Nature**. The nature of horses is very different from that of other animals (horses being one of the few prey animals widely used for recreation); therefore, the inherent risks surrounding horses are themselves unique. The horse's nature will inform and contextualize the inherent risk discussion. Understanding a horse's nature and what a professional can and cannot control is paramount to arriving at the correct inherent risk analysis. This paper suggests that judicial notice ought to be taken of the special nature of horses in order to inform an accurate inherent risk analysis nationally, and that such an inherent risk analysis should be the first step in all equine injury cases.

This paper then discusses why inherent risk is so important and the confusion surrounding equine inherent risk (under **The Importance of Inherent Risk** and **The Confusion of Inherent Risk**). The definition of and approach to inherent risk dictates how the courts deal with equine cases. The courts could determine as a matter of law that the risks were

inherent and dismiss the case (under a motion for summary judgment Rule 56 through the application of the ELA); or the courts could determine that the defendant's actions had some causal effect on the injury. Some courts have described professionals as having the ability to control or reduce inherent risks. This is fundamentally incorrect both in theory and in practice; inherent risks exist independently of the defendant's actions. This paper supports the courts' view that a defendant could even be "negligent" yet not liable, if the inherent risks (but not the defendant's negligence) were the proximate cause of the injury (an example would be a mismatch of horse and rider but that mismatch not being the proximate cause of the injury). Other cases claim that defendants can be negligent causing inherent risks, confusing the definition of inherent risk (which is also the doctrine of primary assumption of risk) with negligence. These sections offer a framework for an analytical approach to inherent risks when applying the ELAs to equine injuries.

This paper proposes that if the facts in the case cannot support a method that would consistently avoid the equine-related injury, then the courts should view that fact situation as inherent risk and then by legal definition, it would not give rise to negligence. To put this another way, if there could be more than one explanation for the horse's reaction or for the cause of injury then that fact situation must remain part of the inherent risk of recreational equine sports. For example, a slipping saddle is most often caused by a loose girth. If that loose girth cannot be described in a scientific way, meaning that the same circumstances cannot be consistently re-created, following exact instructions to produce the same result—then it constitutes an inherent risk. If other variables or other possible contributing factors might have caused either the injury itself or the horse's reaction, then the loose girth is merely part of the larger, inherently dangerous activity. Dealing with horses is more of an art than a science. Horses are not machines, and each has an individual personality. Their individuality and their hard-wired nature as prey animals can precipitate many situations that cannot be predicted or scientifically averted.

Twelve states allow for ordinary negligence in their Equine Liability Statutes.[3] Some contain confusing (and some view as contradictory) legislative sections: negligence of participant as part of "inherent risk" definition and negligence as an exception to immunity. Under the heading, **ELA, Negligence, and the Duty Approach**, this paper argues that negligence of the sponsor (including the professional) survives the ELA and supports the view that the ELA is a codification

[3] *State Equestrian Liability Limitation Laws*, American Equestrian Alliance, (Mar. 7, 2015), https://perma.cc/8D6H-XE4Q.

of the common law doctrine, primary assumption of risk. If the plaintiff provides evidence of negligence (actions which take the fact situation out of inherent risk), then the court should look to see what duty was owed to the plaintiff (the duty approach). This application would support different states having different views of negligence laws; some states allow exculpatory clauses while other states do not. This section supports the view that the courts should be looking at the relationship of the parties to see what duty arises. Drawing on the common law, this section of the paper discusses the role of a professional compared to co-participants, under the heading **Co-participant and Sponsor Negligence**. A co-participant not owing a duty of care to other co-participants is also discussed, and this common law rule supports many ELAs' definition of inherent risk to include participant negligence (participant being interpreted narrowly as co-participant). This would solve the confusion of negligence in the "inherent risk" definition and negligence in the exceptions: "inherent risk" definition would refer to co-participants and negligence in the exceptions would refer to a professional's actions that are necessarily the proximate cause of the injury.

Courts are led astray from using the ELA to its intent and purpose by the lack of clarity surrounding the definition of what is inherent in the situations that are unique to the equine industry. No other dangerous recreational activity has a living, breathing animal that has its own nature and reacts in unpredictable ways. Most cases of equine-related injuries would be described as inherent risk unless there was evidence of negligent handling, which is described in the last section of this paper, **Negligent Handling**. This topic is described as that which the industry would view as dangerous, acting without regard to the horse's reaction. This paper offers a framework to approach negligent handling keeping in mind that co-participants have a lowered duty when engaging in a recreational activity.

This paper concludes that the ELAs should be an effective piece of legislation, serving to protect horse owners, sponsors and professionals against participants' lawsuits involving the unpredictable character of horses. All horses can be dangerous; they are large, strong animals with a fright-fight-flight response. If we want these majestic creatures in our society along with the annual $102 billion dollars of their economic activity they generate,[4] in addition to therapeutic, partnership and companionship benefits derived by their owners and sponsors, courts need to clearly and consistently delineate what professionals are responsible for through consistent and fair application

[4] Deloitte Consulting LLP for the American Horse Council Foundation, *National Economic Impact of the U.S. Horse Industry*, American Horse Council (2005), https://perma.cc/C63P-ZB7R.

of the ELAs. Throughout this paper, five Supreme Court decisions[5] are used to highlight judicial approaches to equine injury litigation. They are presented below in order of least beneficial to the equine industry to most beneficial. All five offer very different views of ELA interpretation, purpose and scope. This paper aims to draw a middle ground relying on common law and what is best for the industry with an analysis of the nature of horses. In order for the equine industry to thrive, all states must adopt a similar approach to equine injuries, while maintaining any necessary differences from state to state in their negligence law. A unified approach will allow industry participants to understand their responsibilities and to ensure a stable economic base.

II. Case Descriptions

This section will offer facts of and court analyses in the five equine-injury Supreme Courts cases considered in this paper. In all five cases, summary judgment had initially been awarded in favor of the defendant. The pertinent ELA was applied in four of the cases, while in the fifth, having to do with the nature of horses, the Equine Liability Statute was discussed but not actually applied.

Vendrella v. Astriab Family[6] involved a two-year old plaintiff who lost a large portion of his cheek due to a horse bite sustained at the defendant's place of business, which was open to the public. This business provided two distinct services: the sale of flowers and plants, and the boarding of horses. The plaintiffs purchased plants, but did not board horses at the defendant's farm.[7] The trial court granted the defendants a summary judgment, ruling that they owed no duty to the plaintiffs because the plaintiffs had not established that the horse had a propensity to bite, a propensity different from most horses.[8] The appellate court reversed, finding that the defendants may have been put on notice of the horse's propensity to bite. The appellate court held that

[5] There is a sixth Supreme Court case involving horses from Montana, which is not discussed in this paper. McDermott v. Carie, LLC, 124 P.3d 168 (Mont. 2005).

[6] 36 A.3d 707 (2012).

[7] *Id*. at 709.

[8] Vedrella v. Astriab Family, 2010 WL 42270762010, at 9 (Conn. Super. Ct. Sept. 16, 2010). "Connecticut still adheres to the requirement that the owner or keeper know or have notice of at least one other incident of vicious conduct before he has a duty to warn or safeguard others from the injurious actions of his domestic animal." *Id*. at 4. The Superior Court of Connecticut goes on to say, "[T]herefore, under Connecticut law, the owner of a horse, classified as a domesticated animal, is only liable to an injured plaintiff if the owner had actual or constructive knowledge of the horse's propensity to attack other animals or people, given that knowledge of this propensity renders the owner liable for injuries to people that foreseeably result from such behavior." *Id*. at 5.

the defendants had a duty to realize that ordinarily gentle animals are likely to be dangerous in certain situations and, therefore, the defendants are bound to exercise reasonable care to prevent foreseeable harm. The appellate court applied a case involving a cat[9], a domestic predator. Horses are prey animals and have different reactions when compared to predators; the difference will be discussed below, under the heading **The Nature of Horses**. The appellate court went on to categorize a horse in a paddock as not properly restrained.[10] The Appeal Court used testimony of the defendant to classify horses as potentially dangerous with a natural tendency to bite. The defendant's plant-sale customers reportedly enjoyed seeing the horses[11] and the horses undoubtedly attracted customers. These customers were not horse people with the primary purpose of interacting with the horses but were business invitees for the business involving flowers and plants. The defendant did not invoke the Connecticut ELA,[12] but arguably could have done so as the plaintiffs were engaged in the recreational activity of petting a horse.[13]

The Connecticut Supreme Court in *Vendrella*[14] upheld the decision handed down by the Court of Appeal, stating that the primary issue to be resolved was whether the defendant had a duty to take precautions to prevent foreseeable harm because horses belonged to a class of animals that had a natural tendency to be vicious towards humans.

[9] *Vendrella,* 36 A.3d at 713-16 *(citing and discussing* Bischoff v. Cheney*,* 92 A. 660 (Conn. 1914)).

[10] "The commentary to § 518 … 'Section [518] is applicable to those domestic animals of a class that can be confined to the premises of their keepers or otherwise kept under constant control without seriously affecting their usefulness'… (h) explains that '[o]ne who keeps a domestic animal that possesses only those dangerous propensities that are normal to its class is required to know its normal habits and tendencies. He is therefore required to realize that even ordinarily gentle animals are likely to be dangerous under particular circumstances and to exercise reasonable care to prevent foreseeable harm.'" *Id.* at 716 (citing Restatement (Second) of Torts § 518 (1977)). "Viewed in the light most favorable to the plaintiffs, Astriab's [the defendant] testimony thus indicates that the injury suffered by the plaintiff son was a foreseeable one, and the defendants had a "duty to use reasonable care to restraint the animal in such a manner as to prevent its doing injury … ." *Id*. at 724 (*citing* Bischoff v. Cheney, 92 A. 660 (Conn. 1914)).

[11] *Id.* at 723.

[12] "We also are not called upon in this case to consider the scope and application of General Statutes §52-557p, which provides that persons engaged in recreational equestrian activities assume the risk of the inherent hazards of such activities, because the defendants make no claim that the plaintiffs were engaged in recreational equestrian activities." *Vendrella v. Astriab Family*, 87 A.3d 546, 578 n.8 (Conn. 2012).

[13] "[T]he fact that the plaintiff was not engaged in a competitive equestrian activity does not preclude the application of equestrian activity assumption of risk." Reilly v. Leasure, No. 2011 WL 3427213, at 6 (Conn. Super. Ct. July 12, 2011).

[14] *Vendrella,* 87 A.3d at 568.

The trier of fact would determine if the horses as a species has a natural tendency to bite.[15] What is determined by the trier of fact and by law is very important to the equine industry and arguably is the reason for the ELAs (discussed later under **The Importance of Inherent Risk**). The Supreme Court clarified that not all horses are presumed to be dangerous and that as a result, horse bites are not foreseeable as a matter of law,[16] yet both courts held that the plaintiff's injury was foreseeable. The Supreme Court conceded that no prior Connecticut cases had directly held that an owner had a duty to prevent foreseeable injuries inflicted by a domestic animal without propensities.[17] The Supreme Court applied a four-prong test developed in a case concerning a bystander who fainted upon seeing a medical professional have difficulty finding her sister's vein; this case did not involve animals at all and ergo not a prey animal specifically.[18] The Supreme Court expanded the application of foreseeability to include "the natural propensities of the class of domestic animal to which that specific animal belongs."[19] The court did not use any known experts in the discipline of equine behavior and did not take judicial notice of a horse's nature. The court also relied on dicta from an 1881 case: "[T]he owner of a horse which he knows to be vicious is liable… while upon the owner's land which is open to the public. The owner is also liable, *though he does not know the horse to be vicious,* if he turns him loose to go *on such open land* in so negligent a manner as to endanger the safety of persons passing across it."[20] The court then "conclude[d] that, as a matter of law, the owner or keeper of a domestic animal has a duty to take reasonable steps to prevent the animal from causing injuries that are foreseeable because the animal belongs to a class of animals that is naturally inclined to cause such injuries, regardless of whether the animal had previously caused an injury or was roaming at large."[21]

In *Vendrella's* concurring opinion of Justice Zarella, the justice disagreed with "asking the jury to decide whether a particular species of domesticated animal has a natural propensity to engage in potentially harmful behavior … This is not only unfair to owners charged with

[15] *Id*. at 547.

[16] *Id*. at 550.

[17] *Id*. at 558.

[18] *Id*. at 558 *(citing* Murillo v. Seymour Ambulance Ass'n*,* 823 A.2d 1202 (Conn. 2003)).

[19] *Id*. at 565. The Court further stated, "[w]e conclude that this evidence, viewed in the light most favorable to the plaintiffs, as it must be, created a genuine issue of material fact as to whether horses have a natural propensity to bite that rendered the minor plaintiff's bite injury foreseeable. A jury reasonably could conclude …" *Id*. at 567.

[20] *Id.* at 556-57 *(quoting dicta* from Baldwin v. Ensign*,* 49 Conn. 113, 117-18 (Conn. 1881)).

[21] *Id.* at 568.

negligence, whose fate will depend on the 'luck of the draw' and the subjective opinions of the jury members, but will lead to confusion regarding the future liability of animal owners under Connecticut's negligence law."[22] While *Vendrella* did not involve a liability release, it is important to note that Connecticut's negligence laws do not favor liability releases for public policy reasons; therefore, the court would be more inclined to allow a negligence case go to trial.[23]

In the Michigan Supreme Court case of *Beattie v. Mickalich,*[24] the facts are clearer in the Court of Appeal. The defendant was left horses through a divorce and the plaintiff (a neighbor) had visited the defendant: "…[o]n eight to ten occasions in 2003 or 2004, defendant invited plaintiff over to his property to exercise a few of the horses."[25] The plaintiff was injured by what the court described as a "green-broke" horse. "Plaintiff's complaint claimed that defendant was 'negligent' because he failed to properly secure the horse's head before saddling the horse; and, by **failing in his duty to avoid alarming the horse**, and by failing to lift the saddle up to the horse's back and instead made a high arching throw of the saddle which caused the horse to "spook," and then rear-up … ."[26]

The Michigan ELA is one of the few ELAs that mention negligence[27] in the exceptions to immunity section (participant negligence is mentioned in many ELAs' definition of inherent risk) of Mich. Comp. Laws § 691.1665(b) and (d):

> Sec. 5. Section 3 does not prevent or limit the liability of an equine activity sponsor, equine professional, or another person if the equine activity sponsor, equine professional, or other person does any of the following:

[22] *Id.* at 351. Justice Zarella also described judicial notice, "Taking judicial notice of the fact that horses have a natural propensity to nip and bite also is consistent with the decisions of many other jurisdictions that have taken judicial notice of, or described as "a matter of common knowledge," the natural propensities of horses to nip, bite, kick, or engage in other playful, inquisitive, or inadvertent behavior that, due to their sheer size and weight, may be harmful or dangerous to persons in close proximity." *Id.* at 571.

[23] "We conclude that, based on our decision in *Hanks,* the totality of the circumstances surrounding the recreational activity of horseback riding and instruction that was offered by the defendants demonstrates that the enforcement of an exculpatory agreement in their favor from liability for ordinary negligence violates public policy and is not in the public interest." Reardon v. Windswept Farm*,* 905 A.2d 1156, 1161 (Conn. 2006) (citing Hanks v. Powder Ridge Rest. Corp., 885 A.2d 734 (Conn. 2005)).

[24] 773 N.W.2d 748 (Mich. Ct. App. 2009).

[25] *Id.* at 750.

[26] *Id*. at 751 (emphasis added).

[27] *See State Equestrian Liability Limitation Laws, supra* note 3. There are fourteen states that mention general negligence.

> (d) Commits a negligent act or omission that constitutes a proximate cause of the injury, death, or damage.

The trial court held, "[b]ecause there is no evidence indicating that Whiskey's [the horse that injured the plaintiff] behavior … represented anything other than unpredictable action to a person or unfamiliar object[,] [p]ursuant to the statute, Plaintiff's argument in this case is without merit …."[28] The Michigan Court of Appeals ruled that the above § 5(d) "does not create a general negligence claim, but rather permits a negligence claim when it necessarily involves something other than inherently risky equine activity."[29] The Court of Appeals categorized the exceptions to immunity as "fall[ing] outside the definition of [the] 'inherent risk of equine activity'."[30]

The court went on to outline the plaintiff's claim that Whiskey presented a high risk of harm. The court disagreed with how the plaintiff pled the case. The court outlined that the plaintiff must allege specific facts in his or her complaint under one of the exceptions enumerated under § 5. The plaintiff's claim made no specific mention of § 5, but only pled a general negligence claim.[31] "[B]ecause plaintiff failed to plead a violation of this provision in her complaint, her claim fails as a matter of law."[32]

The Supreme Court of Michigan, in a short ruling, overturned the Court of Appeals, stipulating "[a] plaintiff is not required to plead a claim in avoidance of the limitations on liability provided in the Equine Activity Liability Act."[33] This order contrasted the Michigan ELA where "a participant or participant's representative **shall not make a claim** for, or recover, civil damages from an equine activity sponsor, an equine professional, or another person for injury to or the death of the participant or property damage resulting from an **inherent risk of an equine activity**."[34] Justice Markman disagreed with the Court of Appeals' holding that a negligence claim was permitted only "when it involve[d] something other than inherently risky equine activity."[35] Justice Markman opined that the Court of Appeals' interpretation of the ELA immunity was too broad[36] and suggested that "the common-law strict liability would have applied to the owner of a 'green broke'

[28] 284 Mich. App. at 569.

[29] *Id.* at 566.

[30] *Id*. at 573.

[31] *Id*. at 574.

[32] *Id*. at 579.

[33] Beattie v Mickalich, 486 Mich. 1060, 1060 (2010).

[34] Mich. Comp. Laws § 691.1663 (LexisNexis 2015).

[35] Mickalich, 486 Mich. at 1060.

[36] *Id.* at 1061.

horse … . Because EALA abolished strict liability for horse owners, *Amburgey v Sauder*, 238 Mich App 228, 245; 605 N.W.2d 84 (1999), defendant is not strictly liable for plaintiff's injuries."[37] Justice Markman continued to discuss strict liability for horse owners; this paper analyses his comments under the **Strict Liability** heading. Justice Markman discussed general negligence claims and stated that "it would have been completely unnecessary for the Legislature to indicate in § 5 that injuries resulting from something *other* than 'inherent[ly] risk[y]' … equine activity are exempt from this immunization, i.e., to exempt something from immunization that was not even subject to immunization in the first place."[38] The reason for the later addition of §5(d), the general negligence claim, in the Michigan legislation is discussed in the section **Negligence.** The Justice then categorized the exceptions of faulty tack, mismatching of horse and rider, "dangerous latent conditions … [to be] all 'inherent risk[s] *of* an equine activity'".[39] Justice Young dissented (along with two other justices, Weaver and Corrigan[40]), siding with the Court of Appeals that the exceptions are "involving 'human error' [and] 'not within the gamut of 'inherent[ly] risk[y] … equine activity.'"[41] Justice Young points out that "the majority order, as well as Justice Markman's concurring statement, base their interpretation of the negligence exception to the EALA on an overly narrow and faulty linchpin: that the exception was intended simply to eliminate strict liability for horse owners."[42] The dissenting opinion went on to elaborate that saddling a horse and the horse's unexpected reaction is clearly an inherent risk. This approach of judicial reasoning is further developed in the **Inherent risk** section below.

The New Jersey case *Hubner v. Spring Valley Equestrian Center*[43] involves the Huebner couple preparing to go on a trail ride. The Court of Appeals reversed the trial court's summary judgment in favor of the defendant. The defendants had set up cavaletti (small jumps) to simulate potential obstacles on the trail ride. The plaintiff's horse backed up into the cavaletti, tripped, and fell. The plaintiff landed on the portable mounting block, and the horse rolled over her, causing her to suffer broken bones and other injuries.[44] The Court of Appeals found that inherent risks did not include those within the defendant's capacity to control. Risks involved in the use of faulty equipment or

[37] *Id.*
[38] *Id.* at 1062.
[39] *Id.*
[40] *Id.* at 1065.
[41] *Id.* at 1064.
[42] *Id.*
[43] 408 N.J. Super. 626 (N.J. Super. Ct. App. Div. 2009).
[44] *Id.* at 630.

the poor placement of the poles constituted additional dangers, posing an unnecessary risk of personal injury.[45] It is interesting to note that the Court of Appeals did not view the exceptions in the ELA as duties, unlike the New Jersey legislation covering ski operators. The court discussed the exculpatory agreement that was broad enough to cover ordinary negligence. The New Jersey ELA, like its Michigan counterpart, includes negligence in the list of exceptions to immunity: "[a]n act or omission on the part of the operator that constitutes negligent disregard for the participant's safety, which act or omission causes the injury . . ."[46] The court held that the "exculpatory agreement would permit escape from liability" where the Legislature had intended to assign culpability and therefore, the court reversed the grant of summary judgment based on the release.[47]

The New Jersey Supreme Court overturned the Superior Court of New Jersey, Appellate Division's decision in *Hubner*[48] and held that the New Jersey's ELA "operate[d] as a complete bar to [the] plaintiff's claim[, holding that the plaintiff's] … injuries were caused by … inherent risks of equine activities."[49] The court pointed out "a latent ambiguity in the overall meaning of the statute:" "'[N]egligent disregard for a participant's safety,' that exception might operate to effectively swallow the Act's protections entirely."[50] The court defined the primary assumption of risk as "a known or obvious inherent risk" to which a recreational facility operator owes no duty (this point will be discussed further below, under the heading **Inherent Risk**):[51]

> Although the organizational pattern and structure of the Equine Act does not precisely mirror the Ski Act and the Roller Skating Rink Act, all three statutes reflect an effort to protect operators of these recreational facilities from liability by maintaining an assumption of risk defense against injuries resulting from inherent conditions of the activity or the facility, while at the same time ensuring that operators manage the facility in a reasonable manner.

[45] *Id.* at 635. The court held that a jury could find "Gloria's injuries … caused by conduct within the scope of … *N.J. Stat. Ann*. § 5:15-9," *id*. at 635, "[n] otwithstanding any provisions of [*N.J.S.A*. 5:15-3] to the contrary, the following actions or lack thereof on the part of operators shall be exceptions to the limitation on liability for operators: a. Knowingly providing equipment or tack that is faulty to the extent that it causes or contributes to injury." *Id*. at 632.
[46] N.J. Stat. Ann. §5:15-9(d) (West 2015).
[47] 408 N.J. Super. at 637.
[48] Hubner v. Spring Valley Equestrian Center, 203 N.J. 184 (2010).
[49] *Id.* at 188.
[50] *Id.* at 197.
[51] *Id.* at 200.

> All three, therefore, remain faithful to the "primary" and "secondary" analytical framework of this Court's *Meistrich* decision. The Equine Act, like the Ski Act and the Roller Skating Rink Act, is designed to establish a **dividing line between the known and inherent risks of the endeavor that are assumed by the participant, and those events or conditions that are within the control of, and thus are part of the ordinary obligations of, the facility's operator.**[52]

The court did not find the equipment to be faulty: the cavaletti themselves were in good repair. The court then turned to subsection (d) of the N.J. ELA, which covers "operator … negligent disregard for the participant's safety."[53] The court stipulated that the plaintiff must show the injury arouse because of the operator's breach of one of the duties outlined in the statute's exceptions. A contrary, expansive approach "would permit the exceptions to extinguish the statute's broad protective scope;" " … the overall intention expressed by the Legislature demand that it be given a narrow reading."[54] The court went on to compare an injury from lack of upkeep, a door falling off a rusty hinge causing an injury to a horse frightened by a loud noise causing an injury. The former a breach duty and the latter an assumed risk (inherent risk).[55]

The New Jersey Supreme Court, unlike the Court of Appeals, viewed the exceptions as duties owed to the plaintiff and held that those should be narrowly or strictly construed so as not to impede the ELA's broad protection.

The Ohio ELA offers the broadest protection to professionals and sponsors by defining a "spectator" in the same general category as an "equine participant." Most ELAs do not bar spectators from bringing civil suit, unless the spectator is injured in an unauthorized area.[56] The Ohio Supreme Court, in *Smith v. Landfair,*[57] was faced with defining who should be considered a spectator under the ELA. The Ohio ELA does not define what a spectator is; the Supreme Court was asked to "determine when an injured person is a 'spectator' and therefore an 'equine activity participant' whose claim for damages is barred by the

[52] *Id*. at 202-03 (citing Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959)) (emphasis added).

[53] N.J. Stat. Ann. § 5:15-9(d) (West 2015).

[54] Hubner, 203 N.J. at 206.

[55] *Id.* at 207.

[56] An example in the Texas ELA: "Engages in a farm animal activity" means riding, handling, training, driving, loading, … The term does not include being a spectator at a farm animal activity unless the spectator is in an unauthorized area and in immediate proximity to the farm animal activity." TEX. CIV. PRAC. & REM. CODE ANN § 87.001(1) (LexisNexis 2015).

[57] 135 Ohio St. 3d 89 (2012).

statute."[58] Landfair, the defendant and owner of the horse that injured Smith, was unloading his horse from his trailer when it was spooked by an Amish wagon. Landfair fell to the ground, and Smith went to his assistance (Smith's father, Landfair's trainer had warned against trailering the horse). Smith sustained facial and head injuries from the horse's kicks while she attempted to help Landfair. The Court of Appeals[59] held that Smith was not a spectator nor was she controlling the horse; she was not specifically watching the horse but was instead watching Landfair. She was therefore not an "equine participant" and not barred from suing.[60] The state Supreme Court clarified the scope of "spectator" and who is barred from suit, being someone who has deliberately exposed himself or herself to a horse's inherent risk. This is not limited to a show or event but "purposeful placement in an area of exposure" will provide immunity for the defendant.[61] This case does raise some interesting questions about negligent handling, which will be discussed under the heading **Negligent Handling.**

In the Texas case of *Lee v. Loftin,*[62] the plaintiff, Lee, appealed the trial court's grant of summary judgment in favor of the defendant Loftin for Lee's injury while on a trail ride with the defendant. Lee claimed negligence in the suitability of the horse and of the activity as well as in the selection of the trail.[63] Lee's horse panicked after a vine wrapped around its flank on the trail.[64] The Court of Appeals, in reversing the trial court's summary judgment in favor of the defendant, ruled that Loftin's lack of inquiry into Lee's riding ability qualified as one of the exceptions to immunity.[65] The Texas Supreme Court in turn reversed the opinion of the Court of Appeals, reasoning that Loftin's failure to inquire into the rider's ability to participate had not in itself caused the accident. "So construed, section 87.004(2) would impose strict liability … "[66]

[58] *Id*. at 89.

[59] Smith v. Landfair, 194 Ohio App. 3d 468 (Ohio Cr. App. 2012).

[60] *Id.* at 474.

[61] Smith, 135 Ohio St. 3d at 97.

[62] 277 S.W.3d 519 (Tex. App. 2009).

[63] *Id*. at 526-527.

[64] *Id*. at 527.

[65] *Id.* at 532-33**.** *See also* **Exceptions to Limitation on Liability**

A person … is liable for property damage or damages arising from the personal injury or death caused by a participant in an equine activity … if: … (2) the person provided the equine or livestock animal and the person did not make a **reasonable and prudent effort to determine the ability of the participant to engage safely in the equine activity** … and determine the ability of the participant to safely manage the equine … taking into account the participant's representations of ability; … (emphasis added)

TEX. CIV. PRAC. & REM. CODE ANN. (Vernon 2005) § 87.004

[66] Loftin v. Lee, 341 S.W.3d 352, 359 (Tex. 2011).

The Texas Supreme Court held that sponsor negligence fit squarely under the definition of inherent risk of equine activity. "This provision alone refutes the argument that sponsor negligence is not an inherent risk of equine activity. We disapprove the contrary statement in *Steeg*."[67] This court found that the list of exceptions to immunity in Texas ELA § 87.004 includes actions that would otherwise be considered inherent risks in an equine activity, such as "knowingly supplying faulty equipment, failing to determine a participant's ability, failing to warn of latent land conditions, willfully or wantonly disregarding safety, and intentionally causing injury."[68] The Texas Supreme Court thus expanded the reach of that state's ELA beyond the unavoidable risks associated with equine behavior offering a very broad interpretation, pointing out that the common law does not impose liability for a domestic animal unless that animal was known to be abnormally dangerous. "It would have been pointless for the Legislature to limit liability when none existed. **We must presume that the Legislature intended more."**[69] The court concluded that since no further inquiry into Lee's riding would have prevented the accident therefore that exception to immunity did not apply.[70]

These five state Supreme Court cases offer differing views of horses in society and the role of the ELA. *Vendrella* suggests that horses are dangerous and warrant liability without ELA application. *Beattie* insists that horses' reactions are the responsibility of the owners ignoring the ELA. *Hubner* protects the owner/operator because non-defective equipment could not be an exception, also stipulates that ELA exceptions be strictly construed. *Smith* limits who should be able to sue, those that voluntarily expose themselves to inherent risk. *Loftin* includes sponsor/operator negligence is part of inherent risk. These cases are extremely difficult to reconcile with one another. They offer conflicting interpretation of not only the ELA but also the role of horses

[67] *Id.* at 357. In *Steeg*: "The Act thus shields sponsors from liability for factors beyond their control, such as innate equine behavior, unknown land conditions, negligence by participants, and interactions of these factors. The Act denies immunity from liability for factors essentially within the sponsors' control, such as tack in poor condition, the inappropriate matching of participant and horse, the known dangers of sponsors' land, and their own wilful or intentional actions. The Act essentially sets two benchmarks on the continuum of factors causing injuries and damage: (1) factors that are inherent risks of equine activity and never result in liability; and (2) other factors listed in the Act that are excepted from immunity. These benchmarks do not exhaust the potential causes of injury, however; between them lie other factors that may result in the sponsor's liability for damages." Steeg v. Baskin Valley Camps, 124 S.W.3d 633, 637 (Tex. App. 2003).

[68] Loftin, 341 S.W.3d at 358.

[69] *Id*. at 358 (emphasis added).

[70] *Id*. at 359.

in society. This paper will examine these cases more closely, identifying some of their inconsistencies in an effort to formulate a clearer approach to equine injury cases, one that might succeed in applying the ELA nationwide in a consistent, appropriate way.

III. ELA and Common Law

While many courts might agree with the aims of the ELA in theory, they frequently differ in practice. An ELA will often begin with a preamble that outlines its purpose, perhaps describing the economic benefits of the equine industry, the preservation of green space, the duties of equine professionals and other objectives. Some courts have been misdirected by counsel's arguments (*Amburgey* not pleading negligence); some courts have misread the common law regarding domestic animals (*Vendrella* all horses are dangerous)*;* some courts have misunderstood the ELA's intent (*Loftin* including sponsors' negligence as an inherent risk); while other courts have shown a lack of knowledge of a horse's nature (*Beattie* defendant liable for horse's innate reactions). This paper will explore the five Supreme Court cases in order to identify a unified approach to equine injury using the ELA, which this paper argues codifies the common law.

The majority in the Supreme Court in *Beattie* has obfuscated the purpose of the ELAs. Using the later added "negligence" exception[71] the Supreme Court held that the plaintiff is not required to show that the injury was something other than an inherent risk. With so few Supreme Court decisions applying and interpreting the ELA, courts look to other jurisdictions for interpretation of legislation[72]. While other jurisdictions offer only persuasive rather than binding authority, these opinions provide framework for other jurisdictions to apply similarly structured ELAs. Defendants should not be confronted with very different judicial expectations when traveling or residing in different states, especially

[71] "The [Michigan] EALA had no 'negligence' exception when introduced in the Michigan legislature in 1993 as HB 5006. In its place, by comparison, was an exception for 'an act of omission that constitutes willful or wanton disregard for the safety of the participant, and that act of omission was a proximate cause of the injury or death.' When HB 5006 proceeded to the Senate, a substitute bill deleted its 'willful or wanton" exception and replaced it with an exception for a 'negligent act or omission that constitutes a proximate cause of the injury, death, or damage.' That version became the law." Julie I. Fershtman, *Michigan's Equine Activity Liability Act: Are We Galloping in the Right Direction*, Foster Swift Agricultural Law Update (Jan. 16, 2014), https://perma.cc/GH3K-QBNK.

[72] "All relevant data includes the state's intermediate court decisions, restatements of law, law review commentaries and decisions from other jurisdictions on the 'majority' rule.'" Lawson v. Dutch Heritage Farms, Inc., 502 F. Supp. 2d 698, 701 (N.D. Ohio 2007).

states with similar legislation. The ELA in both Michigan (*Beattie*) and New Jersey (*Hubner*) have a similar negligence exception yet the interpretation and outcomes of these two cases are very different.[73]

Legal commentators have described the ELAs as a codification of the common law.[74] The courts have not been as consistent. Why do some judges view the ELAs as codification of the common law? "[W]hen the statute is digested, it seems only to immunize activity that would not have given rise to liability under the common law in the first place"[75]; while other courts "presume that the Legislature

[73] "An act or omission on the part of the operator that constitutes negligent disregard for the participant's safety, which act or omission causes the injury … " N.J. Stat. Ann. § 5:15-9(d) (2015) and "[c]ommits a negligent act or omission that constitutes a proximate cause of the injury, death, or damage." Mich. Comp. Laws Serv. § 691.1665(5)(d) (LexisNexis 2015).

[74] Examples of legal journal articles commenting on the ELA codification of the common law:

"The Act goes on to provide that persons who participate in the particular sport 'assume the inherent risk of injury and all legal responsibility for damage, injury or death … that results from the, inherent risks in that sport … .' This is simply the codification of the common law principle that the provider's duty does not extend to protecting the participant from the inherent risks of the sport." Cathy Hansen & Steve Duerr, *Recreational Injuries & Inherent Risks: Wyoming's Recreation Safety Act,* 28 U. Wyo, Land and Water L. Rev. 149, 177-78 (1993).

"[T]hese statutes are modeled after the common law…" Jennifer Dietrich Merryman, *Bucking the Trend: Why Maryland Does Not Need an Equine Activity Statute and Why It May Be Time to Put All of These Statutes Out to Pasture*, 36 U. BALT. L.F. 133, 143 (2006).

"[I]n California terms, an EALA would be a codification of primary assumption of risk for equine activities." The author goes on to say that "EALAs which adopt an 'inherent risk' format are essentially a codification of the common law concept which holds that in an activity involving horses, active participants cannot recover for injuries which result from the misbehavior of animals in their control … " Krystyna M. Carmel, *The Equine Activity Liability Acts: A Discussion of Those in Existence and Suggestions for a Model Act*, 83 Ky. L.J. 157, 166 (1994). The author discussed the California cases of Knight v. Jewett, 3 Cal. 4th 296 (Cal. 1992) and Galardi v. Seahorse Riding Club, 20 Cal. Rptr. 2d (Cal. Ct. App. 1993).

[75] Gibson v. Donahue, 148 Ohio App. 3d 139, 144 (2002). Also in Duval v. Howe, 20 Mass. L. Rep. 83 (2005). In Duval, the plaintiff did not claim willful and wanton conduct (defendant allowing a vicious horse to be loose) which would have been an exception allowing the claim. "Plaintiff's complaint alleges mere negligence, which is precisely what the Legislature regarded as insufficient." The Massachusetts legislation, G.L.c. 128 §2D(a), defines inherent risk as "the potential of a participant to act in a negligent manner … such as failing to maintain control over the animal or not acting within his ability." This case seems to be an example of not pleading all possibilities.

"Indeed, the inherent unpredictability of a horse is something that the legislature already has considered in providing to an operator of a horseback riding facility a defense to a claim of negligence pursuant to the assumption of risk doctrine codified in § 52-557p." Reardon v Windswept Farm, 280 Conn. 153, 167 (Conn. 2006).

intended more."[76] These five Supreme Court cases interpret the ELA very differently: very narrowly in the *Beattie* decision, with almost a disregard to its purpose (not having to plead in avoidance of the act) to a very broad interpretation where the negligence of a sponsor is an inherent risk expanding the act's reach in *Loftin*. This paper explores these different interpretations, offering a consistent judicial approach to equine injuries. The ELAs were not enacted to supersede strict liability. "[T]he express purpose of the Act is to limit liability, not create strict liability."[77] How does strict liability align with the ELAs?

a. ELA and Strict Liability

Could the lack of consistent judicial approach to the ELA be not only the lack of appreciation for the horse's nature but also confusion of the purpose of strict liability as it relates to the equine? Strict liability would apply in the common law only when the plaintiff showed that the animal had dangerous propensities and that the defendant had knowledge of them.[78] In the Restatement (Second) of Torts § 509(1) (1976),

" … [W]e conclude the Equine Activity Statute was not intended by the general assembly to abrogate the cause of action for common-law negligence of an equine activity sponsor. However, pursuant to the clear text of the statute, *a negligence action is precluded if the injury resulted from an inherent risk of equine activities* and the facts do not fit one of the exceptions to immunity provided by Section 2(b). Stated differently, if none of the Section 2(b) exceptions apply, then *an equine activity sponsor is not liable for failing to use reasonable care to mitigate an already inherent risk of equine activities* that ultimately resulted in a participant's injury." (emphasis added) Perry v. Whitley County 4-H Club, 931 N.E.2d 933, 939 (Ind. Ct. App. 2010).

[76] Loftin v. Lee, 341 S.W.3d 352, 358 (2011).

[77] *Id.* at 359.

[78] The common law applied to equine injuries pre-ELA can be found in cases outlined in 86 ALR2d; an example is the New York Court of Appeals affirming the case of *Brown v. Willard*, 303 NY 727. "Unless some propensity to injure or to knock down persons was shown it could not be found to be negligence to leave the animal standing in the defendant's own exercise yard. … [W]hether the knocking down of the plaintiff is the result of a tendency to run away or to knock down people viciously, the need for showing knowledge by the defendant is a **necessary condition to liability**." (emphasis added), 278 A.D. 728, 728 (1951).

A California Supreme Court case, Finney v. Curtis, 78 Cal. 498, 501 (1889) states: "The rule is well settled that the owner of an animal, not naturally vicious, is not liable for an injury done by such animal, unless it is affirmatively shown, not only that it was vicious, but that such owner had knowledge of the fact. (Shearman and Redfield on Negligence, secs. 187, 188; 3 Sutherland on Damages."

" … [T]o establish a prima facie case for an injury caused by a horse, a domestic animal, it was incumbent on the plaintiff to demonstrate not only that the animal had vicious propensities but that the owner had knowledge of such propensities or that a reason person would have discovered them." Brophy v. Colum. County Agric. Soc'y, 116 A.D.2d 873, 874 (1986) *citing* Appel v. Charles Heinsohn, Inc., 91 AD2d 1029, 1030 (N.Y. App. Div. 1983).

Comment (e) says that while stallions have dangerous propensities, the law has not regarded them as subject to this strict liability.

Perhaps the judicial interpretation (or misinterpretation) of the ELA stems from lack of clarity on the common law concerning domestic horses or from badly pled cases. The oft-quoted Michigan case of *Amburgey,*[79] gave the impression that the ELA's main purpose was to remove strict liability from equine injury cases. On closer analysis, in one of the first cases involving the Michigan ELA, the appellate court was restricted by the plaintiff's legal claims. The plaintiff in this case only pleaded strict liability, so the court had to focus on that issue. The court denied the plaintiff's request to amend her pleadings to include negligence.[80] This case is frequently cited as authority for how the ELA has changed the law regarding strict liability and horses. The ELA's aim was not to change the law of strict liability but rather to limit frivolous lawsuits involving inherent risks—which is to say, risks beyond the control of sponsors or participants[81]. The statute is also a warning to those engaged in equine activities about the risks assumed.[82]

"[T]he common-law rule as to injuries and deaths caused by any domestic animal that the owner is liable where it appears that the animal had the pre-existing vicious propensity to do the particular injurious act complained of … **Under the rule, a horse, being a domestic animal, is presumed not to be dangerous to persons**, …" (emphasis added) H.G. Hirschberg, Annotation, *Liability of owner of horse to person injured or killed when kicked, bitten, knocked down, and the like*, 85 ALR2d 1162 §2 (1962).

And the Restatement (Second) of Torts § 509 (1976), Comment (e)**:** *"Animals in which dangerous propensities are normal* … Bulls are more dangerous than cows and steers; stallions are more dangerous than mares and geldings; … their dangerous tendencies **has become a normal incident of civilized life … Therefore, the law has not regarded bulls, stallions and rams as being abnormally dangerous animals to be kept under the strict liability stated in this section** …" (emphasis added).

[79] Amburgey v Sauder, 238 Mich. App. 228 (1999).

[80] "In her second issue raised on appeal, plaintiff argues that the trial court abused its discretion in denying her motion to file a first amended complaint adding a negligence claim against defendant. We disagree." *Id.* at 246

[81] Inherent risks will be discussed in further detail but the idea of risks that the sponsor or any other person would not be able to control is central to the intent of the ELA as evidence in the Kentucky ELA:

"The inherent risks of farm animal activities are deemed to be **beyond the reasonable control** of farm animal activity sponsors, farm animal professionals, or other persons … are deemed to have the **duty** to reasonably warn participants … **but not the duty to reduce or eliminate the inherent risks of farm animal activities**." Ky. Rev. Stat. § 247.402(1) (LexisNexis 2014) (emphasis added).

[82] The Colorado Supreme Court states "Apart from … notice of the inherent risks to be assumed by a participant, the legislature has, however, done nothing to regulate equine activities or to impose additional duties on equine activity sponsors. Rather, the statute recognizes the inherent risks involved in equine activities and protects sponsors of equine activities by limiting their liability, except under specified circumstances." Chadwick v. Colt Ross Outfitters Inc., 100 P.3d 465, 468 (Colo. 2004).

The *Amburgey* court stated that the "EALA supersedes the common-law doctrine of strict liability as it pertains to equines."[83] But the ELA's effect on strict liability is tangential. Strict liability under the common law would apply to an equine case only if the horse was known to be dangerous and to have previously injured an innocent third party.[84] An innocent third party would not be someone who walked into a barn with the intention of interacting with horses. The intent of the ELA was not to replace strict liability. In fact, potential plaintiffs in cases where strict liability may apply would not be involved in an equine activity and therefore would not be covered by the ELA.[85] If someone were not a participant as defined in the ELA, the ELA would not apply. Strict liability fact situations are rare in equine injuries. [86]

The strict liability issue seems to be something of a red herring for the courts, and an ongoing source of confusion. The facts in *Beattie* do not support strict liability as the plaintiff was not an innocent third party (she had come to the defendant's property to engage in the risky activity of equine recreation)[87] and the horse was not known to be dangerous. Justice Markman states in his concurring opinion in *Beattie*, "Prior to the enactment of EALA, common-law strict liability would have applied to the owner of a 'green broke' horse."[88] This statement makes fundamentally wrong assumptions. A "green broke" horse is not

[83] Amburgey, 238 Mich. App. 228 (1999) at 245.

[84] Mother of the injured children brought a lawsuit for a pony kick. The ponies were to entertain children at a picnic. It was not a recreational equine activity and thus would not come under the purview of most ELAs. "Generally, since a horse is a domestic animal, a horse owner is not liable for injuries caused by the animal unless he or she knew or should have known of its vicious or violent propensities." Doyle v. Monroe Cnty. Deputy Sheriff's Ass'n, Inc., 758 N.Y.S.2d 791, 793 (Sup. Ct. 2003).

"W. Prosser, *Law of Torts* 499 (4th Ed. 1971). Professor Prosser explains that the rule is simply based on the concept that responsibility is placed on those who, even with proper care, expose the community to the risk of a very dangerous entity … The typical situation in which some courts have been willing to consider the application of strict liability precepts involves the escape of an animal with known dangerous or vicious propensities that bites, gores, or kicks innocent bystanders or social guest." Hardin v. Christy, 462 N.E.2d 256, 262 (Ind. Ct. App.1984).

[85] Carmel, *supra* note 74, at 159. Carmel discusses where the ELA would not apply and that is where a person is not engaged in an equine activity. If someone were not a participant then the common law would be completely unaffected by the ELA.

[86] "From the foregoing, we gather that, in order to hold the owner of an animal strictly liable for damage to another done by the animal, there must be a domestic animal, which is actually or constructively under the control of the owner, or which he has an obligation to restrain, the presence of which causes an unreasonable risk of harm to others and which injures **an innocent third party**." (emphasis added) Alfonso v. Mkt. Facilities of Hous. Inc, 356 So. 2d 86, 89 (La. Ct. App.1978), *appeal denied,* 357 So. 2d 1169 (La. 1978) (emphasis added).

[87] Beattie, 284 Mich. App. 564 at 566.

[88] Beattie, 486 Mich. 1060, 1061 (2010).

per se a dangerous animal. Domestic horses have never been classified as dangerous animals. An Ohio Court of Appeals decision recognizes:

> [T]hat horses may act unpredictably regardless of how much training they have, how old they are or how 'quiet or 'bombproof' they are when confronted with a new or scary situation or new/changed environment. It was for this reason that the Ohio Legislature immunized equine professionals and equine activity sponsors from harm caused by the essential unpredictability of equines to sounds, sudden movements, and unfamiliar situations.[89]

In a Pennsylvanian case, a stallion was not deemed to be dangerous without evidence of vicious tendencies.[90] The Texas Supreme Court decision in *Loftin* observed that the common law does not impose liability for equine injuries except if the horse was found to be abnormally dangerous.[91] In a California case, "[i]n order to support a verdict for the plaintiff, it was necessary to show either that the horse was of a vicious disposition, or that he was so negligently handled by the defendant as to cause the injury. Neither is shown."[92]

There was no evidence that the horse in *Beattie* was vicious or had any vicious propensities. No supporting law was used in the *Beattie* decision for classifying a green horse as dangerous, and there seems to be no law to support the idea that a green horse would cause strict liability. This theory would appear difficult to sustain when even a stallion—theoretically more difficult to handle properly and thus more dangerous—does not rise to this standard.

The courts need to understand how and why horses react in the way they do. Horses are very different from other animals in our society. Courts would benefit from taking judicial notice of the horse's nature. This would avoid sending some fact situations to a jury (importance described under the heading **Importance of Inherent Risk**), offering a clear understanding of why horses should not be generally associated with strict liability, and thereby providing more consistent, predictable outcomes and good precedent.

[89] Markowitz v. Bainbridge Equestrian Center Inc., 2007 Ohio 1540, p20, *appeal denied* 115 Ohio St. 3d 1410.

[90] "The relevant law is clear. Before liability for the bite of an animal attaches, the defendant must know or have reason to know that the animal will display vicious tendencies, as set forth in the Restatement (Second) of Torts ß 518 … ," Kinley v. Bierly, 876 A.2d 419, 422 (Pa. Super. Ct. 2005).

[91] *See supra* note 69.

[92] Finney v. Curtis, 78 Cal. 498, 502 (1889).

IV. The Horse's Nature

Inherent risk relates to what is in a horse's nature. What traits can a professional affect; what training can make a horse safe? What natural instincts can be changed or removed? When defining equine inherent risk, courts must understand the nature of horses. In *Beattie* the plaintiff and defendant seemed to have similar horse knowledge, neither very experienced; therefore neither in tune with horses' methods of communication. By accounts, the plaintiff may have been holding on to the lead rope but all agreed she was also holding on to the halter.[93] Horses are large animals often over one thousand pounds. Humans have restrained and tamed these large creatures with ropes (often referred to as breaking). A horse's nature is to fight or flee what it perceives as dangerous situations. The muscles of a normal human cannot overpower the muscles of a horse. A horse's natural instinct (whether it is green or trained) is to avoid perceived dangerous situations.

> The most obvious difference is the large size of horses in comparison to their human partners. This brings an element of danger into the interaction that rarely is present with dogs and cats and makes crucial the establishment of an effective communication system.[94] In the human-horse relationship, the body is the basis from which a system of communication can grow.[95] Horses, in general, have highly sensitive bodies because their bodies are their vehicle for communication. Because horses rely on their bodies to transmit and receive information, they are highly skilled at reading (and using) body language.[96] Problems arise with instinctive behaviours when the animal responds to the wrong cues. **This most often happens because of unintentional cues for the behaviour in the domestic environment**.[97] Horses' eyes are 5 × 6.5 cm in size and amongst the largest of any living mammal.[98] The detection of movement also helps identify a camouflaged potential predator. Sudden

[93] Brief for Mickalich as Amici Curiae Supporting Defendant-Appellee, Beattie v. Mickalich 284 Mich. App. 564 (2010) (No.13-9438).

[94] Keri Brandt, Between The Species: Readings in Human-Animal Relations: Human-Horse Communication 315 *(*Arnold Arluke & Clinton Sanders eds, Pearson Education, Inc. 2009).

[95] *Id.* at 316.

[96] *Id.* at 317.

[97] Daniel Mills & Kathryn Nankeris, Equine Behaviour Principles and Practice 54 (Blackwell Science Ltd 1999) (emphasis added).

[98] *Id.* at 91.

> or stilted movements therefore alert horses and may cause anxiety. This can cause problems if even a familiar person suddenly appears or moves in the horse's flied of view … By understanding his special sensitivities and weaknesses we can work with him and train him more effectively.[99]

Even a well-trained horse can spook without reference to any human error or fault and cause grievous bodily injury.[100] In *Beattie*, the plaintiff restrained a horse's head when the horse reacted to the movement of a saddle.[101] An experienced horse person would cringe at the potential danger whether that horse was green or trained. A handler should never try to restrain a horse by the halter because horses (trained or green) can easily feel trapped and panic. The restraint of the horse's head by the plaintiff could be viewed as an incitement for the animal to react due to its feeling trapped, and being a prey animal.[102]

Just as some skiers regard moguls as the thrilling part of skiing, some equestrians view horses' unpredictable natures as the most exciting aspect of their sport. Horses are herd animals that will always look to a leader of the herd for direction. As a human being trains a horse, the horse will naturally begin to view the human as its leader. During the training process, professionals will tame a horse's spirit, yet allowing it to maintain its natural instincts (and hence its character). Even as we remain mostly in control, we realize that total control will never be possible.[103] Although we humans have been breeding horses

[99] *Id.* at 99.

[100] In a case in New York State, which does not have an ELA, a summary judgment was awarded when the plaintiff failed to offer facts that caused the horse to fall to the ground and injure the plaintiff. The court added, "[T]he plaintiff's injury was of the type which could occur without the neglect of some duty owed to him by the defendants." Sarver v. Martyn, 161 A.D.2d 623, 624 (N.Y. App. Div. 1990).

[101] The facts were revealed in depositions of Trina Beattie, the plaintiff. Beattie Dep at 18 she answered "correct" to the question "And if you contain a horse's head, basically you will contain most of his body except for kicks in the back, right?"

[102] While this case discussed premise liability versus animal liability and the inconsistent standard for those, it did reference cases where animal incitement could help avoid liability even for a dangerous dog. "Berry v. Kegans, 196 Kan. 388, 391, 411 P.2d 707 (1966), a young child was bitten by a chained dog. She and others had been throwing clods at the dog." Mercer v. Fritts, 9 Kan. App. 2d 232, 237 (1984), a*ff'd* 236 Kan. 73.

[103] "An extreme, but extremely effective, method used by some trainers to deal with recalcitrant or aggressive horses that refuse to accept human control is to deprive them of any social companionship for as much as 23 hours a day; social contact (even with a nonequine) becomes so valuable to a socially deprived horse that it very quickly comes to accept and bond with its trainer." Stephen Budiansky, The Nature of Horse: Exploring Equine Evolution, Intelligence, and Behavior 84 (The Free Press 1997).

for thousands of years now, we have not yet devised a way to alter their instinctive tendency toward fright followed either by flight or fight.[104] Some would argue that this is the desirable challenge that horses pose, calling for us to find training methods that will invite obedience while leaving intact the majesty and nature of the horse.

Perhaps a misunderstanding of the nature of horse's led to the *Vendrella* decision. The Connecticut Supreme Court seems to be redefining what a propensity is and how the courts view domesticated animals. *Vendrella* was decided after *Beattie* and while not mentioned in the case, it begs the question whether this is a new judicial view. Or is the *Vendrella* case stretching the basis of negligence and requiring a heightened duty when young children are involved?[105] The Connecticut Supreme Court takes a step back from labeling all horses as dangerous, but does conclude that owners have a duty to prevent foreseeable injuries.[106]

> [S]ociety has an interest in the outcome because of the system of precedent … a rule once laid down is to be followed until the courts find good reason to depart from it. There is good reason, therefore, to make a conscious effort to direct the law along lines which will achieve a desirable social result .[107]

If the courts are to depart from the horse being a non-threating part of our society, there should be good reason to do so. America was built on the back of the horse, and the horse has been a revered animal in this society.[108]

[104] Germany has a renowned horse industry. The German National Federation has an established accreditation system, which is a very well organized system of educating to ensure consistent quality of education. The German Professional Trainers is a program which is government controlled and regulated Wolfgang Scherzer Vogelsang Farm, *available at* https://perma.cc/9JUZ-2EUR (last visited Jan. 5, 2014).

The horse is a **herd animal.** The herd offers it protection and security. No horse likes to be alone—this is something that it has to be introduced to carefully … Horses are **creatures of flight.** For herbivores, immediate flight offers the best form of protection against all forms of danger. However, different horses have different stimulus thresholds, and any uncertainty or loss of confidence may trigger this flight behavior. **A panicking horse may become oblivious to all outside influences, and as such it can be dangerous.**" (emphasis added) FN-Verlag der Deutschen Reiterlichen Vereinigung GmbH, Completedly Revised, The Principles of Riding, the Official Instrution Handbook of the German National Equestrian Federation 11 (The Kenilworth Press Ltd 1997).

[105] *See infra* note 212.

[106] *Id.* at 339.

[107] W. Page Keeton et al., Prosser and Keeton on the Law of Torts 16 (5th ed.1984).

[108] Clay McShane & Joel A. Tarr, The Horse in the City, Living Machines in the Nineteenth Century 14 (Johns Hopkins University Press 2007).

Most judicial commentators and a few judges state that the ELAs codify the common law[109] where inherent risks causing injury should not be a cause of action in negligence. The very definition of negligence does not include inherent risks, as the definition of inherent excludes control over those risks (and those risks are based on what natural reactions a horse has). If inherent risk caused an injury, the defendant could not have increased the risk of harm (or had any consistent effect on the horse's basic nature to avoid the injury) therefore, should not be at fault.[110] The unpredictable nature of horses in the majority of cases precludes the ability to foresee a horse's reaction, which is the linchpin of negligence analysis.

V. Inherent Risks—What Are They?

Examining the facts in *Beattie* help to illustrate where the Michigan Supreme Court has been misled regarding the intent of the ELA and the definition and applicability of inherent risk. The Supreme Court in *Beattie* overturned the Court of Appeals,[111] who upheld the trial court's summary judgment on the grounds that the plaintiff did not show something other than inherent risks were the cause of her injury. The Supreme Court expands the plaintiff's claims, ruling that the plaintiff can claim negligence involving inherent risks. Either this court has redefined inherent risk (a definition not revealed in the opinion itself), or the court has changed the way we are to look at how a negligence claim proceeds.

Inherent risks should be described as intrinsic, inherent, and not able to be removed from the activity without changing the activity. If the court determines the cause of injury to be inherent then the defendant has no duty and, therefore, is not negligent as a matter of law.[112]

Most ELAs define "inherent risks" as dangers or conditions integral to equine activities. Statutes usually have five dangers or conditions in the "inherent risk" definition: propensity of equines to behave in ways that may injure or kill participants; unpredictability of equine reactions to noise, movement, objects or people, hazardous surface conditions (similar to a ski mogul), collisions with other horses

[109] *See* Hansen, *Recreational Injuries & Inherent Risks*, supra note 74, at 178; Merryman, *Bucking the Trend*, *supra* note 74, at 143; Carmel, *The Equine Liability Acts*, 166; *See* Brophy v. Colum. County Agric. Soc'y, 116 A.D.2d 873, 874 (1986); *see also supra* text accompanying note 78.

[110] The idea of inherent risk analysis as the basis for identifying if there is a duty will be further developed when discussing inherent risk, primary assumption of risk and *volenti non fit injuria*. Hansen, *infra* note 135.

[111] Beattie v. Mickalich, 284 Mich. App. 564 (2009).

[112] *See infra* note 135 and accompanying text.

or objects, and other participant's negligence in handling the horse.[113] Having clear definition of inherent risk in a statute makes inherent risk a question of law not to be determined by a jury (discussed later under **Importance of Inherent Risk)**.[114] Generally, the definition involves the unpredictable nature of horses. There is an understanding that these are the risks that the defendant does not have the ability to reliably reduce

[113] Inherent risk is defined in the following ELAs as:

… **inherent risk** of a farm animal activity … including: (1) the propensity of a farm animal or livestock animal to behave in ways that may result in personal injury or death to a person on or around it; (2) the **unpredictability** of a farm animal's or livestock animal's reaction to sound, a sudden movement, or an unfamiliar object, person, or other animal; (3) with respect to farm animal activities involving equine animals, certain land conditions and hazards, including surface and subsurface conditions; (4) a collision with another animal or an object; or (5) the **potential of a participant to act in a negligent manner** that may contribute to injury to the participant or another, including failing to maintain control over a farm animal or livestock animal or not acting within the participant's ability. Tex. Civ. Prac. & Rem. Code Ann. § 87.003 (LexisNexis 2014).	(f) "**Inherent risk** of an equine activity" means a danger or condition that is an integral part of an equine activity, including, but not limited to, any of the following: (i) An equine's propensity to behave in ways that may result in injury, harm, or death to a person on or around it. (ii) The **unpredictability** of an equine's reaction to things such as sounds, sudden movement, and people, other animals, or unfamiliar objects. (iii) A hazard such as a surface or subsurface condition. (iv) Colliding with another equine or object. Mich. Comp. Laws Serv. § 691.1662 (LexisNexis 2015).	(7) "**Inherent risk** of an equine activity" means a danger or condition that is an integral part of an equine activity, including, but not limited to, any of the following: (a) The propensity of an equine to behave in ways that may result in injury, death, or loss to persons on or around the equine; (b) The **unpredictability** of an equine's reaction to sounds, sudden movement, unfamiliar objects, persons, or other animals; (c) Hazards, including, but not limited to, surface or subsurface conditions; (d) A collision with another equine, another animal, a person, or an object; (e) **The potential of an equine activity participant to act in a negligent manner** that may contribute to injury, death, or loss to the person of the participant or to other persons, including, but not limited to, failing to maintain control over an equine or failing to act within the ability of the participant. Ohio Rev. Code Ann. § 2305.321 (LexisNexis 2014).	"**Inherent risk** or risks of an equine animal activity" means those dangers which are an integral part of equine animal activity, which shall include but need not be limited to: a. The propensity of an equine animal to behave in ways that result in injury, harm, or death to nearby persons; b. The unpredictability of an equine animal's reaction to such phenomena as sounds, sudden movement and unfamiliar objects, persons or other animals; c. Certain natural hazards, such as surface or subsurface ground conditions; d. Collisions with other equine animals or with objects; and e. **The potential of a participant to act in a negligent** manner that may contribute to injury to the participant or others, including but not limited to failing to maintain control over the equine animal or not acting within the participant's ability. N.J. Stat. Ann. § 5:15-2 (LexisNexis 2014).

[114] Some states do not define inherent risks. In states where the statute does not define inherent risks, often a case may offer a definition. For example, Connecticut does not define inherent risk but a Connecticut case does: Reilly v. Leasure, 2011 Conn. Super. Ct. LEXIS 1758 (Conn. Super. Ct. July 12, 2011).

or eliminate.[115] There is no definition of "green horse" in the legislation because a green horse is not inherently different from a trained horse. While more care may be needed in some situations with a green horse, there are situations where more care is needed for a trained horse. If a horse is not accustomed to a handler's movements or to a particular situation, then one should precede with caution; this is true whether that horse is green or trained.[116] The ELAs address situations where the horse reacts true to its nature (reactions that are hard wired into the make-up of a horse related to its fright-fight-flight response)[117] and someone gets hurt as a result.

To arrive at a definition of inherent risk when the statute does not offer one, some cases have described inherent risk as requiring an analysis of the nature of the sport and what is normal in that sport. "[T]he inherent risk standard turn[s] on an analysis of the nature of the sport in question and a determination of what risks are normally created by the nature of the sport."[118] Some statutes, for example the Wyoming Recreational statute, have described inherent risks as any risk that is characteristic of or intrinsic to any sport or recreational opportunity and which cannot reasonably be eliminated, altered, or controlled.[119]

Hansen[120] aided in the clarification of inherent risk in revisions of the Wyoming statutes. She distinguishes two types of inherent risk: (1) those risks that make the activity exciting and desired, like the moguls on a ski hill[121] or the spirit of a horse (challenges to be conquered from

[115] And in the NJ ELA: "The Legislature further finds and declares that equine animal activities involve risks that are essentially **impractical or impossible for the operator to eliminate**; and that those risks must be borne by those who engage in those activities." N.J. Stat. Ann. § 5:15-1 (LexisNexis 2015) (second emphasis added).

[116] I will be drawing on my experience as a professional horse rider, trainer and competitor. I have ridden for over forty years, competing in two Olympics, two World Championships, and two Pan American Games.

[117] Brandt, *supra* note 94, at 315-17; *see* Mills, *supra* note 97, at 54, 91, 99; *see also* Sarver v. Martyn, 161 A.D.2d 623, 624 (N.Y. App. Div. 1990).

[118] Lee v. Loftin, 277 S.W.3d 519, 530 (Tex. App. 2009), rev'd by Loftin v. Lee, 341 S.W.3d 352 (2011).

[119] *"The equine industry had succeeded in eliminating the troublesome 'cannot reasonably be altered, eliminated and controlled' language contained in the Act's inherent risk definition, but had done so for only one group of recreational providers."* Catherine Hansen-Stamp, *Recreational Injuries & Inherent Risks: Wyoming's Recreation Safety Act An Update*, 33 Land and Water L. Rev. 249, 263 (1998).

[120] Hansen, *supra* note 74.

[121] Hansen-Stamp cites "[t]he court in Clover v. Snowbird Ski Resort, aptly clarified the meaning of inherent risks, and thus the rationale for the "no duty" rule, within the context of skiing. The court reasoned that there are really two types of inherent risks: 1) those risks which are essential characteristics of a sport and those which participants desire to confront, e.g., moguls, steep grades, and fresh powder; and 2) those undesirable risks which simply exist, e.g., falling rock, severe and sudden

which the participant obtains pleasure or recreation[122]); and (2) risks that are inherent yet not desired, like falling rock on a ski hill or a windy day making a horse more likely to shy (or a possible scenario in the *Beattie* case: removing a horse from pasture mates). The facts in the *Beattie* case make it difficult to determine what caused the horse's unpredictable reaction. It is possible that the horse's pasture mates started to gallop in the paddock at the same time the saddle was being lifted in the air. It is difficult to know because the Supreme Court in *Beattie* did not approach the facts through analysis of the inherent risk.

Merryman[123] describes inherent risk as something that cannot be eliminated by the equine professional or sponsor. This description should not be interpreted as a duty for the defendant to limit inherent risks[124] but merely that the risk is present independent of the actions of the defendant. While the unpredictable nature of horses can cause injuries, it is also the horse's nature that brings much enjoyment to the participant.

Inherent risk with horses has also been described as a quality or condition that if taken away from that activity then the activity will cease to be the same. An inherent risk example in skiing has been described above as the presence of moguls.[125] The development of the bumps of snow happens when skiers turn, carving small mounds repeatedly. Sometimes the ski hill is too steep to groom those bumps from the ski run, but sometimes they are left because skiers enjoy the moguls. Moguls have an inherent risk of injury because a mogul could cause you to lose your balance and fall. But, if the operator eliminates all the moguls, then the attraction of skiing would be lost to many skiers. The challenge of the mogul attracts skiers. Similarly, if we take away the unpredictable

weather changes, and icy slopes. These same principles can be applied to determine the nature of inherent risks in other recreational opportunities." *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1047 (Utah 1991).

[122] "Horses' behavior can be erratic but in my opinion that's what makes them even more beautiful, dynamic creatures."

John Blackburn & Beth Herman, Healthy Stables by Design: A Common Sense Approach to Health and Safety 9 (The Images Publishing Group Pty Ltd. 2013).

[123] Merryman, *supra* note 74, at 141.

[124] Hansen-Stamp *supra* note 119, at 253; see *infra* note 153.

[125] Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant. Knight v. Jewett, 3 Cal. 4th 296, 315 (1992).

nature or spirit of horses, we change their very nature and for many, the sport would change and become less enjoyable. The challenge for the human-horse bond is to harness that bit of unpredictability, enhancing the majesty and nobility of the horse.

The desirable natural characteristics of a horse that provides the majesty, nobility and expression also come with undesirable characteristics. For example, a windy day causes more distraction for a horse (in winds, horses are not as focused on potential danger as the movement distracts their attention[126] and thus become more reactive to stimulus) and more likely to misbehave. It could be argued that this is the undesirable characteristic, which is also inherent like the rocks (undesirable) in skiing versus the moguls (desirable).

A fact analysis to determine inherent risk was used in the *Cooperman* case,[127] which analyzed a slipping saddle as an inherent risk (the slipping saddle caused the plaintiff's injuries). While the statutes provide definitions of inherent risk, which make them a matter of law (importance is matters of law are not submitted to a jury), the courts analyze facts to determine if the risk is inherent. In the Wyoming slipping saddle case, the Court's approach was to frame the question around the facts available:

> In determining whether a certain risk is inherent to a sport, we are taken to the level of specificity that the facts support. While at some level all sports have inherent risks, as we add in the facts of a specific risk encountered the risk may or may not be inherent. "**Thus, the duty question is best resolved by framing the question correctly**." *Madsen*, 31 F. Supp. 2d at 1328. For example, if the only fact presented to the court is that the horse bucked while the rider was properly sitting on the horse, we would frame the duty question as whether a bucking horse is an inherent risk of horseback riding. However, if the facts established that the owner of the horse lit firecrackers next to the horse and the horse bucked, we would ask whether a horse bucking when firecrackers are lit next to the horse is an inherent risk of horseback riding.[128]

[126] *See supra,* notes 96-99 for a discussion of a horse's vision.

[127] Cooperman v. David, 214 F.3d 1162, 1168 (10th Cir. 2000).

[128] *Id.* at 1167 (emphasis added).

The *Cooperman* court specifies[129] that it should not look at the defendant's actions to determine if the risk were controlled or eliminated. So, the question in the *Beattie* case should be framed: is it an inherent risk when you take a green horse from his friends into isolation and reduce the horse's ability to respond to its environment by holding its head by the halter; would the horse's reaction to this perceived confinement possibly have the inherent risk of the fright-fight-flight response? We do not have a scientific method of determining the exact reaction of a horse in the *Beattie* situation because as in *Cooperman*, there are too many variables[130]. One cannot specify what exactly caused the horse's reaction, which in turn injured the plaintiff. There are too many variables; therefore, one must conclude that that fact situation arose from the inherent unpredictability of the specific situation and of equine reactions in general. In *Cooperman*, if the plaintiff had been able to present some facts suggesting that the defendant did not check the girth or that the girth itself was not appropriate, then those facts would take that case out of the inherent risk category. Similarly, in the *Beattie* case, if the plaintiff had some evidence that the defendant either had known that the horse was prone to react badly to saddles or had run at the horse with the saddle in a reckless manner, then those fact situations might have led the court to conclude that the facts did not support the horse's reaction as an inherent risk.

The undesirable inherent risk could also be described as the horse's unpredictable and variable reactions to stimulus[131]: noise, wind, changing surroundings, perceived danger, etc. In *Beattie,* an analysis of the facts could point to the green horse's increased perceived danger by bringing it into the barn by itself away from its herd. Not being handled often, the horse would not look to the human as a replacement for the herd. Horses are hard wired to remain in groups for protection[132]. The horse's reaction could easily have been the hard-wired instinct to rejoin his equine friends.

[129] *Id*. at 1167 note 4.

[130] "In *Beattie v. Mickalich,* the deposition testimony and the expert letter provided by plaintiff all indicate that this horse may have reacted negatively to being saddled no matter what method defendant used to effectuate the saddling. Accordingly, plaintiff cannot establish that defendant committed human error above and beyond the inherent or essential risk of this equine activity such that defendant increased the danger involved in the activity. *Beattie,* 486 Mich. 1060, 1065 (2010) (Young, J., dissenting). **Aside from different types of analysis of what is an inherent risk and what is a co-participant's duty, this line of reasoning appears to be the most appropriate in light of the legislative intent and a horse's nature.**

[131] *See supra* note 113. Inherent risks are defined in most ELAs in a similar fashion and usually include (1) the propensity of an equine to behave in ways that may injure people (2) the unpredictability of an equine's reaction.

[132] *See supra* note 103.

In *Smith* the court described a spectator as someone who exposes him or herself to inherent risks[133]. In *Smith,* the inherent risk was that a horse could react unpredictably. In the *Loftin* case, vines around a horse's flanks could be seen as an undesirable inherent risk. In extreme trail classes, pool noodles[134] are inserted horizontally into an upright pole and the horse is asked to walk through the pool noodles. This would give the same effect as the vines a horse may have to walk through on a trail ride. Trainers can try to make horses not reactive to this situation, but it is a combination of factors that could cause the horse to react to the pool noodles (and the vines). This would be an example of inherent risk (this was not the reasoning used in *Loftin,* but this reasoning would avoid the inclusion of sponsor negligence as an inherent risk).

In *Hubner* the defendant was also attempting to prepare riders for potential challenges on the trail. Just like the pool noodles, Hubner tried to acquaint the horse/rider combination with a simulation of going over a log that could be encountered on a trail. Cavaletti and poles were used. These obstacles are inherent risks of trail riding (which some may view as desirable or undesirable depending on the level of rider, just like moguls on a ski hill).

How the court defines and interprets inherent risk will dictate how the court analyzes different fact situations. The interpretation of inherent risk requires an understanding of the nature of the horse in the context of a unique recreational activity. For predictability and consistency, statutes or courts should define inherent risk, not the jury. The next section describes how this is accomplished.

a. The Importance of Inherent Risk—A Question of Law or a Question of Fact?

The inherent risk analysis is important because it helps the court to determine whether a legal duty exists. In *Beattie*, the facts arguably show that the horse only reacted as horses sometimes do, and sometimes one can never discover the exact reason. Many horses rear when they feel trapped, for example, when constrained by having their head held, as happened in *Beattie*. If we cannot scientifically explain that the horse would not have reared but for the effect of the saddle's movement, then those facts fall within inherent risk. In *Loftin* vines are an inherent risk of riding on the trails; similarly as are logs in the case of *Hubner.*

[133] 135 Ohio St. 3d at 97.

[134] These are described as "vine simulators" by the American Competitive Trail Horse Association. "Rider will be asked to ride horse through brush (or anything simulating dangling vines)." American Competitive Trail Horse Ass'n Inc., ACTHA Obstacles, ACTHA (2015), https://www.actha.us/obstacles.

If the court determines the risk of injury to be inherent then the defendant has no duty, and therefore, is not negligent as a matter of law. This is the importance of inherent risk. Hansen clearly explains the inter-relationships of inherent risk analysis, primary assumption of risk and *volenti non fit injuria* when determining the existence of a legal duty.[135]

Hansen describes inherent risk as an analysis to determine if the plaintiff assumed the primary risk of that activity. This analysis would determine the presence or absence of duty. The inherent risks doctrine has been described also as *volenti non fit injuria*, "[o]ne who takes part in [such] a sport accepts the dangers that inhere in it."[136] Hansen-Stamp outlines this doctrine in which participants assume inherent risks of recreational activities and all liability for those risks.

When analyzing inherent risk, is it a question of law or a question of fact? Approaching inherent risk as a question of law as opposed to a question of fact is important as this determines what goes to the jury. Hansen-Stamp clearly and accurately describes in her articles how the Wyoming legislation was modified to avoid inherent risk issues going to the jury as a matter of fact.[137] The ELAs were written with the expressed purposes of reducing the number of frivolous lawsuits brought[138] and providing a clearer, more consistent approach to equine injuries. Most ELAs state that there is no cause of action for injuries caused by inherent risk. Inherent risk analysis is a factual approach for use in determining whether a particular situation entails inherent risk as a matter of law. The purpose of the ELAs is to reduce frivolous law suits by codifying inherent risk analysis as a matter of law and by making available to the defendant the possibility of summary judgment for no cause of action available to the plaintiff.[139]

[135] The Wyoming Supreme Court in *Halpern v. Wheeldon*, 890 P.2d 562, 565 (Wyo. 1995) cites Hansen when describing the inherent risks as primary assumption of risk being the intent of the legislation to limit the defendant's duty. Hansen also describes in note 35 the confusion between a defense and a lack of case. Also, Warren notes that the maxim "Volenti non fit injuria" is "strictly not a defense, but a rule of law regarding a plaintiff 's conduct which forms a bar to a suit brought by him ... [it] is really proof of no basis to a right of action." Charles Warren, *Volenti Non Fit Injuria in Actions of Negligence,* 8 HARV. L. REV. 457, 458-59 (1895).

[136] Murphy v. Steeplechase Amusement Co., 250 N.Y. 479, 482 (1929).

[137] The first iteration of the statute was interpreted to place a duty on the equine professional to control the inherent risks of horses. Halpern unfortunately occurred before the amendments even though the case was decided after the amendments. "However, Halpern highlighted the problem with a statutory inherent risk definition, which appeared to beg a factual question, steering judges away from a legal duty determination." Hansen-Stamp (1998), *supra* note 119, at 265.

[138] *See infra* note 164 for example of preamble to the ELAs that limit civil liability.

[139] Most equine cases are Rule 56, motion for summary judgment. If inherent

Spengler[140] offers suggestions for sport statutes in general which neatly relate to our equine situations. The sport statutes place responsibility on participants for risks that they voluntarily assume through participation. Inherent risks are often included in these statutes, wherein their precise definition is key. Often the inherent risks in other statutes are those that are "obvious and necessary." Returning to the skiing analogy: "We view sudden movement of a horse just as inherent in horseback riding as the presence of moguls on ski slopes are to skiers."[141]

Spengler[142] discusses a Vermont skiing case, which shows the dangers of not defining inherent risks in the statute. When the court does not view the inherent risks as a question of law but a question of fact because there is no statutory clear definition, then the jury must deliberate. Avoiding jury deliberation was the birth of contributory negligence in the railroad cases, which gave birth to a strong American tort system.[143] If the case went to the jury, the jury would often side with the injured, causing inconsistent and arguably unfair application of the law and a negative effect on economic development. If a judge is unclear regarding the inherent risk and the judge does not consider it a question of law, that judge is more likely to send the issue to the jury. This highlights the importance of having a clear description in

risk were better understood by the courts (including defendants not being able to effect a horse's behavior) then more motions would be available under Rule 12(b)(6) motion to dismiss or Rule 12(c) motion for judgment on the pleadings which would reduce costs and frivolous law suits.

[140] John O. Spengler & Brian P. Burket, *Sport Safety Statutes and Inherent Risk: A Comparison Study of Sport Specific Legislation,* 11 J. LEGAL ASPECTS OF SPORT 135 (2001).

[141] Harrold v. Rolling J. Ranch, 19 Cal. App. 4th 578, 588 (Cal. Ct. App. 1993).

[142] Spengler & Burket, *supra* note 140, at 159.

[143] "Contributory negligence "development was [] encouraged, if not entirely explained, by three factors. Chief among these was the uneasy distrust of the plaintiff-minded jury which grew upon the courts in the earlier part of the nineteenth century, and a desire to keep the liabilities of growing industry within some bounds. [The Second] was the tendency for the courts … to look for some single, principal, dominant 'proximate' cause of every injury. The third was inability of the courts … to conceive of a satisfactory method by which the damages for a single, indivisible injury could be apportioned between the parties [who were] both [] at fault [–] the loss simply had to fall entirely upon the negligent plaintiff or negligent defendant." Keeton, *supra* note 107, at 452-53.

"The period of development of contributory negligence was that of the industrial revolution, and there is reason to think that the courts found in this defense, along with the concepts of duty and proximate cause, a convenient instrument of control over the jury, by which the liabilities of rapidly growing industry were curbed and kept within bound." William L. Prosser, *Comparative Negligence,* 51 MICH. L. REV. 464, 468 (1953).

the statute or a good understanding of what constitutes an inherent risk (including judicial notice of the nature of horses). A clear definition would avoid the inherent risk analysis being taken to the jury resulting in fewer frivolous law suits and lower more predictable costs for the defendant[144] (all necessary for economic stability of an industry such as skiing or equestrian sports).

Applying this to the *Beattie* facts, the plaintiff knew the horse was "green" and not trained; she still wanted the enjoyment of working around that horse. Why did the Supreme Court in *Beattie* want this fact situation to go to trial? The Supreme Court in *Beattie* did not use any inherent risk analysis. The opinion in *Beattie* lacks an understanding of a horse's nature and what can be controlled in what context. The court also confused inherent risk and when a duty arises. This paper purposes that the Supreme Courts in *Landfair* and *Hubner* understood the inherent risk analysis and the outcome was suitable. In *Loftin* while the outcome was suitable, the reasoning would be more consistent if inherent risk analysis were used.

b. The Confusion of Inherent Risk—Primary vs. Secondary Assumption of Risk

This section discusses how the courts have often confused the primary assumption of risk and the secondary assumption of risk. This mix-up has led to more confusion when duty is discussed. Courts are inconsistent: they obscure situations where the facts lead to a legal conclusion that there was no duty, with situations where the defendant owes a duty and has breached that duty. In *Knight v. Jewett* the court describes the confusion:[145]

> The introductory passage from the Harper and James treatise on The Law of Torts, that was cited with approval in *Li*, stated in this regard: "The term assumption of risk has led to no little confusion because it is used to refer to at least two different concepts, which largely overlap, have a common cultural background, and often produce the same legal result. But these concepts are nevertheless quite distinct rules involving slightly different policies and different conditions for their application. (1) In its primary sense the plaintiff's assumption of a risk is only the counterpart of the defendant's **lack of duty**

[144] *See supra* note 22. In the concurring opinion of Justice Zarella in Vendrella, he points out that owners charged with negligence would be dependent on the luck of the draw and the subjective opinions of the jury.

[145] Knight*,* 3 Cal. 4th at 308, n.3.

> **to protect the plaintiff** from that risk. In such a case plaintiff may not recover for his injury even though he was quite reasonable in encountering the risk that caused it. Volenti non fit injuria. (2) A plaintiff may also be said to assume a risk created by defendant's breach of duty towards him, when he deliberately chooses to encounter that risk. In such a case, except possibly in master and servant cases, plaintiff will be barred from recovery only if he was unreasonable in encountering the risk under the circumstances. This is a form of contributory negligence. Hereafter we shall call this 'assumption of risk in a secondary sense.' (quoting 2 Harper & James, The Law of Torts (1st ed. 1956) ß 21.1, p. 1162, fns. omitted, cited in *Li, supra*, 13 Cal.3d 804, 825.) (emphasis added).

If the courts confuse primary and secondary assumptions of risk then it would make sense that inherent risk and its role may be confused as well[146]. In the Ohio federal court carriage case of *Lawson v. Dutch Heritage Farms*[147] the court states under the heading of inherent risk that the "EALAs are acknowledged to be codifications of the affirmative defense to negligence of assumption of risk." This otherwise well-written decision loses its way in the sea of confusion: if the injury were caused by inherent risk (under the factual analysis described above) the defendant would owe no duty to the plaintiff and would need no defense (the plaintiff would lack a cause of action). Perhaps the court was meaning to say that the ELA and immunity to liability for inherent risks would be a response to a claim for negligence. That response would most likely come in the form of a motion to dismiss for a lack of cause of action. This should not be classified as a defense to negligence because with inherent risk there is no duty and therefore no negligence requiring no defense. "[A]ssumption of risk in this form is really a principle of no duty, or no negligence, and so denies the existence of any underlying cause of action."[148]

This paper interprets the ELAs as the primary assumption of risk (or *volenti non fit injuria*), used in the common law regarding sporting

[146] Loren Speziale, Comment, *Walking Through the New Jersey Equine Activity Statute: A Look at Judicial Statutory Interpretation in Jurisdictions with Similar Limited Liability Laws,* 12 Seton Hall J. Sports L. 65 (2002). In her comment, Speziale has also clouded the inherent risks as primary assumption of risk with the secondary assumption of risk as a defense. She also confuses the heightened level of liability of professionals with co-participants, which the ELA does not do.

[147] Lawson v. Dutch Heritage Farms, Inc., 502 F. Supp. 2d 698, 707 (N.D. Ohio 2007).

[148] Keeton, *supra* note 107, at 496.

activities. Some courts confuse the primary and secondary assumptions of risk, resulting in this type of statement from the United States District Court in the Wyoming *Cooperman*[149] case:

> The Court recognizes that its reading of the Wyoming Recreational Safety Act provides enormous protection to those in the business of providing recreational activities. This case provides only a glimpse of the possible breadth that this protection may one day assume. Consumers in Wyoming are now faced with an entire industry whose economic and consequent legislative power enables them to conduct business **with only a passing thought to the safety of those who utilize their services.** Despite this frightening prospect, this Court recognizes its place in our nation's federal system of government. A court should not decimate the purpose of a legislative act, no matter how distasteful, when that purpose is clearly incorporated in the language of the act.

Perhaps this court is confusing inherent risk with secondary assumption of risk. If the ELAs are a codification of the common law, then the protection is not enormous. The laws fill a hole in protections when there is much confusion over the assumption of risk and when states are enacting comparative negligence statutes. The ELAs make certain that the equine industry does not lose protection from the primary assumption of risk—that is the inherent risks of recreational equine activities. The ELAs' "inherent risks" definitions protect sponsors and operators from frivolous lawsuits.

Another area of confusion is when the courts and legal commentators suggest a defendant could increase inherent risk when by definition it is something that cannot be controlled. Merryman[150] refers to the primary assumption of risk (determined by inherent risk analysis) as eliminating the examination of the defendant's negligence. But then she says something confusing: the defendant has a limited duty not to increase the inherent risks of the sport. She cites a Maryland case[151] in which a young girl was injured in a softball game by a sliding base runner. The plaintiff, Kelly, claimed negligent coaching. The court more clearly states that the defendants have no duty to protect a plaintiff from inherent risk but do have a duty not to increase the risk of harm beyond what is inherent in the sport.[152]

[149] Cooperman v. David, 23 F. Supp. 2d 1315, 1321 (D. Wyo. 1998) (emphasis added).

[150] Merryman, *supra* note 74, at 139.

[151] Kelly v. McCarrick, 155 Md. App. 82 (Md. Ct. Spec. App. 2004).

[152] *Id.* at 106.

This approach would be helpful in equine situations. The *Kelly* court drew a line at inherent risks, offering a clear judicial approach marking the differences between inherent risk and defendant actions that caused an increase in risk of injury to the plaintiff. Equine situations are more complicated than typical scenarios in many other sports because they necessarily incorporate the added variable of the unpredictability of the horse's reactions (refer back to **The Horse's Nature** section). The open and obvious rule used in *Kelly*[153] to describe the obvious risk that a sliding player may get injured could be analogous to an open and obvious risk of a thousand-pound horse's reacting in an unpredictable way, as did the rearing horse in the *Beattie* case.[154]

One legal commentator has similarly confused inherent risk: "[S]ponsors … have immunity for conduct involving negligent and grossly negligent acts when they involve an inherent risk."[155] Inherent risk by definition does not produce a duty; someone cannot be negligent regarding an inherent risk.

In equine situations, a clearer approach would be to first delineate the inherent risks and then to define those as risks that are part of that activity. If those risks were removed that activity would be transformed into something else. Those risks would be described as intrinsic, inherent, and not able to be removed from the activity without changing the activity. If this would be the common definition of inherent risk (used when the statute is silent regarding the definition of inherent risk) then the defendant's actions would have to be viewed separately from inherent risk. If the defendant acted unreasonably and those actions caused injury then inherent risk is not involved. A defendant's actions should not be involved in inherent risk analysis from a legal perspective because the defendant has no duty to the plaintiff when inherent risks are the proximate cause of the injury. If the court uses a definition of increasing harm beyond inherent risk, then the courts will

[153] *Id.* at 120. In the 1951 skiing case of *Wright v. Mt. Mansfield Lift, Inc*., 96 F. Supp. 786 defendants owed no legal duty to plaintiff for inherent risks of skiing.

[154] In the Michigan Supreme Court case, *Ritchie-Gamester v. City of Berkley*, 597 N.W.2d 517, 527 (Mich. 1999) the court concluded that co-participants (as the plaintiff and defendant arguably are) in a recreational activity owe each other a duty not to act recklessly. "Because the trial court properly concluded that plaintiff could not show that defendant violated this standard, summary disposition was proper." Note that the written opinion of the majority in this case was the written dissent in *Beattie***.**

[155] Terence J. Centner, *Equestrian Immunity and Sport Responsibility Statutes: Altering Obligations and Placing them on Participants,* 13 Vill. Sports & Ent. L. J.. 37, 51 (2006). Centner goes on to state "a profit-making sponsor could escape liability for gross negligence involving the inherent risks of equestrian activities. " *Id.* at 52. This sentence is difficult to understand; there is no duty involved in inherent risks and therefore no one could be negligent or grossly negligent when inherent risks are the proximate cause.

be more inclined to send a case to the jury in order to determine if the defendant's actions did increased the risk beyond inherent. If inherent risk is the proximate cause, then the defendant's actions should not be examined. This will limit frivolous lawsuits, as is the intent of the ELAs.

This paper argues that any actions within the defendant's control cannot be classified as an inherent risk. Inherent risk is defined as something that cannot be removed from the activity without the activity's being intrinsically altered. For instance, if a horse is mismatched to a rider,[156] that must entail the defendant's knowing both the capabilities of the rider and the propensities and idiosyncrasies of the horse, and therefore making a poor judgment. This fact situation would not support an inherent risk analysis but would instead invoke a duty analysis—specifically the duty to provide a suitable horse, a requirement that can be found in many pre-ELAs cases.[157] Mismatching a horse and rider may be analogized to mismatching participants in team sports. This would be a negligent claim and not an inherent risk:[158] the Supreme Court in *Beattie* confuses these two.

Another exception found in most ELAs is the provision of faulty tack, which would be analogous to providing a skier with a faulty ski binding. Neither action is an inherent risk of its respective activity. Both are within the control of the defendant. This confusion at the Supreme Court level causes inconsistencies in equine cases and potentially disrupts a very vibrant industry. After analyzing the facts, if the proximate cause of an injury is an inherent risk, then there is no duty[159]. Again, the ELAs

[156] Most ELAs have a similar exception of limitation of liabilities regarding mismatching of horse and rider which involves failing to take care when choosing a horse for a particular rider. M MICH. COMP. LAWS SERV. § 691.1665(5)(b) (LexisNexis 2015); TEX. CIV. PRAC. & REM. CODE ANN, § 87.004(2) (West 2014); OHIO REV. CODE ANN. § 2305.321(B)(2)(b) (LexisNexis 2014).

[157] *See infra* note 195 and 200.

[158] "Similarly, these standards also govern analogous negligence claims based on "mismatching" athletes and teams." Kelly, 155 Md. at 102. While the Kelly court discussed the possibility of a mismatch, they conclude that the negligence mismatch should be carefully employed. The court did discuss mismatching in the theme of negligence. "If recreational league coaches are pressured by liability threats to subjectively segregate "better" players from "average" players, instructional leaguers would lose the opportunity to play with and against more skilled players in an effort to improve their game to "the next level" demonstrated by the more skilled players. That would defeat one of the primary reasons for instructional leagues." *Id.* at 117-118.

[159] In a Texas case a young woman fell off a horse and was impaled on a tree branch after her instructor took her into a field to ride. This was against the father's wishes and although the actual accident did appear to be inherent risk of a horse bolting, the court allowed the case to go to trial due to the question of fact whether the instructor had reasonably tried to match the rider to the horse. These would be facts around the inherent risk that may raise those facts out of inherent risk. Hilz v Riedel, 2012 Tex. App. LEXIS 4736 (Tex. App. Fort Worth June 14, 2012) *appeal denied* 2012 Tex. LEXIS 1087 (Tex., Dec. 14, 2012)

serve to make sure that the inherent risk (primary assumption of risk) is not lost during America's tort reform of assumption of risk.

These two recent Supreme Court opinions overruling their respective Court of Appeals in Texas[160] and Michigan[161] both misclassify the ELA exceptions to immunity as inherent risks and thus create confusion regarding the appropriate approach to determining an inherent risk. In Texas, the *Loftin* decision has broadened the interpretation of the act to include sponsor negligence as an inherent risk when the statute does not specifically do so.[162] In Michigan, the court in *Beattie* has avoided any analysis of the facts to determine if a duty exists thus potentially making the sponsor or professional liable for inherent risk. This does provide a complicated playing field for the equine industry. In Michigan a professional could have to mount a defense in court for a cause of action involving inherent risks while in Texas a professional would not need to defend for negligence. The equine industry needs a consistent approach nationally.

Michigan ELA §5(d) mentions negligence to specify that the defendant could be liable for the potential negligent actions described in §5(a)—(c) as well as common negligence. The Michigan Supreme Court does not acknowledge that if an injury is caused by inherent risk there is no duty and hence no negligence. The Michigan Supreme Court supports a lawsuit where no duty exists and, therefore, no cause of action. The Supreme Court in *Beattie* did not analyze the facts of the case. This paper supports the fact analysis similar to that done in *Cooperman,* where if the facts do not point to a clear, repeatable sequence of events that caused the injury, that would fall under inherent risk. If the slipping saddle in *Cooperman* could have been caused by multiple factors (horse's sweat, saddle pads compressing, or horse bloating) then those facts lead to an inherent risk and the defendant's actions are not examined.

The following reasoning in the *Vendrella* case is dangerous: "[I] t would be 'illogical to relieve … [persons] with greater expertise and information concerning the dangers associated with [the animals] from potential claims of negligence surrounding an alleged failure to [take reasonable steps to prevent foreseeable injuries]."[163] Given the nature

[160] Loftin v. Lee, 341 S.W.3d 352, 356 (Tex. 2011).

[161] The Supreme Court in Beattie overturned the sensible approach of the Court of Appeals which stated: "we hold that ß 5(d) does not create a general negligence claim, but rather permits a negligence claim when it necessarily involves something other than inherently risky equine activity." Beattie v. Mickalich, 773 N.W.2d 748, 750 (Mich. Ct. App. 2009).

[162] *See infra* note 217.

[163] Vendrella v. Astriab Family Ltd. P'ship, 87 A.3d 546, 559 (Conn. 2014) (quoting Reardon v. Windswept Farm, LLC, 905 A.2d 1156 (Conn. 2006)).

of the horse as described above and society's desire to maintain horses in our lives, the *Vendrella* approach could potentially have every equine injury as actionable and foreseeable. No equine professional can predict a horse's reaction with perfect accuracy even with the benefit of greater experience and information. This paper proposes the relationship of the parties is vitally important, to spell out what duty is owed to whom. A professional will owe an increased duty to a student, for example, but a decreased duty to co-participants. If courts fail to focus clearly on these relationships, the distinction between primary and secondary assumptions of risk will continue to be blurred in judicial opinions. This in fact may be one of the points of origin for the persistent confusion with regard to inherent risk. This notion will be explored in the section that follows.

VI. ELA, Negligence, and the Duty Approach

This section discusses the intersection of the ELA with a defendant's determination of negligence through analysis of duty. If an injury is caused by inherent risk, there is no duty. This section explores situations that are not caused by inherent risk but are caused by another action over which the defendant has control, such as matching a rider with a suitable horse. This duty would exist even if the injury were caused by what appeared to be an inherent risk because a duty had been identified—a duty to avoid any foreseeable injury (duty hinges on foreseeability; inherent risk hinges on unpredictability or unforeseeable). The ELAs do not clearly outline duties although some judges and statutes have defined the exceptions as duties, which provide examples of cases where immunity does not apply, such as negligent matching of horse and rider or activity. These exceptions most often apply to participants with less knowledge. When a duty has to be determined by the court through statute or otherwise, this must be done independent of any inherent risk analysis.

The preamble to the Michigan ELA's does mention duties: "AN ACT to regulate civil liability related to equine activities; and to **prescribe certain duties for equine professionals."**[164] "'Although it has been said that no universal test for [duty] ever has been formulated … our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant.'"[165] This judicial approach could be adopted in equine injuries: the foreseeability of the injury. If the horse in *Beattie* had never before acted in that

[164] Mich. Comp. Laws Serv. Ch. 691 Act 351 Note (LexisNexis 2015). Preamble to the Michigan ELA (emphasis added).

[165] Reilly v. Leasure, 2011 Conn. Super. LEXIS 1758, 29 (Conn. Super. Ct. July 12, 2011) (quoting Allen v. Cox 942 A.2d 296 (Conn. 2008)).

manner, as the facts seem to suggest, then the horse's reactions are not foreseeable.[166] *Prosser & Keeton on Torts*, ß 43 (5th ed. 1984): "If one could not reasonably foresee any injury as the result of one's act, or if one's conduct was reasonable in light of what one *could anticipate* there would be no negligence, and no liability." This is why we need experts to say what is reasonable and what one could anticipate. If we were to think of "potential" foreseeability, injury in horse activity is inevitable.

Most ski statutes outline the duties of ski operators. In those that do not the judiciary has to determine those operator duties. Hansen lays out an excellent discussion of the duty approach in her analysis of the Wyoming ELA (a recreational use statute).[167] Hansen[168] suggests a very

[166] A pre-ELA case where plaintiff was getting off and dragged her leg over horse's rump and jabbed him in the ribs with her toe. Defendant moved for summary judgment. The Court of Appeals overturned the summary judgment on the issue of potentially dangerous conditions.

"The injury Carole sustained was not foreseeable, and therefore, Carbrey should not be held liable as a matter of law." "In other jurisdictions where negligence suits have been brought against horse owners, the owner's knowledge of the horse's character was determinative in finding a duty breached." Dolezal v. Carbrey, 778 P.2d 1261, 1269-70 (Ariz. Ct. App. 1989) (Grant, C.J., dissenting), *appeal denied*.

([F]oreseeability "becomes a conclusion of law only when the mind of a fair and reasonable man could reach only one conclusion; if there is room for a reasonable disagreement, the question is one to be determined by the trier as a matter of fact" Vendrella, 87 A.3d at 564 (citing Gutierrez v. Thorne, 537 A.2d 527 (Conn. App. Ct. 1988). The Supreme Court in *Vendrella* refers to *Dolezal:* "In the first instance, the determination of whether the defendant owed to [the] plaintiff any duty to use due care at all is always a question of law for the court … This issue is to be presented to the jury, however, where there is a debatable question as to whether the injury to the plaintiff was within the foreseeable scope of the risk and whether the defendant was required to recognize the risk and take precautions against it." Dolezal, 778 P.2d at 1265 (quoting Schnyder v. Empire Metals, Inc., 666 P.2d 528, 531 (Ariz. App. Ct. 1983)).

"Negligence is never presumed. It must be proved, and it must be shown to be the proximate cause of a plaintiff's injuries." Clifton v. Holliday, 85 Ohio App. 229, 235 (1949).

[167] Hansen 1993, *supra* note 74, at 186-190.

[168] Hansen 1993, *supra* note 74, at 188. The Wyoming Supreme Court has looked to eight specific factors (the "Gates" factors) in conducting its duty analysis. These factors include: (1) foreseeability of harm, (2) nexus of defendant's conduct and injury (3) probability of injury (4) moral blame of defendant (5) policy considerations (6) burden on defendant (7) consequences to community and judicial system (8) could it be insured (paraphrased).

These factors provide the court with a framework for determining the existence of a legal duty in a negligence case. However, the Wyoming Supreme Court has noted that there is no "scientific formula" for determining whether a duty exists. Therefore, these factors should be used in conjunction with broad policy notions to allow the court to determine in any given case whether a risk is inherent, and hence, whether a legal duty exists.

clear approach to duty determination that would be suitable not just for Wyoming. Hansen describes an inherent risk analysis to determine if the plaintiff assumed the primary risk of that activity. If the plaintiff assumed the primary risk and it was the proximate cause, then there would be no duty under the common law and no cause of action as described and outlined in most ELAs. If the plaintiff presents evidence of negligence, then the court would analyze the complex legal and social policies in duty determination as outlined by Judge Hand[169] and as found in that particular state's common law.

Contrary to the implied consent approach to the doctrine of primary assumption of risk, the duty approach provides an answer that does not depend on the particular plaintiff's subjective knowledge or appreciation of the potential risk. The duty approach looks to see if the defendant, under the facts, owed a duty to the plaintiff. This is a similar approach under most ELAs. Even where the plaintiff, who falls while skiing over a mogul, is a total novice and lacks any knowledge of skiing whatsoever, the ski resort would not be liable for his or her injuries. The courts need to classify the risks, making delineation of inherent risks through the common law, understanding of the sport and the relationship of the parties.

> If the application of the assumption of risk doctrine in a sports setting turned on the particular plaintiff's subjective knowledge and awareness, summary judgment rarely would be available in such cases, for, as the present case reveals, it frequently will be easy to raise factual questions with regard to a *particular* plaintiff's *subjective* expectations as to the *existence* and *magnitude* of the risks the plaintiff voluntarily chose to encounter. By contrast, **the question of the existence and scope of a defendant's duty of care is a *legal* question which depends on the nature of the sport or activity in**

[169] This general duty approach has been adopted in Michigan. "Generally, the duty that arises when a person actively engages in certain conduct may arise from a statute, a contractual relationship, or by operation of the common law … The ultimate inquiry … is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty. Factors relevant to the determination whether a legal duty exists include the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. However, **the most important factor to be considered in this analysis is the relationship of the parties and also there can be no duty imposed when the harm is not foreseeable**. In other words, before a duty can be imposed, there must be a relationship between the parties and the harm must have been foreseeable. If either of these two factors is lacking, then it is unnecessary to consider any of the remaining factors." Hill v. Sears, Roebuck and Co, 822 N.W.2d 190, 196 (Mich. 2012).

> **question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury.** (See, e.g., 6 Witkin, Summary of Cal. Law, *supra*, Torts, ß 748, pp. 83-86 and cases cited.) Thus, the question of assumption of risk is much more amenable to resolution by summary judgment under a duty analysis …[170]

The courts often confuse the primary assumption of risk as a defense when the primary assumption of risk requires the duty analysis. "The classic knowledge, appreciation and voluntary consent are not at issue. Mere participation in the sport implies knowledge of those risks deemed inherent."[171] The courts should analyze the fact situation to determine if the plaintiff's injuries were from inherent risks (using the inherent risk analysis described above). If so, there would be no duty under the duty analysis regardless of the defendant's actions or the plaintiff's understanding under the *volenti non fit injuria* doctrine used in recreational activities.

How does negligence play into the ELA? Again, commentators maintain that a negligence action against a defendant is not barred[172] by the ELAs but the courts are less clear. In an early case interpreting the ELA from the Appellate Court of Illinois, *Carl v. Resnick*[173] the court cited a legal journal: "Accordingly, cases involving the 'vicious propensity' of a horse to bite or to kick someone not engaged in some

[170] Knight v. Jewett, 834 P.2d 696, 706 (Cal. 1991) (emphasis added).

[171] "The Act should not be used as a basis for the affirmative defense of assumption of risk. This will only result in confusion with secondary assumption of risk or contributory negligence. If it appears to defense counsel that contributory negligence is a viable affirmative defense, it should by all means be pled. Then, if defendant fails in his pre-trial motions, he can assert the affirmative defense and urge that despite defendant's alleged negligence, plaintiff was contributorily negligent. Defendant then has the burden of proving the presence of contributory negligence, or plaintiff's failure to use ordinary care under the circumstances. See Wyo. Civ. Pattern Jury Instructions, No. 10.01 (Sept. 1981) (contributory negligence defined as a "failure to use ordinary care"). Plaintiff's actual knowledge and appreciation of the risk would then be viewed by the court or jury in assessing plaintiff's share of contributory fault. O'Donnell v. City of Casper, 696 P.2d 1278, 1284 (Wyo. 1985)." Hansen 1993, *supra* note 74, at 186, note 217.

[172] "Many, for example, call the equine liability laws 'zero liability laws.' Some say that these laws have permanently ended all liability in the horse industry and have somehow made liability insurance obsolete. These statements are pure fiction; they originate from people who have never seen the law." Julie I. Fershtman, *Four Strategies for Avoiding Liability,* Equisearch (Dec. 30, 2001), https://perma-archives.org/warc/GZN5-W7YJ/http://www.equisearch.com/article/eqliabilit367.

[173] 714 N.E.2d 1, 11 (Ill. App. Ct. 1999) (citing Carmel, *supra* note 74, at 159).

form of equine activity will continue to be litigated under the common law, completely unaffected by enactment of an EALA." The Supreme Court in *Vendrella* held that the statute "will not immunize the owner or keeper from negligence claims involving foreseeable injuries caused by the horse." [174]

Perhaps courts and lawyers unfamiliar with horses would conclude that a person with years of experience with horses would know when and how a horse will react. The Connecticut Supreme Court seemed to be of this view: "[I]t is illogical to relieve the defendants, as the party with greater expertise and information concerning the dangers associated with engaging in horseback riding at their facility, from potential claims of negligence surrounding an alleged failure to administer properly the activity."[175] This author very experienced in equestrian sports does not support this view.

Comparing again to ski statutes, in *Brewer v. Ski Lift, Inc.* [176] the Montana court could find no rationale for this broad language to include negligence and should "not require all skiers to assume all risks no matter what the cause." Comparing the equine statutes with skiing statutes where the inherent risk was not part of the statutes, the statutes were interpreted to be very broad including ski operator negligence.[177] These statutes were amended to require proximate cause and outlined the operator's duties.

[174] Vendrella v. Astriab Family Ltd. P'ship, 87 A.3d 546, 559 (Conn. 2012).

[175] Reardon v. Windswept Farm, LLC, 905 A.2d 1156, 1162 (Conn. 2006). This quote was altered in *Vendrella: "Accordingly, it would be "illogical to relieve [such owners and keepers], as the [persons] with greater expertise and information concerning the dangers associated with [the animals] from potential claims of negligence surrounding an alleged failure to [take reasonable steps to prevent foreseeable injuries]."* Vendrella, 87 A.3d at 559.

[176] 762 P.2d 226, 231 (Mont. 1988). This case is also discussed in Hansen 1993, *supra* note 74, at 169.

[177] "123. MONT. CODE ANN. § 23-2-736 (1991) states "a skier assumes the risk and all legal responsibility for injury to himself or loss of property that results from participating in the sport of skiing **by virtue of his participation**." (Emphasis added.) The court also struck down [this provision and] the following provision on similar grounds: "the responsibility for collisions with a person or object while skiing is the responsibility of the person or persons and not the responsibility of the ski area operator." The court held that these sections essentially eliminated any proximate cause requirement, thereby precluding recovery against an operator for injuries caused by operator negligence. Brewer, 762 P.2d at 230. The latter section has now been deleted from the act, and the former section revised to require proximate cause and to clearly delineate an operator's duties." Hansen 1993, *supra* note 74, at 169. The court added the following sentence for the District's jury instruction: "A skier assumes the risk and all legal responsibility for injury to himself or loss of property resulting from the inherent risks in the sport of skiing that are essentially impossible to eliminate by the ski area operator." Brewer, 762 P.2d at 231.

Speziale[178] states in her commentary: "The protection of the Equine Liability Statute is limited to injuries resulting from negligence-free conduct by the equine operator." She gives no citations for this and arguably this is again the wrong approach analyzing the defendant's actions. If the courts use this "negligence-free" approach the actions of the defendant will be examined, which would be sent to a jury. The inherent risk analysis would avoid looking at the defendant's conduct when inherent risk is the proximate cause. As a result, the defendant's actions would not be relevant. Carmel also states that: "EALAs do not limit liability for injuries resulting from negligence."[179] If the court investigates the inherent risk involved in the fact situation, then the conduct of the defendant is not examined at all but the focus is on the injury and what caused that injury. The conduct of the defendant is irrelevant unless that conduct was the proximate cause. The analysis should begin with the facts and what is inherent in the sport as a matter of law (and the relationship of the parties).

Blum, in her article, states that: "North Carolina's EALA provides that negligence does not prevent or limit the liability of a sponsor." She goes on to add, "EALAs that identify negligence as a non-inherent risk severely limit the immunity that the EALAs purport to afford sponsors." But as mentioned above, one could argue that negligence was never at issue and that the ELAs only codified the common law regarding inherent risks making it a matter of law to be determined by the court and not the jury, thus reducing costs. Blum asserts, "[T]here is very little tortious conduct that is not negligent, willful or wanton or intentional."[180] This statement is contradicted by cases wherein a horse's unpredictable behavior was the proximate cause, which would be best described as inherent risk and therefore not considered to give rise to a duty in a recreational context.

If the statute does not explicitly include general sponsor negligence, why do some courts hold that it does?[181] There is no ELA that explicitly provides protection from negligence for sponsors or

[178] Speziale, *supra* note 146, at 92.

[179] Carmel, *supra* note 74, at 159. She also states "These EALAs have no impact on liability when the equine professional has been negligent" *Id,* at 174. Sharlene A. McEvoy, *The Rise of Equine Liability Activity Acts*, 3 Animal L. 201, 215 (1997). McEvoy agrees with Carmel and cites Carmel in her 1997 article.

[180] Karen A. Blum, Comment, *Saying "Neigh" to North Carolina's Equine Activity Liability Act,* 24 N.C. Cent L. J. 156, 165 (2001).

[181] The Texas Appeals Court in Steeg*:* "But sponsor negligence is not expressly listed as an inherent risk of equine activity nor is it mentioned as an exception to immunity. *See id*. ß 87.003. We conclude that the absence of negligence from the list of exceptions means only that sponsor negligence is not excepted from immunity." Steeg v. Baskin Familyh Camps, Inc., 124 S.W.3d 633, 638 (Tex. App. 2003).

professionals, which is consistent with other sport statutes and common law. The *Loftin*[182] decision went too far.

The New Jersey Supreme Court in *Hubner* [183] struggled with how the use of negligence within the state's ELA works with other aspects of the act. Like the Michigan ELA, the NJ ELA provides an exception to limited liability as "d. [Engage in a]n act or omission … that constitute negligent disregard for the participant's safety, which act or omission causes the injury [.]"[184] Because this section is limited to "operators," co-participants should not be affected. The court struggles with the internal inconsistencies of the ELA, suggesting that the negligent disregard "might operate to effectively swallow the Act's protection entirely."[185]

The Connecticut ELA suggests that the only negligence not assumed by participants is that of the provider of the horse.[186] McEvoy's commentary cites the hearings in Connecticut of the General Assembly where the intention of the act was not "to protect anyone from acts of negligence, but to limit the number of frivolous lawsuits." [187] The Supreme Court of Connecticut did find that the state's ELA did not preclude a claim of ordinary negligence on the part of the horse provider. The court says: "This protection granted by the legislature, however, does not permit the operator to avoid liability entirely for its negligence or that of its employees." [188] In another Connecticut case, the Superior Court states, "Moreover, the clear language of Connecticut General Statutes § 52-557p makes the statute inapplicable to an action based on the negligence of the person providing the horse or the failure to guard or warn against a dangerous condition, use, structure or activity by the person providing the horse." [189]

[182] *See* Loftin v. Lee, 341 S.W.3d 352, 357 (Tex. 2011). "This provision alone refutes the argument that sponsor negligence is not an inherent risk of equine activity**.**"

[183] Hubner v. Spring Valley Equestrian Ctr., 1 A.3d 618, 626 (N.J. 2010).

[184] N.J. Stat. Ann. § 5:15-9 (West 2014).

[185] Hubner, 1 A.3d at 626.

[186] "Each person engaged in recreational equestrian activities shall assume the risk and legal responsibility for any injury to his person or property arising out of the hazards inherent in equestrian sports, unless the injury was proximately caused by the negligence of the person providing the horse or horses to the individual engaged in recreational equestrian activities or the failure to guard or warn against a dangerous condition, use, structure or activity by the person providing the horse or horses or his agents or employees." Conn. Gen. Stat. § 52-557p (2012).

[187] McEvoy, *supra* note 154, at 214.

[188] Reardon v. Windswept, 280 Conn. 153, 164 (2006). "This language establishes that the plaintiff assumed the risk for certain injuries when riding at the defendants' facility due to the nature of horseback riding as an activity, but that an operator of such a facility can still be liable for injuries caused by its own negligence." *Id.* 167.

[189] Botelle v. Level Acres LLC, CV040184118S, 2006 Conn. Super. LEXIS 2211, at 4-5 (Jud. Dist. July 25, 2006).

That would be similar to exceptions in other ELA statutes, which are viewed as situations of potential negligence—situations of human error.[190] McEvoy also states the exceptions are "negligent acts, such as providing a faulty horse or faulty tack…"[191] This runs counter to the Supreme Court majority in *Beattie,* which classifies the exceptions in the Michigan ELA as inherent risks.[192] The New Jersey ELA, like Michigan's, has negligence listed in the exceptions. Unlike the Supreme Court in *Beattie,* the New Jersey Supreme Court in *Hubner* took a broad view of the intent of the Act, and which this paper endorses as the best approach:

> … [T]he participant must demonstrate that the injury arose not because of one of the inherent dangers of the sport, but because the facility's operator breached one of the duties it owes to the participant, as defined in the statute's exceptions. **A contrary approach, in which the exceptions are read expansively, would threaten to upset the choice that the Legislature has made, because it would potentially permit the exceptions to extinguish the statute's broad protective scope.**[193]

The *Hubner* court concludes, "Nothing in the record suggests that the operator had a duty of care embraced within the statute's exceptions that it breached, or that such a breach led to the injury about which the plaintiff complains."[194]

The Texas Supreme Court, in *Loftin,* goes too far in including sponsor negligence as an inherent risk. The statutes could (and arguably should) be consistently interpreted as identifying the statutory exceptions as situations of either negligence or breach of duty, as the New Jersey Supreme Court has done in the case cited above. These exceptions should not be confused with inherent risks over which the potential defendant's actions would have no effect. If there remains any confusion over what constitutes an inherent risk, the case could then go to the jury for determination, but only after the judge has determined that the defendant had a duty.

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[190] Centner 2006, *supra* note 155*,* at 53. Centner does categorize the mismatching exception in the ELA as negligent actions and as such would not be inherent risks contrary to the Supreme Court in *Beattie*.

[191] McEvoy, *supra* note 179*,* at 214.

[192] Beattie v. Mickalich, 486 Mich. 1060, 1062. The *Beattie* Court of Appeals classifies the exceptions as "human error not integral to engaging in an equine activity." Beattie v. Mickalich, 284 Mich. App. at 573.

[193] Hubner v. Spring Valley Equestrian Center, 203 N.J. 184, 206 (2010) (emphasis added).

[194] *Id.* at 208.

Merryman describes Maryland pre-ELA cases, which outline similar fact situations to the ELA exceptions and were a basis for a claim in negligence.[195] Other commentators have also described the exceptions as examples of negligence.[196] Blum[197] describes the exceptions as "non-inherent risks." She goes on to classify the mismatch of participant's ability to activity as a "specific example of negligence." McEvoy[198] points out that the 1983 California case of *Harrold v. Rolling J Ranch*[199] viewed both the matching of horse to rider and the condition of tack as duties a commercial operator had toward clients.[200] Even the preamble to the Michigan ELA states: "to prescribe certain duties for equine professionals."[201] It is difficult to support the interpretation of the ELA exceptions as inherent risks, as suggested by the Michigan Supreme Court in *Beattie* and the Texas Supreme Court in *Loftin*.

a. Co-participants and Sponsor's Negligence: Definition or Exception?

The court in *Knight*[202] made a distinction between two possible kinds of relationships between parties: either instructor and student (with one party being more knowledgeable than the other) or co-participants. The co-participant relationship is included in many ELAs. A co-participant's negligence is defined as an inherent risk.[203] This is consistent with the California case *Knight*, a state where there is no ELA. The *Knight* case made a distinction between a coach/instructor and a co-participant. *Kelly* is also in agreement with *Knight* and quotes *Knight:*[204]

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[195] Merryman, *supra* note 74*,* at 144-146.

[196] Speziale, *supra* note 146*,* at 92-93.

[197] Blum, *supra* note 180*,* at 169.

[198] McEvoy, *supra* note 179*,* at 202-206.

[199] Harrold v. Rolling J. Ranch*,* 19 Cal. App. 4th 578 (1993).

[200] Other cases have classified mismatching of horse to rider as negligence:

"This evidence and the inferences there from were sufficient for a jury to find that the horse provided to plaintiff was not suitable, that defendant's wrangler knew or should have known that the horse was not suitable because plaintiff was having difficulty controlling the horse, and that defendant's wrangler was negligent in not advising plaintiff or otherwise assisting him so that plaintiff could achieve adequate control of the horse." Shandy v. Sombrero Ranches**,** 525 P.2d 487, 488 (1974).

[201] Mich. Comp. Laws Ann. § 691.1661 (West 1995). Preamble to the Michigan ELA.

[202] Knight v. Jewett, 3 Cal. 4th 296 (1992).

[203] *See supra,* note 113 for a chart comparing statutory inherent risk definitions.

[204] Kelly v. McCarrick, 155 Md. App. 82, 101 (Md. Ct. Spec. App. 2004).

> [T]he overwhelming majority of the cases … have concluded that it is improper to hold a sports participant liable … for ordinary careless conduct committed during the sport—for example, for an injury resulting from a carelessly thrown ball or bat during a baseball game—and that liability properly may be imposed on a participant only when he or she intentionally injures another player or engages in reckless conduct that is totally outside the range of the ordinary activity involved in the sport.

In the Louisiana case *Gautreau v. Washington*[205] co-participants were seen to have a limited duty to others not to act wantonly or willfully, suggesting that if co-participants could be held liable for negligent handling, then participants would be reluctant to participate—which surely is not the intention of the ELA. In the Louisiana ELA, the negligence of a participant is an inherent risk.[206] This is similar to the approach taken to sports participation in general.[207] The ELA exception of wanton or willful conduct is aimed more at co-participants rather than at the class of sponsors/professionals, because sponsors'/professionals' negligence is not covered as an inherent risk in any ELA. Certainly wanton or willful conduct would be actionable even without being explicitly mentioned in the ELA.

Courts hold that wanton and willful conduct cannot be contracted out of unlike negligence (in most states).[208] Negligence for the sponsors and professionals would be addressed in a waiver rather than by the ELA and would be unavailable in some states. The courts also need to analyze the relationship between the parties in order to determine to which class they belong. If the parties are co-participants, then often the ELA will provide negligent handling of a horse as an inherent risk.

[205] Gautreau v. Washington, 672 So. 2d 262 (La. Ct. App. 1996).

[206] La. Rev. Stat. Ann. §9:2795.3(A)(6)(e) (2015). (A)(6)"Inherent risks of equine activities" means those dangers or conditions which are an integral part of equine activities, including but not limited to:

(e) The potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the animal or not acting within his ability

[207] "Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport." And further the court states: "The courts have concluded that vigorous participation in such sporting events likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct. " (emphasis added) Knight*,* 3 Cal. 4th at 316.

[208] Doyice J. Cotten & Mary B. Cotton, Legal Aspects of Waivers in Sport, Recreation and Fitness 94-95 *(*PRC Publishing, INC. 1997). Three states were identified for not enforcing waivers.

Because co-participants may not necessarily have a high skill level in handling horses (as in *Beattie*), allowing them to be sued for negligence would diminish their participation, which is not the intent of the ELA. However, a professional or sponsor with a higher level of education and involvement can and should be held to a different standard. This is reflected in most ELAs' lack of mention of professional/sponsor negligence specifically as an inherent risk, and its inclusion in some ELAs as an exception to immunity.

The heightened show of negligence that Speziale [209] mentions would offer a consistent approach if the parties were co-participants. There is no such section in any ELA regarding the negligence of a professional, who should arguably have to operate as a reasonable person in order not to increase the risk of injury to others. While a professional (or sponsor) should be held to a higher standard, any duty owed to the plaintiff should also be analyzed using the inherent risk fact analysis described previously.

> However, plaintiffs failed to identify a distinct act that defendants should have done or refrained from doing under the circumstances to protect the infant plaintiff, or some distinct, enhanced duty that was violated (*see Schwartz*, 255 AD2d at 38).[210]
>
> New York courts have slowly begun to allow recovery for injuries caused by domestic animals on a theory of negligence … The legal basis for these decisions stems from section 518 of the Restatement (Second) of Torts which states, 'one who possesses or harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, is subject to liability for harm done by the animal if ... (b) he is negligent in failing to prevent the harm.'[211]

[209] "Rather, the court should impose a heightened showing of negligent disregard in order to hold the defendant liable for negligence in his or her conduct." Speziale, *supra* note 146, at 101.

[210] Fintzi v. Riverdale Riding Corporation**,** 32 A.D.3d 701, (N.Y. App. Div. 2006) *appeal denied.* "Before a New York court may consider a negligence claim concerning the behavior of an animal, there must be some other distinct act that the defendant should have done or refrained from doing under the particular circumstances or some distinct, enhanced duty." Schwartz v. Armand Erpf Estate, 255 A.D.2d 35, 38 (N.Y. App. Div. 1999).

[211] Doyle v. Monroe Cnty. Deputy Sheriff's Ass'n, Inc., 758 N.Y.S.2d 791, 793 (N.Y. App. Div. 2003) (citing Schwartz v. Armand Erpf Estate, 255 A.D.2d 35, 38 (N.Y. App. Div. 1999)).

This expanding basis for negligence has been seen in the New York cases when children are injured. "[T]he presence of a horse on property where small children are known to be present constitutes a particular danger to young children, warranting imposition of a further duty to provide protections."[212]

A negligence claim against professionals and sponsors should survive the ELAs, even those silent as to negligence. The expanding negligence claims for domestic animals in New York State seem to revolve around a heightened duty towards protecting children. New York does not have an ELA. Most ELAs do not differentiate between a child and an adult; children will be deemed to have accepted inherent risk of equine activities if classified as a participant in an equine activity.

Perhaps this reasoning is what led the Connecticut Supreme Court to allow the negligence claim for the child's injury in *Vendrella*.[213] The Supreme Court in *Vendrella* did not cite the plaintiff-defendant relationship as a key factor in its decision. Instead, the Supreme Court in *Vendrella* grappled with strict liability and foreseeability of a horse bite. Perhaps following the above analysis of the relationship of the parties would provide a clearer line of reasoning in the opinion. In *Vendrella* the plaintiffs were business invitees for a non-equine purpose yet had access to the horses.[214] It is uncertain if the young age of the injured may have influenced the court or if the defendant, Astriab, was misleading to the animal control officer.[215] A clearer discussion of the parties' relationship as being business invitees and the appropriate level of duty for that relationship would have been more helpful for future cases. There could be a higher level of duty owed to a business invitee,[216] especially a young plaintiff lacking equine experience. The courts should examine the relationships of the parties in order to accurately assess the level of duty required.

[212] Schwartz, 255 A.D.2d at 39-40.

[213] Vendrella, 311 Conn. 301. A child being injured in *Vendrella* may have been an unmentioned factor.

[214] Vendrella v. Astriab, 133 Conn. App. 630, 632-33 (2012). See also section entitled **Case Descriptions.**

[215] "The deposition testimony of Milford animal control officer Richard George … characterized Astriab's conduct during his investigation as misleading." *Vendrella,* 133 Conn. App at 635 n.9.

[216] "The special obligation toward invitees exists only while the visitor is upon the part of the premises which the occupier has thrown open to him for the purpose which makes him an invitee." "But the obligation of reasonable care is a full one, applicable in all respects, and extending to everything that threatens the invitee with an unreasonable risk of harm…and take reasonable precautions to protect the invitee from danger which are foreseeable from the arrangement or use of the property." W. Page Keeton, *Prosser and Keeton on Torts 5th ed, supra at 424-425.* He goes on to mention children and attractive nuisance.

The 2010 Indiana Court of Appeals in *Perry v. Whitley* notes that negligence of a professional or sponsor appears neither in the listed of exceptions nor in the list of inherent risks. Where, then, should it fall? Should the statutes outlining negligence claims survive, or should the question be left up to the duty analysis and common law? The Indiana court goes on to explain that while what a statute says is important, what it does not say is equally so, and if the statute is in derogation of the common law, then it should be strictly construed. The court concludes that the ELA was not intended to abrogate the common law action for negligence of the sponsor. They also note that the sponsor is not liable for failing to use reasonable care to mitigate an inherent risk that was the proximate cause of the injury. [217] Whether a claim of negligence survives any ELA should not be a matter of chance, contingent upon being assigned this or that judge in a particular state.

Next we might ask, how should the courts deal with a defendant's actions that do in fact appear to have been the cause of the injury?

VII. Negligent Handling

At common law, the owner of a horse was not liable for an injury caused by the horse unless either the owner knew of the vicious nature of the horse or the horse was negligently handled.[218] Negligent handling is a thorny issue that the courts seem eager to avoid, and for good reason. In *Smith v. Landfair,*[219] the Ohio Court of Appeals seemed to take a step back in application of the very broad Ohio ELA, which even includes spectators in the class of those barred from suit for inherent risks.[220] The same court's previous decision in *Allison v. Johnson*[221] applied the act, expanding the idea of a spectator (defined as a participant in the Ohio ELA) to a bystander relying on the dictionary definition of a spectator. The fact that the plaintiff was actually watching the horse seemed to be the hook on which the court hung its decision. The plaintiff had no intention of watching but was attracted to the commotion of the defendant's problematic dealings with his horse (negligent handling or inherent risk?). In a very similar fact situation in *Smith*, the plaintiff

[217] "Initially we note that negligence of an equine activity sponsor neither is one of the exceptions to immunity listed in Section 2(b), nor is it included in the non-exclusive list of inherent risks of equine activity under Indiana Code section 34-6-2-69. Thus, Indiana's Equine Activity Statute, like equine activity statutes in some states but unlike some others, is silent on the place of sponsor negligence in the overall scheme of equine liability." 931 N.E.2d 933, 939 (2010).

[218] Finney, 78 Cal. 498, 502 (1889).

[219] 135 Ohio St. 3d 98 (2011).

[220] Ohio Rev. Code Ann. § 2305.321(3)(g) (LexisNexis 2015).

[221] 2001 Ohio App. LEXIS 2485, 14-16.

attempted to aid a horse handler. One would assume that this fact situation would lend itself more clearly to that person being included in the class of spectator/participant and thus barred from suit. But the plaintiff claimed that she did not even look at the horse. Perhaps this proved a wise tactic in light of the Supreme Court's decision in the *Allison* case, which ended by saying immunity would not be granted in all circumstances where someone happens to see a horse and suffers an injury.[222]

It does seem rather harsh that the mere act of Allison's getting out of a car to see if her friend needed help should cause her to be barred from bringing civil suit. But the same court, ten years later in *Smith*, given a set of facts that appear to fit the Ohio ELA even more closely, did not rule that the plaintiff was barred from suing. This was an injury of someone who was actively involved in the unpredictable actions of a horse (facts from the Court of Appeals): "Ms. Smith, who was twenty-four at the time of these events and had extensive horse experience, also had involvement in Annie's care [*the horse that caused the injuries*]."[223] Ms. Smith voluntarily attempted to help yet she was deemed not a participant and could sue.

In an older New Hampshire case, *Wright v. Loon Mountain*, Justice Thayer opined that failure to properly control a horse was a risk inherent in the sport.[224] This could reasonably be the prevailing view when the handler is not a professional. There are, however, situations in which the handling of a horse actually *should* be classified as negligent, such as when the handler has not taken due care in the circumstances. General misbehavior of a horse will be difficult not to classify as inherent risk, but if there are facts that point to undue care, that claim should not be barred. Yet some courts are reluctant to embark on any discussion of negligent handling during the misbehavior of a horse: "The original complaint based its claim of liability upon an alleged **duty to provide a safe environment** for riding instruction, **a duty which we do not find to be capable of fulfillment no matter how diligent a horseback riding stable may be**."[225]

Some courts take the view that working with horses is so inherently dangerous in and of itself that no amount of care could provide a completely safe working environment. There are some situations where a horse is not handled correctly, but proof would be very difficult and the situation would be very unusual. Due to the unpredictable nature of horses, a horse could react positively to a reprimand on Monday, yet

[222] 2001 Ohio App. LEXIS 2485, 20-21.

[223] Smith*,* 194 Ohio App. 3d at 469.

[224] 140 N.H. 166, 172 (1995) (dissenting).

[225] Danielle Thompson v. Otterbein College, 1996 Ohio App. LEXIS 389, 5 (emphasis added).

it could be inappropriate handling of the horse on Friday. This could be due to weather, herd mates, or general activity around the horse. There are just too many possible variables to allow blanket generalizations about negligent handling of horses.

However, there are situations where the defendant could be said to be negligent as in the *Smith* case. Ms. Smith, the plaintiff, did claim that the defendant "acted negligently by attempting to handle the untrained horse, failing to seek assistance when unloading the horse from the trailer and was otherwise negligent."[226] The defendant went against the wishes of Mr. Smith, the trainer of the horse and father of the plaintiff, when the defendant trailered the horse by himself. The elderly Mr. Landfair did not have his hearing aide in and the horse was skittish by nature (propensity of the horse not taken into account by the defendant which could also be classified as reckless, wanton conduct). The defendant was aged, and not agile and he went against the advice of the horse professional who was training his horse, Mr. Smith. The skittish horse shied at a buggy and caused injuries. One could argue this is not how a reasonable person would act, and those actions together dramatically increased the risk of injury to those in the area.

"The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or others within the range of apprehension."[227] "It was within the range of defendant's apprehension that a risk of injury to plaintiff existed and could have been avoided by the exercise of reasonable care. At least a jury would be warranted to so find."[228] This is a possible approach to the *Smith* case that would provide a consistent, predictable result when the facts support a situation where the defendant did not act reasonably when handling a horse.

Controlling an equine is an art, not a science. If the plaintiff is claiming negligent handling, there must be some evidence that the defendant acted without reasonable care. In the *Beattie* case there is no such evidence.[229] Saddling a green horse can either be accomplished easily or can be very challenging depending on the circumstances. The last thing one would want to do is to restrict the horse's head in the manner the plaintiff did in *Beattie*.[230] Generally when saddling for the first time, a wise horseperson would keep the horse in his own stall where the environment is familiar and the horse is comfortable. This was not done in the *Beattie* case. The challenge is the yardstick, to

[226] Smith*,* 194 Ohio App. 3d at 470.

[227] Palsgraf v. Long Island R. Co., 248 N.Y. 339, 344 (1928).

[228] Nicholas v. Tri-State Fair & Sales**,** 82 S.D. 450, 456 (1967).

[229] *See supra,* notes 25 and 26 where the facts are discussed in the Court of Appeal *Beattie.*

[230] *See supra,* note 101.

know what a reasonable person would do in this situation. In *Beattie*, where both the defendant and plaintiff had a similar level of knowledge about horses, learning to saddle and train a horse is a trial-and-error system, similar to skating or skiing. Some have problems controlling their skis or skates. The *Beattie* case involved a recreational activity. Neither party was an instructor or professional. There was no evidence that the defendant in *Beattie* had been warned not to saddle the horse, as Landfair (the defendant) had been warned not to unload his horse in *Smith***.** In *Beattie,* there was nothing specifically cited that the defendant could have done to avoid the horse's reaction. Under the inherent risk analysis, there was thus no duty.

Any handling that causes a horse to react in an unpredictable manner cannot be blameworthy. Handling a horse in a particular manner could be safe on a certain day but unsafe on a different day. Unpredictability means that one cannot predict how a horse will react to a handler's movements. Instead of focusing on the conduct of the plaintiff or the defendant, the court should focus on the proximate cause for reasons offered under **The Importance of Inherent Risk**. Was the proximate cause the bucking horse (inherent risk) or was it the firecrackers (defendant negligence) as described in *Cooperman*[231]?

VIII. Conclusion

Some would argue that horses built America and hold a special place in its history and fabric. Even as their social standing changes with the transition from workhorse to pleasure horse, horses still provide a large economic benefit.[232] Both pleasure and work are sources of contributions to the quality of American lives.[233] We have to ask, however, what will happen to the 9.2 million horses[234] in United States if the courts do not protect owners from frivolous lawsuits?

[231] *See supra*, note 128 and the discussion of *Cooperman*.

[232] American Horse Council cites $112 billion in note 4. Other sources claim a higher amount; $300 billion is cited for the economic impact of the equine industry in Julianne Wyrick, *Today's Equine Industry,* https://perma.cc/AU9B-KV7M (last visited Nov. 11, 2014).

[233] Marcum, Heidi, *Encyclopedia of human-animal relationships: a global exploration of our connections with animals,* Edited by Bekoff, Marc, v. IV, "Living with Animals: Horses and Humans: From Prey to Partner," Westport, CT: Greenwood Press, 2007, 1134.

"Anyone with normal experience is required to have knowledge of the traits and habits of common animals". W. Prosser, Handbook of the Law of Torts § 33, 197-98 (5th ed. 1984).

[234] Deloitte Consulting LLP for the American Horse Council Foundation: *National Economic Impact of the U.S. Horse Industry***,** *National Summary* 1*,* American Horse Council (2005).

The national equine industry deserves a clear, unified approach to equine-related injuries. In order to achieve consistent application of the ELA, the courts should look at the facts and analyze the inherent risks to determine the proximate cause of the injury. To do this the courts must first appreciate the nature of the horse, taking judicial notice both of prey animals' reactions and of the limited ability of professionals' ability to control those reactions. If a situation were caused by inherent risk then the ELA would offer immunity from litigation through a summary judgment for no cause of action. For the ELA to function effectively, the facts surrounding inherent risk should not go for jury consideration but should be determined as a matter of law, saving money and, court time and providing consistency and predictability.

This approach will also allow professionals and sponsors to understand their own responsibilities while being able to rely on consistent treatment by the courts nationally. The equine industry requires consistent and predictable legal responsibilities and outcomes.

The ELA should be seen as a codification of the common law of *volenti non fit injuria* such that a plaintiff is barred from suit because the risks encountered were not the fault of the defendant but the result of the plaintiff's voluntary participation in a recreational activity.[235] (In other words, the defendant could not have avoided the injury through the exercise of reasonable care.) Most ELAs make clear the inherent risks involved so the courts may as a matter of law reduce the number of cases going to trial and thus reduce both costs and the risk of plaintiff-minded juries awarding unpredictable rulings.

The equine industry should not be viewed differently from other sports in which there are co-participants. To determine the level of duty required, the courts should follow the common law, examine the relationship between the parties, and accept that co-participants do not owe a duty of care to other co-participants. This interpretation will fit well with a consistent view of the ELA where the definition of inherent risk will include only the co-participant's and not the sponsor's negligence. This approach will also allow each state to impose its own view of sponsor negligence, either allowing or not allowing sponsors to contract out of a duty through waivers or exculpatory clauses.

Tort law serves to divide up damages, apportioning according to fault. It seems inherently unfair that a defendant would be saddled with inherent risks when the plaintiff has taken on those risks as part of the

[235] "It is well settled that '[w]here individuals engage in recreational or sports activities, they assume the ordinary risk of the activity, and cannot recover for any injury, unless it is shown that the other participant's actions were either reckless or intentional.'" Sword v. Altenberger**,** 2008 Ohio 2513, 17 (Ohio Ct. App.) *quoting* Marchetti v. Kalish (1990), 53 Ohio St.3d 95, 559 N.E.2d 699.

recreational activity—and when, moreover, those very risks are part of what makes the activity itself attractive. Those inherent risks should be discovered as a matter of law following the non-exhaustive list included in most ELAs.

It should not be a professional's duty to protect any voluntary equine participant from injuries related to the inherent risk of that recreational activity. If we want these majestic creatures in our society along with the 102 billion dollars of their economic benefit,[236]—in addition to intangible therapeutic, partnership and companionship benefits they offer to owners and sponsors—courts will need to clearly [237] and consistently delineate what professionals are responsible for through a uniform and fair application of the ELAs.

[236] Deloitte Consulting LLP for the American Horse Council Foundation: *National Economic Impact of the U.S. Horse Industry*, *National Summary* 1, American Horse Council (2005).

[237] FOOTNOTE

2016 Animal and Natural Resource Law Case Review

Morgan Pitz

Animal Legal Defense Fund v. Otter
118 F. Supp. 3d 1195 (D. Idaho 2015)

Summary of the Facts

In 2014, Mercy for Animals, a Los Angeles animal rights group released undercover footage of workers using a tractor to move a cow by a chain around her neck. The footage also showed the workers beating, kicking, and jumping on cows. The Idaho Dairymen's Association drafted and sponsored a bill that criminalized the types of undercover investigations that Mercy for Animals used to film the footage they released. The "Ag Gag" bill was passed and Idaho Code Ann. § 18-7042 criminalizes entering, obtaining records of, obtaining employment with an agricultural production facility by force, threat, misrepresentation or trespass. Anyone who makes audio or video recordings without the owner's express consent also violates the statute. Animal Legal Defense Fund (ALDF) brought a claim challenging the law as unconstitutional as violations of the First and Fourteenth Amendments. ALDF brought a motion for summary judgment on the First Amendment and Equal Protection claims.

Summary of the Holding

The court granted ALDF's motion holding Idaho Code Ann. § 18-7042 unconstitutional. The court recognizes that the purpose of the law is to punish those who speak on topics relating to the agricultural industry and the effect will be suppressing speech that relates to topics of public importance. The court states this type of speech is political in nature and agricultural operations are not entirely private because they implicate matters including food and worker safety. Additionally, there are other statutes that criminalize trespass, fraud, theft, and defamation without infringing on free speech rights. The court found the law violates the First Amendment. The court also held the law violates the Fourteenth Amendment because the motivation behind the passage of the bill was specific animus towards animal welfare groups and infringes upon a fundamental right.

Matter of Nonhuman Rights Project, Inc. v. Stalney
16 N.Y.S. 898 (N.Y. Sup. Ct. 2015).

Summary of the Facts

The Nonhuman Rights Project brought a petition for habeas corpus on behalf of a two chimpanzees, Hercules and Leo, being held by the State University of New York at Stony Brook since November of 2010 and used for research. The petitioner did not allege any violations of animal welfare statutes or challenge the conditions Hercules and Leo were subject to. The petitioner sought that the University demonstrate the basis for deaining Hercules and Leo and an order directing they be released and transferred to a sanctuary in Florida.

Summary of the Holding

The court found it was bound by the decision in *People ex rel Nonhuman Rights Project, Inc. v. Lavery*, 998 N.Y.S. 2d 248 (N.Y. App. Div. 2014). In this case the Appellate Division determined that a chimpanzee is not a legal person entitled to invoke the writ of habeas corpus. Additionally, the court stated the issue would be best addressed by the legislature. The court denied the petition for a writ of habeas corpus.

Animal Legal Def. Fund v. United States Dep't of Agric.
789 F.3d 1206 (11th Cir. 2015).

Summary of the Facts

The Animal Legal Defense Fund (ALDF) brought suit against the United States Department of Agriculture (USDA) in response to alleged poor condition suffered by an orca at the Miami Seaquarium. ALDF alleged that the tank the orca, Lolita, is kept in does not conform to the size requirements required for licensure by the Animal Welfare Act (AWA) as it is too small for the animal. The Seaquarium must renew its license to be an animal exhibitor every year. The Department of Agriculture did not inspect the conditions at the Miami Seaquarium before renewing its license. Under the Animal Welfare Act, the USDA is required to inspect a facility before issuing a license; however, the issue considered whether these procedures apply to renewal.

Summary of the Holding

The Court goes through the Chevron analysis, first using statutory interpretation and legislative history to determine that Congress did not intend that the USDA must repeat the procedures for initial issuance of a license to its renewal and determining that the USDA's interpretation was reasonable. The court held that the USDA was not required to inspect Miami Seaquarium's facility or ensure compliance with the standards required under the AWA before the USDA renewed the Seaquarium's license.

Defenders of Wildlife v. Jewell
2016 U.S. Dist. LEXIS 45532 (D. Mont. 2016).

Summary of the Facts	Summary of the Holding
Groups have attempted to get the wolverine listed as a threatened or endangered species since 1994. It is estimated the entire U.S. population of wolverines does not exceed 300 individuals. Snow is an integral part of the wolverine's habitat and dens built into the snow are necessary for reproduction. The U.S. Fish and Wildlife Service (Service) issued a proposed rule in February 2013 for listing the wolverine as a threatened species relying on the projected impacts of climate change on the wolverine's habitat. The Service drafted a recovery plan that did not include reducing emissions and protecting the snowpack, but providing other protections and establishing an experimental population in Colorado. The rule received tens of thousands of comments, including some from affected western states and experts solicited by the Service. Many states opposed the use of climate models to project habitat loss for the wolverines. A majority of the solicited experts supported the proposed rule. After several discussions, conferences, and panels with proponents and challengers to the proposed rule, the Service continued to receive more comments objecting to the reliance on climate models from state and federal district officials. In August 2014 the Service withdrew the proposed rule because the factors affecting the wolverine identified in the proposed rule were not as significant as first believed and that the impact of climate change is not certain enough to base the rule upon. Plaintiffs brought a motion for summary judgment claiming the Service erred when it disregarded the best available science and did not cite any better science.	The court held the Service violated the Endangered Species Act when it withdrew its proposed rule to list the wolverine as a threatened species. The court found the Service erred when it disregarded several scientific reports and claimed the uncertainty of the impacts of climate change meant the wolverine should not be listed. Siding with the Plaintiffs, the court remanded the case to the Service to consider the effects of climate change using the best available science. The court also held the causal relationship required by the service went beyond what is required under the ESA. Additionally, the court found that the Service did not properly consider the small population size and lack of genetic diversity as an independent threat to the survival of the wolverine population in the United States. The court found the Service's determinations to be arbitrary and capricious and vacated the Service's withdrawal of the proposed rule.

Juliana v. United States
2016 U.S. Dist. LEXIS 52940 (D. Or. 2016)

Summary of the Facts	Summary of the Holding
Plaintiffs were a group of individuals aged 8-19 and activist associations claiming to be beneficiaries of the public trust and a Doctor claiming to be a guardian for future generations. Plaintiffs sued the U.S. government for failing to take action to prevent climate change and its effects and taking actions that increased carbon emissions. Plaintiffs ask the court to declare that Defendants "have violated and are fiolated Plaintiff's fundamental constitutional rights to life, liberty, and property" and seek an order for immediate action and implementation of a plan to reduce atmospheric carbon dioxide to 350 parts per million by 2100. Defendants motioned for summary judgment claiming Plaintiffs lack standing and that the public trust doctrine does not provide a cause of action.	The magistrate judge held the plaintiffs have standing to bring this suit. The Plaintiff's allegations that the consequences of increased carbon dioxide in the atmosphere will lead to severe impacts on children and future generations that will be impossible to adapt to and their survival is threatened constitute a concrete and particularized injury. Further, the court found that if the allegations are true the government's failure to regulate emissions "has resulted in a danger of constitutional proportions to the public health." The court also found that taking Plaintiff's allegations as true that regulation by the United States could reduce emissions and mitigate the impacts of climate change and its effects. The court denied Defendant's motion to dismiss for lack of standing. Additonally, the court recognized the Defendants had duties under the public trust doctrine to provide some substantive due process and the Plaintiffs can bring a case alleging the failure of Defendants to provide due process.

Michigan v. Environmental Protection Agency
135 S. Ct. 2699 (2015)

Summary of the Facts

The Clean Air Act requires that the Environmental Protection Agency regulates stationary sources of hazardous air pollutants if the Agency concludes "regulation is appropriate and necessary" after taking public health hazards into account. The Agency found regulation of emissions from power plants was appropriate because power plant emissions pose risks to the environment and public health. Regulation was necessary because other Clean Air Act regulations do not eliminate the risks to health and the environment. The Agency then promulgated standards for emissions. The Agency did not consider costs when making this decision despite estimated costs of $9.6 billion a year. 23 States and other petitioners sought review of the decision not to consider costs, but the Agency's decision was upheld by the D.C. District Court.

Summary of the Holding

The Supreme Court held the Environmental Protection Agency interpreted the Clean Air Act unreasonably by refusing to consider costs when deciding to regulate power plants. The Court found "appropriate and necessary" when considered within the context of administrative law plainly includes cost considerations. The court determined it is not appropriate to impose billions in costs with substantially less returns in public health and environmental benefits. The Court rejected the Agency's argument that other provisions within the Clean Air Act expressly direct the agency to consider costs and the failure of the provision at issue mean the Agency is not required to consider costs in this decision. The Court found the broad language of "appropriate and necessary" direct the Agency to include all relevant factors, including costs. The Court reversed and remanded for the Agency to make a decision to decide whether regulation is appropriate and necessary considering costs, but leaving it up to the Agency to determine how to account for these costs.

Sturgeon v. Frost
136 S. Ct. 1061 (2016)

Summary of the Facts

The Alaska National Interest Lands Conservation Act (ANILCA) set aside land for preservation and placed the land into "conservation system units" which include any Alaskan national park, refuge, forest monument, other federal land and some state and private lands. In 2007, Sturgeon piloted a hovercraft over a portion of the Nation River that flows though the Yukon-Charley Rivers National Preserve—a conservation system unit. National Park Service regulations do not permit the use of hovercraft and rangers informed Sturgeon who protested that the river was owned by the State of Alaska which does allow the use of hovercrafts. Sturgeon brought suit seeking declaratory and injunctive relief to permit him to operate his hovercraft on this stretch of the river. The State of Alaska intervened in the case in support of Sturgeon. ANILCA sets out the authority of the Park Service's authority to regulate lands protected as conservation system units. The District court granted summary judgment to the Park Service and the 9th Circuit affirmed stating the hovercraft regulation applies to all Park Service administered lands and waters nationwide and concluding the Park Service had authority to enforce the hovercraft regulation on the Nation River.

Summary of the Holding

The Supreme Court held the 9th Circuit's interpretation of ANILCA is inconsistent with the text and the context of the act. The Court found the Circuit Court violated methods of statutory interpretation when they did not look at the statute in its full context. A full reading of ANILCA specifically describes how Alaska is different and carves out several exceptions to the Park Service's authority solely for Alaska. Interpreting the Act in such a way the Park Service could only regulate Alaskan lands under the same rules that apply to lands outside of Alaska—a result not intended by the Act. Additionally, the Act creates a difference between public and non-public lands and under the construction applied by the Park Service, the Park Service could only regulate non-public lands under rules applicable to the whole country and public lands under the Alaska-specific provisions. The Court found this interpretation to be implausible, vacating the decision of the 9th Circuit. The Court did not decide whether or not the Nation River qualifies as public land or if the Park Service had authority to regulate the Nation River. The Court stated the state sovereignty arguments should first be argued in the lower courts and remanded the case for further proceedings.

Foster v. Dep't of Ecology
184 An. 2d 465 (Wa. 2015)

Summary of the Facts

The city of Yelm applied to the Department of Ecology for a water permit to meet the needs of its population. Granting the permit would affect the minimum flows downstream so the Department conditioned the permit on the implementation of a mitigation plan to offset the impacts of Yelm's appropriation. This mitigation plan included the retirement of existing water rights and the reintroduction of reclaimed water back into the stream system. Additionally, Yelm was required to improve stream conditions through restoration efforts. The Department approved the permit by applying Overriding Considerations of the Public Interest (OCPI) balancing test. Plaintiff appealed the permit as it would still impact minimum flows to the Pollution Control Hearings Board which found for the Department and approved the permit. The Board concluded the mitigation plan would confer a net ecological benefit despite the loss of water resources and reduced minimum flow. Plaintiff then appealed the permit approval to the superior court and while the appeal was pending, the court heard the case *Swinomish Indian Tribal Cmty. V. Dep't of Ecology*, 178 Wn. 2d 571 (2013) which rejected the OPCI balancing test. The superior court affirmed the Board's decision despite the decision in *Swinomish*.

Summary of the Holding

The court held the Department exceeded its authority by granting the permit to the city of Yelm under the OPCI exception. Under *Swinomish* the court rejected the three part test because under the test any beneficial use would always be considered an overriding consideration of the public interest. This interpretation conflicts with canons of statutory interpretation that exceptions to statutes are to be interpreted narrowly. In order for minimum flow to be impaired, the OPCI exception requires "extraordinary circumstances." The court further distinguished "withdrawal" from "appropriation" as withdrawal can be done on as emergency, temporary basis while appropriation confers a permanent water right. The court determined the OPCI exception does not permit permanent impairment of minimum flows as the exception permits withdrawals and not appropriations. Further, the court found the mitigation plan is not an "extraordinary circumstance" required to apply the OPCI exception as the mitigation plan is meant to offset the impacts of the minimum flow impairment. Additionally, ecological improvements cannot mitigate the injury as the injury is in the impairment of holders of senior water rights. The court reversed the decisions of the superior court and the Board and rejected the approval of Yelm's permit.